



Law Council  
OF AUSTRALIA

# Exposure Draft Marriage Amendment (Same-Sex Marriage) Bill

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

19 January 2017

# Table of Contents

About the Law Council of Australia .....3

Acknowledgement.....4

Executive Summary .....5

Law Council Position on Same-Sex Marriage.....7

Comments on the Exposure Draft.....8

    Exemptions for religious ministers .....8

    Exemptions for marriage celebrants.....9

    Conscientious belief exemptions.....10

    Exemptions for religious bodies and organisations .....12

    Title of the Bill .....13

    Partner.....13

    Defence to discrimination.....13

    Retrospective recognition of previous foreign marriages of same-sex couples .....14

# About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council of Australia is grateful for the assistance of its National Human Rights Committee, the Queensland Law Society and the Law Institute of Victoria in the preparation of this submission.

# Executive Summary

1. Thank you for the opportunity to make a submission and for the extension of time in which to do so to the Senate Select Committee (**the Committee**) on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (**the Exposure Draft**).
2. Owing to time constraints for which to provide a submission, the Law Council has not had the opportunity to seek the views of all of its Constituent Bodies on the Exposure Draft. The Law Council notes that the Senate Select Committee considering the Exposure Draft was established on 30 November 2016 and that the call for submissions was put out in early December 2016. Submissions to the Committee were due on 13 January 2017. The Law Council considers the consultation period inadequate, having regard to both the exceptional importance of the subject matter, as well as the time of year when most if not all organisations are closed and consultation with members difficult.
3. The Exposure Draft would legalise same-sex marriage in Australia by way of amendments to the *Marriage Act 1961* (Cth) (**the Marriage Act**).<sup>1</sup> It would also exempt religious ministers<sup>2</sup> and civil marriage celebrants<sup>3</sup> from having to solemnise same-sex marriages.
4. The Law Council welcomes the Committee's inquiry as an opportunity for the Parliament to consider and recommend protections for religious freedoms while removing discrimination.
5. The Law Council, Law Institute of Victoria and Queensland Law Society are generally supportive of the proposed amendments in the Exposure Draft. The current exclusion of same-sex couples from the Marriage Act denies them a right that is afforded to all other Australians and is inconsistent with the right to be free from discrimination.
6. The Law Council, Law Institute of Victoria and the Queensland Law Society support the protection of religious freedom and considers it reasonable to allow ministers of religion to conduct religious marriage ceremonies in accordance with the tenets and doctrines of their religion.
7. However, the proposed exemptions for marriage celebrants, 'conscientious belief' or 'religious bodies and organisations' are not supported.
8. Key recommendations of this submission include:
  - Proposed s 47A relating to an exemption for marriage celebrants from solemnising same-sex marriages should be removed from the Exposure Draft.
  - The 'conscientious belief' exemption should be removed from the Exposure Draft.

---

<sup>1</sup> Specifically, *Marriage Act 1961* (Cth) s 5(1).

<sup>2</sup> Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, s 47.

<sup>3</sup> *Ibid.*, s 47A.

- Proposed section 47B relating to an exemption for religious bodies and organisations from providing facilities or goods and services should be removed from the Exposure Draft.
- The proposed amendment to the *Sex Discrimination Act 1984* (Cth) relating to exemptions for anything done under the Marriage Act should be removed from the Exposure Draft.
- The Exposure Draft should include a provision to ensure that liabilities (such as tax liabilities) are not imposed retrospectively as a consequence of the retrospective recognition of a foreign same-sex marriage.

# Law Council Position on Same-Sex Marriage

9. The Law Council supports the removal of legal restrictions on marriage by same-sex couples.
10. In 2013, the High Court of Australia stated that 'marriage' in section 51(xxi) of the Constitution includes a marriage between persons of the same sex and held that the Federal Parliament has power under the Constitution to legislate with respect to same-sex marriage.<sup>4</sup>
11. The Law Council regards both formal and substantive discrimination on arbitrary grounds, including sexual orientation, to be contrary to the rule of law and Australia's voluntarily assumed international obligations.
12. In addition to the broad non-discrimination Article 2 of the *International Covenant on Civil and Political Rights (ICCPR)*, which requires State Parties to ensure all individuals are to enjoy the rights set out in the ICCPR without discrimination, Article 26 provides that:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.*<sup>5</sup>
13. The Australian Human Rights Commission has observed that Article 26 is a 'stand-alone' right which forbids discrimination in any law and in any field regulated by public authorities, even if those laws do not relate to a right specifically mentioned in the ICCPR.<sup>6</sup> Although 'sexual orientation' or 'sexuality' are not specifically referenced in Article 26, the United Nations Human Rights Committee (**UNHRC**), which is mandated to promote and protect human rights in accordance with international human rights laws and treaties, considers that States are obliged to provide 'effective protection' against discrimination based on sexual orientation.<sup>7</sup>
14. The UNHRC has considered two cases from Australia, and found that discrimination on the basis of sexual orientation is prohibited pursuant to Article 26.3.<sup>8</sup>
15. In the context of same-sex marriage, non-discrimination must be balanced with the right to freedom of religion. Most relevantly, section 116 of the Australian Constitution provides that 'the Commonwealth shall not make any law...for prohibiting the free exercise of any religion'.

---

<sup>4</sup> *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, at 452, 454.

<sup>5</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>6</sup> See: [https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0#\\_edn10](https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0#_edn10).

<sup>7</sup> See, for example: Human Rights Committee, *Concluding observations of the Human Rights Committee: El Salvador*, UN Doc CCPR/CO/78/SLV (2003), [16].

<sup>8</sup> *Young v Australia* (Communication No 941/2000) UN Doc CCPR/C/78/D/941/2000 2003), at [10.4]; *Toonen v Australia* (Communication No 488/1992) U.N. Doc CCPR/C/50/D/488/1992 (1994).

16. The right to freedom of religion also appears in Article 18 of the ICCPR. However, the right to freedom of religion is not absolute. Under international law, there are two broad facets to the right to freedom of religion: the right to hold religious beliefs and the right to manifest those religious beliefs; only the latter may be subject to reasonable limitations.<sup>9</sup> One such limitation may be the right to be free from discrimination.<sup>10</sup> The Law Council suggests that the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*<sup>11</sup> provide an instructive principled framework when considering the human rights issues the Exposure Draft raises.

## Comments on the Exposure Draft

17. The Law Council, Law Institute of Victoria and Queensland Law Society are generally supportive of the proposed amendments in the Exposure Draft. The current exclusion of same-sex couples from the Marriage Act denies them a right that is afforded to all other Australians and is not consistent with the right to be free from discrimination.
18. The Law Council, the Law Institute of Victoria and Queensland Law Society also support the recognition in Australia of same-sex marriages validly entered into in other jurisdictions, as provided for in the draft Bill. This proposed amendment is consistent with Australia's obligations under Article 9 of the *Hague Convention on the Celebration and Recognition of the Validity of Marriages*.<sup>12</sup>
19. The Law Council, Queensland Law Society and Law Institute of Victoria have concerns about a number of aspects of the draft Bill, as set out below.

### Exemptions for religious ministers

20. The Law Council, Law Institute of Victoria and the Queensland Law Society support the protection of religious freedom and considers it reasonable to allow ministers of religion to conduct religious marriage ceremonies in accordance with the tenets and doctrines of their religion.
21. Paragraph 47(a) of the Marriage Act currently makes it clear that ministers of religion are not obliged to solemnise any marriage. The House of Representatives Social Policy and Legal Affairs Committee (**the Social Policy Committee**) in its *Advisory Report*:

---

<sup>9</sup> UN Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion* CCPR/C/21/Rev.1/Add.4, [3] and [8].

<sup>10</sup> *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75. See also *Bull & Anor v Hall & Anor* [2012] EWCA Civ 83; *Swanner v. Anchorage Equal Rights Commission* 874 P.2d 274 (Supreme Court of Alaska 1994); *Elane Photography v. Vanessa Willock* CV-2008-06632, Second Judicial District Court, Country of Bernalillo, New Mexico (2009), discussed in International Commission of Jurists, *Submission to the Victorian Court of Appeal in Christian Youth Camps Ltd v Cobaw Community Health Services Limited* (August 2012), available at [http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/04/221000080\\_17\\_Submissions-ICJ-amicus-curiae-application-17-August-20....pdf](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/04/221000080_17_Submissions-ICJ-amicus-curiae-application-17-August-20....pdf).

<sup>11</sup> International Commission of Jurists, *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), available at [http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles\\_en.pdf](http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf).

<sup>12</sup> Opened for signature 14 March 1978, [1991] ATS 16, 16 ILM 18 (entered into force 1 May 1991).



*Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012* came to the view that 'section 47 as it currently stands in the Marriage Act is sufficient to protect the religious freedom of ministers of religion when solemnising marriages, including same-sex marriages should they be legal.'<sup>13</sup> As the Law Council previously noted in its submission to the Social Policy Committee regarding the Marriage Amendment Bill 2012, although the proposed amendments to s 47 in the Exposure Draft may not be strictly necessary, they may assist in clarifying the situation for ministers of religion.<sup>14</sup>

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

## Exemptions for marriage celebrants

23. While the Law Council, Law Institute of Victoria and the Queensland Law Society accept the retention of an exemption for religious ministers in the Marriage Act, extending this exemption to civil celebrants discriminates against same-sex, intersex and transgendered couples without any proper basis.
24. The *Code of Practice for Marriage Celebrants* (the Code of Practice)<sup>15</sup> requires marriage celebrants to 'prevent and avoid unlawful discrimination in the provision of marriage celebrancy services'.<sup>16</sup> Unlike religious ministers, under the current Marriage Act civil celebrants have no basis to refuse to marry a couple based on their religious beliefs.
25. The marriage ceremonies civil celebrants perform are secular, not religious, in nature. Therefore, they do not merit the same freedom of religion basis or any other proper basis for an exemption. This issue has been considered internationally. For example, in *Ladele v Islington*, Nueberger MR stated that civil partnership ceremonies for same-sex couples were a 'purely secular task, which was being treated as part of [the celebrant's] job'<sup>17</sup> The court held that it was not discriminatory to dismiss a person for refusing to perform same-sex civil ceremonies where doing so conflicted with the celebrant's religious beliefs. Further, in *Re Marriage Commissioners appointed under*

<sup>13</sup> House of Representatives Social Policy and Legal Affairs Committee, *Advisory Report: Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012* (June 2012), 45.

<sup>14</sup> Law Council of Australia, *Submission to Inquiry into the Marriage Amendment Bill 2012 and Marriage Equality Amendment Bill 2012* (30 March 2012), 13.

<sup>15</sup> *Marriage Act 1961* (Cth) s 39G, *Marriage Regulations 1963* (Cth) sch 1A ('Code of Practice for Marriage Celebrants').

<sup>16</sup> *Ibid* s 4C.

<sup>17</sup> *Ladele v Islington* [2009] EWCA Civ 1357, [52].

*the Marriage Act*,<sup>18</sup> the Saskatchewan Court of Appeal held that proposed amendments to the Marriage Act that would exempt marriage commissioners from solemnising civil marriages on religious grounds violated guarantee of equality in the Canadian Charter of Rights and Freedoms. Richards J noted that marriage commissioners were 'agents of the provincial government' and further stated that allowing a religious exemption would 'undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis'.<sup>19</sup>

**Recommendation:**

- **Proposed s 47A relating to an exemption for marriage celebrants from solemnising same-sex marriages should be removed from the Exposure Draft.**

## Conscientious belief exemptions

26. The Bill would allow both celebrants and ministers of religion to refuse to solemnise a marriage on the grounds of 'conscientious belief' (proposed ss 47(3)(b)(iii) and 47A(1)(b)). This could have wide discriminatory effects for certain groups of people, given the broad jurisprudential interpretation of the term in Australia and the United Kingdom. This term is currently not used in Australian anti-discrimination law and the Bill does not include a definition.

27. 'Conscientious belief' was discussed in an industrial context in *R v Sweeney; Ex Parte NorthWest Exports Pty Ltd*<sup>20</sup>, which involved an application of refusal to join a union pursuant to the *Conciliation and Arbitration Act 1904* (Cth). That Act (now repealed) defined the term as 'any conscientious beliefs, whether the grounds for the beliefs are or are not of a religious character and whether the beliefs are or are not part of the doctrine of any religion.'<sup>21</sup>

28. In *Roach v Canada (Minister for State of Multiculturalism and Citizenship)*<sup>22</sup> Linden J cited the reasons of Wilson J in *R v Morgentaler*<sup>23</sup> as instructive in their approach:

*...freedom of conscience and religion should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should*

<sup>18</sup> *Re Marriage Commissioners appointed under the Marriage Act* [2011] SKCA 3.

<sup>19</sup> *Ibid.*, [98]. See also International Commission of Jurists, *Submission to the Victorian Court of Appeal in Christian Youth Camps Ltd v Cobaw Community Health Services Limited* (August 2012), available at [http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/04/221000080\\_17\\_Submissions-ICJ-amicus-curiae-application-17-August-20....pdf](http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/04/221000080_17_Submissions-ICJ-amicus-curiae-application-17-August-20....pdf).

<sup>20</sup> *R v Sweeney; Ex Parte NorthWest Exports Pty Ltd* [1981] HCA 22.

<sup>21</sup> *Conciliation and Arbitration Act 1904* (Cth) s 144A(1).

<sup>22</sup> *Roach v Canada (Minister for State of Multiculturalism and Citizenship)* (1994) 113 DLR (4<sup>th</sup>) 67.

<sup>23</sup> *R v Morgentaler* [1988] 1 SCR 30.

*not be treated as tautologous if capable of independent, although related, meaning.*<sup>24</sup>

29. A review of the authorities was set out by Refshauge J in *R v AM*.<sup>25</sup> In that case, His Honour referred to "conscientious belief" in the context of (refusing) military conscription, defining the term as: "an individual's inward conviction of what is morally right or morally wrong, and it is a conviction that is genuinely reached and held after some process of thinking about the subject".<sup>26</sup>
30. This case was decided under the *Human Rights Act 2004* (ACT), which relevantly provides: 'a person shall have freedom of thought, conscience, religion and belief'.<sup>27</sup> The right to freedom of recognition and equality before the law without discrimination is also protected under this Act.<sup>28</sup>
31. Human rights are not protected by domestic legislation across all states and territories;<sup>29</sup> however, the ICCPR provides that 'all persons shall have freedom of religion and conscience, subject only to such limitations as prescribed by law and necessary to protect, among other things, the fundamental rights and freedoms of others'.<sup>30</sup>
32. A person's right to freedom of equality before the law is sought to be protected across all states and territories by virtue of the *Sex Discrimination Act 1984* (Cth) (**the SDA**). Relevantly, the SDA seeks to:
- ... eliminate, so far as is possible, discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs...*<sup>31</sup>
33. The Law Council and Law Institute of Victoria are concerned that amending the Act to allow civil celebrants or religious ministers to refuse to solemnise any marriage on conscientious grounds would permit discrimination on the basis of sex, gender identity, or previous marital or relationship status, which would otherwise be unlawful under the SDA and in breach of the Celebrant's Code of Practice.

---

<sup>24</sup> *R v AM* [2010] ACTSC 149, citing Linden JA in *Roach v Canada (Minister for State of Multiculturalism and Citizenship)* (1994) 113 DLR (4<sup>th</sup>) 67, quoting Wilson J in *R v Morgentaler* [1988] 1 SCR 30.

<sup>25</sup> *R v AM* [2010] ACTSC 149.

<sup>26</sup> *Ibid*, quoting Dwyer CJ, *Grondal v Minister of State for Labour and National Service*, (Unreported, Supreme Court of Western Australia, 11 September 1953).

<sup>27</sup> *Human Rights Act 2004* (ACT) s 14.

<sup>28</sup> *Ibid*, s 8. Note: the Act only includes specific provisions relating to religion and belief.

<sup>29</sup> Only the ACT and Victoria have a legislative human rights framework.

<sup>30</sup> *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 23 March 1976) Article 18.

<sup>31</sup> *Sex Discrimination Act 1984* (Cth) s 3.

**Recommendation:**

- The 'conscientious belief' exemption should be removed from the Exposure Draft.

## Exemptions for religious bodies and organisations

34. The Law Council, Law Institute of Victoria and Queensland Law Society do not support the proposed exemption in s 47B for 'religious bodies and organisations' in the provision of facilities, goods or services for the purpose of solemnisation of a same-sex marriage, or for incidental purposes, if the refusal conforms to the doctrines, tenets or beliefs of the religion, or is necessary to avoid injury to the religious susceptibilities of adherents to that religion.

35. Proposed s 47B is unnecessary in light of existing provisions in the SDA. Section 37 of the SDA contains exemptions to discrimination laws for 'religious bodies' in defined circumstances. Relevantly, the section also provides that nothing in Division 1 or 2 (which prohibit discrimination in work and other areas) affects:

*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.*<sup>32</sup>

36. Division 2 of the SDA prohibits discrimination in the provision of goods and services or in the making available of facilities on the grounds of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding.<sup>33</sup>

37. The exemption for religious bodies (outlined above) applies to a 'body established for religious purposes.'<sup>34</sup> The exemption would likely apply, for instance, to a religious organisation refusing to make a church available for the solemnisation of marriage between two persons not being a man and a woman. The Law Council accepts that this would be lawful under the SDA. An organisation not established for religious purposes, but connected with a religious body, which provides commercial services incidental to the solemnisation of marriage, such as, photographers and formal-wear providers, should not be able to rely on the exemptions to unlawfully discriminate against persons on the grounds outlined in Division 2 of the SDA.

38. The current provisions of the SDA are sufficient to protect religious freedoms in the provision of goods and services and the making available of facilities.

---

<sup>32</sup> Ibid, s 37(4).

<sup>33</sup> Ibid, s 22.

<sup>34</sup> Ibid, s 37 (1)(d).

39. Further, the Exposure Draft does not provide sufficient clarity around the meaning of 'religious bodies and organisations'. The inclusion of this provision would introduce unnecessary complexity and uncertainty.
40. In any event, the Law Council notes that, internationally, the provision of commercial services has been held to be at the periphery of protected manifestations of religious belief.<sup>35</sup> The Supreme Court of Alaska in *Swanner v Anchorage Equal Rights Commission* that '[v]oluntary commercial activity does not receive the same status accorded to directly religious activity.'<sup>36</sup>

**Recommendation:**

- **Proposed section 47B relating to an exemption for religious bodies and organisations from providing facilities or goods and services should be removed from the Exposure Draft.**

## Title of the Bill

41. The Law Institute of Victoria recommended amending the title of the Bill and replacing 'same-sex marriage' with a more inclusive term that would encompass intersex and transgender persons. Amended titles for the Exposure Draft could include 'Marriage Amendment (Marriage Equality) Bill', or 'Marriage Amendment (Equal Marriage) Bill', or 'Marriage Amendment Bill'.
42. Similarly, the purpose statement – 'A Bill for an Act to provide for same-sex marriage, and for related purposes' – should be amended to capture relationships beyond those between persons of the same sex, to recognise the relationships of intersex and transgender persons, who would be permitted to be married if the Exposure Draft was passed.

## Partner

43. The Law Institute of Victoria has recommended that the term 'partner' should also be included in the proposed amendments to subsection 45(2) and 72(2) of the Marriage Act (following 'spouse') to respect a couple's use of language.

## Defence to discrimination

44. The current wording of the SDA provides a defence to discrimination done 'in direct compliance with' the Marriage Act.<sup>37</sup> The term 'in direct compliance with', as it features in other legislation, has been the subject of judicial consideration in a

---

<sup>35</sup> See, e.g. *Ontario (Human Rights Commission) v Brockie* [2002] 22 DLR (4th) 174.

<sup>36</sup> *Swanner v Anchorage Equal Rights Commission* 874 P.2d 274, 283 (relying on *United States v Lee* (1982) 455 US 252).

<sup>37</sup> *Sex Discrimination Act 1984* (Cth) s 40(2A).

number of cases.<sup>38</sup> The case law illustrates that the defence of things done 'in direct compliance with' an Act will only succeed where the legislation is 'mandatory and specific'; where the legislation is such that the discriminator could not reasonably have acted otherwise.<sup>39</sup>

45. Item 11 of the Exposure Draft seeks to provide a defence to discrimination where it is 'authorised by the Act'. This permits discrimination beyond the mandatory and specific requirements of the Act.
46. This proposed amendment, when read in the context of the extensive exemptions for religious ministers, civil celebrants and religious bodies as discussed above, is likely to broaden the defence to discrimination under the SDA. As such, it should not be included in the Exposure Draft.

**Recommendation:**

- **The proposed amendment to the *Sex Discrimination Act 1984* (Cth) relating to exemptions for anything done under the *Marriage Act 1961* (Cth) should be removed from the Exposure Draft.**

## **Retrospective recognition of previous foreign marriages of same-sex couples**

47. The Law Council and Law Institute of Victoria welcome the retrospective recognition of previous foreign marriages of same sex couple in item 14. However, it is noted that this recognition may have legal implications for some couples, such as tax implications. It is recommended that the Exposure Draft include a provision similar to that included in the Marriage Legislation Amendment Bill 2016 (Sch 2, Part 2, Item 4), which limits liability.

**Recommendation:**

- **The Exposure Draft should include a provision to ensure that liabilities (such as tax liabilities) are not imposed retrospectively as a consequence of the retrospective recognition of a foreign same-sex marriage.**

---

<sup>38</sup> See especially *Waters v Public Transport Corporation* (1991) 173 CLR 349; *SUPR v Minister for Transport Services* [2006] NSWADT 83; *Keech v Western Australia Metropolitan Health Services* (2010) 276 ALR 118.

<sup>39</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349.