SUBMISSION TO THE REVIEW PANEL ON RELIGIOUS FREEDOM

14 February 2018

About the Institute for Civil Society

The Institute for Civil Society is a social policy think tank which seeks to:

1. Promote recognition and respect for the institutions of civil society which sit between the individual and the State such as clubs and associations, schools, religious bodies, charities and NGOs.
2. Promote recognition and protection of traditional rights and freedoms such as freedom of association, freedom of expression and freedom of conscience and religion.
3. Promote a sensible and civil discussion about how to balance competing rights and freedoms.

Recommendations:

1. **A general statutory limitation on government (Federal, State, Territory and local) interference with religious freedom based either on the US Religious Freedom Restoration Act 1993 or on Article 18 of the International Covenant on Civil and Political Rights.**
2. **Religious belief and conduct should be made a protected attribute under federal anti-discrimination law**
3. **Lift the bar on vilification laws for reasonable expression of genuine religious beliefs regarding morality of conduct**

   The federal Parliament should provide that the expression of a genuinely held religious belief about the morality or propriety of any conduct, in a manner which does not intimidate, incite violence or hatred against, or threaten the physical safety of a person

or group of persons, is not unlawful under a federal, State or Territory law prohibiting the vilification of persons.

4. **Protect religious associations from anti-discrimination rules which prevent them from applying a religious values filter and conduct filter in employment decisions and, if feasible, extend this to non-religious associations whose mission is to represent a worldview and way of life of a non-religious community to the public**
5. **Give parents the right to have their child excused from that part of school classes which is antithetical to the religious and moral convictions of the child's parents (as does the NZ Education Act).**
6. **Enact specific protections for persons and organisations and charities who hold, express or act on specified beliefs in favour of man-woman marriage, but not protecting any conduct which is discrimination contrary to the Sex Discrimination Act or conduct which threatens or harasses persons because of sexual orientation etc.**

   The occasion for calling this inquiry was the debate about protecting freedom of religion and belief of those who remain opposed to same sex marriage (approximately 4.9 million Australians voted No in the national postal survey). The ALP voted against amendments proposed in the Parliament intended to protect those freedoms on the basis that those amendments and the issues they raise would be considered in this Inquiry. We recommend consideration of the following proposals.

   1) That an anti-detriment shield be created as a legal protection against unfavourable treatment initiated by a public authority or by a person acting on the request or requirement of a public authority against persons and entities because the person or entity holds, expresses (or in some cases acts upon) specified genuine religious or conscientious beliefs in favour of man-woman marriage

      However, this provision would not create any shield or protection for such persons or entities any conduct which is discrimination contrary to the Sex Discrimination Act or conduct which threatens or harasses persons because of sexual orientation etc

   2) that a person or entity cannot be required to express or publish or endorse or promote a statement or opinion in favour of same-sex marriage which is contrary to their genuine religious or conscientious belief.

3) that governments cannot decline to provide funding, impose conditions or withdraw funding from an individual or entity solely because that individual or entity holds a relevant belief.
4) that charities that hold a relevant belief will not lose their charitable status as a result of the changes to the Marriage Act permitting same sex marriage, as has happened in some other countries.
5) that bodies established for religious purposes and educational institutions established for religious purposes may perform acts consistent with a relevant belief.

7. **Create an office of a federal Religious Freedom Commissioner**

Part One: The State of Religion and Spiritual Belief and Religious Freedom in Australia

From the first human settlers, spirituality and beliefs in the transcendent and supernatural which guide human lives has been part of human society in Australia. British settlement in the eighteenth century then imported the Christian religion, the developing concepts of freedom of religion and belief, the legacy of the Reformation and the legal tolerance of most forms of Protestant Christianity, along with Enlightenment thought including both religious tolerance and the seeds of secularism. Catholic Christians obtained legal emancipation through the nineteenth century. Migration, especially in the twentieth and twenty-first centuries, has brought many different religions to Australia. Secularising influences have led to an increase in the number of Australians who either have no religious belief or have spiritual beliefs but do not identify with an organised religion.

Today, Australia is a pluralist society made up of those who identify with a particular religion, those who have spiritual beliefs that are not tied to an organised religion and those who have no spiritual beliefs. The 2016 census identified that 52.1% of Australians classify themselves as Christian (22.6% identifying themselves as Catholic and 13.3% as Anglican). Another 8.2% of Australians identify themselves as followers of non-Christian religions (making a total of 60.3% who identified as affiliated with a named religion). 30.1% categorised themselves as having "No religion". The ABS defined ‘No religion' as equivalent to 'Secular Beliefs and Other Spiritual Beliefs and No Religious Affiliation'. Thus, it is not clear how this group divides

among atheists, agnostics and those with spiritual beliefs but who do not affiliate with a named religion. Just under 10% did not answer the question.[1]

An increased hostility toward religion among cultural elites

These figures from the general population do not seem to reflect the attitudes and increasing suspicion of, or hostility to, religion among many Australian cultural elites. There are several causes for this.[2] Some are discussed below.

Secularism

The word "secular" relevantly means "concerned with the affairs of this world," or "not connected with religion or spiritual matters." It does not mean opposed to religion.

Australia is and has been a secular state in the sense that:

1. The institutions of government are not tied to or controlled by a particular religion or influenced by a particular religion (other than through the normal representative democratic processes);
2. the institutions of government do not control any religion or prefer one religion over another;
3. the State is neutral as to religious truth claims and to the claim that there is no God or transcendent, non-material reality, but is not hostile to religious belief or non-belief and supports and accommodates and protects the freedom of its citizens and their communities and associations to hold and express and live by their religious belief or non-belief.

The Australian polity has developed, both legally and socially broadly in line with this understanding of a secular state. It has not followed the model of the USA where, since the 1940s, the US Supreme Court has required a strict separation of church and State in the sense of no government support for religion (although the Court has backtracked on that position in many cases).

Part of the success of Australia as a multi-cultural and multi-religious country has been its ability to allow the expression of a range of religious beliefs by individuals and communities

[1] http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Data%20Summary~70

[2] See generally Roy Williams, *Post God Nation?* (2015) ABC Books.

and their organisations supported on a non-preferential basis by government. For example, in Australia government funding supports private schools and tertiary institutions run by religious organisations on an equitable basis with other private non-religious institutions. Government supports religious bodies and religious and non-religious charities with tax deductions. Government schools have long allowed religious education to be provided by external volunteers to students whose parents approved such instruction. Government contracts with religious welfare agencies to deliver welfare services for government. Section 116 of the Commonwealth Constitution prevents the Commonwealth from making a law prohibiting the free exercise of any religion or requiring a religious test for public office or for establishing any religion (as the national religion), but allows the Commonwealth to support religions on an equitable basis among themselves and with secular activities.

A good example of this principle is found in the 1981 case of *AG (Vic) ex rel Black v The Commonwealth*[3], in which the High Court held that federal government funding of religious schools on the same basis as funding to non-religious private schools did not violate that part of section 116 of the Constitution which provides that the Commonwealth must not make any law for establishing any religion. The Court held that section 116 did not erect "a wall of separation between Church and State", a phrase from Thomas Jefferson which the US Supreme Court had held was implied by similar words in that country's Constitution's First Amendment.

More recently there are attempts to redefine a secular Australian state on what might be called secularist terms. Charles Taylor, in his widely-revered book *A Secular Age*, refers to a number of ways in which the idea of "the secular" (or what he calls "secularity") can be understood. One is that public spaces are emptied of God or "any reference to ultimate reality."[4] Taylor perceives this emptying as happening in any number of different ways, not merely in "the public square" or political life. But this idea that the religious should be absent from public life *in particular* has gained widespread currency in the last 60 or so years. We perceive this to be a perverse understanding of the relationship between religion and public life, an understanding which often goes by the name of "secularism."

Secularism is well described by Hunter Baker when he writes that it sees the public square as "a neutral space in the polity benevolently keeping religions from dangerous, disharmonious,

[3] (1981) 146 CLR 559 ("the DOGS case")

[4] Charles Taylor, *A Secular Age* (Cambridge: Belknap Press, 2007), 2.

and potentially oppressive activity."[5] Secularism is, according to Baker, "much more than a formal financial and legal separation of church institutions from state institutions". It is, rather, "a way of living together in community that emphasizes clean conceptual boundaries over organic beliefs and traditions."[6] Secularism is, put very simply, the conviction that people's religious beliefs ought to be restricted to their private lives: "Individuals and subcommunities may believe fervently, but that is not something to impact public business or our professional lives."[7]

The promotion of this very different (and in our view very wrong) understanding of the relationship between religion and public life over the past number of decades has shifted the tone of public discourse considerably. Secularists have, whether deliberately or not, promoted disdain for, and hostility towards, religion in the public square. And secularism has become increasingly assertive in public education, the media, political parties and the public service in Australia. Some of the examples in Part 3 are instructive. State education department bureaucrats in Victoria and Queensland were not content with policing the role of religious volunteers in delivering optional religious instructions but have sought to restrict the religious freedom of state school students to discuss religion and even bring religious texts to school.

When proponents of secularism (once again, not to be confused with the secular non-discriminatory support model of section 116 of the Constitution) claim that Australia is a secular country or state, what they often mean is that our state and federal governments should provide no assistance or support of religion or religious people or religious belief or positions grounded in religious belief at all. In short, according to the secularist, the State ought to be opposed to connecting religion to any aspect of public life and the public square.

Under secularism, there should be no support of religious schools by government, no preferential tax treatment for religious bodies, and no religious teaching in government schools even to students whose parents have agreed in advance to their children receiving such teaching. More strident forms of secularism seek to exclude all religious views from the public square simply because they are religious and are presumed to have nothing of value to say to

[5] Hunter Baker, *The End of Secularism* (Wheaton: Crossway, 2009), 15; cf. Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in Americ*a (Grand Rapids: Wm. B. Eerdmans, 1986).

[6] Baker, *The End of Secularism*, 19.

[7] Baker, *The End of Secularism*, 20.

rational, secular people.[8] This line of argument was commonly deployed in the recent euthanasia debate in Victoria.[9]

We would maintain that this understanding is not only unhelpful, but also does not cohere with the framework laid down in the Australian Constitution. That framework is one which is intended to ensure equal treatment of all religions, and of all people regardless of their religious belief or lack of religious belief. The secularist framework argues for something quite different, and this is contributing to a political and social environment which is quite hostile to religion and religious believers. This has manifested itself in various ways.

Proponents of some modern agendas in conflict with traditional religions

Over the last 40 years, some progressive agendas (for example, abortion on demand and same sex marriage) have been successfully prosecuted by their proponents over the opposition of many traditional or conservative Christians, Jews and Muslims (but not all members of those religions). This has led to significant conflict between some progressive groups and some more traditional religious groups and an increase in hostility towards those traditional forms of religion by some progressives in public education, the media, political parties and the public service.

The prime example of recent times is those who are in, or who support those in, same sex sexual relationships expressing hostility to those religious individuals, organisations and schools which continue to hold to the traditional view that a sexual relationship should only be between a man and woman within the confines of marriage. The disagreement and hostility arise from many sources, including emotional hurt from a sense of affront to dignity and a sense of rejection. Behind this lies a clash in broader meta-beliefs– whether there are transcendent absolute truths, whether everything is permissible as long as it does not hurt others, whether anyone is entitled to criticise another's lifestyle choices and whether it is possible to respect a person without accepting an aspect of their personhood and conduct which they consider crucial to their identity

[8] While "secularist" is not an accurate descriptor of his thought, John Rawls is one very articulate advocate of a moderate version of this position. He argues for public discourse to be fenced by "public reason" at the exclusion of all comprehensive doctrines. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 220–226.

[9] See, for example, Joe Kelly, 'Andrew Denton tells church to get out of euthanasia debate' *The Australian*, 11 August 2016.

A high-profile victim of this hostility is Tim Farron, former leader of the UK Liberal Democrats. Farron felt compelled to resign in June 2017 when journalists kept pursuing him over his views as a Christian on same sex relationships, gay marriage and abortion, which overshadowed his attempts to advocate his party's platform. He said:

> To be a political leader – especially of a progressive, liberal party in 2017 – and to live as a committed Christian, to hold faithfully to the Bible's teaching, has felt impossible for me… I seem to be the subject of suspicion because of what I believe and who my faith is in. In which case we are kidding ourselves if we think we yet live in a tolerant, liberal society.[10]

Other causes of hostility

The scandal of cover-ups of child abuse in some religious institutions has dented the respect of many Australians towards those institutions and has certainly been a potent and legitimate source of attack for their opponents.

Finally, concerns about *some* expressions of Islam, such as the different dress and role and treatment of women in traditional Islam compared with Western social norms, and radical Islamism promoting terrorist acts, has led to a suspicion of, or hostility towards, Muslims in Australia.

The net effect has been an increased suspicion of, or hostility to, religion, which has provided the context for some significant incursions into religious freedom.

The above is not to suggest that religious individuals and organisations are never hostile to those with secularist, relativist, or hedonist worldviews. At times they have also resorted to abuse, mockery and other inappropriate behaviour. However, in general, religious individuals and organisations are much less likely to resort to legal complaints and remedies than their opponents. To the extent that hostilities manifest in legal action, those with traditional religious beliefs find themselves on a very uneven legal playing field. Traditional religionists are in a minority (albeit sometimes a large minority) in the public debate on many issues of sexual and relationship morality. They lack significant legal protections of freedoms of religion and belief while most of their opponents on issues to do with sexuality enjoy many legal rights through anti-discrimination law (which protects the attributes of sexual orientation and lawful sexual activity) and anti-vilification laws. So traditional religionists find the law is more often used as a means of lawfare against them, resulting in the legal suppression of the expression of their

[10] https://www.theguardian.com/politics/2017/jun/14/tim-farron-quits-as-lib-dem-leader; and https://www.libdems.org.uk/liberal-democrat-leader-tim-farron-resigns

religious worldview rather than affirming their freedom to speak and act consistently with their religious convictions.

Threats to Religious Freedom in Australia

In modern Australia, religious freedom is not widely threatened by sectarian conflict between religions. However, there are significant examples of social hostility to Islamic people and practices in some places including opposition to the building of mosques and violence in both directions.

Religious freedom is also not widely threatened by any blatant restriction on worship or religious observance in private or in religious communities.

Beside the important issues of hostility to Muslims and the threat and reality of radical Islamist terrorism, we consider that the broadest threat to religious freedom comes from a range of efforts by those hostile to traditional religious views to discourage people and organisations with those views from expressing them outside the private sphere and to minimise or eliminate any serious consideration of such views in the public square.

We consider that some of the current threats to religious freedom include the following. **Specific examples where these threats have materialised into interferences with religious freedom are set out in Part 3.**

1. The use of education policies, workplace policies, contracts or commercial or social pressure, or the use of legal processes to silence or stop the expression of, and acting on, religious views by religious individuals and organisations outside the purely private sphere where those views conflict with secularist agendas.

2. The exercise of discretion by governments and public authorities (including public education authorities) to exclude religious voices and practices from their domains or to discriminate against them in funding and in the provision of economic and other benefits where the religious views or practices conflict with progressive agendas.

3. The use of low-bar vilification laws which make conduct unlawful if it is reasonably likely to insult or offend a person on the basis of a protected attribute to stifle the expression of religious views about a protected attribute, even if the view is expressed in a reasonable and moderate manner. This has been done in three complaints under Tasmania's low-bar vilification provision in its Anti-Discrimination Act. Effectively,

this use of anti-vilification laws turns a disagreement (e.g. as to whether adultery or homosexual sexual conduct is morally right or wrong) into a legal weapon to silence an opposing viewpoint in public discourse.

4. The use of anti-discrimination law complaints to force religiously motivated organisations to disregard the conformity of a person's belief and behaviour to religious precepts when making employment decisions about officers, staff or volunteers. This is a particular issue for religious schools and ministry and welfare organisations which do not meet the test of a body established for religious purposes in anti-discrimination law "exemptions".

5. The use of anti-discrimination law complaints to force religiously motivated organisations and individuals to act contrary to their religious convictions or be made liable for discrimination against others (e.g. in relation to supplying goods or services to a person on the grounds of the broadening class of protected attributes such as lawful sexual activity, sexual orientation, gender identity and intersex status). These cases require a careful balancing of rights of the person with the protected attribute and the religious person or organisation. But too rarely in such complaints is there an acknowledgement that the religious person or organisations would also be discriminated against if forced to act contrary to their religious convictions as well as having their freedom of religion impaired.

6. Add to items 4 and 5 the relentless campaign to remove or wind back religious "exemptions" from anti-discrimination legislation which provide balancing protections for religious freedom. The result of that campaign, where successful, is to expose more religiously motivated conduct to complaint and public shaming and correction.

7. The failure in domestic law to guarantee parental rights to ensure the religious and moral education of their children in accordance with their religious convictions. And this, despite the fact that this is an international human rights obligation to which Australia is a party (e.g. International Covenant on Civil and Political Rights (ICCPR), Article 18(4)). Most prominently, some of the content of the Safe Schools program has raised significant parental concern but, other than removing their child from government education and paying for private education, parents have no ability to enforce this right. The States cannot be relied on to implement ICCPR Article 18(4).

For example, the Victorian Government funds its own Safe Schools program which it will roll out to all State high schools this year.

Section 25A of the Education Act 1989 (NZ) gives parents a right to have their child excused from attending that part of classes where material is to be taught which is antithetical to the religious and moral convictions of the home. A federal law providing this right would be a reasonable and useful implementation of ICCPR Article 18(4). In practice, it would parallel the right given to parents to have their child excused from attending religious instruction classes in government schools.

8. The threat to religious charities' charitable status and hence tax exemptions if they pursue policies or advocate for positions which are contrary to new progressive social norms (such as same sex adoption or marriage) as shown by cases in England, New Zealand and the USA.

We also adopt the detailed analysis provided by Freedom for Faith in its submission of the current challenges to religious freedom. We also adopt the detailed analysis supporting the need for religious freedoms for individuals and organisations holding traditional marriage beliefs contained in the Appendix in the Supplementary Explanatory Memorandum to the five amendments proposed to be made to the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017* and we ask the Panel to give that Explanatory Memorandum and the amendments its careful consideration.

The Need to Build True Tolerance in the Culture Including Through Balanced Legal Protections of Freedom of Religion

With increasing pluralism in Australian society comes increasing awareness of the differences among us as individuals, groups and sub-cultures, leading to discomfort and anxiety.

In Australia, we are struggling with how to discuss these deep differences with each other privately and in the public square, how to negotiate the differences where public decisions may or must involve a choice between them and how to live together before, during and after such decision without hostility in a civil society.

A too common approach is to go to war – to win the battle on the issue of the day outright– and to do so by demonising opponents and opposing views rather than rather than acknowledging that they may have some valid points to be negotiated and that they have the right to disagree.

A significant problem is that such wars don't necessarily end, even when there is a democratic decision on the issue. Too often, the war footing carries on and for some winners the losing view (and the losers) must be excluded forever, at least from the public square. Some religious people have done this in the past to their opponents; today, religious people are in a practical democratic minority on some issues and feel it is being done to them. But regardless of who is the victor on the issue, the consequence of a "my way or the highway" exclusion of the opponent's views from the public square will be to increase division not eliminate it. All of us need to resist the temptation to live in a social tribe and a social or mainstream media chamber where only one or a few views on an issue are "right" and continually reinforced.

"True tolerance" and diversity in a civil society requires that each of us accept that:

- other Australians have the right to be wrong in my eyes; and
- I have an *obligation to defend* other Australians' right to be wrong in my eyes rather than to ridicule, dismiss or exclude them or their views.

Attaining that true tolerance in a civil society will require our political, civic, religious, media and education leaders to make civil discourse and respect for those with other views a priority in education and in public debate and discussion, and to model it in their leadership (rather than defining and immediately dismissing views they do not like as "hate speech" or "extremism" from the "loony left" or "far right").

In the context of this inquiry, attaining true tolerance will also require better legal protection of freedom of religion in Australian law which applies at all levels of government. Otherwise, the forces pushing to restrict religious freedom to express unpopular views can operate unhindered by legal restraint.

Re-establishing freedom of religion for all (including the freedom to hold no religious belief) as a prime cultural value is a key element on the road to true tolerance.

Legal protections alone will not create a culture which values freedom of religion, and will not produce true tolerance. It needs to be a cultural value or a "habit of the heart".[11] But as the Freedom for Faith submission demonstrates, the state of legal protection of religious freedom in Australian law is poor, so legal protections are, nonetheless, part of the solution.

[11] Os Guinness, *The Global Public Square: Religious Freedom and the Making of a World Safe for Diversity* (2013) 146-156.

Part 2 of this submission proposes reasonable legal protections for freedom of religion and belief in federal law, carefully balanced to protect the human rights of other Australians (including same sex oriented Australians), which, for the first time, would see Australia fulfil its international commitments to protect the human right of freedom of religion and belief expressed in Article 18 of the ICCPR and in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981.

Part Two: Proposed Forms of Religious Freedom Protection

Several forms of legal protection for religious freedom in federal law are recommended. These will need to bind States and Territory governments and the federal executive. They could be included in a federal Religious Freedom Act.

I. A general statutory limitation on government (Federal, State, Territory and local) interference with religious freedom

Option 1 – use ICCPR Article 18 as a starting point

This could be based on Article 18(1) to (3) of the ICCPR, which provides:

- That everyone shall have the right to (inter alia) freedom of religion;
- That this right shall include: the freedom to have or to adopt a religion or belief of one's choice and the freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching;
- That no one shall be subject to coercion which would impair their freedom to have or to adopt, or to refuse to have or adopt, a religion or belief of their choice;
- That the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

If this model is followed, it is important to remember that Article 18(3) is one of only a few non-derogable rights (not suspendable in emergencies) and to retain the Article 18(3) strict wording that any permissible limitations on the freedom must be prescribed by law (not

executive discretion) and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

By contrast, the Charters of Rights in Victoria and the ACT permit "reasonable limitations" on all rights, which gives interpreters much more flexibility to permit incursions into religious freedom.

We readily concede that no human right, including religious freedom, can be absolute. Accordingly, it must yield to certain limitations. However, broadly worded limitations, while unavoidable when included in a human rights instrument, need to be delineated in order to avoid definitional inflation in their application.[12] Thus, considerable care should be taken to confine the concepts of "public safety, order, health or morals" so they are not given an expansive meaning which undermines the protection of religious freedom. We therefore recommend that the legislation address each limitation referred to in Article 18(3) as follows.

Public safety

The most obvious and uncontroversial application of this limitation on freedom of religion is where the expression of one person's religious belief would cause physical harm to another, an extreme example being a terrorist attack undertaken in the name of religion. However, the problem with this qualification is that the reference to safety can be deliberately (and in our view improperly) extended to include feelings of well-being, affirmation and belonging. If so, any expressed religious viewpoints that evoke feelings of unbelonging, unease or rejection among sections of the community becomes amenable to being characterised as a threat to public safety. The following examples illustrate our concern:

- during the same sex marriage debate it was commonly asserted that to express a view against same sex marriage was to jeopardise the mental health of persons in the LGBTIQ community, an outcome for which the speaker should feel responsible (see also examples in Part Three of Darebin Council, the IT manager who was sacked because his temperate statement of his religious views on homosexual relations allegedly created an "unsafe" workplace and the Australian university student who was suspended for making a fellow student feel unsafe by expressing (when asked to do so) his religious understanding of homosexual relations);

[12] An example is the phrase 'hate speech' which is increasingly used to encompass speech that merely offends or which simply runs counter to the 'preferred' values.

- The Communications, Electrical and Plumbing Union initially pressured Australia Post not to deliver "No" campaign material because its mere presence in their mailbag would traumatise posties who do not hold that belief;
- The banning of the Christian Union from the "freshers fair" by student leaders at Balliol College at Oxford University (refer example in Part Three);
- The increasing use of trigger warnings by universities in western countries to protect students from "unsafe" speech could be used to prevent people from expressing religious views.

While we understand that extreme bullying behaviour can drive people to suicide, we are concerned that the notion that religious persons should be held responsible for the reactions of those with whose views or lifestyles they have simply expressed disagreement might be used to sustain an argument that religious freedoms must be curtailed in order to protect public safety.

Public Order

If the manifestation of a particular person's religious beliefs is creating a public disorder or disturbance, then this may justify the imposition of a restriction on the manifestation of such a belief. However, "public order" should not be used to justify bans on street preaching or prayer meetings in public places (such as within 500 metres of an abortion or euthanasia clinic), particularly where the disturbance might emanate from those seeking to shut down the expression of those beliefs.

Public Health

In principle, public health is a legitimate limitation on freedom of religion. We would concede, for example, that it should mean that there should be no female genital mutilation or no ability on the part of parents to refuse a life-saving blood transfusion to a child who is not Gillick competent and therefore is unable to make the decision for himself or herself. However, as is the case with public safety, the concept of public health is liable to be construed too broadly, to the extent that it overrides freedom of religion in circumstances where it should not. For example, does the concession to public health mean that Jewish parents should not be permitted to have their baby boys circumcised in case the surgery has complications? Is it a threat to public health if parents, on the basis of their religious beliefs, refuse to encourage their child to transition to a different gender?

Morals

This limitation on the freedom to manifest one's religious beliefs may be so contentious as to lack meaning. It assumes that certain morals are shared by the public and that courts are able to recognise and articulate those morals and justifiably subordinate religious freedom in order to preserve them.

Fundamental rights and freedoms of others

This limitation acknowledges that the manifestation of one person's religious beliefs is capable of infringing on other persons' fundamental rights and freedoms (as set out in the ICCPR). It is possible to envisage circumstances where this might clearly be the case. However, the vagueness of the terms would permit a court which was so disposed to use this limitation to chip away at freedom of religion. Accordingly, we suggest that a Religious Freedom Act spell out in greater detail the ambit of this limitation, and use the ICCPR as the touchstone for what are fundamental rights and freedoms. We suggest that parliament only permit this limitation to be invoked where the manifestation of a person's religious belief in practice prevents another person from enjoying or exercising their fundamental rights and freedoms.

Option 2 – use the US Religious Freedom Restoration Act 1993 as a starting point

Another and perhaps superior model is to prohibit government action which substantially interferes with religious freedom unless it pursues a class of compelling other goals and is no more restrictive of religious freedom than is necessary to achieve those goals. The US Religious Freedom Restoration Act of 1993 provides a possible model. This Act was a bipartisan measure approved by liberal and conservative lobby groups and achieved near unanimous support in the House of Representatives and the Senate. Section 3 provides:

> (a) In General.--Government[13] shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Exception.--Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

[13] The Act was later held to be unable constitutionally to bind State government but able to bind the federal government. Many State have enacted their own Religious Freedom Restoration Acts. The reference to "restoration" is because the test in the Act restores a prior US Supreme Court test.

> (c) Judicial Relief.--A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

This law should bind the Commonwealth, State and Territory governments and public authorities. To bind the States, it would need to be enacted in reliance on the external affairs power.

II. Religious belief and conduct should be a protected attribute under federal anti-discrimination law

Genuine religious belief and conduct which conforms to a person's genuine religious belief should be a protected attribute under federal anti-discrimination law. This is not limited to religious observance, but should also cover lawful conduct which the person genuinely believes is required by, or conforms to, their genuine religious beliefs.

Religious belief and conduct is not a protected attribute under federal, NSW or South Australian anti-discrimination law. It should be added as a protected attribute in federal anti-discrimination law.

III. Lift the bar on vilification laws for reasonable expression of genuine religious beliefs regarding morality of conduct

The federal Parliament should provide that the expression of a genuinely held religious belief about the morality or propriety of any conduct, in a manner which does not intimidate, incite violence or hatred against, or threaten the physical safety of a person or group of persons, is not unlawful under a federal, State or Territory law prohibiting the vilification of persons.

IV. Protect religious expressive associations from anti-discrimination rules which prevent them from applying a religious values filter and conduct filter in employment decisions and, if feasible, extend this to non-religious expressive associations

Organisations which adopt and express a religious worldview and model that as the best way to live should be free to use the conformity (or otherwise) of a person's beliefs and life to those of the organisation in their employment decisions (including regarding officers and volunteers) whether or not they are "bodies established for a religious purpose".

The reason for this is that religious organisations need to be able to maintain their character as religious so they can represent and express their religious faith and worldview in their culture and endeavours. To do this they need to be able to employ people committed to the religious belief and way of life and not employ people whose beliefs or lives do not fit the religious faith and worldview. If they were compelled by anti-discrimination laws to employ people whose beliefs or practices were not compatible with the religion that would lead to internal cultural conflict and compromise the organisation's ability to represent the religious faith and worldviews.[14]

We consider this same freedom might be extended to other non-religious organisations whose mission is to represent a worldview and way of life of a non-religious community to the public. For example, political parties exist to represent and advocate for certain world views and policies of a community of people who are committed to that worldview. They are not and should not be required by antidiscrimination law to employ people who believe or live in a way that is contrary to the worldview the organisation represents.

This is an existential issue. It should be obvious that the ethos of an organisation will, over time, become compromised if it is not permitted to employ or to prefer to employ persons who adhere to its beliefs. Genuine diversity and plurality is promoted by the inclusion of this right. Diversity should not mean micro diversity within each organisation; true diversity is secured only if an organisation is able to express its own individual ethos, thereby providing different views and options to society. The same prerogative can (and is) applied to other organisations e.g.: political, sporting and environmental groups. It is a general prerogative which promotes freedom of association and therefore one which should also be possessed by both religious organisations and non-religious expressive organisations.

Effectively, this proposal is to provide a federal override of the operation of Commonwealth, State and Territory anti-discrimination law in limited circumstances in relation to some employment decisions. To bind the States, it would be enacted in reliance on the external affairs power.

[14] We have developed this argument more fully in terms of Freedom of Association and Freedom of Expression through voluntary associations and Cultural Rights at http://www.i4cs.com.au/sarc-eoa-religious-exceptions-bill/

V. Give parents the right to have their child excused from that part of school classes which is antithetical to the religious and moral convictions of the child's parents (as does the NZ Education Act)

The international human right of parents to ensure the religious and moral education of their children in accordance with their own conviction (ICCPR Art 18(4)) should be protected. Currently, this human right is breached daily in Australian state schools through compulsory attendance at programs like Safe Schools. The Federal Parliament should give parents the same right they have under the New Zealand Education Act, namely, to have their child excused from attending that part of a class which teaches material that is antithetical to their religious and moral convictions. In order to give this recommendation 'teeth' it will be necessary to confine controversial programs such as Safe Schools to specific 'spaces' in the curriculum rather than embed it throughout the curriculum.

To bind the States, this law would be enacted in reliance on the external affairs power and ICCPR Article 18(4) and other applicable international Conventions.

VI. Specific protections for persons and organisations who hold, express or act on beliefs in favour of man-woman marriage, but not protecting any conduct which is discrimination contrary to the Sex Discrimination Act or conduct which threatens or harasses persons because of sexual orientation etc.

The occasion for calling this inquiry was the debate about protecting freedom of religion and belief of those who remain opposed to same sex marriage (approximately 4.9 million Australians voted No in the national postal survey). The ALP voted against amendments proposed in the Parliament intended to protect those freedoms on the basis that those amendments and the issues they raise would be considered in this Inquiry.

Because those amendments deal with the protection of the expression of specific beliefs about the value of man-woman marriage, it is possible to be more detailed as to the protections needed for those beliefs compared with the more general protections of all genuine religious beliefs discussed in 1 and 2 above.

We recommend that each of those amendments put in the House of Representatives and the Senate to the Marriage Equality Bill and which attracted the support of a significant majority

of Coalition MPs and the Ministry on a conscience vote should be considered by the Expert Panel for enactment.

Those amendments were originally contained in the Marriage Amendment (Definition and Freedoms) Bill 2017 which was withdrawn in the Senate and some of its content was put as separate amendments. (The amendment in that Bill which would have authorised suppliers of goods or services to refuse to supply a same sex wedding or related event was not put in either House). The amendments and the Supplementary Explanatory Memorandum attached as an Appendix to this submission also contain many useful definitions and interpretive provisions such as when a religious belief is to be treated as genuine and when a religious belief can be held by an organisation, and a discussion of the international and domestic law on religious freedom issues.

As summarised in the Explanatory Memorandum, the substantive amendments we propose the Panel consider are:

1) That an anti-detriment shield[15] be created as a legal protection against unfavourable treatment initiated by a public authority or by a person acting on the request or requirement of a public authority against persons and entities because the person or entity:
    i. **holds, expresses or acts upon** a genuine religious or conscientious belief that marriage is between a man and a woman ('relevant marriage belief') in relation to matters such as employment, engagement as a contractor, education, supply of goods or services or economic benefits.

    (A relevant marriage belief is a genuine religious or conscientious belief that marriage is the union of a man and a woman to the exclusion of all others, voluntarily entered for life, and related beliefs that are constitutive, supportive or a corollary of that belief.)

[15] The Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, February 2017 acknowledged that 'the evidence supported the need to enhance current protections for religious freedom' and referred to an anti-detriment clause as one of 'various potential remedies' available to protect religious freedom.

ii. **holds or expresses** a 'relevant belief' (note that there is no protective shield in relation to person or entity *acting* on a relevant belief unless it is a relevant marriage belief).

(A relevant belief includes a relevant marriage belief and a person's genuine religious or conscientious belief that a same sex relationship is not consistent with their religious or conscientious conviction or that for most people gender is either male or female and related beliefs that are constitutive, supportive or a corollary of those beliefs.)

However these protections **do not** create any shield or protection for such persons or entities:

1. to express their belief in a way that is reasonably likely in all the circumstances to threaten or harass another person or group on the grounds of sexual orientation, gender identity, intersex status, marital or relationship status or their family responsibilities;
2. to engage in any conduct on the basis of that belief that would be unlawful discrimination under the *Sex Discrimination Act* against another person (e.g. on the grounds of sexual orientation, intersex status, gender identity, marital or relationship status or family responsibilities).

2) that a person or entity cannot be required to express or publish or endorse or promote a statement or opinion in favour of same-sex marriage which is contrary to their genuine religious or conscientious belief.
3) that governments cannot decline to provide funding, impose conditions or withdraw funding from an individual or entity solely because that individual or entity holds a relevant belief.
4) that charities that hold a relevant belief will not lose their charitable status as a result of the changes to the *Marriage Act* permitting same sex marriage, as has happened in some other countries.
5) that bodies established for religious purposes and educational institutions established for religious purposes may perform acts consistent with a relevant belief.

VII. A federal Religious Freedom Commissioner

We support the creation of an office of a federal Religious Freedom Commissioner in the form proposed and for the reasons set out in the submission by Freedom for Faith. Provided the holder of that office has a genuine passion for religious freedom, the existence of that office and its advocacy will keep religious freedom issues alive in the minds of departments and agencies, policy makers and the public.

Religious freedom issues can be forgotten or poorly understood in the development of laws and policies and in the administration of government. A recent example is the largely unrecognised impact that the Foreign Influence Transparency Scheme Bill 2017 would have had on Australian religious bodies and charities. Because of its very broad drafting, it seems likely to catch Australian religious groups or individuals who receive funding from foreign entities or lobbying material or requests or instructions from foreign entities and agree to or engage in influencing, communication, lobbying or donor activities. Thus it could cover policy submissions and lobbying by Australian religious groups using materials or funds from or in collaboration with an international branch of the religious groups (e.g. Anglican, Baptists, Seventh Day Adventists, Catholics, Eastern Orthodox, Latter Day Saints, various Islamic groups) and friendly foreign religious or religiously motivated groups (e.g. international mission agencies and aid agencies and lobby groups on issues such as anti-Semitism, women's rights, euthanasia, abortion, religious freedom).

There is a limited exception in clause 27 for Australian religious bodies acting on behalf of foreign government entities to advocate for the religious beliefs or tenets of the religion of the foreign government entity. That will only assist those acting on behalf of the Vatican or Islamic governments like the government of Iran.

It seems that these implications for religious bodies and charities were not fully thought through. A Religious Freedom Commissioner could be a point of assistance and a point of critique to prompt such thinking through.

Part 3: Examples of Infringements of Religious Freedom And its Inadequate Protection in Australia and Other Western Democracies

The following examples illustrate our claim that religious freedom is under threat in Australia. We do not suggest that all of the examples should come within the purview of the law, but

collectively, they reveal an increasing hostility towards some or all forms of religious expression.

1) *Australian university student suspended for making a classmate feel "unsafe" because he said he would show love to a gay friend but not agree with their lifestyle.*

"Andrew" (a pseudonym) is a student at a large Australian university. He is also a Christian. That is what he told a classmate who spoke to him regarding their struggles with anxiety. He offered to pray for them, with their permission, which they granted.

Shortly thereafter, during a conversation to which the same classmate was a party, Andrew was challenged with the question, "What would you do if your friend was gay?" His response included statements to the effect that he would show love to them, but would not necessarily agree with what they were doing. Andrew was suspended from the university for at least one semester pending a review and had official disciplinary action recorded on his transcript for allegedly making his classmate feel unsafe. Lawyers affiliated with the Human Rights Law Alliance were able to represent Andrew in his negotiations with the university, ultimately securing a reversal of the decision which enabled Andrew to return to his studies without detriment.[16]

2) *Australia: Complaints against dissemination or preaching of standard Christian doctrine under Tasmania's very broad provisions prohibiting causing offence or insult.*

In Tasmania, a booklet outlining the Catholic position on same-sex marriage distributed by a Catholic Archbishop to parents of Catholic school students was held by the Anti-Discrimination Commissioner to be a possible violation of anti-vilification legislation.[17] The matter proceeded to a conciliation session but was eventually abandoned many months later by the complainant.

This is not an isolated incident. In Tasmania, complaints are current underway under the same law against Presbyterian Minister Campbell Markham and street preacher David Gee for expressing standard Christian teaching on homosexual relations and on marriage. Orthodox Jews and Muslims share the same teaching.

[16] http://www.hrla.org.au/university

[17] Dennis Shanahan, 'Catholic bishops called to answer in anti-discrimination test case', *The Australian* (online), 13 November 2015 <http://www.theaustralian.com.au/nationalaffairs/state-politics/catholic-bishops-called-to-answer-in-anti-discrimination-test-

3) Australia: Sacking for Expressing Traditional Religious Views

"Ryan" was the General Manager of a digital services agency in Victoria, which he grew substantially in sales, revenue, staff and operational maturity over a two-year period. The team Ryan recruited under his leadership included members of the LGBTIQ community.

When challenged unexpectedly at work concerning the Safe Schools Coalition, Ryan explained that, while he did not want to see anyone subject to bullying, there were elements of the Safe Schools program that conflicted with his values, including the concepts of gender fluidity and the promotion of sexual diversity. Ryan's views were not tolerated by some in the workplace and he was summarily terminated from his role for allegedly creating an unsafe workplace through his comments.

Ryan was able to achieve a substantial settlement for his termination. However, if his case was one of demotion or unfair treatment short of dismissal, the Fair Work Act would not have helped him if his views were based on non-religious grounds.[18] Even if his views were based on religious grounds he would not gave been protected under the anti-discrimination provisions in the Fair Work Act in NSW or SA because they only apply if the State anti-discrimination law protects that attribute (and NSW and SA laws do not have religious belief or practice as protected attributes, nor does any federal anti-discrimination law).[19]

4) Australia: Sacking for saying it's OK to vote No in SSM plebiscite

In Canberra a young woman contractor to Capital Parties expressed the view on her Facebook page that it was OK to vote no in the plebiscite. The business owner sacked her and said she

[18] http://www.hrla.org.au/ryan

[19] The current anti-discrimination laws in Australia y protect same sex oriented Australians from discrimination in every State and Territory and federally (and hence protect supporters of same sex marriage because that is a commonly associated characteristic with same sex orientation.)

But their protection of Australians who hold to traditional marriage is very patchy and incomplete. They do not protect at all Australians who support traditional marriage from a conscientious conviction not based in religious conviction (e.g. many parts of the Chinese community and others from traditional cultures and many indigenous Australians). And federal law, NSW and South Australian anti-discrimination laws do not protect Australians who support traditional marriage based in religious conviction. (The Fair Work Act anti-discrimination provisions do not protect people in NSW or South Australia from employment discrimination because the FWA is subject to the same limits as the State laws in those two States). And nowhere in Australia do anti-discrimination laws protect small businesses or associations or charities or schools from detriment because they adhere to a belief in favour of traditional marriage. For example, the laws do not protect such organisations from governments discriminating against them in the provision of funding or economic benefits or licensing or permits because they support traditional marriage.

did so because the contractor's views expressed on Facebook showed she was a bigot and homophobe.

The young woman may have had no recourse under the Fair Work Act unfair dismissal provisions because she was a contractor. She may have had recourse under the ACT Anti-discrimination Act (again subject to the contractor point) if her views were based in religious conviction but would have had no protection if the events took place in NSW or SA.

5) *Australia: Campaigns to have employees sacked or to force them to resign from private directorships*

In Australia, a social media campaign was waged to have Mark Allaby dismissed by IBM unless he resigned as a director of another organisation (the Lachlan Macquarie Institute) that was perceived to support traditional marriage. The basis for the campaign was that Allaby's personal time role was inconsistent with IBM's commitment to workplace diversity (meaning, in context, gay rights and same sex marriage). Mr Allaby resigned the directorship. Mr Allaby had previously resigned from the Board of the Australian Christian Lobby after a similar social media campaign was waged against him when he worked for PricewaterhouseCoopers.[20]

Following this, the Australian Charities and Not-for-profits Commission acceded to a request from the Australian Christian Lobby and the Lachlan Macquarie Institute that the names and addresses of their board members be removed from the public record on the grounds that publication "could endanger public safety".[21]

A social media campaign was waged to have Dr Stephen Chavura dismissed by Macquarie University unless he resigned as a director of another organisation (the Lachlan Macquarie Institute).[22]

In the USA a similar campaign forced Brendan Eich out as CEO of Mozilla for donating his own money to a referendum campaign in favour of traditional marriage.

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[20] Jeremy Sammut, 'Public companies are already demonstrably diverse, why sign up to extra pledges?' *The Financial Review*, 3 April 2017 http://www.afr.com/opinion/public-companies-are-already-demonstrably-diverse-why-sign-up-to-extra-pledges-20170402-gvbr92

[21] 'ACNC Moves to Withhold Charity Information' 29 March 2017 https://probonoaustralia.com.au/news/2017/03/acnc-moves-withhold-charity-information

[22] 'Gay Rights Activist Michael Barnett Turns on Christian Academic', *The Australian*, 29 March 2017

If Allaby or Chavura had been sacked by their employer in NSW, the Fair Work Act anti-discrimination provisions would not have assisted them because they only apply if the State anti-discrimination law protects that attribute (and NSW do not have religious belief or practice as protected attributes, nor does any federal anti-discrimination law).

6) *Australia: Campaign to have a professional deregistered for her views on same sex marriage*

Dr Pansy Lai was the subject of a petition, which gained 5000 signatures, circulated calling for her deregistration as a doctor due to her comments about same-sex marriage and safe schools in a No campaign TV commercial.[23] The petition was subsequently removed from the GetUp website.

7) *Australia: Federal public servant disciplined for expressing concern about pressure to march in gay pride parade*

"Chris" served in a Commonwealth government department for a number of years without incident. Chris felt pressure to affirm lifestyles that were contrary to his cultural convictions and heritage. Whilst happy to work with and befriend all people, Chris believed such matters to be ones of private practice and conviction.

After raising concerns about pressure to march in a "pride" parade and a refused request to unsubscribe from a "pride" email newsletter, Chris was not only officially warned once by the departmental discipline unit, but placed under a further investigation for suspected breaches of discipline. Lawyers were able to represent Chris in negotiations with the discipline unit which ultimately saw the investigation dropped and no further action taken.

Concerns remain over the nature of the policies that saw Chris disciplined.[24]

8) *Australia and USA – commercial boycotts of businesses because they expressed or supported the expression of a belief in traditional marriage*

Coopers Brewing sponsored the Bible Society to produce a video of a civil debate between two politicians about same sex marriage. As a result, several commercial hotels announced their

[23] Lily Mayers and Ky Chow, 'Same-sex marriage survey: Petition to deregister Pansy Lai, doctor in No campaign ad, taken down,' 4 Sep 2017, http://www.abc.net.au/news/2017-09-04/same-sex-marriage-petition-against-doctor-pansy-lai-taken-down/8869260

[24] http://www.hrla.org.au/chris

intention to boycotted Coopers Brewing and refused to buy their products because they believed views against same sex marriage should not be expressed. Coopers backed down and withdrew its sponsorship of that video.

The Say No to No campaign was a campaign to get Australian advertising and media industry professionals to refuse to work on No campaign communications because they will always be "harmful and homophobic". 1,709 advertising professionals have committed to refuse to supply commercial services because they disagree with a position that is the law.[25]

In the United States of America, Chick Fil A was subject to commercial boycotting because of management's views and donations supporting traditional marriage. As part of this boycott, local governments and universities refused to allow new Chick Fil A franchise licences.[26]

In 2016 numerous companies threatened to boycott or reduce services to, and employment in, the US states of Georgia and North Carolina, after these states tabled legislation seeking to expand religious freedom exceptions regarding same sex weddings. The companies involved included Disney, Intel, Coca Cola, Unilever, and others; as well as threats from the NFL and NBA to reduce or remove match scheduling, if the laws were passed.[27]

9) *Australia: Victorian Education Department Ministerial Direction and Departmental Policy severely restricted students' religious freedom in Victorian schools*

A Ministerial Direction MD141 – Special Religious Instruction in Government Schools - was made on 14 May 2014 under the Education and Training Reform Act 2006 (Vic). These purported to relate to regulating the 30 minutes per week of religious instruction that may be delivered by accredited providers in government schools: However, in an extraordinary overreach seemingly based on the fear or hostility towards religion of the Departmental policy makers, the Direction and accompanying Departmental Policy:

- Prevented the distribution or display by any person (including students) of any material at a school if that material had the effect of promoting any particular religious practice,

[25] See: http://www.saynotono.com.au; www.theaustralian.com.au/.../say-no-to no.../6311a44ccf110af29ac3813d378bdee0

[26] See, for example: Ian Duncan, 'UM students circulate petition to oust Chick-fil-A from campus', *The Baltimore Sun*, 20 August 2012, http://www.baltimoresun.com/news/breaking/bs-md-college-park-chick-fil-a-20120820-story.html

[27] https://www.forbes.com/sites/annafields/2016/03/23/disney-is-boycotting-homophobes-and-so-should-you/#290bc5fb6d19

denomination or sect. This would effectively prevent one student from showing or handing out to another student a Bible, Koran, Torah, or verses from these or other sacred texts, religious books, pamphlets, poetry, pictures, videos etc, or having on their desk or locker a diary with a Bible verse or religious image on it. It would even seem to have prohibited students advertising that a student religious group is meeting.

- Restricted the permitted activities of student-initiated religious groups in schools to personal prayer and excluded for example study or teaching based on the Bible or Koran or other specific religious text. This policy seems to take the requirement in the Act that *education provided in a government school must be secular* and change it into a requirement which is not in the Act that *any activity of students in a government school must be religion-free.*

10) Australia - Queensland Education Department encourages school principals to take action on student evangelism

The Queensland Education Department conducted a review into the "Godspace" religious instruction materials used by Christian volunteers who were approved to deliver religious education in government schools. The report conceded that evangelism is not explicitly prohibited by legislation nor referenced in the Religious Instruction policy but nevertheless stated that:

The department expects schools to take appropriate action if aware that students participating in religious instruction (RI) are evangelising to students who do not participate in their RI class, given this could adversely affect the school's ability to provide a safe, supportive and inclusive environment for all students.

According to The Australian newspaper, the Education Department regards "evangelising" as "preaching or advocating a cause or religion with the object of making converts to Christianity".

Examples cited include giving Christianity-themed Christmas cards and Christmas tree decorations and making beaded bracelets to give to friends "as a way of sharing the good news about Jesus."[28]

[28] Rebecca Urban, 'Jesus Unwelcome in Schoolyard Crack Down' *The Australian*, 27 July 2017 https://www.theaustralian.com.au/national-affairs/education/junior-evangelists-targeted-in-schoolyard-crackdown/news-story/e719eabc9778e812fd390bd2736

11) Australia - Pub cancels meetings by Christian group in beer garden

In November 2017 the licensee of the Rose Hotel in Chippendale (Sydney) apologetically informed a Christian group that they could no longer hold their monthly meetings – called Theology on Tap – in the pub's beer garden because some patrons had complained that same sex marriage was being discussed and had threatened not to return if the meetings continued. It is understood that the licensee offered the group a private room instead.[29]

12) Australia – use of Darebin Council facilities during no campaign

During the same sex marriage plebiscite, the Darebin Council put forward a draft motion which, had it been passed, would have allowed proponents of the yes campaign to use the Council's facilities and services free of charge during the campaign but would have prohibited the no campaign from using council facilities. The council also announced its intention to write to churches and religious groups to warn them about the consequences of campaigning against same sex marriage. Ultimately, the Council did not pass the motion, having been warned that they were on shaky legal grounds. However, it is very concerning that a local council would consider introducing such a blatantly discriminatory measure.

13) Australia - Catholic Society students vilified and attacked for support of no campaign at Sydney University

During the same sex marriage postal plebiscite, a group of students from the Catholic Society set up a table on a Sydney University campus with placards saying "it's OK to Vote No" in order to give the no campaign some coverage on a university campus. Video footage showed the group being vilified, abused and threatened, physically attacked and their property damaged over a number of hours.[30]

14) Australia – University of Sydney Union threatens to deregister Evangelical Union

In 2016 the University of Sydney Union threatened to deregister the Sydney University Evangelical Union if it did not remove a declaration of faith "in the Lord Jesus Christ as my

[29] Miranda Devine, 'Yes Voters Vilify Christians to the Bitter End' *The Daily Telegraph*, 5 November 2017 https://www.dailytelegraph.com.au/rendezview/yes-voters-vilify-christians-to-the-bitter-end/news-story/88c2b6ed2282f9ce97f14384108629d3

[30] Miranda Devine, 'Yes Voters Vilify Christians to the Bitter End' *The Daily Telegraph*, 5 November 2017 https://www.dailytelegraph.com.au/rendezview/yes-campaigners-show-their-true-colours/news-story/6ad4b71806c4c610329a1cb7dcaa43b2

Saviour, my Lord and my God" as part of membership on the basis that union regulations required that membership of clubs and societies be equally accessible to all. Fortunately, following consultation with several faith-based groups on campus the USU agreed to amend union regulations to "allow faith-based declarations as a condition of membership and executives" of faith-based groups on campus.

15) Australia – calls to rename Margaret Court Arena

Tennis greats Billie Jean King and Martina Navratilova publicly called for Australian Open organisers to rename Margaret Court Arena because of Margaret Court's public views on homosexuality and same sex marriage.[31] While we would not support restrictions on this type of speech, it gives occasion to reflect on the inherent biases in some anti-vilification laws. Would these comments amount to vilification of Margaret Court on the basis of her religious belief if she was reasonably insulted or offended by them? Flipping the example, would it be vilification if Margaret Court was homosexual and publicly critical of religious conservatives who opposed homosexual sexual relations and some of those conservatives then called for the renaming of the arena because of her comments?

16) Australia – unbalanced and patchy anti-discrimination laws give limited protection to freedom of religion

The current anti-discrimination laws in Australia protect same-sex oriented Australians from discrimination in every State and Territory and federally (and hence protect supporters of same sex marriage because that is a commonly associated characteristic with same sex orientation.)

But their protection of Australians who hold to traditional marriage is very patchy and incomplete. They do not protect at all Australians who support traditional marriage from a conscientious conviction not based in religious conviction (e.g. many parts of the Chinese community and others from traditional cultures and many indigenous Australians). And federal law, NSW and South Australian anti-discrimination laws do not protect Australians who support traditional marriage based in religious conviction. (The Fair Work Act anti-discrimination provisions do not protect people in NSW or South Australia from employment

[31] Sam McPhee, 'Billie Jean King and Martina Navratilova call for Margaret Court Arena to be renamed – saying they would refuse to play on it due to her 'homophobic' comments' *The Daily Mail*, 12 January 2018

discrimination because the FWA is subject to the same limits as the State laws in those two States).

And nowhere in Australia do anti-discrimination laws protect small businesses or associations or charities or schools from detriment because they adhere to a belief in favour of traditional marriage. For example, the laws do not protect such organisations from governments discriminating against them in the provision of funding or economic benefits or licensing or permits because they support traditional marriage.

17) UK: Loss of Charitable Status by Charities Implementing Religiously-Based Policies in Adoption and Fostering

In the United Kingdom, the Charities Commission for England and Wales removed the charitable status of 19 Catholic adoption and foster agencies because they preferred not to adopt or foster to same-sex couples. This caused many of these agencies to close down or transfer their operations as they were no longer exempt for the purposes of tax.

18) NZ: Loss of Charitable Status by Charity Advocating for Traditional Marriage

In New Zealand, Family First was deregistered by the Charities Board because of its commitment to traditional marriage which no longer could be regarded as a public benefit:

> The Board considers that Family First has a purpose to promote its own particular views about marriage and the traditional family that cannot be determined to be for the public benefit in a way previously accepted as charitable. Family First has the freedom to continue to communicate its views and influence policy and legislation but the Board has found that Family First's pursuit of those activities do not qualify as being for the public benefit in a charitable sense.[32]

The matter has been litigated over several years.

19) UK: Liberal Democrat leader Tim Farron forced to resign because of his Christian convictions on same sex marriage

Tim Farron the former leader of the UK Liberal Democrats felt compelled to resign in June 2017 when journalists kept pursuing him over his views as a Christian on same sex relationships, gay marriage and abortion, as these persistent questions overshadowed his attempts to advocate the party's platform. In his resignation speech he said:

[32] https://charities.govt.nz/assets/Uploads/20170821-Family-First-of-New-Zealand-deregistration-decision.pdf

> To be a political leader – especially of a progressive, liberal party in 2017 – and to live as a committed Christian, to hold faithfully to the Bible's teaching, has felt impossible for me.
>
> I'm a liberal to my fingertips, and that liberalism means that I am passionate about defending the rights and liberties of people who believe different things to me.
>
> There are Christians in politics who take the view that they should impose the tenets of faith on society, but I have not taken that approach because I disagree with it – it's not liberal and it is counterproductive when it comes to advancing the gospel.
>
> Even so, I seem to be the subject of suspicion because of what I believe and who my faith is in.
>
> In which case we are kidding ourselves if we think we yet live in a tolerant, liberal society.
>
> That's why I have chosen to step down as leader of the Liberal Democrats.[33]

20) *UK: Refusal to allow successful Christian foster parents to foster new children because of their traditional views on sexuality and marriage*

In Johns v Derby County Council 2011, the English High Court supported a local council decision that a Christians couple with traditional views on sexual ethics, who had successfully fostered many children, would not make suitable foster carers because they would not be open to promoting a homosexual lifestyle.[34]

21) *UK: Removal from Government office because of personal views expressed about religious freedom*

In the UK, Adrian Smith placed on his Facebook page a comment that he did not think that churches should be compelled to marry same-sex couples, although he did not object to same-sex marriage. He was accused by his employer, a housing association, of "gross misconduct" and threatened with dismissal. Because of his long service, he was only demoted. However, he lost 40% of his salary.[35]

22) *UK: Balliol College bans Christian Union from having a presence at fair for new students*

In 2017 the student leaders at Balliol College, Oxford University would not permit the college's Christian Union to have a stand at the annual "freshers' fair" due to their concerns that a Christian presence at activities for new university students risked "potential for harm to

[33] https://www.theguardian.com/politics/2017/jun/14/tim-farron-quits-as-lib-dem-leader; https://www.libdems.org.uk/liberal-democrat-leader-tim-farron-resigns

[34] *Johns v Derby County Council* [2011] EWHC 375 (Admin).

[35] *Smith v Trafford Housing Trust* [2012] EWHC 3221.

freshers" and that they wanted the fair to be a safe space.[36] (The Balliol Christian Union had not been accused of engaging in any discriminatory behaviour.) The student body that banned the Christian group cited the "damaging" historic influence of Christianity on marginalised communities and the use of Christianity "in many places as an excuse for homophobia and certain forms of neo-colonialism" as a reason to prevent it from holding a stall. A backlash ensued and it has since been decided that the Christian Union will be able to attend future fairs.

23) UK: student expelled from social work course for views on homosexuality

Felix Ngole was expelled from his social work course by Sheffield University for expressing a belief that homosexuality is a sin.[37] He appealed and lost. Deputy High Court judge Collins Rice J said: "Public religious speech has to be looked at in a regulated context from the perspective of a public readership. Social workers have considerable power over the lives of vulnerable service users and trust is a precious professional commodity."[38] The judge added: "Universities also have a wide range of interests in and responsibilities for their students – academic, social and pastoral. Where, as Sheffield does, they aspire to be welcoming environments for students from a diverse range of backgrounds, they must expect to be inclusive and supportive of that diversity."

24) UK: Government moves to refuse accreditation to private religious school because of inadequate promotion of homosexuality and gender reassignment

In the UK independent religious schools are under threat of deregistration for failing to conform their teaching on sexual issues to progressive agendas. OFSTED, the body responsible for school-assessment, visited Vishnitz Jewish Girls School in 2017. The school passed all academic and facilities tests of OFSTED but failed their school-assessment on one issue alone - the inadequate promotion of homosexuality and gender reassignment (the promotion of which is contrary to orthodox Jewish beliefs). Several faith schools face similar threats of closure.[39]

25) Tutor dismissed for views on homosexuality and reported as radicalisation threat

[36] https://www.theguardian.com/education/2017/oct/09/anger-as-oxford-college-bans-christian-group-from-freshers-fair; http://www.telegraph.co.uk/education/2017/10/10/oxford-college-bans-harmful-christian-union-freshers-fair/

[37] https://www.theguardian.com/uk-news/2017/oct/27/christian-felix-ngole-thrown-out-sheffield-university-anti-gay-remarks-loses-appeal

[38] *R (on the application of Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin).

[39] http://www.dailymail.co.uk/news/article-4694610/School-faces-closure-refusing-transgender-issues.html

In July 2016, a tutor in a government-funded pre-apprenticeship academy in Bristol was dismissed by the T2 Apprenticeship Academy after giving her views on homosexuality. The tutor had been asked about her views by students and replied that, 'as a Christian, she "personally" believed the Bible says that homosexual activity was against God's will, but that God still loves every person regardless of what they did, or who they were.' The student who asked the tutor about her views then pointed out that another student in the group was a lesbian, to which the tutor replied that God loved her. Two days later, the Academy's HR Officer informed the tutor that her contract was terminated with immediate effect for "gross misconduct". The tutor's case is currently before the Employment Tribunal. In a witness statement made to the Tribunal, the Academy's Chief Safeguarding Officer informed the Tribunal that she had contacted the local coordinator for Prevent - the government's 'counter-terrorism' strategy group – and reported the tutor as a "radicalisation threat" after students complained that they were brainwashed and preached to.[40]

26) Canada: Tertiary graduates denied the right to practise their profession by delegated government power because their tertiary institution had adopted a covenant of orthodox religious values relating to sex and marriage.

In British Columbia, Trinity Western University required their students and staff to sign a community covenant which included a promise to abstain from sexual activity, unless it was between a husband and wife.

Due to this, the British Columbia College of Teachers voted to refuse accreditation to all teaching graduates because they might discriminate against LGBTI students. After many years of litigation, the Supreme Court of Canada upheld the right of Trinity graduates to be accredited in 2000.

Subsequently, Trinity Western has sought to open a law school. Four Provincial (State) Law societies decided to refuse accreditation to the planned law school and program of Trinity Western University on the grounds that the community covenant of the university was discriminatory, not on any grounds relating to the quality of the curriculum or faculty of the law school. The effect of the decision would be to deny graduates of the law school the right

[40] 'Teacher fired, reported to counter-terrorism agency after telling lesbian student 'God loves you,' 5 February 2018, https://www.lifesitenews.com/news/christian-teacher-referred-to-anti-terrorism-agency-for-telling-lesbian-stu?utm_source=LifeSiteNews.com&utm_campaign=b657d0bdbb-Daily%2520Headlines%2520-%2520U.S.&utm_medium=email&utm_term=0_12387f0e3e-b657d0bdbb-401398773

to practise law in those Provinces. Two of those Provinces reversed the decision. In the other two provinces, ligation about the decisions has been through the Provincial Courts and is now to be heard by the Supreme Court of Canada.

27) Canada – guidelines for federal funding for summer jobs program requires applicants to express respect for abortion

In December 2017, the Trudeau Government announced new guidelines for groups and organisations intending to apply for funding from the Federal Government for the Summer Jobs Program for students. Applicants for funding are required to check a box on an electronic form acknowledging that they respect "individual human rights in Canada." Those rights encompass women's reproductive rights, including the right to access safe and legal abortions. The application guidelines explain that the stipulation covers both the job activity and the core mandate of the organisation applying for the funding. If the box is not checked the application cannot be submitted.

28) Canada – failure to support gender transition is child abuse

In 2017 the Ontario legislature legislated to classify a failure by parents to support their child in identifying as, and transitioning to, a different gender as a potential form of child abuse which would enable the state to remove the child from the parents under a child protection order.[41]

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[41] http://www.theblaze.com/news/2017/06/05/new-law-allows-government-to-take-children-away-if-parents-dont-accept-kids-gender-identity/; https://genderidentitywatch.com/2017/07/20/the-supporting-children-youth-and-families-act-of-2017-canada/

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APPENDIX

Supplementary Explanatory Memorandum to Five Amendments Moved to The Marriage Amendment (Definition And Religious Freedoms) Bill 2017 to Achieve Better Protection of Freedom of Religion And Conscience in Relation to Traditional Marriage Beliefs.

(Note: these amendments were opposed by the ALP (and were unsuccessful) on the grounds that instead they should be considered as part of the Expert Panel inquiry into Religious Freedom announced by the Prime Minister.)

2017

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MARRIAGE AMENDMENT (DEFINITION AND RELIGIOUS FREEDOMS) BILL 2017

SUPPLEMENTARY EXPLANATORY MEMORANDUM
AND SUPPLEMENTARY STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

This document provides the Supplementary Explanatory Memorandum to the five amendments proposed to be made to the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017*. The amendments it refers to are those moved by Mr Sukkar, Mr Hastie, Mr Hawke, Mr Morrison and Mr Broad. As each of the five amendments share amending provisions relating to definitional and interpretive matters this Supplementary Explanatory Memorandum provides a single statement on the five amendments. The applicable proposed sections in each of the five amendments are referenced sequentially in this document. References to 'the Bill' in this document are to be read as references to the *Marriage Amendment (Definition and Religious*

Freedoms) Bill 2017 as amended by the five amendments. This Supplementary Explanatory Memorandum originally accompanied the *Marriage Amendment (Definition and Protection of Freedoms) Bill 2017.* That Bill has been amended to provide the basis of the five amendments (with the deletion of section 88M concerning commercial suppliers to same sex weddings). Accordingly, the references to Item numbers and Part numbers have now varied and the references to Item numbers and Part numbers in this Supplementary Explanatory Memorandum should therefore be disregarded. Reference is instead to be had to the relevant proposed section numbers and Parts for each Act which is proposed to be amended.

MARRIAGE AMENDMENT (DEFINITION AND RELIGIOUS FREEDOMS) BILL 2017

SUMMARY OF SUPPLEMENTARY EXPLANATORY MEMORANDUM

1. This Bill amends the *Marriage Act 1961* to allow two people to marry in Australia, regardless of their sex or gender. The Bill also enacts Australia's international obligations in respect of the following human rights: freedom of expression, association, thought, conscience or religion and the rights of the child.

2. The Bill extends the definition of marriage to include the union of a man and a woman to the exclusion of all others, voluntarily entered into for life, or the union of 2 people to the exclusion of all others, voluntarily entered into for life.

3. The Bill draws upon international experience to date and the recommendations of the *Report of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, February 2017 which unanimously stated that 'should legislation be enacted to change the definition of marriage, careful attention is required to understand and deliver a balanced outcome that respects the human rights of all Australians if the nation is to continue to be a tolerant and plural society where a diversity of views is not only legal but valued.' The Report further recommended that 'the right to religious freedom should be positively protected'. This Bill acquits these obligations.

4. The Bill gives effect to the international human rights of thought, conscience or religion in relation to the solemnisation of marriage in the following ways:
    1) ministers of religion will be able to refuse to solemnise a marriage consistent with their religion's doctrine, tenets or beliefs, or the religious susceptibilities of adherents of that religion, or their own genuine religious or conscientious belief.
    2) a new category of traditional marriage celebrants, inclusive of, but not limited to, ministers of religion who are not ministers of a religion of a recognised denomination, will be able to refuse to solemnise a marriage where their genuine religious or conscientious beliefs do not allow them to do so. The inclusion of persons who hold a religious belief that marriage is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life alongside ministers of religion is consistent with the recommendations of the Senate Select Committee.[42]

[42] Senate Select Committee, Parliament of Australia, *Report of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (2017) xiv.

The Bill protects only genuine beliefs which are not fictitious, capricious or an artifice. The Bill does not permit any conduct which is unlawful discrimination under the *Sex Discrimination Act*.

5. There is substantial experience of discrimination and intimidation against persons and entities who support traditional marriage in Australia and in jurisdictions that have legislated for same-sex marriage, in areas like employment, education, professional accreditation and commercial boycotts. However, as acknowledged by the United States Supreme Court in *Obergefell v. Hodges* the view that '[m]arriage…is by its nature a gender-differentiated union of man and woman…long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.'[43]

6. Persons who hold the traditional view of marriage for reasons other than religious belief do not have protection under Federal, State and Territory anti-discrimination laws or the *Fair Work Act's* anti-discrimination provisions. Persons who hold the traditional view of marriage on the ground of religious belief have no protection under Federal anti-discrimination laws and no protection under New South Wales or South Australian anti-discrimination laws. Some protection is provided under the anti-discrimination laws of the other States or Territories but only for individuals and not organisations. The Bill redresses this imbalance and provides legal protections against that discrimination and intimidation to persons and entities that hold a traditional marriage belief by giving effect to their international human rights to expression, association, thought, conscience or religion.

7. The Bill carefully balances this protection with the rights of others in several ways. The Bill protects expression of traditional marriage beliefs from overbroad vilification laws (such as Tasmania's law used to bring a complaint against Catholic Bishops who stated the orthodox Catholic view of marriage). But the Bill expressly does not protect expression which would threaten or harass a person or group of persons on the basis of sexual orientation, gender identity, intersex status, marital or relationship status or family responsibilities.

8. Currently State and Territory law gives varying and incomplete protection to the internationally recognised rights of freedom of expression, association, thought, conscience or religion and the rights of the child. The Bill protects conduct by a person or entity with a traditional marriage belief which is consistent with that belief from the varying and incomplete patchwork of State and Territory anti-discrimination laws. However it leaves such conduct subject to the anti-discrimination regime in the Federal *Sex Discrimination Act 1984*. Such conduct is not protected by the Bill if it would be unlawful discrimination against another person on the basis of these protected attributes under the *Sex Discrimination Act*.

9. The Bill inserts a new Part VAA of the *Marriage Act* which provides:

    1) a shield to be used as a legal protection against unfavourable treatment initiated by a public authority or by a person acting on the request or requirement of a public authority against persons and entities because the person or entity:

        i. **holds, expresses or acts upon** a genuine religious or conscientious belief that marriage is between a man and a woman ('relevant marriage belief') in

[43] *Obergefell v. Hodges* 576 U. S. ____ (2015).

relation to matters such as employment, engagement as a contractor, education, supply of goods or services or economic benefits.

(A relevant marriage belief is a genuine religious or conscientious belief that marriage is the union of a man and a woman to the exclusion of all others, voluntarily entered for life, and related beliefs that are constitutive, supportive or a corollary of that belief.)

ii. **holds or expresses** a 'relevant belief' (note that there is no protective shield in relation to person or entity *acting* on a relevant belief unless it is a relevant marriage belief).

(A relevant belief includes a relevant marriage belief and a person's genuine religious or conscientious belief that a same sex relationship is not consistent with their religious or conscientious conviction or that for most people gender is either male or female and related beliefs that are constitutive, supportive or a corollary of those beliefs.)

iii. However these protections **do not** permit such persons or entities:

1. to express their belief in a way that is reasonably likely in all the circumstances to threaten or harass another person or group on the grounds of sexual orientation, gender identity, intersex status, marital or relationship status or their family responsibilities;

2. to engage in any conduct on the basis of that belief that would be unlawful discrimination under the *Sex Discrimination Act* against another person (e.g. on the grounds of sexual orientation, intersex status, gender identity, marital or relationship status or family responsibilities).

2) that a person or entity cannot be required to express or publish or endorse or promote a statement or opinion in favour of same-sex marriage which is contrary to their genuine religious or conscientious belief.

3) that governments cannot decline to provide funding, impose conditions or withdraw funding from an individual or entity solely because that individual or entity holds a relevant belief.

4) that charities that hold a relevant belief will not lose their charitable status as a result of the changes to the *Marriage Act* permitting same sex marriage, as has happened in some other countries.

5) that bodies established for religious purposes and educational institutions established for religious purposes may perform acts consistent with a relevant belief.

10. The Senate Select Committee acknowledged that 'the evidence supported the need to enhance current protections for religious freedom'[44] and referred to an anti-detriment clause as one of 'various potential remedies' available to protect religious freedom.[45] The protective shield referred to at subparagraph 9(a) gives legal protection from detrimental conduct initiated by a public authority or by a person acting on the request or requirement of a public authority in three ways:

    1) It makes unlawful certain detrimental action taken against a person or entity because they hold or express or act on a relevant marriage belief or hold or express a relevant belief.

    2) It provides a person or entity which suffers from such detrimental action with the right to seek court orders against the person or entity taking the detrimental action. These orders include a declaration that the detrimental action is unlawful, an injunction, damages for loss suffered from the detrimental action and such other orders of a compensatory or corrective nature as the court thinks appropriate.

    3) The person who suffers the detrimental action also has the option to make a complaint to the Australian Human Rights Commission (AHRC) that the detrimental action is in contravention of the protective shield provisions and the AHRC may conciliate and determine the complaint.

11. The Bill also introduces protections that enact Australia's international obligations to protect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.

12. The Bill introduces amendments to the *Sex Discrimination Act* to ensure that the protections in the *Marriage Act* are consistent with the protections in the *Sex Discrimination Act*. The amendments also clarify that faith-based charities are bodies established for religious purposes under the *Sex Discrimination Act* so that they can exercise discretion over their staff and leaders, and thus maintain their unique character, consistent with the protections granted to religious freedom in international law. Consequential amendments to the *Charities Act 2013, Income Tax Assessment Act 1997* and *Fringe Benefits Tax Assessment Act 1986* are made to ensure that the tax endorsements of charities are not affected by those amendments.

13. There is a concern that Federal, State and Territory anti-discrimination laws are unbalanced in giving much less protection to Australians with relevant beliefs than they do to Australians of same sex orientation and supporters of same sex marriage. In addition, even where State and Territory anti-discrimination laws do give some protection to Australians with relevant beliefs they are varied and inconsistent in how they do this.

14. This Bill strikes the appropriate balance of protections between those Australians with relevant beliefs and those who are same sex attracted or support same sex marriage, consistently with Australia's obligations in international law. To ensure consistency, that balance is properly to be expressed in Federal law through the interaction of the protective provisions in the *Marriage Act* to be inserted by the Bill and the Federal *Sex Discrimination*

[44] At page xv.

[45] At page xi and xv.

Act. The Bill will therefore override the patchwork of State and Territory anti-discrimination laws. The Bill leaves the expression and acting on a relevant belief subject to the Federal *Sex Discrimination Act* anti-discrimination provisions and the provisions in Part VAA of the *Marriage Act* as described above. In order to ensure consistency with Australia's obligations in international law, the Bill provides that these protections prevail against any State and Territory law to the contrary.

SUMMARY OF SUPPLEMENTARY STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Rights to equality before the law and to non-discrimination

The Right to Equality in Respect of Marriage

15. The Bill does not engage the right to equality and non-discrimination under articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR) in respect of the amendment of the definition of marriage. No inequality arises where a State retains the traditional definition of marriage because the definitional boundary of marriage does not enfold persons of the same sex. The scope of marriage under the ICCPR does not contain same sex marriage by definition. On that basis the Senate Select Committee noted that UN Human Rights Committee had held in *Joslin et al. v. New Zealand* that no discrimination can arise under Articles 2 or 26 of the ICCPR and the right to equality was not breached. However, nothing in the provisions of the ICCPR prevents Australia from enacting a law to recognize some same sex relationships to be marriages.

The Right to Equality in Respect of Religious Belief

16. The Bill does however engage the rights to freedom from discrimination on religious grounds enshrined in Articles 2(1) and 26 of the ICCPR. Any refusal to provide an exemption for religiously conscientious objectors would amount to discrimination on the basis of their religious or conscientious convictions. A law that adversely impacts a religious group in a manner that is disproportionate to its impact on other groups would violate the right to equality. As the right to equality also protects religion, a failure to protect religious adherents with a conscientious objection would amount to a violation of the right to equality as it unjustly subjects religious adherents to a detriment that they only suffer because of their religious commitments.

The right to freedom of thought, conscience and religion

17. The right to freedom of thought, conscience and religion protected under Article 18 of the ICCPR is wide-ranging in scope and protects both individual and corporate entities. Under Article 18(3) limitations on this right can only occur where such are 'necessary'. International law also requires that any state limitation on this right 'shall use no more restrictive means than are required'. A weighing of the relative burden placed upon religious and conscientious freedom amongst the applicable alternatives is then required in order to identify the means that are the least restrictive.

18. However, as noted above, the UN Human Rights Committee has held that no discrimination can arise under Articles 2 or 26 of the ICCPR in relation to same-sex marriage, on the basis that the ICCPR defines marriage to include persons of the opposite sex. As there is no right to same-sex marriage, such cannot be said to be a fundamental right or freedom, and Article 18(3) cannot be enlivened to curtail the right to manifest freedom of religion or beliefs. In the absence of any conflict with other human rights, the ICCPR prohibits any restriction on an individual's right to freedom of religion, belief or conscience. Since the right to marry a person of the same gender is not required by the ICCPR, and the principle of non-discrimination in Article 26 can be satisfied by providing equal rights other than the right to marry, the right to maintain religious beliefs and practices in relation to religious

understandings of marriage is not limited by any right of a person to marry another person of the same gender. Furthermore, accommodation for religious belief and practice does not constitute diminution of the right to equality or non-discrimination because such protections are based on criteria which are reasonable and objective, and which achieve a purpose which is legitimate under the Covenant.

19. Even if such is not accepted, and the right to equality extended to same-sex marriage in international law, it would be inconsistent with the *Siracusa Principles* and *General Comment No. 22* to exhaust religious and conscientious freedom in favour of the right to freedom from discrimination. A proportionate approach to the balancing of rights would require investigation of means to accommodate competing rights without unduly burdening the right to religious or conscientious freedom. To require celebrants to act against their religious or conscientious convictions for the purposes of solemnising same-sex marriages would amount to the application of means that are more restrictive than are required to amend the law to permit persons of the same-sex to marry. The Bill achieves an appropriate balance by permitting such religious or conscientious objectors the ability to have their religious or conscientious objections protected in law, whilst permitting persons of the same-sex to engage individuals and businesses in respect of the solemnisation of their marriage. In so doing the Bill avoids the discrimination that would arise against such religious or conscientious objectors were the protections not offered.

20. As outlined in Appendix A to this Summary, the prospect of detrimental conduct aimed at persons because of their beliefs about marriage poses a real threat to the lawful exercise of their religious and conscientious freedoms. Such conduct also amounts to discrimination on the basis of religious or conscientious belief, which State parties to the ICCPR have obligations to prevent. On these bases, the Bill then introduces a defence against unfavourable treatment initiated by a public authority or by a person acting on the request or requirement of a public authority against persons and entities that hold a relevant belief.

21. Absent appropriately broad protections, the religious freedom of bodies established for religious purposes will be limited. The potential adverse impact on religious charities from a failure to adequately protect religious liberty has been demonstrated in other jurisdictions. In the United Kingdom, for example, the refusal to provide an exception to religious groups from the operation of anti-discrimination legislation caused religious adoption agencies to either reject their religious identity or to close down on the basis that they considered it would be unethical to assist same-sex couples to adopt children. The Senate Select Committee recommended that the notion of bodies established for religious purposes be defined in any Bill that is progressed to redefine marriage. The Bill amends section 37 of the *Sex Discrimination Act 1984* to provide a definition of 'body established for religious purposes'. The definition covers faith based charities, such as adoption agencies. It gives effect to *The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* which provides that the right to freedom of thought, conscience, religion or belief under Article 18 of the ICCPR includes the freedom, 'to establish and maintain appropriate charitable or humanitarian institutions'.

Protections to the religious and moral education of children

22. An alteration in the law of the Commonwealth resulting in a change to a fundamental social institution, as is proposed by the Bill, would compel consideration of how that change is to

be reflected in public education. Any such requirement in public education would amount to a limitation on the Article 18(4) rights of the parents to 'ensure the religious and moral education of their children in conformity with their own convictions'. Article 14 of the *Convention on the Rights of the Child* provides that children enjoy the freedom of thought, conscience and religion in their own right, as do adults. The Bill enacts these rights by permitting children to be excused from tuition that is inconsistent with a relevant belief.

Application to State and Territories

23. The Bill excludes or limits the operation of the laws of States or Territories that are inconsistent with the rights protected in the Bill. Such is intended to effect consistency in Australia's acquittal of its obligations under international law, as outlined in this Statement. Currently State and Territory law gives varying and incomplete protection to the internationally recognised rights of freedom of expression, association, thought, conscience or religion. Pursuant to Article 50 of the *International Covenant on Civil and Political Rights*, the Commonwealth is held to account for the actions of the State and Territories in failing to protect human rights, including the right to religious and conscientious freedom under Article 18. Where State or Territory law protections to religious freedom do not fulfil the protections guaranteed under international human rights law, including where exemptions in State or Territory anti-discrimination law do not reflect the scope of religious freedom protections, the Commonwealth is responsible. The Bill retains the existing protections against discrimination in the *Sex Discrimination Act* but in giving effect to the Commonwealth's obligations under international law, prevails over any inconsistent State or Territory law to ensure that the applicable rights are recognised equally and without discrimination in all the States and Territories of the Commonwealth in respect of acting on a relevant marriage belief and expressing a relevant belief.

Conclusion

24. The Bill is therefore compatible with human rights. It permits couples to marry regardless of their sex or gender, sexual orientation, gender identity or intersex status where the union is not that of a man and a woman while protecting the rights to expression, association, freedom of thought, conscience and religion or belief. To the extent that the Bill may limit the freedom of thought, conscience and religion or belief, those limitations are consistent with the requirement under the ICCPR that they be necessary and 'use no more restrictive means than are required'.

SUMMARY APPENDIX A: EXAMPLES

While the Bill does not rely upon the following rulings as a form of precedent to guide its interpretation, the following matters provide examples of the conduct it seeks variously to address:

(a) In the United Kingdom, the Charities Commission for England and Wales removed the charitable status of 19 Catholic adoption and foster agencies because they preferred not to adopt or foster to same-sex couples. This caused many of these agencies to close down or transfer their operations as they were no longer exempt for the purposes of tax.[46]

(b) In New Zealand, Family First was deregistered by the Charities Board because of its commitment to traditional marriage which no longer could be regarded as a public benefit.[47]

(c) In *Johns v Derby County Council 2011*, the English High Court supported a local council decision that a Christian couple with traditional views on sexual ethics, who had successfully fostered many children, would not make suitable foster carers because they would not be open to promoting or accepting a homosexual lifestyle.

(d) In New Jersey the government declared that a Methodist organisation would no longer receive a real estate tax exemption when it declined to allow a same sex couple to have a commitment ceremony in a pavilion that was used for Church services, youth ministry programs and weddings.[48]

(e) In Tasmania, a booklet outlining the Catholic position on same-sex marriage distributed by a Catholic Archbishop was held by the Anti-discrimination Commissioner to be a possible violation of anti-vilification legislation.[49] The matter proceeded to a conciliation session but was eventually abandoned after many months by the complainant.

(f) In 2011 Adrian Smith from Manchester in England placed on his Facebook page a comment that he did not think that churches should be compelled to marry same-sex couples, although he did not object to same-sex marriage. This was before England

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[46] *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales 2009* UKFTT 376 (GRC) (01 June 2009) available at http://www.charity.tribunals.gov.uk/decisions.htm. An English judge later reversed and remanded this decision. See The Yorkshire Post, 'Catholic Adoption Society Wins Ruling on Gay Parents', *The Yorkshire Post* (Online), 17 March 2010 <http://www.yorkshirepost.co.uk/news/main-topics/local-stories/catholic-adoption-society-wins-ruling-on-gay-parents-1-2567726>.

[47] New Zealand Charities Registration Board, *Deregistration Decision: Family First New Zealand* (21 August 2017) 57.

[48] Jill P Capuzzo, 'Group Loses Tax Break Over Gay Union Issue', The New York Times (online), 18 September 2007 <http://www.nytimes.com/2007/09/18/nyregion/18grove.html>.

[49] Dennis Shanahan, 'Catholic bishops called to answer in anti-discrimination test case', The Australian (online), 13 November 2015 <http://www.theaustralian.com.au/nationalaffairs/state-politics/catholic-bishops-called-to-answer-in-anti-discrimination-test-case/newsstory/b98439693f2f4aal7aca9b46c7bda776?nk=7bd2d275fddd376333435b60d3ac81 Ic1474942859>. 30 Andrew Drummond, 'Transgender rights activist Martine Delaney drops complaint over Catholic Church's marriage booklet', The Mercury (online), 5 May 2016 <http://www.themercury.com.au/news/tasmania/transgender-rights-activist-martinedelaney-drops-complaint-over-catholic-churchs-marriage-booklet/newsstory/d8d9079bf932526b27e5f094e57dbe84?nk=7bd2d275fddd376333435b60d3ac81 c1474933967>.

allowed same-sex marriage. He was accused by his employer, a housing association, of "gross misconduct" and threatened with dismissal. Because of his long service, he was only demoted; but he lost 40% of his salary.[50]

(g) In Australia, calls were made for Dr Stephen Chavura to be dismissed by Macquarie University unless he resigned from another organisation that was perceived to be opposed to same-sex marriage.

(h) In Australia, Dr Pansy Lai had a petition, which gained 5000 signatures, circulated calling for her deregistration as a doctor due to her comments about same-sex marriage and safe schools in a No campaign TV commercial to deregister her as a doctor.

(i) In the United States of America, Chick Fil A was subject to commercial boycotting because of management's views and donations supporting tradition marriage. As part of this local governments and universities refused to allow new Chick Fil A franchises.

(j) In Australia, complaints are current underway against Presbyterian Minister Campbell Markham and street preacher David Gee for expressing their views on same-sex marriage.

(k) In the United Kingdom, the Vishnitz Jewish Girls School failed their school-assessment on one criteria, which was its inadequate promotion of homosexuality and gender reassignment, as it was deemed that these were necessary to have a full understanding of fundamental British values and equality principles.

(l) In British Columbia, Trinity Western University required their students and staff to sign a community covenant which included a promise to abstain from sexual activity, unless it was between a husband and wife. Due to this the British Columbia College of Teachers voted to refuse accreditation to all teaching graduates because they might discriminate against LGBTI students. After many years of litigation, the Supreme Court of Canada upheld the right of Trinity graduates to be accredited.

(m) In Canada, Four Provincial (State) Law societies decided to refuse accreditation to the planned law school and program of Trinity Western University on the grounds that the community covenant of the university was discriminatory, not on any grounds relating to the quality of the curriculum or faculty of the law school. The effect of the decision would be to deny graduates of the law school the right to practise law in those Provinces. Two of those Provinces reversed the decision and in the other two ligation about the decisions has been through the Provincial Courts and is now to be heard by the Supreme Court of Canada.

(n) In Northern Ireland, Ashers Bakery company, run by a Christian couple, was found liable for discrimination because it refused to bake a cake for a political group with the slogan "Support Gay Marriage". Ashers led evidence that it had never refused to supply a person on the grounds of their sexual orientation and did not do so in this case but refused only because it would not disseminate or be associated with the message on the cake. The court held that the sexual orientation of the person who ordered the cake was irrelevant and the refusal to provide a cake with that message on it amounted to discrimination.

[50] *Smith v Trafford Housing Trust* [2012] EWHC 3221.

GENERAL OUTLINE

25. This Bill amends the *Marriage Act 1961* to allow two people to marry in Australia, regardless of their sex or gender. The Bill also gives protections to freedom of expression, association, thought, conscience or religion. The Bill also recognises foreign same-sex marriages in Australia. The requirements for a legally valid marriage otherwise remain the same under the *Marriage Act*.

26. The Bill draws upon the *Report of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, February 2017 (Senate Select Committee Report) which unanimously stated that 'should legislation be enacted to change the definition of marriage, careful attention is required to understand and deliver a balanced outcome that respects the human rights of all Australians if the nation is to continue to be a tolerant and plural society where a diversity of views is not only legal but valued.'[51] The Report further recommended that 'the right to religious freedom should be positively protected'. This Bill acquits these obligations.

27. Throughout this Supplementary Explanatory Memorandum, reference is made to 'same-sex marriage'. The terms 'same-sex marriage' or 'same-sex relationship' should be read to include a marriage or relationship of two people regardless of their sex or gender, sexual orientation, gender identity or intersex status where the union is not that of a man and a woman. The same interpretation is to be applied to the use of that term in the Bill.

28. Under paragraph 51(xxi) of the *Constitution of Australia*, the Commonwealth has the power to make laws relating to marriage. In *The Commonwealth v Australian Capital Territory*[52] the High Court of Australia made comments in *obiter* that this power includes the power to make laws relating to same-sex marriage. Under paragraph 51(xxix) of the *Constitution of Australia*, the Commonwealth has the power to make laws relating to external affairs. This Bill gives effect to the various international instruments that contain Australia's obligations to protect freedom of expression, association, thought, conscience or religion and the rights of the child.

29. In summary, the Bill includes amendments to:
    1) redefine marriage to mean the union of a man and a woman to the exclusion of all others, voluntarily entered into for life, or the union of 2 people to the exclusion of all others, voluntarily entered into for life,
    2) confirm that the requirements for a legally valid marriage otherwise remain the same under the *Marriage Act*, by introducing non-gendered language to ensure these requirements continue to apply equally to all marriages. It will continue to be the case that a marriage will be void if any of the following situations apply:
        - one or both parties are already legally married,
        - the parties are in a 'prohibited relationship'. A prohibited relationship includes a relationship between siblings, and a parent-child relationship (including an adoptive parent-child relationship),
        - one or both parties did not provide real consent, or

[51] Senate Select Committee, Parliament of Australia, *Report of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (2017) xi.

[52] [2013] HCA 55.

- one or both parties are not of marriageable age, which is generally 18 years of age or older,

3) enable same-sex marriages that have been, or will be, solemnised under the law of a foreign country, to be recognised in Australia,
4) identify traditional marriage celebrants on the register of marriage celebrants as a new category including:
    - ministers of religion from religious denominations that are not recognised under the *Marriage Act* (e.g. independent religious organisations),
    - marriage celebrants wanting to perform marriages consistent with their genuine religious or conscientious belief that marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life (a 'relevant marriage belief'),
5) establish a new category of officers to solemnise marriages of members of the Australian Defence Force overseas, and
6) protect religious and conscientious freedoms in relation to marriage:
    i. ministers of religion will be able to refuse to solemnise a marriage consistent with their religion's doctrine, tenets or beliefs, or the religious susceptibilities of adherents of that religion, or their own religious or conscientious belief (e.g. marriages of same-sex, previously divorced or inter-faith couples),
    ii. a new category of traditional marriage celebrants, inclusive of, but not limited to, ministers of religion who are not ministers of a religion of a recognised denomination will be able to refuse to solemnise a marriage where their religious or conscientious beliefs do not allow them to do so.

As further set out in the Supplementary Statement of Compatibility with Human Rights that accompanies the Bill, these provisions give effect to protections in international law.

30. The Bill provides protections for individuals and entities (including both commercial and religious bodies) that hold and express a 'relevant belief'. The Bill also provides protections for individuals and entities (including both commercial and religious bodies) that hold, express and act upon a 'relevant marriage belief'. The Bill provides that a person or entity cannot be required to endorse or promote same-sex marriage against their genuine religious or conscientious belief. The Bill also clarifies that bodies established for religious purposes and educational institutions established for religious purposes may perform acts consistent with a relevant belief. In order to ensure consistency with Australia's obligations in international law, these protections prevail against State and Territory law to the contrary.

31. The Bill also introduces protections to ensure that children are educated in accordance with their religious and conscientious beliefs or those of their parents (as the case may be).

32. The Bill clarifies that:
    1) Governments cannot decline to provide funding or impose conditions on an individual or entity within any funding contract because that individual or entity holds a relevant belief.
    2) Charities that hold a relevant belief will not lose their charitable status as a result of the changes to the *Marriage Act*.
33. Part 3 of Schedule 1 amends the *Sex Discrimination Act* to give full effect to the religious exemptions contained in the Bill by extending the exemption from Divisions 1 and 2 of Part II of the *Sex Discrimination Act* for people whose conduct is in direct compliance with the *Marriage Act*, to also capture conduct authorised by the *Marriage Act*. The exemptions

specifically reference the protections in the Bill for ministers of religion, traditional marriage celebrants, Defence Force chaplains and authorised officers. The existing exemptions for bodies established for religious purposes and educational institutions established for religious purposes are also aligned with the new test introduced by the amendments to the *Marriage Act*. The Bill also clarifies that bodies established for religious purposes under the *Sex Discrimination Act* include faith-based charities.

34. Parts 4 and 5 of Schedule 1 of the Bill provides for amendments to the *Marriage Act* allowing for the commencement of the Bill's amendments either before or after the commencement of the *Civil Law and Justice Legislation Amendment Bill 2017*, which also proposes to amend the *Marriage Act*.

35. Parts 6, 7 and 8 of Schedule 1 contain amendments to the *Charities Act 2013, Income Tax Assessment Act 1997* and *Fringe Benefits Tax Assessment Act 1986* that are consequential upon the amendments to the *Sex Discrimination Act 1984* made by Part 3 of Schedule 1.

36. Part 9 of Schedule 1 of the Bill provides the application provisions necessary to support the commencement of these amendments and transitional provisions for foreign marriages not recognised in Australia prior to these amendments to be recognised.

NOTES ON CLAUSES Preliminary Clause 1 – Short title

37. This clause is a formal provision specifying that the short title of the Act is the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*.

Clause 2 – Commencement

38. The table in Clause 2 provides that sections 1 to 3 of the Act will commence the day the Act receives Royal Assent.

39. Schedule 1, Part 1, containing the main amendments made by the Bill, will commence on the day after the Act receives Royal Assent.

40. Schedule 1, Part 2 contains amendments to the *Australian Human Rights Commission Act 1986* and will commence on the day after the Act receives Royal Assent.

41. Schedule 1, Part 3 provides for amendments to the *Sex Discrimination Act 1984* and commences the day after the Act receives Royal Assent.

42. Schedule 1, Part 4 provides for contingent amendments in the event that the *Civil Law and Justice Legislation Amendment Act 2017* has not come into effect and will commence at the same time as Parts 1 and 2, or not at all.

43. Schedule 1, Part 5 are amendments resulting from those enacted by Schedule 9 of the *Civil Law and Justice Legislation Amendment Act* and will commence either at the same time as Parts 1 and 2 (if Schedule 9 of the *Civil Law and Justice Legislation Amendment Act* is in force) or immediately after that Schedule commences, or not at all.

44. Parts 6, 7 and 8 of Schedule 1 contain amendments to the *Charities Act 2013, Income Tax Assessment Act 1997* and *Fringe Benefits Tax Assessment Act 1986* respectively. These

amendments are consequential upon the amendments to the *Sex Discrimination Act 1984* made by Part 3 of Schedule 1. They ensure that the tax endorsements of charities are not affected by those amendments. Parts 6, 7 and 8 commence when Parts 1 and 2 commence.

45. Part 9 of Schedule 1 relates to application and transitional provisions and commences when Parts 1 and 2 commence.

Clause 3 – Schedules

46. Each Act specified in a Schedule to this Act is amended or repealed as is set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

Schedule 1 – Amendments Part 1—Main amendments

Marriage Act 1961

Item 1—Subsection 2A Objects of this Act

47. Section 2A inserts an objects clause into the *Marriage Act 1961*. The clause amends the Act so that it is clear that the legal framework relating to marriage will recognise marriages of two adults and also fulfil Australia's obligations to protect various freedoms. It also lists the international instruments in which those freedoms are contained. Subsection 2A(3) refers to *The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*. This Declaration was reaffirmed by the United Nations by resolution 48/128 in 1993, and declared "an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986*" by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993.

Item 1—Subsection 2B Alternative constitutional basis for Part VAA

48. The Bill inserts a new Part VAA in the *Marriage Act.* This section sets out the constitutional basis for Part VAA.

Item 2—Subsection 5(1) (paragraph (c) of the definition of authorised celebrant)

49. This item amends the current definition of authorised celebrants so that, in addition to the existing categories of:
    1) Minister of religion registered under Subdivision A of Division 1 of Part IV;
    2) A person authorised to solemnise marriages under Subdivision B of Division 1 of Part IV; and
    3) Marriage celebrant

    a new category of marriage celebrant titled a 'traditional marriage celebrant' (to be registered under Subdivision D of Division 1 of Part IV) is created.

Item 3 – Subsection 5(1) (definition of authorised officer)

50. This item inserts a definition of authorised officer to enable the Chief of the Defence Force to authorise an officer (as defined by the *Defence Act 1903*) other than a chaplain to solemnise marriages.

Item 3 – Subsection 5(1) (definition of Commonwealth authority)

51. This item introduces a definition of Commonwealth authority. A Commonwealth authority is included within the definition of public authority.

Item 3 – Subsection 5(1) (definition of entity)

52. This item introduces a definition of entity by reference to section 5AA.

Item 3 – Subsection 5(1) (definition of law)

53. This item introduces a definition of the term 'law'.

Item 4—Subsection 5(1) (definition of marriage)

54. The current definition of marriage means only marriages between a man and a woman can be solemnised in Australia or recognised from overseas under Australian law.

55. This item amends the definition of marriage to mean only the union of a man and a woman to the exclusion of all others, voluntarily entered into for life, or the union of 2 people to the exclusion of all others, voluntarily entered into for life.

56. Same-sex couples and people who are legally recognised as neither a man or a woman will be able to marry and have their foreign marriages recognised under Australian law. For example, this would include an intersex person who is legally recognised as both male and female and a gender diverse person who is legally recognised as having a non-specific gender. This gives effect to the recommendations of the Senate Select Committee.[53]

Items 5, 12, 27, 29, 30, 32-50, 52, 53, 55-62 & 65, 66, 68— Updating references to "authorised officer"

57. Currently the *Marriage Act* only provides for chaplains in the Defence Force to solemnise marriages of Defence force members while overseas. Under this Bill, marriages solemnised under Division 3 of Part V (marriages of members of the Defence Force overseas) will be able to be solemnised by:
    1) an authorised officer (authorised in writing by the Chief of the Defence Force), or
    2) a chaplain.

58. These amendments will ensure that all responsibilities and rights currently afforded to chaplains in relation to the solemnisation of marriages outside of Australia are extended to authorised military officers, where at least one party to the marriage is a member of the Australian Defence Force.

59. See the discussion below at items 51 and 54 on religious and conscientious exemptions for chaplains and officers authorised in writing by the Chief of the Defence Force.

Item 6—Subsection 5(1) (Definition of public authority)

[53] Senate Select Committee, Parliament of Australia, *Report of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (2017), xiii.

60. This item amends subsection 5(1) of the *Marriage Act* to provide a definition of public authority. Section 88KB provides provisions that assist in determining the scope of the definition of public authority.

Item 6—Subsection 5(1) (Definition of relevant belief)

61. This item amends subsection 5(1) of the *Marriage Act* to provide that the definition of relevant belief is contained at section 5AC of that Act.

Item 6—Subsection 5(1) (Definition of relevant marriage belief)

62. This item amends subsection 5(1) of the *Marriage Act* to provide that the definition of relevant marriage belief is contained at section 5AB of that Act.

Item 6- Subsection 5(1) (Definition of religious body or organisation)

63. This item amends subsection 5(1) of the *Marriage Act* to provide that the definition of religious body or organisation means a body established for religious purposes to which section 37 of the *Sex Discrimination Act 1984* applies or an educational institution to which section 38 of that Act applies.

Item 6—Subsection 5(1) (Definition of State or Territory authority)

64. This item inserts a definition of a State or Territory authority. A State or Territory authority is included within the definition of public authority.

Item 6—Subsection 5(1) (Definition of traditional marriage celebrant)

65. This item inserts a definition of a traditional marriage celebrant in subsection 5(1) of the *Marriage Act* as a person identified as such on the register of marriage celebrants under Subdivision D of Division 1 of Part IV.

66. This item clarifies the difference between:

a. a traditional marriage celebrant registered under Subdivision D of Division 1 of Part IV (the religious or conscientious exemptions under new section 47A of the *Marriage Act* will apply to traditional marriage celebrants, where they are not acting in the capacity of a minister of religion and the religious or conscientious exemptions under amended section 47 of the *Marriage Act* will apply to traditional marriage celebrants who are acting in their capacity as ministers of religion), and
b. a 'civil' marriage celebrant (referred to in the *Marriage Act* simply as a marriage celebrant) registered under Subdivision C of Division 1 of Part IV, to whom religious or conscientious exemptions will not apply where they are not also registered under Subdivision D of Division 1 of Part IV, or are not a minister of religion covered by section 47.

Item 7 - Section 5AA (Meaning of entity)

67. This section inserts a definition of entity by importing in the definition provided at section 184-1 of the *A New Tax System (Goods and Services Tax) Act* 1999. That definition is intended to encompass all forms of commercial and not-for-profit structuring in Australia.

68. As various sections within Part VAA extend protections to entities, subsection (2) provides that an entity is an entity regardless of whether it is:

- for-profit or not-for-profit (a matter that is determined by whether the entity may make distributions to its members);
- the entity is a religious body or organisation (as defined by section 5(1));
- the entity operates to make a profit (many not-for-profit entities that are bound by their constitution not to make distributions to members undertake commercial operations for the purpose of giving rise to a surplus to apply to their charitable or other purposes (see for example the circumstances outlined in *Commissioner of Taxation v Word Investments*[54]).

The protections afforded in Part VAA are intended to apply to all such bodies.

69. The protections granted under Article 18 of the ICCPR extend beyond religious institutions and their officials – they extend to individuals and corporations. The High Court of Australia recognised in *Commissioner of Taxation v Word Investments,*[55] that extensive engagement in commercial activities and recognition as a religious body are not mutually exclusive categories. The recognition of the religious freedom rights of for-profit entities has also been recently acknowledged by the United States Supreme Court in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al* (*Hobby Lobby*)[56] where the Court, referring to both non-profit and for-profit corporations, held that '[f]urthering their religious freedom also "furthers individual religious freedom"'.[57] The consistency of the Part VAA provisions with international law is further set out in the Supplementary Statement of Compatibility with Human Rights that accompanies this Bill.

Item 7—Subsection 5AB (Meaning of relevant marriage belief)

70. Section 5AB outlines the concept of relevant marriage belief, to which various protections attach in Part VAA. Subsection 5AB(1) provides that a belief is a relevant marriage belief for a person if the person holds:

a. a genuine religious or conscientious belief that marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life (this is the definition of marriage provided in the *Marriage Act* prior to the amendments effected by this Bill); or
b. any one or combination of genuine religious or conscientious beliefs that are constitutive of, supportive of, or a corollary of the foregoing belief. A non-exhaustive example list of the kinds of beliefs that may fall within the subparagraph is provided.

A person or entity that holds a relevant marriage belief receives certain protections under Part VAA. A belief under subparagraph (a) is protected independently from any of the beliefs that may fall within subparagraph (b) within Part VAA. The beliefs that may fall within the scope of subparagraph (b) are protected independently from the belief under

[54] (2008) 236 CLR 204.

[55] (2008) 236 CLR 204.

[56] 573 U.S. (10th Cir, 2014).

[57] *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al,* 573 U.S. (10th Cir, 2014), 21.

subparagraph (a) that are protected under Part VAA. These beliefs are independently protected in Part VAA, and their protection is not dependent on their mutual application in a set of circumstances. Where both a belief under subparagraph (a) and any one or all of the beliefs under subparagraph (b) mutually apply to a certain set of circumstances, they will all be protected.

71. Subsection (2) provides that an entity may hold a relevant marriage belief (inclusive of either or both a genuine religious or conscientious belief that marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life and any one or more of the beliefs covered by subsection 5AB(1)(b)).

Item 7—Subsection 5AC (Meaning of relevant belief)

72. Section 5AC outlines the concept of relevant belief. A person holds a relevant belief if the person holds:

a. a relevant marriage belief (defined at section 5AB); or
b. a genuine religious or conscientious belief that:
    - a same-sex relationship (or same-sex relationships in general) are not consistent with the doctrines, tenets, beliefs or teachings of the religion or the conscience of the person or
    - the normative state of gender is binary and can, in the overwhelming majority of cases, be identified at birth; or
    - any one or combination of genuine religious or conscientious beliefs that are constitutive of, supportive of, or a corollary of the foregoing beliefs.

73. The term 'same-sex relationship' is to be read to include a relationship of two people regardless of their sex or gender, sexual orientation, gender identity or intersex status where the union is not that of a man and a woman.

74. A belief about the nature of gender is included in relevant belief. This is because, for example, a same sex relationship in which one of the members had altered their gender would, by reference to their legal status alone, no longer be a same-sex relationship but would be a relationship between persons of the opposite sex. To limit the protections of a person who holds a genuine or conscientious belief about same-sex relationships to only those same-sex relationships in which one of the members had not altered their gender identity would undermine the scope of the protections contained in the Bill.

75. Subsection 5AC(2) provides that an entity may hold a relevant belief. A person or entity who holds a relevant belief receives certain protections under Part VAA, as outlined below.

76. Again, the beliefs defined at section 5AC are independently protected in Part VAA, and their protection is not dependent on their mutual application in a set of circumstances. Where a belief under subsection (1)(a) (or any one or all of beliefs that fall within a relevant marriage belief) and any one or all of the beliefs under subsection (1)(b) mutually apply to a certain set of circumstances, they will all be protected.

Item 7 - Subsection 5AD (Determining when a belief is held)

77. Section 5AD sets out interpretive principles that apply to the holding of certain beliefs by a person or an entity under the *Marriage Act*.

78. Subsection 5AD(1) provides that a person or entity holds a *genuine belief* or a *genuine religious or conscientious belief* or *genuinely believes* a matter if the holding of the belief is not fictitious, capricious or an artifice. This test adopts the wording employed by Lord Nicholls in *R (on the application of Williamson) v Secretary of State for Education and Employment*.[58] As the Canadian Supreme Court has recognized, an individual's right to religious freedom does not necessitate an inquiry into whether their 'beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make'.[59] The ruling in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*[60] *(Cobaw),* to the extent that the Court had regard to, what was considered by the Court to be, a range of views amongst congregations associated with the appellant, is an example of reasoning that is to be distinguished from this test. For this reason, section 5AD(1) requires that, wherever the *Marriage Act* makes reference to a genuine belief or a genuine religious or conscientious belief or whether a person or entity genuinely believes a matter, regard is instead to be had to the belief of the actual 'person' or 'entity', and whether that belief is genuinely held by that person or entity.
79. Subsection (2) clarifies the means by which an entity (including a religious body) may be said to hold a relevant belief or a relevant marriage belief (or any component thereof). In *Cobaw* an entity's doctrines were held to be limited to the matters expressly addressed solely in its core governance document. This reading, it is considered, fails to appreciate the many and varied means by which religious belief may be adopted or held. The question concerns when the law will recognise the holding of belief. The effect of the reading in *Cobaw* is to impose very strict limitations on the expression of religious freedom by religious bodies. Subsection (2) clarifies that this strict reading is not to be applied. It provides a means for the law's recognition of when religious bodies have adopted a belief that gives due recognition to the broad plurality of religious expressions within Australia, and the many and varied unique means by which they may adopt or define their beliefs.

80. As the Bill allows all couples to marry and to have their marriages recognised regardless of their sex, gender, gender identity or intersex status, subsection (3) clarifies that for the purposes of the Act whether or not another person is a man or a woman is to be determined by the authorised celebrant, chaplain or authorised officer who is the holder of the relevant marriage belief, subject to the requirement that their belief must be genuine (not fictitious, capricious or an artifice) and reasonably held. As recognised by the Senate Select Committee in its consideration of the *Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*:

> definitions of 'sex' vary between the Commonwealth, states and territories, and legal definitions can differ from religious or doctrinal definitions. This means that the current drafting which limits religious exemptions to "same-sex couples" would not apply to all marriages that some religious doctrines would regard as same-sex regardless of the fact that a person has changed legal sex or because they have biological attributes in variance to their legal sex.[61]

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[58] [2005] UKHL 15, 22.

[59] *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 [43].

[60] [2014] AVSCA 75.

[61] At paragraph 2.30.

Subsection 5AD(3) addresses this concern and is required to give consistency and effect to the religious and conscientious protections contained in the Bill.

Item 8 - Subsection 5B (Act binds Crown)

81. Section 5B provides that the *Marriage Act* binds the Crown in each of its capacities. The Act thus binds the Commonwealth, each of the States, the Australian Capital Territory, the Northern Territory, Norfolk Island and the other territories of the Commonwealth.

Item 9 - Section 6 (heading)

82. This item repeals the current heading of section 6 of the *Marriage Act* and replaces it with 'Interaction of Act with State and Territory laws'.

Item 10 - Section 6

83. This item clarifies that Part VAA excludes the operation of State and Territory laws. The Bill otherwise preserves the current interaction of the *Marriage Act* with State and Territory law.

Item 11 – At the end of section 6

84. The Senate Select Committee acknowledged that 'the intersection of federal, state and territory law is a complex matter that should be considered further if a parliament introduces a marriage bill.'[62] Currently State and Territory law gives varying and incomplete protection to the internationally recognised rights of freedom of expression, association, thought, conscience or religion and the rights of the child. Under Article 50 of the *International Covenant on Civil and Political Rights*, the Commonwealth is accountable for a failure on the part of the States or Territories to acquit the obligations under the Covenant.

85. For the avoidance of doubt section 6(2) then provides that Part VAA excludes and limits the operation of State and Territory laws to the extent of any inconsistency. This provision is intended to effect consistency in Australia's acquittal of its obligations under the *International Covenant on Civil and Political Rights* and the relevant international instruments which the Bill gives effect to, as outlined at section 2A. It draws upon existing judicial authorities to clarify the intention of the provision, including authorities in which the courts have recognised that the Commonwealth has obligations under international law to ensure that the applicable rights are recognised equally and without discrimination in all the States and Territories of the Commonwealth. To that end, subsection (2) adopts the wording of the Full High Court in *Viskauskas v Nilan*[63] and also of Dixon J in *Ex parte McLean*.[64] The provision also is supported by *Dao v Australian Postal Commission*[65] and *AMP v Goulden*.[66] Subsection (4) provides the circumstances in which a person may not be prosecuted under the law of a State or Territory.

[62] At paragraph 2.42.

[63] (1983) 153 CLR 280, at 292.

[64] (1930) 43 CLR.

[65] (1987) 162 CLR 317.

[66] (1986) 160 CLR 330.

86. The intergovernmental immunity doctrine set out by the High Court in *Melbourne Corporation v Commonwealth*[67] does not invalidate section 6(2). This is because in the *Industrial Relations Act Case*[68] the High Court affirmed the ability of the Commonwealth to make laws that lay down generally applicable minimum wage laws and general terms and conditions of employment, so, by analogy, it is possible for the Commonwealth to stipulate that the States cannot when they disperse funding discriminate on the grounds listed in section 6(2).

Item 13—Paragraph 23B(2)(b)

87. This item amends paragraph 23B(2)(b) of the *Marriage Act* by removing the words 'a brother and a sister' and replacing them with the words '2 siblings' to clarify that existing restrictions on prohibited relationships apply regardless of sex or gender.

Item 14— Sections 39DA – 39DE Subdivision D – Traditional marriage celebrants

88. New section 39DA specifies that only persons who have completed the necessary steps to register as a marriage celebrant can be identified as a traditional marriage celebrant on the register of marriage celebrants.

89. Identification as a traditional marriage celebrant is available to:

a. ministers of religion (as defined in subsection 5(1)) from non-recognised denominations (these ministers are only able to register as a marriage celebrant under Subdivision C),
b. ministers of religion (as defined in subsection 5(1)) from recognised denominations (who are usually registered under Subdivision A, but may wish to register as a marriage celebrant under Subdivision C in order to perform marriages outside the specific rituals and observances of their religion), and
c. other marriage celebrants who hold a genuine religious or conscientious belief that marriage is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

90. The inclusion of persons who hold a religious belief that marriage is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life alongside ministers of religion is consistent with the recommendations of the Senate Select Committee.[69]

91. The inclusion of persons who hold such a belief alongside ministers of religion is also consistent with international law. This inclusion recognises their rights to freedom of thought, conscience or religion under Article 18 of the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23). In particular the United Nations Human Rights Committee has recognised in *General Comment No. 22* on Article 18 that

> The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18 (1) is far-reaching and profound; it encompasses freedom of thoughts on all matters, personal

[67] (1974) CLR 31.

[68] *Victoria v Commonwealth ('The Industrial Relations Act case')* (1996) 187 CLR 416, 487.

[69] Senate Select Committee, Parliament of Australia, *Report of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (2017) xiv.

> conviction and the commitment to religion or belief, whether manifested individually or in community with others.[70]

92. The inclusion of persons who hold a conscientious relevant marriage belief is also consistent with international law. Article 18 protects individual conscience separate from religious conviction. *General Comment No. 22* provides:

> The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.[71]

As noted by the Senate Select Committee:

> General Comment 22 makes the specific point that equal protection is afforded to conscience, and as such any attempt to differentiate on the rights of an individual based on conscience vs religion may be contested.[72]

It is also to be noted that the inclusion of conscientious objectors at section 47A of the *Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* was supported by the Australian Federation of Civil Celebrants in evidence before the Senate Select Committee.[73]

Furthermore, regard is had to the *Defence Legislation Amendment Act 1992*:

i. which was a response to a recommendation of the Senate Select Committee on Constitutional and Legal Affairs that conscientious objectors be lawfully permitted to object to 'participation in a particular military conflict where to be compelled by law to do so would violate the individual's sense of personal integrity';[74]

ii. which expanded the grounds for objection to military service to include not only religious but also conscientious objection; and

iii. thus provides an example of Commonwealth law that affords comparable protection to conscientious and religious belief.

93. The protections to religious and conscientious belief contained in the Bill are also consistent with the *United Nations Economic and Social Council's Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political*

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[70] Human Rights Committee, *General comment No. 22 (48) (art. 18),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993).

[71] Ibid.

[72] At paragraph 3.122.

[73] At paragraph 2.50.

[74] Senate Standing Committee on Constitutional and Legal Affairs, Conscientious Objection to Conscripted Military Service, 1985, p. ix.

Rights (*Siracusa Principles*) which, in setting out when a limitation of a right may be considered 'necessary' under Article 18(3), require that 'in applying a limitation, a state shall use no more restrictive means than are required'.[75] The consistency of these provisions with international law is further set out in the Supplementary Statement of Compatibility with Human Rights that accompanies this Bill. This Supplementary Explanatory Memorandum is to be read to include the statements made in the Supplementary Statement of Compatibility.

94. Existing marriage celebrants who hold a relevant marriage belief may apply to be registered as traditional marriage celebrants.

95. New section 39DB specifies notice requirements for identification as a traditional marriage celebrant to ensure the Registrar has access to relevant information needed to administratively process requests.

96. New section 39DC requires the Registrar to identify a person as a traditional marriage celebrant on the register of marriage celebrants if they are entitled to be registered and notice has been provided to the Registrar.

97. The Bill provides a clear and easy to administer solution for traditional marriage celebrants to access protections for their religious or conscientious beliefs. All 'civil' marriage celebrants under Subdivision C will be able to access protections for their religious or conscientious beliefs by registering under the new Subdivision D as a traditional marriage celebrant.

98. New section 39DD describes the process of identifying a person as a traditional marriage celebrant, which includes annotations and notice requirements.

99. New section 39DE provides a process by which a person may give notice that they no longer wish to be identified as a traditional marriage celebrant on the register of marriage celebrants.

100. The new heading for Subdivision E makes clear that sections 39F to 39M apply to all marriage celebrants, unless otherwise stated.

Item 15 & 67— Updating traditional marriage celebrant references and administrative procedures

101. Item 15 provides that a certificate signed by the Registrar that a person is, or is not, identified as a traditional marriage celebrant on the register is prima facie evidence of that fact. Item 67 makes a consequential amendment.

Item 16 - Section 43

102. This Item clarifies that section 43 is subject to Part VAA.

[75] United Nations Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, http://www.refworld.org/docid/4672bc122.html.

Items 17 to 20—Wording of the monitum

103. Subsection 45(2) of the *Marriage Act* currently specifies the wording of the 'monitum' - the vows that must be used in all marriages solemnised in Australia, other than marriages that are solemnised in the presence of a minister of religion. The vows required to be used for a marriage solemnised by a minister of religion are determined by the minister's religion (see subsection 45(1) of the *Marriage Act*).

104. Subsection 45(2) currently provides the following:

> Where a marriage is solemnised by or in the presence of an authorised celebrant, not being a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorised celebrant and the witnesses, the words:
>
> > I call upon the persons here present to witness that I, A.B. (or C.D.), take thee, C.D. (or A.B.), to be my lawful wedded wife (or husband).

105. Items 17 and 18 insert subheadings that are consequential upon the introduction of a new monitum at section 45(2A).

106. Item 19 amends section 45(2) by omitting 'not being a minister of religion' and inserting 'traditional marriage celebrant (other than a minister of religion)'. The existing phraseology will then continue to be used by marriages that are solemnised by a traditional marriage celebrant in their capacity as a traditional marriage celebrant.

107. As noted above, ministers of religion (as defined in subsection 5(1)) from recognised denominations who are usually registered under Subdivision A, may wish to register as a traditional marriage celebrant under Subdivision D in order to perform marriages outside the specific rituals and observances of their religion. These authorised celebrants would be required, when solemnising a religious marriage in their capacity as a minister of a recognised denomination, to solemnise the marriage in accordance with 'any form or ceremony recognised as sufficient' for the purposes of their religious body or religious organisation. When solemnising a marriage as a traditional marriage celebrant outside the specific rituals and observances of their religion, the vows provided by subsection 45(2) of the *Marriage Act* would then be used. The same applies to any minister of religion that is not from a recognised denomination who chooses to solemnise a marriage in their capacity as a traditional marriage celebrant – the persons must use the wording provided in section 45(2). Where they solemnise a marriage in accordance with any form and ceremony recognised as sufficient by their religious body, they are authorised to do so under section 45(1).

108. Item 20 inserts a new subsection 45(2A) which includes a new monitum that is to be used by all remaining celebrants. Item 20 amends the monitum by adding the gender neutral term 'spouse' to existing terms 'husband or wife'. These amendments ensure that people who are legally recognised other than male or female can use the gender neutral term 'spouse' to be accurately described in their wedding vows.

109. These items therefore enable marrying couples to word their marriage vows in a manner that best reflects their relationship.

110. Item 21 inserts a subheading that is consequential upon the introduction of a new monitum at section 46(1A). Item 22 amends existing section 46(1) to insert the words 'but being a traditional marriage celebrant' after 'denomination'. This has the effect that the existing

vows under the *Marriage Act* will continue to be used in marriages solemnised by traditional marriage celebrants, inclusive of:

a. Marriage celebrants who hold a genuine religious or conscientious belief that marriage is the union of a man and a woman;
b. Ministers of religion who are not from recognised denominations; and
c. Ministers of religion (as defined in subsection 5(1)) from recognised denominations who are usually registered under Subdivision A, but wish to register as a traditional marriage celebrant under Subdivision D in order to perform marriages outside the specific rituals and observances of their religion (and who are solemnising a marriage in their capacity as a traditional marriage celebrant as opposed to their capacity as a minister of a recognised denomination).

111. Item 23 inserts an additional monitum at section 46(1A) that reflects the inclusion of 2 people within the updated definition of marriage in this Bill. These amendments ensure that people who are legally recognised other than male or female can use the gender neutral term 'spouse' to be accurately described in their wedding vows. Item 24 is a consequential amendment that provides reference to 46(1A) at subsection 46(2).

Item 25—Section 47

112. This item makes clear when ministers of religion may refuse to solemnise a marriage.

113. 'Minister of religion' is defined in subsection 5(1) of the *Marriage Act*. The definition includes both ministers of a denomination recognised under section 26 and ministers from non-recognised religious bodies or organisations. The Bill does not alter that definition.

114. Subsections 47(1) and (2) reiterate the position under the existing section 47 of the *Marriage Act*.

115. Subsection 47(1) will provide that a minister of religion may refuse to solemnise a marriage despite anything in Part IV of the *Marriage Act*.

116. Subsection 47(2) continues to allow a minister of religion to refuse to solemnise a marriage if notice requirements are not met and to impose additional requirements to solemnise a marriage. This enables religions to maintain their own rituals and observances in relation to marriage (e.g. educational classes on the religious importance of marriage or pre-marriage counselling for a prescribed period), provided these do not contravene Australian law.

Refusing to solemnise a marriage on the basis of religious beliefs etc.

117. Subsection 47(3) is a new subsection which will allow ministers of religion to continue to refuse to solemnise a marriage to maintain the protection of freedom of conscience or religion under the *Marriage Act*:

- subparagraph 47(3)(a) ensures that conduct that is consistent with religious doctrine, tenets or beliefs is protected,
- subparagraph 47(3)(b) ensures conduct that is because of the susceptibilities of a religious community is protected, and
- subparagraph 47(3)(c) ensures the minister's genuine religious or conscientious beliefs are protected (e.g. where the doctrines, tenets or beliefs of the minister's

religion are ambiguous or allow for a variety of different practices regarding marriages).

118. In addition, subparagraph 47(3)(a) adopts a test that requires that the conduct is consistent with religious doctrine, tenets or belief. This is distinct from tests that require conduct to conform with religious doctrine. In *Cobaw* the interpretation applied to the phrase 'conforms with the doctrines of the religion' by the Victorian Court of Appeal was that 'the doctrine requires, obliges or dictates that the person act in a particular way when confronted by the circumstances which resulted in their acting in the way they did'[76] and 'as requiring it to be shown that conformity with the relevant doctrine(s) of the religion gave the person no alternative but to act (or refrain from acting) in the particular way.'[77] This strict reading is not to be applied under the Act. Instead, the term 'consistent' is adopted, noting the Macquarie Dictionary definition of that term is 'agreeing or accordant; compatible'.

119. In addition, subparagraph 47(3)(b) adopts a test that requires that the conduct be entered into because of religious susceptibilities. This is distinct from tests that require that the conduct be necessary to avoid injury to religious susceptibilities. Applying such a test in *Cobaw,* the Victorian Court of Appeal held that that test required demonstration of various matters, including that the harm be 'unavoidable'. The strict reading applied in *Cobaw* is not intended to be applied.

120. Subparagraph 47(3)(c) provides an additional circumstance where a minister of religion can refuse to solemnise a marriage. If an individual minister's genuine religious or conscientious beliefs do not allow them to solemnise a marriage, that minister's refusal to solemnise the marriage will not contravene anti-discrimination laws. By way of example, this may include circumstances where the doctrines, tenets or beliefs of the minister's religion are ambiguous or allow for ministers to exercise their own discretion in deciding whether to perform certain marriages.

121. The minister of religion will also remain able to solemnise a marriage according to any form and ceremony recognised by the minister's religious body or organisation, provided the marriage is otherwise in accordance with the *Marriage Act*.

Grounds for refusal not limited by this section

122. The *Marriage Act* does not require a minister of religion to solemnise any marriage. New subsection 47(4) ensures that section 47 does not limit the grounds on which a minister of religion may otherwise refuse to solemnise a marriage (e.g. a double-booking). Ministers of religion will still be required to comply with other laws outside of Part IV of the *Marriage Act 1961*, including anti-discrimination laws (e.g. *Racial Discrimination Act 1975*). Part 3 of the Bill effects amendments to the *Sex Discrimination Act 1984* to ensure that Act is consistent with the exemptions introduced into the *Marriage Act 1961* by this Bill. These provisions, and the provisions of new section 47, are designed to ensure that a minister of religion whose religious belief is that marriage is only a relationship between a man and a woman, may decline to solemnise a same-sex marriage without penalty. These

[76] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] AVSCA 75, 286.

[77] Ibid, 286.

provisions will also over-ride any State or Territory law on discrimination relating to sexual orientation which might have been argued to operate to the contrary.

Item 26—Before section 48

Section 47A—Traditional marriage celebrants may refuse to solemnise marriages

123. New section 47A will allow traditional marriage celebrants that hold a genuine religious or conscientious belief that marriage is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life and who are not acting in a capacity as a minister of religion to refuse to solemnise marriages. Persons who are solemnising a marriage in their capacity as a minister of religion will rely upon section 47. A traditional marriage celebrant's decision may be based on their own religious or conscientious beliefs. A traditional marriage celebrant who relies upon their religious beliefs may also take into account their religion's doctrines or tenets in determining their religious beliefs.

124. Identification as a traditional marriage celebrant is available to ministers of religion (as defined in subsection 5(1)):

a. from non-recognised denominations (these ministers are only able to register as a marriage celebrant under Subdivision C),
b. ministers of religion from recognised denominations (who are usually registered under Subdivision A, but may wish to register as a marriage celebrant under Subdivision C in order to perform marriages outside the specific rituals and observances of their religion).

125. Where a traditional marriage celebrant is acting in their capacity as a minister of religion, they will rely upon section 47. Where they are not acting in that capacity, they will rely upon section 47A.

Grounds for refusal not limited by this section

126. The *Marriage Act* does not require a traditional marriage celebrant to solemnise any marriage. New subsection 47A(2) ensures that section 47A does not limit the grounds on which a traditional marriage celebrant, may otherwise refuse to solemnise a marriage (e.g. a concern that the parties do not understand the religious significance of the marriage). Traditional marriage celebrants will still be required to comply with other laws, including anti-discrimination laws (e.g. *Racial Discrimination Act*). Part 3 of the Bill effects amendments to the *Sex Discrimination Act 1984* to ensure that Act is consistent with the exemptions introduced into the *Marriage Act 1961* by this Bill. These provisions, and the provisions of new section 47A, are designed to ensure that traditional marriage celebrants whose genuine religious or conscientious belief is that marriage is only a relationship between a man and a woman, may decline to solemnise a same-sex marriage without penalty. These provisions will also over-ride any State or Territory law on discrimination relating to sexual orientation which might have been argued to operate to the contrary. 'Civil' marriage celebrants (who are not traditional marriage celebrants) may not refuse to solemnise marriages on religious or conscientious grounds.

127. Section 47B provides that bodies established for religious purposes may refuse to make a facility available or provide goods or services for the purposes of the solemnisation of a

marriage, or for purposes reasonably incidental thereto. Purposes that will be reasonably incidental thereto include:

(a) the purpose of preparing for the solemnisation of a marriage that is not the union of a man and a woman; and

(b) the purpose of solemnising a marriage that is not the union of a man and a woman; and

(c) the purpose of celebrating a marriage, contemporaneously with the marriage, that is not the union of a man and a woman.

A non-exhaustive list of examples of facilities, goods and services provided by religious bodies that are covered by section 47B include provision of services by relationship counsellors, hire of reception halls and catering for receptions. A note clarifying that this in the intention of the provision is provided in the following terms:

Note: Examples include:
(a) provision of services by relationship counsellors;
(b) hire of reception halls;
(c) catering for receptions.

Item 28 – Marriage officers

128. New section 71A allows an officer (as defined by the *Defence Act 1903*) authorised in writing by the Chief of the Defence Force to solemnise marriages under Division 3 of Part V of the *Marriage Act*. This is consistent with the recommendations of the Senate Select Committee.[78] The inclusion of officers will ensure that Defence Force members, including those on deployment overseas, will have a non-religious option to have their marriage solemnised by a marriage officer, including where a chaplain declines to solemnise their marriage.

129. An officer shares the same meaning as provided in the *Defence Act 1903*, which is defined as either a chaplain in the Defence Force or a person appointed as an officer of the Navy, Army or Air Force and who holds a rank specified in items 1 to 12 of the table in subclause 1(1) of Schedule 1:

Item	Navy	Army	Air Force
1	Admiral of the Fleet	Field Marshal	Marshal of the Royal Australian Air Force
2	Admiral	General	Air Chief Marshal
3	Vice Admiral	Lieutenant General	Air Marshal
4	Rear Admiral	Major General	Air Vice Marshal
5	Commodore	Brigadier	Air Commodore
6	Captain	Colonel	Group Captain

[78] At paragraph 2.80.

7	Commander	Lieutenant Colonel	Wing Commander
8	Lieutenant Commander	Major	Squadron Leader
9	Lieutenant	Captain	Flight Lieutenant
10	Sub Lieutenant	Lieutenant	Flying Officer
11	Acting Sub Lieutenant	Second Lieutenant	Pilot Officer
12	Midshipman	Staff Cadet or Officer Cadet	Officer Cadet

Item 31 — Subsection 72(2)

130. Under Part V of the *Marriage Act* (as amended by this Bill), Defence Force chaplains or officers authorised by the Chief of the Defence Force are authorised to solemnise marriages outside of Australia, where at least one party to the marriage is a member of the Australian Defence Force.

131. Subsection 72(2) of the *Marriage Act* sets out the vows that must be used in all marriages solemnised by Defence Force chaplains and officers, unless they consider it unnecessary for the parties to do so having regard to the form and ceremony of the marriage.

132. Subsection 72(2) currently provides the following:

> I call upon the persons here present to witness that I, A.B. (*or* C.D.), take thee, C.D. (*or* A.B.), to be my lawful wedded wife (*or* husband).

133. Item 31 amends the monitum by adding the gender neutral term 'spouse' to existing terms 'husband or wife'.

134. This amendment ensures that people who are legally recognised other than male or female can use the gender neutral term 'spouse' to be accurately described in their wedding vows.

Items 51 & 54 – Amendments to section 81

135. Item 51 amends the heading of section 81 and introduces a new subheading for new section 81(1).

136. Item 54 inserts new provisions at the end of section 81 to clarify the situations in which a chaplain or an officer, may refuse to solemnise a marriage.

Refusing to solemnise a marriage on the basis of religious or conscientious beliefs etc.

137. A chaplain is a minister of religion (as defined under subsection 5(1) of the Marriage Act). To avoid confusion, the new subsection 81(2) replicates subsection 47(3) of the *Marriage Act* to ensure chaplains can refuse to solemnise a marriage on the basis of their genuine religious or conscientious beliefs. This provision maintains the protection of freedom of religion and conscience under the *Marriage Act* and provides the same protections for Defence Force chaplains solemnising marriages of Defence Force members as it does for ministers of religion more generally in Australia.

138. This provision provides important three tiered protections for freedom of religion by allowing a Defence Force chaplain to refuse to solemnise a marriage:
    a. subparagraph 81(2)(a) ensures that conduct that is consistent with religious doctrine, tenets or beliefs is protected,
    b. subparagraph 81(2)(b) ensures conduct that is because of the susceptibilities of a religious community is protected, and
    c. subparagraph 81(2)(c) ensures the chaplain's genuine religious or conscientious beliefs are protected (e.g. where the doctrines, tenets or beliefs of the minister's religion are ambiguous or allow for a variety of different practices regarding marriage).

139. Paragraphs 118 ff. above further elaborate upon the intention of these provisions.

140. Subparagraph 81(2)(c) provides for an additional circumstance where a chaplain can refuse to solemnise a marriage. If an individual chaplain's genuine religious or conscientious beliefs do not allow them to solemnise a marriage, that chaplain's refusal to solemnise the marriage will not contravene anti-discrimination laws.

141. New section 81(3) will allow officers authorised by the Chief of the Defence Force that hold a genuine religious or conscientious belief that marriage is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life to refuse to solemnise marriages under Part V. An authorised officer's decision may be based on their own religious or conscientious beliefs. An authorised officer who relies upon their religious beliefs may also take into account their religion's doctrines or tenets in determining their religious beliefs.

Grounds for refusal not limited by this section

142. The *Marriage Act* does not require chaplain or an authorised officer to solemnise any marriage under Part V. New subsection 81(4) ensures that section 81 does not limit the grounds on which an authorised celebrant may otherwise refuse to solemnise a marriage.

143. Authorised celebrants will still be required to comply with other laws, including anti-discrimination laws (e.g. *Racial Discrimination Act*). Part 3 of the Bill effects amendments to the *Sex Discrimination Act 1984* to ensure that Act is consistent with the exemptions introduced into the *Marriage Act 1961* by this Bill. Authorised celebrants already have broader discretion to refuse to solemnise a marriage (e.g. lack of time to solemnise a marriage because of other authorised celebrant's duties). Subsection 81(1) of the *Marriage Act* will continue to allow an authorised celebrant to refuse to solemnise a marriage where the authorised celebrant is of the opinion that it would be inconsistent with international law or the comity of nations.

Items 57-58—Section 88EA

144. Section 88EA was inserted into the *Marriage Act* by the *Marriage Amendment Act 2004* to prevent foreign same-sex marriages solemnised overseas from being recognised in Australia.

145. The removal of this provision from the *Marriage Act* will allow same-sex marriages solemnised overseas to be recognised in Australia, in accordance with section 88D of the *Marriage Act*. Recognition of foreign same-sex marriages will be subject to the same

restrictions currently in place in Part VA of the *Marriage Act* for the recognition of other foreign marriages (e.g. restrictions on bigamy, underage marriage, prohibited relationships and if there was no consent). This provision will address the circumstances that were recently considered by the United Nations Human Rights Committee in *G v Australia*.[79] The amendment will allow persons who have entered into a same sex marriage overseas but who have subsequently separated to be divorced under Australian law, subject to the provisions of the *Family Law Act 1975*.

Part VAA – Protection of freedoms for persons holding relevant beliefs

Item 64 – Part VAA – Freedom of thought, conscience, religion, expression and association in relation to holding certain beliefs

146. Part VAA introduces protections for freedoms of persons, including individuals and entities, religious bodies and religious educational bodies who hold a relevant belief. The freedoms are based upon protections in international law. The consistency of these provisions with international law is further set out in the Supplementary Statement of Compatibility with Human Rights that accompanies this Bill. As set out therein, and as recognised by the Senate Select Committee, the comprehensive protections granted to freedom of expression, association, thought, conscience or religion extend beyond religious institutions and their officials – they extend to individuals and corporations. This Supplementary Explanatory Memorandum is to be read to include the statements made in the Supplementary Statement of Compatibility.

147. Australian and international experience has shown that individuals and entities have suffered discrimination and intimidation for expressing and acting upon genuine beliefs about marriage or sexuality, including for refusing to make supplies (including facilities, goods and/or services) or confer privileges or benefits in relation to a same-sex marriage. While Part VAA does not rely upon the following rulings as a form of precedent to guide its interpretation, the following matters provide examples of the conduct it seeks variously to address:
    a. In the United Kingdom, the Charities Commission for England and Wales removed the charitable status of 19 Catholic adoption and foster agencies because they preferred not to adopt or foster to same-sex couples. This caused many of these agencies to close down or transfer their operations as they were no longer exempt for the purposes of tax.[80]
    b. In New Zealand, Family First was deregistered by the Charities Board because of its commitment to traditional marriage which no longer could be regarded as a public benefit.[81]
    c. In *Johns v Derby County Council 2011*¸ the English High Court supported a local council decision that a Christian couple with traditional views on sexual ethics, who

[79] Communication No. 2216/2012.

[80] *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales 2009* UKFTT 376 (GRC) (01 June 2009) available at http://www.charity.tribunals.gov.uk/decisions.htm. An English judge later reversed and remanded this decision. See The Yorkshire Post, 'Catholic Adoption Society Wins Ruling on Gay Parents', *The Yorkshire Post* (Online), 17 March 2010 <http://www.yorkshirepost.co.uk/news/main-topics/local-stories/catholic-adoption-society-wins-ruling-on-gay-parents-1-2567726>.

[81] New Zealand Charities Registration Board, *Deregistration Decision: Family First New Zealand* (21 August 2017) 57.

had successfully fostered many children, would not make suitable foster carers because they would not be open to promoting or accepting a homosexual lifestyle.

d. In New Jersey the government declared that a Methodist organisation would no longer receive a real estate tax exemption when it declined to allow a same sex couple to have a commitment ceremony in a pavilion that was used for Church services, youth ministry programs and weddings.[82]
e. In Tasmania, a booklet outlining the Catholic position on same-sex marriage distributed by a Catholic Archbishop was held by the Anti-discrimination Commissioner to be a possible violation of anti-vilification legislation.[83] The matter proceeded to a conciliation session but was eventually abandoned after many months by the complainant.
f. In 2011 Adrian Smith from Manchester in England placed on his Facebook page a comment that he did not think that churches should be compelled to marry same-sex couples, although he did not object to same-sex marriage. This was before England allowed same-sex marriage. He was accused by his employer, a housing association, of "gross misconduct" and threatened with dismissal. Because of his long service, he was only demoted; but he lost 40% of his salary.[84]
g. In Australia, calls were made for Dr Stephen Chavura to be dismissed by Macquarie University unless he resigned from another organisation that was perceived to be opposed to same-sex marriage.
h. In Australia, Dr Pansy Lai had a petition, which gained 5000 signatures, circulated calling for her deregistration as a doctor due to her comments about same-sex marriage and safe schools in a No campaign TV commercial to deregister her as a doctor.
i. In the United States of America, Chick Fil A was subject to commercial boycotting because of management's views and donations supporting tradition marriage. As part of this local governments and universities refused to allow new Chick Fil A franchises.
j. In Australia, complaints are current underway against Presbyterian Minister Campbell Markham and street preacher David Gee for expressing their views on same-sex marriage.
k. In the United Kingdom, the Vishnitz Jewish Girls School failed their school-assessment on one criteria, which was its inadequate promotion of homosexuality and gender reassignment, as it was deemed that these were necessary to have a full understanding of fundamental British values and equality principles.

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[82] Jill P Capuzzo, 'Group Loses Tax Break Over Gay Union Issue', The New York Times (online), 18 September 2007 <http://www.nytimes.com/2007/09/18/nyregion/18grove.html>.

[83] Dennis Shanahan, 'Catholic bishops called to answer in anti-discrimination test case', The Australian (online), 13 November 2015 <http://www.theaustralian.com.au/nationalaffairs/state-politics/catholic-bishops-called-to-answer-in-anti-discrimination-test-case/newsstory/b98439693f2f4aal7aca9b46c7bda776?nk=7bd2d275fddd376333435b60d3ac81 Ic1474942859>.
30 Andrew Drummond, 'Transgender rights activist Martine Delaney drops complaint over Catholic Church's marriage booklet', The Mercury (online), 5 May 2016 <http://www.themercury.com.au/news/tasmania/transgender-rights-activist-martinedelaney-drops-complaint-over-catholic-churchs-marriage-booklet/newsstory/d8d9079bf932526b27e5f094e57dbe84?nk=7bd2d275fddd376333435b60d3ac81 c1474933967>.

[84] *Smith v Trafford Housing Trust* [2012] EWHC 3221.

l. In British Columbia, Trinity Western University required their students and staff to sign a community covenant which included a promise to abstain from sexual activity, unless it was between a husband and wife. Due to this the British Columbia College of Teachers voted to refuse accreditation to all teaching graduates because they might discriminate against LGBTI students. After many years of litigation, the Supreme Court of Canada upheld the right of Trinity graduates to be accredited.
m. In Canada, Four Provincial (State) Law societies decided to refuse accreditation to the planned law school and program of Trinity Western University on the grounds that the community covenant of the university was discriminatory, not on any grounds relating to the quality of the curriculum or faculty of the law school. The effect of the decision would be to deny graduates of the law school the right to practise law in those Provinces. Two of those Provinces reversed the decision and in the other two ligation about the decisions has been through the Provincial Courts and is now to be heard by the Supreme Court of Canada.
n. In Northern Ireland, Ashers Bakery company, run by a Christian couple, was found liable for discrimination because it refused to bake a cake for a political group with the slogan "Support Gay Marriage". Ashers led evidence that it had never refused to supply a person on the grounds of their sexual orientation and did not do so in this case but refused only because it would not disseminate or be associated with the message on the cake. The court held that the sexual orientation of the person who ordered the cake was irrelevant and the refusal to provide a cake with that message on it amounted to discrimination.

Item 64 - Section 88J Freedom to express etc. relevant belief

148. As noted above, Australian and international experience has shown that individuals have been subjected to discriminatory treatment and governmental detriments for expressing traditional beliefs about marriage or sexuality. As acknowledged by the United States Supreme Court in *Obergefell v. Hodges* the view that '[m]arriage…is by its nature a gender-differentiated union of man and woman…long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.'[85]

149. Section 88J(1) is a statement of the freedoms of thought, conscience, religion or belief protected under Articles 18, 19 and 22 of the *International Covenant on Civil and Political Rights,* as apply to the holding and expression of a relevant belief. Subsection 88J(2) and (3) clarify when it is lawful for a person or entity to express a relevant belief, including with reference to 88KA, further outlined below.

Item 64 - Section 88JA Freedom to hold, express or act on relevant marriage belief

150. Section 88JA(1) is a statement of the freedoms of thought, conscience, religion or belief protected under Articles 18, 19 and 22 of the *International Covenant on Civil and Political Rights,* as apply to the holding and expression of a relevant marriage belief. Section 88JA(1) clarifies that that these rights are not confined to the private sphere but also extend to business, employment, community and public affairs and that it is not unlawful to hold, express and act upon a relevant marriage belief. Subsection 88JA(2) and (3) clarify when

[85] *Obergefell v. Hodges* 576 U. S. ____ (2015).

it is lawful for a person or entity to express and act upon a relevant belief, including with reference to 88KA, further outlined below.

Item 64 - Section 88K Protection from unfavourable treatment

151. The Senate Select Committee acknowledged that 'the evidence supported the need to enhance current protections for religious freedom'[86] and referred to an anti-detriment clause as one of 'various potential remedies' to protect religious freedom.[87] Although regard is to be had solely to the terminology of section 88K in its interpretation, international experience has shown that other jurisdictions have considered similar anti-detriment protections to be necessary.[88]

152. In light of the international experience referred to above, section 88K(1) provides that it is 'unlawful for a public authority or a relevant person or entity within the meaning of subsection (2) to treat another person or entity unfavourably, or subject or propose to subject the person or entity to any detriment or disadvantage, obligation or sanction, or denial of any benefit, whether directly or indirectly' including in a range of fields, because the person or entity holds or expresses a relevant belief (other than a relevant marriage belief), or holds, expresses or acts consistently with a relevant marriage belief. The protection for acts only applies to those that are consistent with a relevant marriage belief under subparagraph (1)(l) and that protection is limited to lawful acts. The meaning of lawful acts is clarified by subsection (5), in conjunction with section 88KA.

153. Subsection 88K(1) makes unlawful certain conduct of a public authority which treats someone unfavourably, directly or indirectly, because of the specified beliefs. 'Public authority' is defined in section 88KB. Because public authorities may also cause or induce other persons or entities (such as a contractor or funding recipient or the holder of a licence or permit) to engage in conduct of treating someone unfavourably because of the specified beliefs, section 88K also makes unlawful:
    a. A relevant person or entity treating someone unfavourably because of the specified beliefs where the person or entity is caused or induced to do so by a public authority (sub-section 88K(1)); and
    b. A public authority's causing or inducing a relevant person or entity to treat someone unfavourably because of the specified beliefs (sub-section 88K(3)).

154. Subsection 88K(2) defines a ***relevant person or entity*** in sub-section (1) to mean a person or entity which engages in the conduct described in subsection (1) because it is caused or induced to do so by a public authority and gives some inclusive examples of how that causing or inducing may occur.

155. Sub-section 88K(4) provides that a request or instruction by a public authority or a condition in a contract or arrangement with a public authority or a condition in direct or indirect funding by a public authority or a condition in a licence or permission granted by a public authority which would cause or induce a person or entity is inoperative to the

[86] At page xv.

[87] At page xi and xv.

[88] See for example, section 3.1 of the *Civil Marriage Act* (Canada).

extent that it would cause or induce a person or entity to engage in conduct described in sub-section (1).

156. Section 88K acts in almost all respects only as a shield protecting persons and entities with a relevant belief from detriment being imposed upon them by a public authority or a relevant person or entity because they express or act on their belief. It will protect, for example:
    a. a person who is dismissed or demoted as an employee or terminated as a contractor; or
    b. a business which is terminated as a supplier or refused the opportunity to tender, or is denied a permit, licence or funding; or
    c. a school or college which is refused government accreditation;

    because the person or business or school or college holds, expresses or acts on a specified.

157. Section 88K provides this shield by making such detrimental actions unlawful and giving the affected person or entity the right to seek civil remedies in court such as an injunction or declaration or damages, as well as the right to complain to the AHRC of discrimination.

158. The protection of freedoms of persons and entities holding relevant beliefs under section 88K is balanced with freedoms of other Australians. Where section 88K gives protection from unfavourable treatment for acts or omissions based on specified beliefs, it only gives that protection for lawful acts and omissions. Thus section 88K does not protect criminal actions or other unlawful activity, subject to 88KA.

159. Section 88K(5) provides that a lawful act or omission does include an act or omission that is not an offence against, or a contravention of, a law because of section 88KA.

Item 64 - Section 88KA

160. Section 88KA deals with the issue that overbroad and inconsistent State and Territory vilification laws and anti-discrimination laws have in some cases unreasonably interfered with the human rights of Australians to express and manifest by action certain genuinely held conscientious and religious beliefs. For example some Australians have been dismissed from their jobs for expressing a traditional marriage belief and would be without a remedy under federal and some State and Territory anti-discrimination laws. Some Australians have been put through lengthy vilification complaint processes simply for stating their orthodox and longstanding religious beliefs. A balance needs to be struck which protects those rights and the rights of Australians not to be discriminated against on grounds like sexual orientation and relationship status. Current anti-discrimination law does not strike that balance, but section 88KA does so.

161. To strike this balance in relation to discrimination law, section 88KA provides a limited protection from anti-discrimination laws in relation to persons and entities acting on a specified belief, but not from the federal *Sex Discrimination Act*. Section 88K provides that a person or entity that holds a relevant marriage belief does not commit an offence against or contravene a law prohibiting discrimination (except the *Sex Discrimination Act 1984*) to the extent that the conduct of the person or entity is engaged in because the person or entity genuinely believes that the conduct is consistent with the relevant marriage belief. But the person's conduct will still contravene the *Sex Discrimination Act* prohibitions on discrimination (e.g. on the grounds of sexual orientation or gender identity or relationship

status) if the person or entity engages in conduct which is unlawful discrimination against another person.

162. To strike a better balance between free speech and anti-vilification laws, section 88KA provides a limited protection for persons expressing a specified belief from laws prohibiting vilification or a law which makes it unlawful to offend, humiliate, intimidate, insult or ridicule another person. But this protection does not apply where the expression of the belief would be reasonably likely, in all the circumstances, to threaten or harass another person or group of persons on the basis of the sexual orientation, gender identity, intersex status, marital or relationship status or the family responsibilities of the person or persons in the group.

163. This is intended to allow Australians to state their specified beliefs without fear of vilification complaints because a person is offended by the belief, but it does not permit a person to state their beliefs in a way that would be reasonably likely, in all the circumstances, to threaten or harass another person or group of persons on the specified bases.

164. To summarise the overall effect of sections 88K and 88KA, section 88K makes unlawful unfavourable treatment initiated against persons and entities that:

a. **hold, express or act upon** a genuine religious or conscientious belief that marriage is between a man and a woman ('relevant marriage belief') in relation to matters such as employment, engagement as a contractor, education, supply of goods or services or economic benefits. However this protection does not permit such persons or entities:

    1. to express their belief in a way that is reasonably likely in all the circumstances to threaten or harass another person or group on the grounds of sexual orientation, gender identity, intersex status, marital or relationship status or their family responsibilities (see88K(5) and 88KA);

    2. to engage in any conduct on the basis of that belief that would be unlawful discrimination under the *Sex Discrimination Act* against another person (e.g. on the grounds of on the grounds of sexual orientation, gender identity, intersex status, marital or relationship status or their family responsibilities) – see 88K(5) and 88KA.

    (A relevant marriage belief is a genuine religious or conscientious belief that marriage is the union of a man and a woman to the exclusion of all others, voluntarily entered for life, and beliefs that are constitutive, supportive or a corollary of that belief.)

b. **hold and express** a 'relevant belief'. However this protection will not permit expression that is reasonably likely in all the circumstances to threaten or harass another person on the grounds of sexual orientation, gender identity, intersex status, marital or relationship status or their family responsibilities;– see sections 88K(5) and 88KA. As for acting upon a relevant marriage belief, there is no protection for engaging in an act based on a relevant belief (unless it is a relevant marriage belief

– see above) if the act would be unlawful discrimination under the *Sex Discrimination Act* against another person (e.g. on the grounds of sexual orientation, gender identity, intersex status, marital or relationship status or their family responsibilities;) – see section 88KA.

(A relevant belief includes a relevant marriage belief and a person's genuine religious or conscientious belief that that a same sex relationship is not consistent with their religious or conscientious conviction or that for most people gender is either male or female and related beliefs that are constitutive, supportive or a corollary of those beliefs.)

165. The Bill thus carefully balances this protection with the rights of others in several ways. The Bill protects expression of traditional marriage beliefs from overbroad vilification laws (such as Tasmania's law used to bring a complaint against Catholic Bishops who stated the orthodox Catholic view of marriage). But the Bill expressly does not protect expression which would threaten or harass a person or group of persons on the basis of sexual orientation, gender identity, intersex status, marital or relationship status or family responsibilities.

166. Currently State and Territory law gives varying and incomplete protection to the internationally recognised rights of freedom of expression, association, thought, conscience or religion and the rights of the child. The Bill protects conduct by a person or entity with a traditional marriage belief which is consistent with that belief from the unbalanced and inconsistent patchwork of State and Territory anti-discrimination laws. However it leaves such conduct subject to the anti-discrimination regime in the Federal *Sex Discrimination Act 1984*. Such conduct is not protected by the Bill if it would be unlawful discrimination against another person on the basis of these protected attributes under the *Sex Discrimination Act*. Refusals to supply to same sex married couples and other discriminatory conduct retain their protections under the *Sex Discrimination Act*.

Item 64 - Section 88KB

167. Section 88KB provides provisions that assist in determining the scope of the definition of public authority.

Item 64 - Section 88L Scope of rights – expressing a relevant belief

168. Section 88L provides that the right to express a relevant belief or relevant marriage belief includes, but is not limited to, the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print, in the form of art, or through any other medium. It is based upon Article 19 of the *International Covenant on Civil and Political Rights*.

Item 64 - Section 88M Supply of facilities or provision of goods or services

169. Intentionally deleted.

170. Intentionally deleted.

171. Intentionally deleted.

172. Intentionally deleted.

173. Intentionally deleted.

174. Intentionally deleted.

Item 64 - Section 88N Non-discrimination in the allocation of funding

175. Experience has also shown that governments, including local and State governments in Australia, have proposed, or effected restrictions on access to funding for bodies that hold a relevant belief. Again, such is inconsistent with Australia's international obligations, as further articulated in the Supplementary Statement of Compatibility with Human Rights that accompanies this Bill. Section 88N provides that the Commonwealth, a State or a Territory, local government or any government entity cannot decline to provide funding or impose any conditions on funding because an individual or entity holds, expresses or acts upon a relevant belief.
176. Subsection (3) inserts a definition of government entity with reference to the *A New Tax System (Australian Business Number) Act 1999* and also provides that it includes an entity established by or under a law of a State or Territory.

Item 64 - Section 88O Charitable status

177. Section 88O introduces protections to charities to address concerns that their charitable status will be affected by the introduction of same sex marriage. Australia shares the common law of charities with the United Kingdom, the United States and New Zealand. Based on recent experience in those jurisdictions there is a real concern that a failure to provide religious or faith based charities with an ability to access exemptions in charity law in respect of the question of marriage will lead to the loss of charitable status, government funding where such is conditional on that status, and tax exemptions and concessions.

On 21 August 2017 the New Zealand Charities Registration Board deregistered Family First New Zealand, a body advocating for the traditional understanding of marriage, on the basis that it 'has a purpose to promote its views about marriage and the traditional family that cannot be determined to be in the public benefit in a way previously accepted as charitable.'[89] In considering whether Family First could be said to be established for the charitable purpose of advancing moral and mental improvement in the community the Board said 'it is not possible to establish a public benefit analogous to moral improvement in the advocacy of Family First. Most of the advocacy of Family First concerns advocacy on issues where there are two sides to an argument on a topical social issue, neither of which has been determined to be for the benefit of the public.' The Board was drawing on a long line of authorities which had held that contentious social issues could not be determined to be for the public benefit.

As the Board was applying the common law of charities, there is a concern that a similar conclusion may be reached by an Australian Court. While not binding in Australia, Australian courts have looked to other common law jurisdictions in matters of charity law, and vice-versa. The public benefit test under which Family First lost its charity status, is the same common law test, adopted from the seminal decision of the House of Lords in

[89] New Zealand Charities Registration Board, *Deregistration Decision: Family First New Zealand* (21 August 2017) 57.

Pemsel's case.[90] All Australian charities must satisfy the requirement that they be for the public benefit. There is no material distinction between New Zealand and Australia on this point. This concern is addressed by section 88O(1) of the Paterson Bill. Importantly it is at the moment that the law changes to allow same sex couples to marry that the question of whether a belief that marriage does not include same sex couples continues to be for the public benefit at law arises.

178. The second relevant common law requirement is that charities must conform to public policy.[91] This requirement is replicated in section 11(a) of the *Charities Act 2013*. In *Obergefell v Hodges*,[92] Chief Justice Roberts stated that the tax exempt status of United States religious institutions that opposed same sex marriage "would be in question," based on the reasoning of the Court in *Bob Jones University v United States*.[93] In doing so, he referred to the following exchange between Justice Alito and the Solicitor General for the U.S. Department of Justice appearing as amicus curiae during the proceedings:

> JUSTICE ALITO: Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?
>
> GENERAL VERRILLI: You know, I -- I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I -- I don't deny that. I don't deny that, Justice Alito. It is -- it is going to be an issue.

In the *Bob Jones University* decision the Supreme Court held that a university that refused to enrol persons in an interracial marriage failed to meet the requirement under the Internal Revenue Code that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy" (basing such in part on the seminal House of Lords decision in *Pemsel's case*[94]) and the requirement at common law that the "purpose of a charitable trust may not be illegal or violate established public policy."[95] This concern has prompted the United States Internal Revenue Service to issue a clarification that, for its purposes, it will not interpret the law to remove the tax exemption of religious charities.[96]

Turning to the position in Canada, in *Everywoman's Health Centre Society (1988) v The Queen,* Decary JA stated the public policy test as requiring conformity to "definite and

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[90] *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

[91] *Everywoman's Health Centre Society (1988) v The Queen* (1991) 92 DTC 6001 at 6008 per Decary JA, Federal Court of Appeal.

[92] *Obergefell v. Hodges* 576 U. S. ____ (2015).

[93] *Bob Jones University v United States; Goldsboro Christian Schools Inc v United States* 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157.

[94] *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

[95] *Bob Jones University v United States; Goldsboro Christian Schools Inc v United States* 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157, 574.

[96] Letter from John A Koskinen, Commissioner, Internal Revenue Service to Scott Pruitt, Attorney General, Oklahoma, dated 30 July 2015.

somehow officially declared and implemented public policy."[97] In *Canada Trust Co. v. Ontario Human Rights Commission*[98] a trust settled to provide scholarships to persons who were needy, white, of British parentage or nationality and Protestant was held to be contrary to public policy. Tarnopolsky JA based his decision on the principle that "public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void."[99] Robins JA agreed:

> To perpetrate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard are respect.[100]

While in Australia, charities are permitted to have a purpose 'of promoting or opposing a change to any matter established by law, policy or practice',[101] this ability remains subject to the provision disqualifying any purpose 'of engaging in, or promoting, activities that are unlawful or contrary to public policy'.[102] That is the common law test referred to by Chief Justice Roberts, drawn from the House of Lords decision in *Pemsel's case* and referred to in the Canadian cases cited above.[103] To the extent that there may be tension within the *Charities Act* itself between the ability of a charity to advocate for a change in policy and the requirement that a charity be in conformity with public policy, the amendments proposed by section 88O do not attempt to provide reconciliation. However, it must be presumed that section 11(a) has work to do. It is this common law requirement that led to the removal of the tax exemption in *Bob Jones University v United States*,[104] and which grounded Chief Justice Roberts' concern that the finding of a Constitutional right to same sex marriage may lead to the loss of tax exemptions for religious bodies.

Furthermore, In the United Kingdom, the Charities Commission for England and Wales removed the charitable status of 19 Catholic adoption and foster agencies because they preferred not to adopt or foster to same-sex couples. This caused many of these agencies to close down or transfer their operations as they were no longer exempt for the purposes of tax.[105]

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[97] *Everywoman's Health Centre Society (1988) v The Queen* (1991) 92 DTC 6001, 6008 (Federal Court of Appeal).

[98] *Canada Trust Co. v Ontario Human Rights Commission* (1990) 69 DLR (4th) 321.

[99] Ibid 352-3.

[100] Ibid 345.

[101] Section 12(1)(l).

[102] Section 11(a).

[103] Commissioner for Special Purposes of Income Tax v Pemsel [1891] AC 531.

[104] *Bob Jones University v United States; Goldsboro Christian Schools Inc v United States* 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157.

[105] *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales 2009* UKFTT 376 (GRC) (01 June 2009) available at http://www.charity.tribunals.gov.uk/decisions.htm. An English judge later reversed and remanded this decision. See The Yorkshire Post, 'Catholic Adoption Society Wins Ruling on Gay

179. The above establishes that there is no reasonable distinction to be drawn between the common law of charities as applied in the above Anglophone jurisdictions and Australia, either in respect of the public benefit test or the conformity with public policy test. There is thus no reasonable ground for concluding that similar conclusions will not be reached in Australia and that an Australian charity's position on the question of same sex marriage will not be relevant to a determination of whether it meets the requirement of a charity at law. The simplest remedy is that contemplated by section 88O in the proposed amendments - remove from the calculus as to whether a charity promotes activities that are contrary to public policy consideration of whether it holds a relevant marriage belief. It is at the moment that the law changes to allow same sex couples to marry that the question of whether a belief that marriage does not include same sex couples is against public policy arises.

Item 64 - Section 88P Endorsement and Promotion

180. As outlined above, international experience has shown that individuals and entities have been compelled to express, create, publish, associate with or endorse or promote statements or opinions contrary to their genuine conscientious or religious belief (e.g. a statement in favour of same sex marriage against their convictions in favour of traditional marriage). An illustration of this form of conduct was recently provided in *Lee v McArthur, McArthur & Ashers Baking Co Ltd*[106] where a denial of a request to make a cake that made a political statement promoting same-sex marriage was considered (the request was to bake a cake conveying the statement "Support Gay Marriage" for a same sex marriage lobby group's event). In that case the respondent asserted that the denial was based upon the request to promote a view, as opposed to any personal protected attribute of the person seeking the service. In order to permit a person in similar circumstances to lawfully act upon their genuine religious or conscientious belief, subsection 88P(1) makes it unlawful to require a person or entity to engage in relevant conduct in relation to a statement or opinion (such as expressing or supporting or being associated with the statement or opinion), if the person or entity holds a relevant belief and genuinely believes that the statement or opinion is not consistent with that relevant belief. Subsection (2) defines relevant conduct in relation to a statement or opinion.

Item 64 - Section 88Q Bodies established for religious purposes and education institutions

181. Section 88Q pertains to any act or omission of a body established for religious purposes or an educational institution established for religious purposes that is consistent with a relevant belief. Section 88Q is intended to provide a wide ranging exemption. Section 88Q does not endorse unlawful acts, as clarified by section 88KA.

Item 64 - Section 88R Right not to attend class if material taught is not consistent with a relevant marriage belief or relevant belief

Parents', *The Yorkshire Post* (Online), 17 March 2010 <http://www.yorkshirepost.co.uk/news/main-topics/local-stories/catholic-adoption-society-wins-ruling-on-gay-parents-1-2567726>.

[106] [2016] NICA (24 October 2016).

182. Section 88R introduces protections to students and parents that enact their rights, as provided under international law. It relies upon the Commonwealth external affairs power. Article 18(4) of the *International Covenant on Civil and Political Rights* provides:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

183. The right of the child to 'freedom of thought, conscience and religion' is explicitly outlined in Article 14 of the *Convention on the Rights of the Child*.[107] The Convention reiterates the 'rights and duties of parents … to provide direction to the child in the exercise of his or her right.'[108] It requires State Parties to 'undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents …'.[109] It is therefore clear that international human rights law protects freedom of religion for both adults and children. The application of these provisions to the Bill is further set out in the Supplementary Statement of Compatibility with Human Rights that accompanies this Bill.

184. The Commonwealth has the power to legislate in respect of the matters stated at section 51 of the Australian Constitution. These powers include the external affairs power, which is exercisable against any power reserved to the States, see for example *Commonwealth v Tasmania*[110] (the *Tasmanian Dams* Case) and *Western Australia v Commonwealth*.[111] The Commonwealth has clear power to effect a law that relates to the States' powers over education. Furthermore the intergovernmental immunity doctrine set out by the High Court in *Melbourne Corporation v Commonwealth*[112] does not invalidate section 88R as this doctrine is limited to protecting the states in their capacity to function as independent governments (see the *Industrial Relations Act case*[113] as an example) and section 88R does not impinge on this ability. The provision requires that the States provide alternate education to any child whose rights are asserted under section 88R.

185. Section 88R provides that a parent or student aged 16 and above, or the parent of a student aged under 16, may ask the principal of any school in any State or Territory that the student is attending to release the student from any class or classes (or the relevant parts of those classes) involving any material inconsistent with a relevant belief. The provision draws upon section 25A of the *Education Act 1989* (NZ).

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[107] Ibid art 14(1).

[108] Ibid art 14(2). See also art 5, which contains a general requirement for State Parties to 'respect the responsibilities, rights and duties of parents … to provide … appropriate direction and guidance in the exercise by the child of the rights contained in the Covenant.'

[109] Convention on the Rights of the Child (1989), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(2) ('CRC').

[110] (1983) 158 CLR 1.

[111] (1995) 183 CLR 373.

[112] (1974) CLR 31.

[113] *Victoria v Commonwealth ('The Industrial Relations Act case')* (1996) 187 CLR 416, 487.

186. Section 88R provides a student aged over 16 at an educational institution or a parent or guardian of such a student aged under 16 with a right to have the student excused from attending a class or a part of class which teaches material that the person genuinely believes is not consistent with a relevant belief held by the student or parent. The school must arrange alternative supervision for such students during the period that material is taught.

Item 64 - Section 88S Victimisation

187. Based on a similar provision in the *Australian Human Rights Commission Act*, section 88S makes it an offence for one person to subject, or threaten to subject, the other person to any detriment on the ground that the other person has alleged a contravention of Part VAA or sought to exercise rights under Part VAA such as by bringing civil proceedings or making a compliant to the AHRC.

Item 64 – Division 3 – Remedies

188. Subdivision A provides for civil remedies in courts of competent jurisdiction for contraventions of Part VAA.

189. Section 88T provides for a civil action for damages against a person who contravenes Part VAA.

190. Section 88U provides that a court can grant an injunction against a person who contravenes or proposes to contravene Part VAA.

191. Section 88V provides that a court can make other orders including declaratory orders and orders of a restorative nature if a person or entity contravenes Part VAA.

192. Section 88VA provides for the avoidance of doubt that conduct which is unlawful under Part VA constitutes a contravention of Part VA.

193. Subdivision B confers jurisdiction on courts to hear and determine applications for civil remedies.

194. Section 88W confers jurisdiction on the Federal Court of Australia and the Federal Circuit Court to hear and determine matters arising under Part VAA.

Part 2—Amendment of the Australian Human Rights Commission Act 1986

Australian Human Rights Commission Act 1986

Item 69 – Subsection 3(1)

195. Item 69 amends the definition of unlawful discrimination in section 3 of the *Australian Human Rights Commission Act 1986* to include a contravention of Part VAA of the *Marriage Act* as a form of unlawful discrimination in respect of which a complaint may be made to the AHRC. This provision gives a person or entity who suffers from a contravention of Part VAA an additional avenue to seek a remedy to the civil court remedies described above.

Item 70 – Subsection 3(1)

196. Item 70 also amends the definition of unlawful discrimination in section 3 of the *Australian Human Rights Commission Act* to include conduct which constitutes the offence of victimisation under proposed section 88S.

Part 3—Amendment of the *Sex Discrimination Act* 1984

Sex Discrimination Act 1984

Item 71 – Subsection 37(1)(d)

197. Section 37(1) of the *Sex Discrimination Act 1984* currently provides that

> 'Nothing in Division 1 or 2 affects … (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.'

Item 71 amends section 37(1)(d) of the *Sex Discrimination Act* to replace the reference to 'conforms to' with 'is consistent with'. Item 71 also amends section 37(1)(d) to replace 'necessary to avoid injury to' with 'because of'. This change is made to effect consistency between the new test in the *Marriage Act* and the test in the *Sex Discrimination Act.* To effect the equivalent amendments to the *Marriage Act* but fail to correspondingly amend the *Sex Discrimination Act* could lead to an inference the Parliament intends that a stricter test is to be applied under the *Sex Discrimination Act*. That is not the intention of the Bill.

198. In *Cobaw* the interpretation applied to the phrase 'conforms with the doctrines of the religion' by the Victorian Court of Appeal was that 'the doctrine requires, obliges or dictates that the person act in a particular way when confronted by the circumstances which resulted in their acting in the way they did'[114] and 'as requiring it to be shown that conformity with the relevant doctrine(s) of the religion gave the person no alternative but to act (or refrain from acting) in the particular way.'[115] This strict reading is not to be applied under the Act. Instead, the term 'consistent' is adopted, noting the Macquarie Dictionary definition of that term is 'agreeing or accordant; compatible'.

199. In addition, subparagraph 37(1)(d) is amended to adopt a test that requires that the conduct be entered into because of religious susceptibilities. This is distinct from tests that require that the conduct be necessary to avoid injury to religious susceptibilities. Applying such a test in *Cobaw,* the Victorian Court of Appeal held that that test required demonstration of various matters, including that the harm be 'unavoidable'. The strict reading applied in *Cobaw* is not intended to be applied under section 37(1)(d).

Item 72 – After subsection 37(2)

200. Item 72 introduces subsection 37(3), (4) and (5). The intent of these provisions is to provide clarity that faith-based charities will be bodies established for religious purposes for the purposes of section 37(1)(d) of the Act. Such bodies rely upon exemptions in anti-discrimination law to ensure that they are able to appoint staff and governing persons that

[114] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] AVSCA 75, 286.

[115] Ibid, 286.

share their religious convictions. This ability is critical to the maintenance of the ethos and unique identity of these institutions.

201. These provisions draw upon existing judicial pronouncements of the High Court in *Congregational Union of New South Wales v Thistlethwaite*[116] and the New South Wales Court of Appeal in *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council*.[117] They draw upon the common law recognition that non-religious charitable purposes can be religious in certain circumstances. For example, in *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* a retirement village operated by the Presbyterian Church was held to be a religious body.

202. A further illustration of a body that is intended to be covered by these provisions is a faith-based public benevolent institution (PBI). The Australian Charities and Not-for-profits Commission (ACNC) has adopted the interpretation that such a body must have a main purpose of providing benevolent relief in order to be registered as a PBI on the ACNC Register, but cannot have a religious purpose.[118] In *Cobaw*, the Victorian Court of Appeal held that the charity law test for determining whether a body had a purpose of advancing religion was the test for determining whether an entity was a 'body established for religious purposes' under the *Equal Opportunity Act 1995* (Vic). If this reasoning is applied to the ACNC's interpretation of the law of public benevolent institutions (which are charities under the *Charities Act 2013*), all such faith-based institutions will lose discretion over their identity and character.

203. Similarly the Queensland Anti-Discrimination Tribunal has held that St Vincent de Paul's Society is not a 'body established for religious purposes' under the *Anti-Discrimination Act 1991* (Qld), with the result being that St Vincent de Paul's Society could not require that the President of a local conference be a Catholic.[119] As noted in the Supplementary Statement of Compatibility, the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, proclaimed by the General Assembly of the United Nations on 25 November 1981 (resolution 36/55) is a matter of international concern referred to in the Bill. Article 6(b) of the Declaration provides that the right to freedom of thought, conscience, religion or belief under Article 18 of the ICCPR includes the freedom 'to establish and maintain appropriate charitable or humanitarian institutions'. To remove the ability of such institutions to control the appointment of their staff and leaders is to remove their ability to maintain their faith-based character, and thus a direct impingement on their religious freedom rights. Subsections 37(3), (4) and (5) address these concerns.

Items 73, 74, 75 – Subsection 38

204. Items 73, 74 and 75 amend subsections (1), (2) and (3) of section 38 of the *Sex Discrimination Act* respectively. These amendments adopt a test that requires that the conduct be entered into because of religious susceptibilities. This is distinct from tests that

[116] (1952) 87 CLR 375.

[117] [1978] 2 NSWLR 387.

[118] Australian Charities and Not-for-profits Commission, Commissioner's Interpretive Statement: Public Benevolent Institutions, 2016/03, paragraph 5.5.3, available at https://www.acnc.gov.au/ACNC/Publications/Interp_PBI.aspx

[119] *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32.

require that the conduct be necessary to avoid injury to religious susceptibilities. Applying such a test in *Cobaw,* the Victorian Court of Appeal held that that test required demonstration of various matters, including that the harm be 'unavoidable'. The strict reading applied in *Cobaw* is not intended to be applied under section 37(1)(d).

Item 76 – after subsection 38(3)

205. Item 76 inserts new section 38A into the *Sex Discrimination Act.* Subsections (1), (2) and (3) provide that a body established for religious purposes or institution holds a belief if the holding of the belief is not fictitious, capricious or an artifice. This test adopts the wording employed by Lord Nicholls in *R (on the application of Williamson) v Secretary of State for Education and Employment*.[120] In addition, as the Canadian Supreme Court has recognized that the right to religious freedom does not necessitate an inquiry into whether the "beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make".[121] The ruling in *Cobaw* to the extent that the Court had regard to, what was considered by the Court to be, a range of views amongst congregations is to be distinguished from this test. For this reason, new subsections (1), (2) and (3) require regard to be had to the belief of the relevant body or institution.

206. Subsection (4) outlines when such a body may hold a doctrine, tenet or belief. In *Cobaw* an entity's doctrines were held to be limited to the matters expressly addressed solely in its core governance document. This reading, it is considered, fails to appreciate the many and varied means by which religious belief may be adopted or held. The question concerns when the law will recognise the holding of belief. The effect of the reading in *Cobaw* is to impose very strict limitations on the expression of religious freedom by religious bodies. Subsection (2) clarifies that this strict reading is not to be applied. It provides a means for the law's recognition of when religious bodies have adopted a belief that gives due recognition to the broad plurality of religious expressions within Australia, and the many and varied unique means by which they may adopt or define their beliefs.

207. The Senate Select Committee acknowledged that 'the intersection of federal, state and territory law is a complex matter that should be considered further if a parliament introduces a marriage bill.'[122] Currently State and Territory law gives varying and incomplete protection to the internationally recognised rights of freedom of expression, association, thought, conscience or religion. Under Article 50 of the *International Covenant on Civil and Political Rights*, the Commonwealth is accountable for a failure on the part of the States or Territories to acquit the obligations under the Covenant.

208. Section 38B then provides that section 37, 38 and 38A exclude and limit the operation of State and Territory laws to the extent of any inconsistency. This provision is intended to effect consistency in Australia's acquittal of its obligations under the *International Covenant on Civil and Political Rights*. It draws upon existing judicial authorities to clarify the intention of the provision, including authorities in which the courts have recognised that the Commonwealth has obligations under international law to ensure that the applicable rights are recognised equally and without discrimination in all the States and Territories of the Commonwealth. To that end, subsection (2) adopts the wording of the

[120] [2005] UKHL 15 at para 22.

[121] *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 [43].

[122] At paragraph 2.42.

Full High Court in *Viskauskas v Nilan*[123] and also of Dixon J in *Ex parte McLean*.[124] The provision also is supported by *Dao v Australian Postal Commission*[125] and *AMP v Goulden*.[126] Subsection (3) provides that subsections (1) and (2) do not however operate to override any Commonwealth, State or Territory law where that law is more protective of a body established for religious purposes or educational institution.

Item 77—Subsection 40(2A)

209. In 2013, subsection 40(2A) was inserted into the *Sex Discrimination Act* to ensure that new discrimination protections on the grounds of 'sexual orientation', 'gender identity', 'intersex status' and 'marital or relationship status' did not apply to marriages solemnised in compliance with subsection 5(1) or religious exemptions in the *Marriage Act*. This exemption was necessary in order for the *Marriage Act* not to be inconsistent with the protections against discrimination in the *Sex Discrimination Act*.

210. The Bill proposes amendments to subsection 40(2A) of the *Sex Discrimination Act* to ensure the exemptions for ministers of religion and traditional marriage celebrants contained in sections 47 and 47A and chaplains and authorised officers in section 81 are given effect to.

211. New subsection 40(2AA)(a) includes an additional provision clarifying that this exemption from the *Sex Discrimination Act* does not apply if a traditional marriage celebrant's identification as a traditional marriage celebrant on the register of marriage celebrants has been removed at the time the marriage is solemnised.

212. Item 77 also includes a note that cross-references subsection 37(1)(d) of the *Sex Discrimination Act* to make readers aware of the permanent exemption available for bodies established for religious purposes. This cross-reference is to assist readers who may not be familiar with the *Sex Discrimination Act* as a whole and its interplay with the *Marriage Act*.

213. These amendments are required to give full effect to sections 47, 47A and 81 as proposed by this Bill. It makes clear that a minister of religion, traditional marriage celebrant, chaplain or authorised officer's refusal to solemnise marriages in prescribed circumstances does not constitute unlawful discrimination under the *Sex Discrimination Act*.

Item 78 – After section 40

214. Intentionally deleted.

Part 4—Amendments if Schedule 9 to the Civil Law and Justice Legislation Amendment Act not yet commenced

[123] (1983) 153 CLR 280, at 292.

[124] (1930) 43 CLR.

[125] (1987) 162 CLR 317.

[126] (1986) 160 CLR 330.

Item 79—Paragraph 115(2)(b)

215. Section 115 of the *Marriage Act* outlines information included in the register of authorised celebrants published on the internet.

216. The new subsection 115(2)(b)(ii) includes a requirement to publish whether or not the person is identified as a traditional marriage celebrant. This builds on subsection 115(2)(a) that requires the list to clearly identify ministers of religion.

217. The new subsections 115(2)(b)(i) and (iii) provide that the published list shall show the traditional marriage celebrant's full name, designation (if any) and address and, where appropriate, the religious body or religious organisation to which he or she belongs, in line with similar requirements for marriage celebrants under subsection 115(2)(b) of the *Marriage Act*.

218. In clearly requiring all lists of authorised celebrants to accurately describe the category under which an authorised celebrant is registered, potential customers can make informed consumer decisions before contacting a celebrant in the knowledge of exemptions which apply to ministers of religion and traditional marriage celebrants.

Item 80— The Schedule (table item 1 of Part III)

219. This item amends 'a husband and wife' to 'two people' in The Schedule which identifies whose consent is required for the marriage of a minor who is adopted.

220. As at 1 July 2017, all states and territories except the Northern Territory permit adoption of children by couples regardless of their sex or sexual orientation, where it is in the best interests of the child.

221. The changes to The Schedule will amend the language to accommodate the inclusive language of all couples who may jointly adopt a child.

Part 5—Amendments once Schedule 9 of the Civil Law and Justice Legislation Amendment Act 2017 commences

222. Items 81, 82 and 83 provide for traditional marriage celebrants to be listed on the register of marriage celebrants (as will occur as discussed above at item 79 in the event that amendments to Schedule 9 of the Civil Law and Justice Legislation Amendment Act commence).

223. However, amendments to The Schedule which will occur if the Civil Law and Justice Legislation Amendment Act passes negate the need to amend The Schedule.

Part 6 – Amendment of the Charities Act 2013

224. **Item 84 is necessary to clarify that the fact that a faith-based charity would be a body established for religious purposes will not be relevant for the determination as to whether it satisfies the definition of charity provided by section 12 of the *Charities Act 2013*. That definition draws upon the common law of charities. The item clarifies that, for example, the mere characterisation of a faith-based charity that is registered as a charity advancing social or public welfare through a purpose of relieving the poverty, distress or disadvantage of individuals or families as a body established for religious purposes under section 37(1)(d) of the *Sex Discrimination Act* will not affect its registration under the *Australian Charities and Not-for-profits Commission Act 2012* as a charity advancing social or public welfare.**

Part 7 – Amendment of the Income Assessment Act 1997

225. **Item 85 inserts a new provision in the *Income Tax Assessment Act 1997* that provides that the mere characterisation of a body as a body established for religious purposes under section 37(1)(d) of the *Sex Discrimination Act 1984* will not detrimentally affect any endorsement as a deductible gift recipient it has received. Bodies advancing religion are not generally eligible for endorsement as a deductible gift recipient.**

Part 8 – Amendment of the Fringe Benefits Tax Assessment Act 1986

226. **Items 86 and 87 insert new subprovisions in the *Fringe Benefits Tax Assessment Act 1986* that provide that the mere characterisation of a public benevolent institution or a health promotion charity as a body established for religious purposes under section 37(1)(d) of the *Sex Discrimination Act 1984* will not detrimentally affect their respective endorsement either as a public benevolent institution or a health promotion charity under the *Fringe Benefits Tax Assessment Act*. The amendment is necessary to ensure that the fringe benefits tax treatment of such bodies will not be adversely affected as a result of their characterisation as a body established for religious purposes under the *Sex Discrimination Act 1984*.**

Part 9 - Application and transitional provisions

227. Part 9 of Schedule 1 sets out the application provisions necessary to support the commencement of the amendments. Part 9 of Schedule 1 also includes transitional provisions necessary to give full effect to the *Marriage Act* amendments.

Item 88—Definitions

228. The only term defined by item 69 is '***amended Act***' to make clear that the references to 'amended Act' in Part 5 are references to the *Marriage Act* as amended by this Bill.

Item 89—Application of amendments

229. Subitem 89(1) will enable any two people wishing to marry in Australia, regardless of their sex or gender, to be eligible to lodge a Notice of Intended Marriage with an authorised celebrant on or after the date the amendments to the *Marriage Act* commence.

230. Subitem 89(2) will enable existing same-sex marriages solemnised outside of Australia to be automatically recognised in Australia from the date the amendments commence. Recognition of these marriages from the time of commencement of the provisions of the Bill will mitigate against the potential adverse impact of retrospective recognition. In addition, all future foreign same-sex marriages will also be recognised in Australia.

231. Subitem 89(3) clarifies that Part VAA applies according to its terms from its commencement.

232. Subitem 89(4) clarifies that any foreign marriages involving a prohibited relationship will not be recognised in Australia.

Item 90—Recognition of certain marriages by foreign diplomatic or consular officers that occurred in Australia before commencement

233. This item ensures that same-sex marriages solemnised by, or in the presence of, a foreign diplomatic or consular officer in Australia before the commencement of this Bill will be recognised in Australia from the date on which the amendments commence.

234. In order to recognise such marriages, item 90 will treat the marriage as though it took place in the overseas country under whose laws it was solemnised, provided the same-sex marriage would have been recognised as valid in the overseas country but was solemnised in Australia prior to the commencement of this item.

235. Restrictions on unlawful foreign marriage remain which will not allow certain marriages to be recognised in Australia as valid (e.g. restrictions on bigamy, underage marriage, prohibited relationships and if there was no consent).

236. Item 90 is a transitional provision which ensures that same-sex couples who married under foreign laws prior to the commencement of this Bill will be equally and consistently treated in having their existing marriage recognised, regardless of whether their marriage took place in Australia or overseas. The provision further ensures that same-sex couples whose marriage was solemnised by or in the presence of a foreign diplomatic or consular officer in Australia are not detrimentally affected by the fact that the diplomatic or consular officer was of a non-proclaimed overseas country.

237. Subitem 90(2) sets out definitions that apply in item 90 to give effect to items 89 and 90.

Supplementary Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Marriage Amendment (Definition and Religious Freedoms) Bill 2017

1. The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

2. The objective of the Bill is to allow two people to marry in Australia, regardless of their sex or gender and to grant protections to freedom of expression, association, thought, conscience or religion.

Human rights implications

3. The following provides a statement of the compatibility of the Bill with the human rights to which regard is to be had under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.* Throughout this Statement, reference is made to 'same-sex marriage'. The term 'same-sex marriage' should be read to include a marriage of two people regardless of their sex or gender, sexual orientation, gender identity or intersex status where the union is not that of a man and a woman.

Rights to equality before the law and to non-discrimination

The Right to Equality in Respect of Marriage

4. The rights to equality and non-discrimination are contained in Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which provide that all persons are equal before the law and are entitled to the equal protection of the law without discrimination on any ground.

5. In *Joslin et al. v. New Zealand*[127] the United Nations Human Rights Committee, noting that Article 23(2) of the ICCPR states that '[t]he right of men and women of marriageable age to marry and to found a family shall be recognized', held that 'a mere refusal to provide for marriage between homosexual couples' does not violate the State Party's obligations under the ICCPR, including the rights to equality before the law and to non-discrimination. The Committee expressed its View as follows:

> Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all

[127] *Joslin et al. v. New Zealand,* Communication No. 902/1999, U.N. DOC. A/57/40.

> persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.
> 8.3 In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.
> 9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.[128]

6. The UN Human Rights Committee's View is that whether discrimination exists over marriage is a matter of the meaning that is ascribed to marriage. If it is accepted that the concept of marriage includes a union between two persons who are of the same sex, then inequality or discrimination will arise where those persons are precluded from marrying. However if by definition marriage includes only a union between persons of the opposite sex, then by classification, inequality or discrimination cannot exist. The UN Committee interpreted the specific language of Article 23(2) to require that the ICCPR's definition of marriage falls within the latter category. The inability of same-sex couples to marry does not follow from a differential treatment of same-sex couples, or an exclusion or restriction, but from the inherent nature of the institution of marriage recognized by article 23, paragraph 2, itself. Given the scope of marriage under the ICCPR cannot contain same sex marriage by definition, the UN Human Rights Committee held in *Joslin et al. v. New Zealand* that no discrimination can arise under Articles 2 or 26 of the ICCPR and the right to equality was not breached. In essence, the Committee's View was that no inequality arises where a State retains the traditional definition of marriage because the definitional boundary of marriage did not enfold persons of the same sex.

7. That construction is supported by reputed academic comment. As noted by Harris and Joseph "It seems clear that the drafters did not envisage homosexual or lesbian marriages as falling within the terms of article 23 (2)."[129] Nowak also notes that "The prohibition of 'marriages' between partners of the same sex is easily upheld by the term 'to marry' ('se marrier') which traditionally refers only to persons of different gender. Moreover, article 23(2) places particular emphasis, as in comparable provisions in regional conventions, on the right of 'men and women' to marry".[130]

8. Furthermore, while under international human rights law the definition of marriage does not include couples of the same sex, and thus the question of discrimination cannot arise,

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[128] Human Rights Committee, Decision Communication No. 902.1999, 75th sess, (*Joselin et. al v New Zealand*), 8.2-9.

[129] Harris, D., Joseph, S, *The International Covenant on Civil and Political Rights and United Kingdom Law*, Oxford, Oxford University Press, 1995, 507.

[130] *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Kehl, 1993) 407.

in its General Comment 18, the United Nations Human Rights Committee has explained that conduct is not discriminatory if it is for a purpose that is legitimate under the ICCPR:

> the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[131]

This statement is not qualified by necessity, nor does it require that the purported differentiation is the most appropriate means of achieving the purpose; rather, the test is to achieve a legitimate purpose and be determined by reasonable and objective criteria. The definition of marriage adopted under the ICCPR is objectively and reasonably justified, for a purpose legitimate under the Covenant. In differentiating between same-sex couples and heterosexual couples, the current provisions of the *Marriage Act 1961* (prior to the passage of amendments effected by this Bill) rely on clear and historically objective criteria that have shaped the definition of marriage, and which reflect the social and cultural values that that institution has represented. As noted above, this purpose is explicitly recognised as legitimate by article 23, paragraph 2, of the Covenant.

9. These principles are also consistent with the Covenant's *travaux préparatoires,* which recognize that the right to non-discrimination does not require identical treatment. When discussing "All persons are equal before the law" in Article 7 of the *Universal Declaration of Human Rights* the *travaux préparatoires* provide:

> The provision was intended to ensure equality, not identity, of treatment, and would not preclude reasonable differentiations between individuals or groups of individuals.[132]

10. The definition of marriage under Article 23(2) is also consistent with Article 16 of the *Universal Declaration of Human Rights* which provides, in the only gender-specific reference in the Declaration, the right of "[m]en and women ... to marry". It is also consistent with Article 16 of the *Convention on the Elimination of all Forms of Discrimination Against Women*, which provides:

> States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> 1. The same right to enter into marriage;

11. It is important to note under section 8(3) of the *Human Rights (Parliamentary Scrutiny) Act 2011* a 'statement of compatibility must include an assessment of whether the Bill is compatible with human rights.' The human rights referred to, are defined as those contained in the seven international instruments referenced therein. Those instruments do not include the rights contained within the *European Convention for the Protection of Human Rights and Fundamental Freedoms* or the *European Charter on Human Rights*, to which Australia is not a signatory. The rights contained in (and the surrounding jurisprudence accompanying) those European instruments differ in content and limitation from those the

[131] United Nations Human Rights Committee, CCPR General Comment No. 18: Nondiscrimination, 10 November 1989, para 13, http://www.refworld.org/docid/453883fa8.html (accessed 9 February 2017).

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

Statement is required to review for compatibility. That this is the approach to be adopted is clarified by the Explanatory Memorandum accompanying the *Human Rights (Parliamentary Scrutiny) Bill 2010*, which provides that the human rights to which the Committee is to have regard are those 'rights and freedoms recognised or declared by the seven core United Nations human rights treaties as that treaty applies to Australia [sic].' The rights are those specifically 'recognised or declared' by the seven treaties, and which specific treaties apply to Australia. Such a reading is also to be preferred as the only possible construction in light of the varying nature of human rights under differing international systems. For this reason, the actual human rights to which regard is to be had are those rights (with their specific limitations and extensions) contained in the seven listed instruments, and not the similarly titled rights contained in other international instruments.

12. However, without detracting from the comments in the foregoing paragraph, it may be helpful to give some consideration to the European context. As acknowledged within the *Parliamentary Joint Committee on Human Right's June 2015 Guide to Human Rights*:

> case law from other domestic systems, including cases brought under the European Convention on Human Rights (which is very similar to the ICCPR), can be a valuable resource in understanding how human rights are to be applied in practice. While none of this is binding on how the committee carries out its scrutiny function, it can assist the committee in gaining a broader understanding of the content and application of human rights.

13. The European Court of Human Rights (ECHR) has found that there is no right of same-sex couples to be included in the definition of marriage. In *Schalk and Kopf v Austria* the ECHR upheld the application of the doctrine of the "margin of appreciation" to Austria's refusal to marry a same-sex couple, finding that there was no right to same-sex marriage under the European human rights charters. In so doing, the Court held that in the European context, 'The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.'[133] The Court affirmed its prior judgements to the effect that although 'the Convention was a living instrument which had to be interpreted in the light of present-day conditions, it had only used that approach to develop its jurisprudence where it had perceived a convergence of standards among member States.'[134] In 2014 in *Hämäläinen v. Finland*,[135] the ECHR 'held that while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples.'[136]

[133] *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010), 105.

[134] *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010), 46

[135] *Hämäläinen v. Finland* [2014] ECHR 787.

[136] *Oliari and Others v Italy* (European Court of Human Rights, Fourth Section, Application nos. 18766/11 and 36030/11, 21 July 2015), 191.

14. The ECHR has held that in order for a measure to engage the rights of equality and non-discrimination there must be a difference in the treatment of persons in relevantly similar situations.[137] In *Schalk and Kopf v Austria* the Court held that 'same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.' However, as noted in the preceding paragraph, in *Schalk and Kopf v Austria* that 'relevantly similar situation' did not extend from the need for legal protection to then encompass a right to marriage. The Court did not hold however that States Parties are required to afford same-sex couples access to marriage. Instead, in an acknowledgement of the differing views concerning the definition of marriage, in light of the 'deep rooted social and cultural connections which may differ largely from one society to another' it instead recognised the rights of States Parties to define marriage autonomously. Having found that the Convention does not impose an obligation to grant same-sex couples access to marriage, the Court found that the prohibition on discrimination under Article 14 was not breached.[138] The existence of legal protections afforded by registered partnerships and equality in access to benefits were relevant to this determination. All Australian States have given legal recognition to same-sex partnerships through civil unions or partnerships or have amended their laws to recognise same-sex partnerships as de facto relationships and have enacted legislation to remove discrimination against same-sex couples. In 2008 the Commonwealth enacted a range of laws to remove vestiges of discrimination in respect of Commonwealth government conferred rights and entitlements.

15. In *Oliari v Italy* [2015] the Court held that same-sex couples are 'in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.' Again, the Court's ruling pertains only to 'the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection'. The Court held that the extent to which same-sex couples are in a relevantly similar situation to different-sex couples did not extend to their inclusion in the definition of marriage. The Court reaffirmed its decisions in *Schalk and Kopf v Austria* and *Hämäläinen v Finland* referred to above. These conclusions were affirmed again in *Chapin and Charpentier v France.*[139]

16. For the foregoing reasons the Bill does not engage (the right to equality and non-discrimination) under articles 2 and 26 of the *International Covenant on Civil and Political Rights* in respect of the provisions of the Bill that give effect to amendment of the definition of marriage.

The Right to Equality in Respect of Religious Belief

17. The Bill does however engage the rights to freedom from discrimination on religious grounds enshrined in Articles 2(1) and 26 of the ICCPR. The Bill provides various exemptions for religious and conscientious objectors. For the reasons elaborated below,

[137] *D.H. and Others v. the Czech Republic ([GC], no. 57325/00, ECHR 2007-IV);* See also *Burden v. the United Kingdom ([GC], no. 13378/05, ECHR 2008).*

[138] *Schalk and Kopf v Austria* (European Court of Human Rights, First Section, Application No 30141/04, 22 November 2010), 101.

[139] [2016] ECHR 504.

any refusal to provide an exemption for religiously conscientious objectors would amount to discrimination on the basis of their religious or conscientious convictions. The ICCPR defines 'discrimination' as a distinction based on a personal attribute (which attributes include religious belief, and conscientious belief within any 'other status' under Article 26) which has either the purpose (called 'direct' discrimination), or the effect (called 'indirect' discrimination), of adversely affecting human rights. The UN Human Rights Committee has explained indirect discrimination is 'a rule or measure that is neutral on its face or without intent to discriminate', which exclusively or disproportionately affects people with a particular personal attribute.

18. A law that adversely impacts a religious group in a manner that is disproportionate to its impact on other groups would violate the right to equality.[140] The comments of Sachs J in *Christian Education South Africa v Minister of Education* are apposite:

> To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views. ... [T]he essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect.[141]

19. The comments of Heiner Bielefeldt, the United Nations Special Rapporteur on Freedom of Religion or Belief, are also noteworthy:

> members of minorities should have the possibility to demand, to a certain degree, personal adjustments when general legal provisions collide with their conscientious convictions. Such measures of 'reasonable accommodation', which often have been criticized as allegedly privileging minorities, in fact should be seen as an attempt to rectify situations of indirect discrimination from which members of minorities typically suffer even in liberal democracies that are devoted to the principle of neutrality in questions of religion and belief.[142]

20. As the right to equality also protects religion, a failure to protect religious adherents with a conscientious objection would amount to a violation of the right to equality as it unjustly subjects religious adherents to a detriment that they only suffer because of their religious commitments. The objects to be inserted by Item 1 of Schedule 1 of the Bill acknowledge this, wherein they provide:

> It is an object of this Act to create a legal framework that: …
>
> eliminates, as far as possible, discrimination against persons or entities on the ground of religious or conscientious belief; and

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[140] Greg Walsh, 'Same-Sex Marriage and Religious Liberty' (2016) 35(2) *The University of Tasmania Law Review,* 133.

[141] *Christian Education South Africa* [2000] 4 SA 757 (Constitutional Court) [42].

[142] Heiner Bielefeldt, 'Freedom of Religion or Belief A Human Right under Pressure' (2012) 1(1) *Oxford Journal of Law and Religion* 15, 24 5.

> (e) ensures, as far as practicable, that everyone has the same rights to equality, regardless of religious or conscientious belief, as the rest of the community.

21. For the reasons now put, to not allow an exemption for religiously conscientious objectors would have the effect that the Bill disproportionately affects such people.

The right to freedom of thought, conscience and religion

22. Article 18(1) of the ICCPR provides:

> 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.

Article 18(3) provides that the:

> freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

23. Article 4(2) of the ICCPR reflects the fundamental aspect of the right to religious freedom, listing it amongst a limited suite of the freedoms that may not be infringed upon, even in a time of 'public emergency which threatens the life of the nation'. The Human Rights Committee emphasised that this restriction 'underlines the great importance of non-derogable rights'.[143] The importance that the ICCPR attributes to the right to religious freedom is further illustrated by the other six non-derogable rights, which include the right to life, the right not to be tortured and the right not to be enslaved.

24. This has led the Human Rights Committee in *General Comment No. 22* to describe the right to religious freedom as a 'fundamental' right:

> Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.[144]

25. The United Nations Human Rights Committee has described the wide-ranging scope of the rights protected under Article 18 in its *General Comment No. 22*, wherein it acknowledges that the rights protect both individual and corporate entities:

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[143] Human Rights Committee, General Comment No 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, 52nd sess, UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994) [10].

[144] United Nations Human Rights Committee, CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add 4, 30 July 1993, 8.

> The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18 (1) is far-reaching and profound; it encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.[145]

26. Furthermore, the United Nations Economic and Social Council's *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,*[146] provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue'. The Principles provide that:

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

The *Siracusa Principles* also require that 'in applying a limitation, a state shall use no more restrictive means than are required'.[147] This means that where consideration is being given to the implementation of a fundamental right that conflicts with the right to religious and conscientious freedom, consideration of alternative means for progressing that fundamental right must be undertaken. A weighing of the relative burden placed upon religious and conscientious freedom amongst the alternatives is then required in order to identify the means that are the least restrictive.

27. Having observed these broad principles, it is recalled that the foregoing section establishes that under the ICCPR the UN Human Rights Committee has held that that no discrimination can arise under Articles 2 or 26 of the ICCPR in relation to same-sex marriage, on the basis that the ICCPR defines marriage to include persons of the opposite sex. (Furthermore, having found that there is no right of same-sex couples to be included in the definition of marriage the European Court of Human Rights has also found that the prohibition on discrimination under Article 14 was not breached.)

28. As there is no right to same-sex marriage, such cannot be said to be a fundamental right or freedom, and Article 18(3) cannot be enlivened to curtail the right to manifest freedom of

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[145] Human Rights Committee, *General comment No. 22 (48) (art. 18),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993).

[146] U.N. Doc. E/CN.4/1985/4, Annex (1985).

[147] United Nations Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, http://www.refworld.org/docid/4672bc122.html.

religion or beliefs. In the absence of any conflict with other human rights, the ICCPR prohibits any restriction on an individual's right to freedom of religion, belief or conscience. Since the right to marry a person of the same gender is not required by the ICCPR, and the principle of non-discrimination in Article 26 can be satisfied by providing equal rights other than the right to marry, the right to maintain religious beliefs and practices in relation to religious understandings of marriage is not limited by any right of a person to marry another person of the same gender. Accommodation for religious belief and practice does not constitute diminution of the right to equality or non-discrimination because such protections are based on criteria which are reasonable and objective, and which achieve a purpose which is legitimate under the Covenant. [148] Having outlined the broad applicable principles, this Statement turns to consider their application to the classes of persons offered protections under the Bill.

Ministers of Religion

29. The Bill preserves the rights of ministers of religion to exercise freedom of religion and conscience in respect of marriage (see section 47). The Bill does not impose limitations on those rights. Ministers of religion are defined under section 5(1) of the *Marriage Act* to include both ministers of religion under Subdivision A of Part IV and those registered under Subdivision C. The Bill also enables congregations to express their religious freedom and conscientious rights in respect of marriages.

Religious and Conscientious Freedoms of Celebrants

30. The right to religious freedom under Article 18 of the ICCPR is not limited to religious ministers, but applies to all. The inclusion of persons who hold a relevant marriage belief (regardless of whether they are ministers of religion) within traditional marriage celebrants under Subdivision D of Part IV to solemnise marriages is also consistent with international law (see section 47A). The inclusion of chaplains and officers authorised by the Chief of the Defence Force in the classes of persons who may hold a relevant marriage belief is also consistent with international law (see section 81). These provisions give recognition to the rights to freedom of thought, conscience or religion under Article 18 of the *International Covenant on Civil and Political Rights*. It gives effect to the United Nations Human Rights Committee's recognition in *General Comment No. 22* on Article 18 that:

> The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18 (1) is far-reaching and profound; it encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.[149]

31. The inclusion of persons who hold a conscientious relevant marriage belief is also consistent with international law. Article 18 protects individual conscience separate from religious conviction. *General Comment No. 22* states:

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[148] United Nations Human Rights Committee, CCPR General Comment No. 18: Nondiscrimination, 10 November 1989, para 13, http://www.refworld.org/docid/453883fa8.html (accessed 9 February 2017).

[149] Human Rights Committee, *General comment No. 22 (48) (art. 18),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993).

> The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.[150]

32. As noted above, as the definition of marriage under the ICCPR has been held not to encompass persons of the same sex, the Bill does not concern the right to equality and the right to freedom from discrimination. As outlined above, the UN Human Rights Committee has held that the ICCPR defines marriage as between a man and a woman, and that therefore discrimination cannot arise under Article 26, as persons of the same sex are not eligible for admission to the concept of marriage. (Similarly, the ECHR has not compulsorily required States to extend the recognition of same-sex partnerships to *marriage*, and such a requirement cannot be then relevant to the pursuit of the right to freedom from discrimination.) There is thus no contravening rights which would serve to limit the religious freedom rights of celebrants under Article 18(3). To burden such rights would be inconsistent with the human rights law this Statement is required to have regard to under the *Human Rights (Parliamentary Scrutiny) Act 2011*. For the reasons put above, there is thus no ground to limit the religious or conscientious rights of celebrants. The Bill gives appropriate protection to their rights, whilst amending the law to permit all couples to marry regardless of their sex, sexual orientation, gender identity or intersex status.

33. However, even if the right to equality were to encompass a right to marriage for persons regardless of these attributes, there are less restrictive ways of recognising the right to religious and conscientious freedom of celebrants who are not ministers of religion than the complete removal of these freedoms. It would be inconsistent with the *Siracusa Principles* and *General Comment No. 22* to exhaust a celebrant's religious and conscientious freedom in favour of the right to freedom from discrimination.

34. To require that all celebrants that are not ministers of religion to solemnise same-sex marriages regardless of religious or conscientious conviction would entail a limitation on the rights to religious and conscientious freedom of those who hold an objection that is not necessary. To do so would amount to the application of means that are more restrictive than are required to amend the law to permit persons of the same sex to marry (applying the *Siracusa Principles*). A proportionate approach to the balancing of rights would require investigation of means to accommodate competing rights without unduly burdening the right to religious or conscientious freedom. The Bill achieves an appropriate balance by giving celebrants the ability to have their religious or conscientious objections protected in law, whilst permitting couples to seek a celebrant who will solemnise their marriage regardless of their sex, sexual orientation, gender identity or intersex status.

35. To the extent that an exemption for individuals who are religious ministers is proposed in recognition of the right to religious freedom, there could be no legitimate rationale for limiting the religious freedom of individuals who are marriage celebrants, as both are equally capable of autonomous agency, and both are protected under Article 18 of the ICCPR. Furthermore, to protect celebrants who are ministers of religion and who hold a relevant marriage belief, but not other celebrants who hold a relevant marriage belief but are not ministers of religion would amount to discrimination on the basis of their religious belief, in accordance with the principles outlined at paragraphs 17 to 20 above.

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[150] Human Rights Committee, *General comment No. 22 (48) (art. 18),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993).

Protections to Religious and Conscientious Objectors

36. In addition, section 88K introduces a protection to persons who express a religious or conscientious relevant belief from unfavourable treatment initiated by a public authority. This protection also extends to unfavourable treatment imposed by a person or entity at the behest of a public authority. International experience has shown that the persons who hold a relevant belief have been subjected to detrimental actions. As further examples of detrimental actions:
    a. In *Johns v Derby County Council 2011*¸ the English High Court supported a local council decision that a Christians couple with traditional views on sexual ethics, who had successfully fostered many children, would not make suitable foster carers because they would not be open to promoting or accepting a homosexual lifestyle.
    b. In New Jersey the government declared that a Methodist organisation would no longer receive a real estate tax exemption when it declined to allow a same sex couple to have a commitment ceremony in a pavilion that was used for Church services, youth ministry programs and weddings.[151]
    c. In Tasmania, a booklet outlining the Catholic position on same-sex marriage distributed by a Catholic Archbishop was held by the Anti-discrimination Commissioner to be a possible violation of anti-vilification legislation.[152] The matter proceeded to a conciliation session but was eventually abandoned after many months by the complainant.
    d. In 2011 Adrian Smith from Manchester in England placed on his Facebook page a comment that he did not think that churches should be compelled to marry same-sex couples, although he did not object to same-sex marriage. This was before England allowed same-sex marriage. He was accused by his employer, a housing association, of "gross misconduct" and threatened with dismissal. Because of his long service, he was only demoted; but he lost 40% of his salary.[153]
    e. In Australia, calls were made for Dr Stephen Chavura to be dismissed by Macquarie University unless he resigned from another organisation that was perceived to be opposed to same-sex marriage.
    f. In Australia, Dr Pansy Lai had a petition, which gained 5000 signatures, circulated calling for her deregistration as a doctor due to her comments about same-sex marriage and safe schools in a No campaign TV commercial to deregister her as a doctor.

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[151] Jill P Capuzzo, 'Group Loses Tax Break Over Gay Union Issue', The New York Times (online), 18 September 2007 <http://www.nytimes.com/2007/09/18/nyregion/18grove.html>.

[152] Dennis Shanahan, 'Catholic bishops called to answer in anti-discrimination test case', The Australian (online), 13 November 2015 <http://www.theaustralian.com.au/nationalaffairs/state-politics/catholic-bishops-called-to-answer-in-anti-discrimination-test-case/newsstory/b98439693f2f4aal7aca9b46c7bda776?nk=7bd2d275fddd376333435b60d3ac81 Ic1474942859>. 30 Andrew Drummond, 'Transgender rights activist Martine Delaney drops complaint over Catholic Church's marriage booklet', The Mercury (online), 5 May 2016 <http://www.themercury.com.au/news/tasmania/transgender-rights-activist-martinedelaney-drops-complaint-over-catholic-churchs-marriage-booklet/newsstory/d8d9079bf932526b27e5f094e57dbe84?nk=7bd2d275fddd376333435b60d3ac81 c1474933967>.

[153] *Smith v Trafford Housing Trust* [2012] EWHC 3221.

g. In the United States of America, Chick Fil A was subject to commercial boycotting because of management's views and donations supporting tradition marriage. As part of this local governments and universities refused to allow new Chick Fil A franchises.
h. In Australia, complaints are current underway against Presbyterian Minister Campbell Markham and street preacher David Gee for expressing their views on same-sex marriage.
i. In the United Kingdom, the Vishnitz Jewish Girls School failed their school-assessment on one criteria, which was its inadequate promotion of homosexuality and gender reassignment, as it was deemed that these were necessary to have a full understanding of fundamental British values and equality principles.
j. In British Columbia, Trinity Western University required their students and staff to sign a community covenant which included a promise to abstain from sexual activity, unless it was between a husband and wife. Due to this the British Columbia College of Teachers voted to refuse accreditation to all teaching graduates because they might discriminate against LGBTI students. After many years of litigation, the Supreme Court of Canada upheld the right of Trinity graduates to be accredited.
k. In Canada, Four Provincial (State) Law societies decided to refuse accreditation to the planned law school and program of Trinity Western University on the grounds that the community covenant of the university was discriminatory, not on any grounds relating to the quality of the curriculum or faculty of the law school. The effect of the decision would be to deny graduates of the law school the right to practise law in those Provinces. Two of those Provinces reversed the decision and in the other two ligation about the decisions has been through the Provincial Courts and is now to be heard by the Supreme Court of Canada.
l. In Northern Ireland, Ashers Bakery company, run by a Christian couple, was found liable for discrimination because it refused to bake a cake for a political group with the slogan "Support Gay Marriage". Ashers led evidence that it had never refused to supply a person on the grounds of their sexual orientation and did not do so in this case but refused only because it would not disseminate or be associated with the message on the cake. The court held that the sexual orientation of the person who ordered the cake was irrelevant and the refusal to provide a cake with that message on it amounted to discrimination.

37. The prospect of detrimental conduct aimed at persons because of their relevant belief poses a real threat to the lawful exercise of the religious and conscientious freedoms of those persons, as outlined at paragraphs 21 to 27 of this Statement. By the principles outlined at paragraphs 17 to 20 such conduct also amounts to discrimination on the basis of religious or conscientious belief, which State parties to the ICCPR have obligations to prevent. On these bases, section 88K then introduces protections to persons who hold a relevant belief.

38. Under section 5AB of the Bill a 'relevant belief' includes not only a relevant marriage belief, but also belief that 'a genuine religious or conscientious belief that … a same-sex relationship is not consistent with the doctrines, tenets, beliefs or teachings of the religion or the conscience of the person'. Under Article 26 of the ICCPR, states are required to prohibit any discrimination and guarantee to all people equal and effective protection against discrimination on any ground. Article 26 lists a number of grounds as examples as to when discrimination is prohibited, which examples include sex and 'any other status'.

While sexual orientation is not specifically listed as a protected ground the treaty otherwise prohibits discrimination on 'any ground', and the UN Human Rights Committee has specifically recognised that the treaty includes an obligation to prevent discrimination on the basis of sexual orientation.[154]

39. To the extent that sexual orientation is then protected from discrimination, this right must be balanced with the right to religious and conscientious freedom. Pursuant to Article 18(3), limitations on these freedoms are only permitted to the extent that such are 'necessary', and as further outlined in the *Siracusa Principles*. To allow such detrimental conduct to be lawfully pursued against persons who hold a relevant belief would be an unnecessary limitation on their religious and conscientious freedoms. It would be inconsistent with the *Siracusa Principles* and *General Comment No. 22* to exhaust religious and conscientious freedom in favour of the right to freedom from discrimination. A proportionate approach to the balancing of rights would require investigation of means to accommodate competing rights without unduly burdening the right to religious or conscientious freedom. The Bill achieves an appropriate balance by giving protections to those who express or act upon religious or conscientious objections, whilst preserving the rights of same sex couples to be free from discrimination on the basis of sexual orientation, gender identity or intersex status where those rights are protected under international law. The provisions of Part VAA give effect to the right of religious or conscientious belief, as protected under Article 18.

Bodies established for religious purposes and educational institutions

40. Article 18 extends to both individuals and corporations. Absent appropriately broad protections, the religious freedom of bodies established for religious purposes will be limited. The potential adverse impact on religious charities from a failure to adequately protect religious liberty has been demonstrated in other jurisdictions. In the United Kingdom, for example, the refusal to provide an exception to religious groups from the operation of anti-discrimination legislation caused religious adoption agencies to either reject their religious identity or to close down on the basis that they considered it would be unethical to assist same sex couples to adopt children.[155]
41. The Senate Select Committee recommended that the notion of bodies established for religious purposes be defined in any Bill that is progressed to redefine marriage.[156] The Bill amends section 37 of the *Sex Discrimination Act 1984* to provide a definition of 'body established for religious purposes'. The definition is intended to cover not only religious bodies that are engaged in 'the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it',[157] but also faith based charities that are pursuing a charitable purpose that is other than the technical advancement of religion. To illustrate, the definition is intended to cover faith based (without limitation):

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[154] See UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992 (1992) and UN Human Rights Committee, *Young v Australia*, Communication No. 941/2000 (2003).

[155] *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales 2009* UKFTT 376 (GRC) (01 June 2009) available at http://www.charity.tribunals.gov.uk/decisions.htm. An English judge later reversed and remanded this decision. See The Yorkshire Post, 'Catholic Adoption Society Wins Ruling on Gay Parents', *The Yorkshire Post* (Online), 17 March 2010 <http://www.yorkshirepost.co.uk/news/main-topics/local-stories/catholic-adoption-society-wins-ruling-on-gay-parents-1-2567726>.

[156] At pages x and xiv.

[157] *Roman Catholic Archbishop of Melbourne v Lawlor* [1934] HCA 14; (1934) 51 CLR 1 at 32 (per Dixon J).

a. aged care providers or retirement villages;
b. welfare providers or public benevolent institutions;
c. hospitals;
d. health promotion charities;
e. human rights promotion charities;
f. environmental groups;
g. camp ground providers;
h. organisations established to promote culture (such as faith-based radio stations);
i. bodies advancing social or public welfare, which includes faith-based charities with a purpose of:
j. relieving the poverty, distress or disadvantage of individuals or families,
k. caring for and supporting:
    i. the aged; or
    ii. individuals with disabilities;
l. bodies with the purpose of caring for, supporting and protecting children and young individuals (and, in particular, providing child care services); and
m. bodies providing disaster relief.

42. The definition is consistent with *The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* Proclaimed by General Assembly of the United Nations on 25 November 1981. Article 6 (b) of the Declaration provides: The right to freedom of thought, conscience, religion or belief [under Article 18 of the ICCPR] includes the freedom, "To establish and maintain appropriate charitable or humanitarian institutions". To remove the ability of such institutions to control the appointment of their staff and leaders is to remove their ability to maintain their faith-based character, and thus a direct impingement on their religious freedom rights. Section 88Q and the amendments to the *Sex Discrimination Act 1984* give recognition to these rights.

Provisions addressing when belief may be held and acted upon

43. The Bill proposes that a new subsection 5AD(1) be inserted into the *Marriage Act* to provide that a person holds a genuine belief if the holding of the belief is not fictitious, capricious or an artifice. The Bill also introduces a new section 38A into the *Sex Discrimination Act 1984* that applies the same test to bodies established for religious purposes and religious educational institutions. This test adopts the wording employed by Lord Nicholls in *R (on the application of Williamson) v Secretary of State for Education and Employment*.[158] In addition, as the Canadian Supreme Court has recognized, an individual's right to religious freedom does not necessitate an inquiry into whether their "beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make".[159] The ruling in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*[160] to the extent that the Court had regard to, what was considered by the Court to be, a range of views amongst congregations is to be distinguished from this test. For this reason, section 5AD(1) requires regard to be had to the belief of the 'person.'

[158] [2005] UKHL 15 at para 22.

[159] *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 [43].

[160] [2014] AVSCA 75.

44. In addition, various provisions in the Bill adopt a test that requires that the conduct is consistent with religious doctrine, tenets or belief. This is distinct from tests that require conduct to conform with religious doctrine. In *Cobaw* the interpretation applied to the phrase 'conforms with the doctrines of the religion' by the Victorian Court of Appeal was that 'the doctrine requires, obliges or dictates that the person act in a particular way when confronted by the circumstances which resulted in their acting in the way they did'[161] and 'as requiring it to be shown that conformity with the relevant doctrine(s) of the religion gave the person no alternative but to act (or refrain from acting) in the particular way.'[162] This strict reading is not to be applied under the *Marriage Act* or the *Sex Discrimination Act* and for the reasons put elsewhere is inconsistent with the broad protections guaranteed to religious or conscientious belief in international law. Instead, the term 'consistent' is adopted, noting the Macquarie Dictionary definition of that term is 'agreeing or accordant; compatible'.

45. In addition, various provisions adopt a test that requires that the conduct be because of religious susceptibilities. This is distinct from tests that require that the conduct be necessary to avoid injury to religious susceptibilities. Applying such a test in *Cobaw,* the Victorian Court of Appeal held that that test required demonstration of various matters, including that the harm be 'unavoidable'. The strict reading applied in *Cobaw* is not intended to be applied under either the *Marriage Act* or the *Sex Discrimination Act*. For the reasons put elsewhere in this Statement the test is inconsistent with the broad protections guaranteed to religious or conscientious belief in international law.

46. Proposed subsections 5AD(2) of the *Marriage Act* and section 38A(4) of the *Sex Discrimination Act* clarify the means by which an entity may be said to hold a relevant belief or a relevant marriage belief. In *Cobaw* an entity's doctrines were held to be limited to the matters expressly addressed solely in its core governance document. For the reasons put elsewhere in this Statement the test is inconsistent with the broad protections guaranteed to religious or conscientious belief in international law. This reading, it is considered, fails to appreciate the many and varied means by which religious belief may be adopted or held. The question concerns when the law will recognise the holding of belief. The effect of the reading in *Cobaw* is to impose very strict limitations on the expression of religious freedom by religious bodies. The amendments provide a means for the law's recognition of when religious bodies have adopted a belief that gives due recognition to the broad plurality of religious expressions within Australia, and the many and varied unique means by which they may adopt or define their beliefs.

The right to freedom of expression

47. Article 19 of the ICCPR provides a protection to freedom of expression. It is as follows:

    1. Everyone shall have the right to hold opinions without interference.

[161] At 286.

[162] At 286.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    a. For respect of the rights or reputations of others;
    b. For the protection of national security or of public order (ordre public), or of public health or morals.

48. The right to freedom of expression includes religious discourse.[163] The relevance of freedom of religious expression to human rights principles is demonstrated by the long-running Trinity Western University law school saga. In *Trinity Western University v. The Law Society of British Columbia*[164] the Court of Appeal held that the decision of the Law Society of British Columbia to refuse accreditation to practice law in the Province, to graduates of a new proposed TWU law school, was unlawful. That decision had been based on the "Community Covenant" required of all students to (among other things) "abstain from… sexual intimacy that violates the sacredness of marriage between a man and a woman". The Court held that the Law Society had failed to give proper consideration to the impact on the religious freedom of TWU students and graduates in making its decision. In Canada, concerns over the right to freedom of religious expression were seen to be sufficiently legitimate to require the inclusion of an acknowledgement in the Preamble to the Canadian *Civil Marriage Act 2005* of 'the freedom of members of religious groups to hold and declare their religious beliefs'.

49. As acknowledged by the United States Supreme Court in *Obergefell v. Hodges* the view that '[m]arriage…is by its nature a gender-differentiated union of man and woman…long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.'[165] The Bill gives recognition to the freedom to express that view. Sections 88J and 88JA clarifies that that these rights are not confined to the private sphere but also extend to business, employment, community and public affairs and that it is not unlawful to hold and publicly express a relevant belief or relevant marriage belief.

50. In respect of the limitations to freedom of expression contained at Article 19(3), UN Human Rights Committee *General Comment No. 34* provides that 'Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights'.[166] Under the ICCPR 'human rights' are inclusive of the right to religious and conscientious freedom. Sections 88J, 88JA, 88K, 88KA, 88L and 88P give effect to the internationally protected right of freedom of expression.

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[163] Human Rights Committee, General Comment 34 Article 19 Freedoms of opinion and expression, 102nd sess, (12 September 2011). See also communication No. 736/97, *Ross v. Canada*, Views adopted on 17 July 2006

[164] 2016 BCCA 423 (1 Nov 2016)

[165] *Obergefell v. Hodges* 576 U. S. ____ (2015).

[166] See communication No. 458/91, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

Protections to the religious and moral education of children

51. Article 18(4) provides that States Parties must ensure 'the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.' Articles 13(3)-(4) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) reinforce that right.

52. Parents in Canada and several European countries have been required to leave their children in sex-education classes that teach the virtues of same-sex activity and its equality with heterosexual marital activity. As an example, David and Tanya Parker objected to their kindergarten son being taught about same-sex marriage after it was legalised by the Massachusetts Supreme Judicial Court, leading to David being handcuffed and arrested for trying to remove his son from the class for that lesson.

53. An alteration in the law of the Commonwealth resulting in a change to a fundamental social institution, as is proposed by the Bill, would compel consideration of how that change is to be reflected in public education. Any such requirement in public education would amount to a limitation on the Article 18(4) rights of the parents to 'ensure the religious and moral education of their children in conformity with their own convictions'. Importantly, it would also amount to a limitation on the right of educators to express their religious beliefs. Protections to such educators are provided under various provisions in the Bill, including section 88K.

54. Children, as autonomous individuals, enjoy the freedom of thought, conscience and religion in their own right, as do adults. Article 14 of the *Convention on the Rights of the Child* (CRC), which Australia has ratified, provides:

> 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
>
> 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

55. Article 5 also contains a general requirement for State Parties to 'respect the responsibilities, rights and duties of parents … to provide … appropriate direction and guidance in the exercise by the child of the rights contained in the Covenant.' Article 29(1) of the CRC provides:

> that the education of the child shall be directed to: …
>
> (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
>
> (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
>
> (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin

56. In *Hartikainen et al. v. Finland*, the UNHRC concluded that instruction in a religious context should respect the convictions of parents and guardians who do not believe in any religion. In its View, the Committee considered that the requirements of Article 18(4) were met by the Finnish legislation providing for religious instruction in schools as 'paragraph 6 of the *School System Act* expressly permits any parents or guardians who do not wish their children to be given either religious instruction or instruction in the study of the history of religions and ethics to obtain exemption therefrom by arranging for them to receive comparable instruction outside of school.'[167] Section 88R of the Bill respects the rights of parents or guardians who do not wish their children to be given instruction that is inconsistent with their religious or conscientious beliefs.

57. In *Leirvåg and ors v. Norway*[168] the UNHRC found that Norway's system of religious education which required dissenting parents to identify the aspects of the teaching to which they had a philosophical or religious objection breached Article 18(4). The Committee's View was:

> 14.7 In the Committee's view, the difficulties encountered by the authors, in particular the fact that Maria Jansen and Pia Suzanne Orning had to recite religious texts in the context of a Christmas celebration although they were enrolled in the exemption scheme, as well as the loyalty conflicts experienced by the children, amply illustrate these difficulties. Furthermore, the requirement to give reasons for exempting children from lessons focusing on imparting religious knowledge and the absence of clear indications as to what kind of reasons would be accepted creates a further obstacle for parents who seek to ensure that their children are not exposed to certain religious ideas. In the Committee's view, the present framework of CKREE, including the current regime of exemptions, as it has been implemented in respect of the authors, constitutes a violation of article 18, paragraph 4, of the Covenant in their respect.

58. The same principles may be applied to a parent or child who expresses a religious or conscientious objection to teaching that is inconsistent with a relevant belief. Section 88R gives effect to these internationally protected rights.

59. In the European context, the cases that have considered instruction in schools have primarily focussed upon Article 2 of Protocol No 1 to the European Convention on Human Rights, which provides:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

60. The ECHR has held that:

> The second sentence of Article 2 of Protocol No. 1 aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.[169]

61. Furthermore the right to religious freedom is not to be relegated solely to any particular time (whether allotted to religious instruction or otherwise), the right to religious freedom

[167] Communication No. 40/1978 Paragraph 10.4.

[168] *Leirvåg and ors v. Norway* UN Doc CCPR/C/82/D/1155/2003.

[169] *Case of Folgero and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No. 15472/02 29, 29 June 2007) at para 84(b).

is to be recognised across the whole curriculum. The ECHR has held that the right applies across the entirety of the educational experience of the child:

> 51. The Government pleaded in the alternative that the second sentence of Article 2 (P1-2), assuming that it governed even the State schools where attendance is not obligatory, implies solely the right for parents to have their children exempted from classes offering "religious instruction of a denominational character".
> The Court does not share this view. Article 2 (P1-2), which applies to each of the State's functions in relation to education and to teaching, does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme.[170]

62. Furthermore, the ECHR has held that the obligation to 'respect' religious conviction sets a high standard on the State in the education of children:

> That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account". In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State. [171]

63. Section 88R thus protects the right of parents to ensure the religious and moral education of their children. It also gives effect to the religious and conscientious freedoms of children, as protected under the *Convention on the Rights of the Child.* Subsection 88R(5) gives effect to Articles 2(1) and 28 of the *Convention on the Rights of the Child,* ensuring that the education of the child will not be detrimentally effected or discriminated against as a result of the expression of the child's religious and conscientious rights, or those of their parents.

The right to marry and found a family

64. The right to marry and to found a family is contained in Article 23 of the ICCPR. As noted above, under current human rights instruments and jurisprudence, including the United Nations Human Rights Committee decision in *Joslin v New Zealand*, the right to marry does not oblige states to legislate to allow same-sex couples to marry. However, it is clear that there are no legal impediments to Australia taking this step. The Bill retains the existing consent, marriageable age and prohibited relationship requirements for intended spouses under the *Marriage Act*, consistent with Article 23 of the ICCPR.

Application to State and Territories

65. Proposed section 6(2) of the *Marriage Act* and proposed section 38B of the *Sex Discrimination Act* provide that Part VAA and sections 37, 38 and 38A respectively will exclude or limit the operations of the laws of States or Territories that are inconsistent with the rights recognised therein. Such is intended to effect consistency in Australia's acquittal of its obligations under international law, as outlined in this Statement. Currently State and Territory law gives varying and incomplete protection to the internationally recognised

[170] *Case of Kjeldsen, Busk Madsen and Pedersen v Denmark* (European Court of Human Rights, Application No. 5095/71; 5920/72; 5926/72, 7 December 1976) at para 51.

[171] *Case of Folgero and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No. 15472/02 29, 29 June 2007) at para 84(c).

rights of freedom of expression, association, thought, conscience or religion. Pursuant to Article 50 of the *International Covenant on Civil and Political Rights* the Commonwealth is held to account for the actions of the State and Territories in failing to protect human rights, including the right to religious and conscientious freedom under Article 18. Where State or Territory law protections to religious freedom do not fulfil the protections guaranteed under international human rights law, including where exemptions in State or Territory anti-discrimination law do not reflect the scope of religious freedom protections, the Commonwealth is responsible. The Bill retains the existing protections against discrimination in the *Sex Discrimination Act* but, in giving effect to the Commonwealth's obligations under international law prevails over any inconsistent State or Territory law to ensure that the applicable rights are recognised equally and without discrimination in all the States and Territories of the Commonwealth in respect of acting on a relevant marriage belief and expressing a relevant belief.

Conclusion

66. The Bill is therefore compatible with human rights. It permits couples to marry regardless of their sex or gender, sexual orientation, gender identity or intersex status where the union is not that of a man and a woman while protecting the rights to expression, association, freedom of thought, conscience and religion or belief and the rights of the child. To the extent that the Bill may limit the freedom of thought, conscience and religion or belief, those limitations are consistent with the requirement under the ICCPR that they be necessary and 'use no more restrictive means than are required'.