

2016-2017

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MARRIAGE AMENDMENT (DEFINITION AND RELIGIOUS FREEDOMS) BILL
2017**

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Smith)

MARRIAGE AMENDMENT (DEFINITION AND RELIGIOUS FREEDOMS) BILL 2017

GENERAL OUTLINE

1. This Bill amends the *Marriage Act 1961* (Cth) to remove the restrictions that limit marriage in Australia to the union of a man and a woman. The Bill will allow two people the freedom to marry in Australia, regardless of their sex or gender. 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.
2. Throughout this Explanatory Memorandum, 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, where the union is not that of a man and a woman.
3. Under paragraph 51(xxi) of the *Constitution of Australia*, the Commonwealth has the power to make laws relating to marriage. The High Court of Australia confirmed that this power includes the power to make laws relating to same-sex marriage in *The Commonwealth v Australian Capital Territory* [2013] HCA 55.
4. In summary, the Bill includes amendments to:
 - a. redefine marriage as ‘a union of 2 people, to the exclusion of all others, voluntarily entered into for life’
 - b. 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
 - one or both parties are not of marriageable age, which is generally 18 years of age or older,
 - c. enable same-sex marriages that have been, or will be, solemnised under the law of a foreign country, to be recognised in Australia,
 - d. identifying religious marriage celebrants on the register of marriage celebrants as a new category including:
 - ministers of religions from religious denominations that are not recognised under the Marriage Act (e.g. independent religious organisations), and

- existing marriage celebrants wanting to perform marriages consistent with their religious beliefs,
- e. establish a new category of officers to solemnise marriages of members of the Australian Defence Force overseas, and
- f. protect religious freedoms in relation to marriage:
 - ministers of religion will be able to refuse to solemnise a marriage in conformity with their religion's doctrine, their religious beliefs or in order to avoid injury to the susceptibilities of their religious community (e.g. marriages of same-sex, previously divorced or inter-faith couples),
 - a new category of religious marriage celebrants will be able to refuse to solemnise a marriage where their religious beliefs do not allow them to do so,
 - bodies established for religious purposes will be able to refuse to provide facilities, goods or services consistently with their religion's doctrine or if this refusal conforms with religious doctrine, tenets or beliefs or is necessary to avoid injury to the feelings of their religious communities. This is consistent with existing religious exemptions in section 37 of the *Sex Discrimination Act 1984* (Cth).

5. The Bill 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, religious marriage celebrants, Defence Force chaplains and bodies established for religious purposes providing goods or services, or hiring facilities.

6. Parts 3 and 4 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.

7. Part 5 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.

8. Schedule 2 of the Bill makes additional amendments to the Sex Discrimination Act to repeal the exemption from anti-discrimination law in relation to refusals to make, issue or alter an official record of a person's sex, if a law of a state or territory requires, because the person is married.

9. Schedule 3 of the Bill provides for consequential amendments to 20 pieces of Commonwealth legislation to ensure consistency and support the changes made by the Bill. These amendments are intended to ensure that provisions in Commonwealth legislation that apply to married persons apply to all those who are married under, or whose marriage is recognised in accordance with, the *Marriage Act 1961* as amended by the Bill. The amendments in Schedule 3 are generally straightforward in nature, and amend gendered

terms and definitions used in other Acts that would ensure equal treatment of all married couples, including same-sex couples.

10. Schedule 4 to this Bill provides additional application and transitional provisions relating to family law and other matters.

NOTES ON CLAUSES

Preliminary

Clause 1 – Short title

1. 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

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

3. Schedule 1, Parts 1 and 2 will commence on a day to be fixed by Proclamation. The date proclaimed must be within a 28 day period of Royal Assent or these parts will commence on the 29th day after Royal Assent.

4. Schedule 1, Part 3 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.

5. Schedule 1, Part 4 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.

6. Part 5 of Schedule 1 relates to application and transitional provisions and commences when Parts 1 and 2 commence.

Clause 3 – Schedules

7. 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

8. 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 the protection of religious freedoms as they relate to marriage.

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

9. This item replaces the current definition of authorised celebrants so there are three new limbs to the definition:

- the inclusion of religious marriage celebrant,
- to clarify that a chaplain in the Defence Force is an authorised celebrant, and
- to enable the Chief of the Defence Force to authorise an officer (as defined by the *Defence Act 1903*) other than a chaplain to be an authorised celebrant.

10. 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.

Item 3—Subsection 5(1) (definition of marriage)

11. 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.

12. This item amends the definition of marriage to the union of 2 people to the exclusion of all others, voluntarily entered into for life.

13. 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.

Items 4, 6, 22-25, 27-47, 49-56, 59-60 & 62—Updating references to “authorised celebrant”

14. 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:

- an officer (authorised in writing by the Chief of the Defence Force), or
- a chaplain.

15. 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.

16. See discussion at item 48 on religious exemptions for chaplains.

Item 5—Subsection 5(1) (Definition of religious marriage celebrant)

17. This item inserts a definition of religious marriage celebrant in subsection 5(1) of the Marriage Act as a person identified as such on the register of marriage celebrants.

18. This item clarifies the difference between:

- a religious marriage celebrant registered under Subdivision D of Division 1 of Part IV, to whom religious exemptions under new section 47A of the Marriage Act will apply, and
- a ‘civil’ marriage celebrant (referred to in the Marriage Act as marriage celebrant) registered under Subdivision C of Division 1 of Part IV, to whom religious exemptions will not apply.

Item 7—Paragraph 23B(2)(b)

19. 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 8—Sections 39DA – 39DE Subdivision D – Religious Marriage Celebrants

20. New section 39DA specifies that only ministers of religion who have completed the necessary steps to register as a marriage celebrant can be identified as a religious marriage celebrant on the register of marriage celebrants.

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

- ministers of religion from non-recognised denominations (these ministers are only able to register as a marriage celebrant under Subdivision C), and
- 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).

22. All other marriage celebrants (colloquially referred to as ‘civil’ marriage celebrants) will not be identified as religious marriage celebrants, except for transitional arrangements discussed below at paragraph 25.

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

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

25. New section 39DD sets out transitional provisions for existing marriage celebrants:

- ministers of religion from non-recognised denominations will be automatically identified as religious marriage celebrants without being required to give notice, and
- marriage celebrants who are currently registered when the Bill commences (but who are not ministers of religion) will also have 90 days to notify the Registrar in writing that they wish to be identified as a religious marriage celebrant based on their religious beliefs. These formerly ‘civil’ marriage celebrants will be required to advertise their services as a religious marriage celebrant should they wish to register under this transitional provision (see discussion at item 9). This allows a pathway for current ‘civil’ marriage celebrants to elect to transfer to the new Subdivision D for religious marriage celebrants.

26. The Registrar must identify a person as a religious marriage celebrant provided that the eligibility and notice requirements are met and the choice is based on the person’s religious beliefs. The Bill provides a clear and easy to administer solution for religious marriage celebrants to access protections for their religious beliefs, while all remaining and future ‘civil’ marriage celebrants under Subdivision C will continue to provide non-discriminatory services.

27. Any new marriage celebrant registered after the Bill commences will not be identified as a religious marriage celebrant unless they are a minister of religion. The Bill recognises that ‘civil’ marriage celebrants are authorised to perform a function on behalf of the state and should be required to uphold Commonwealth law.

28. New section 39DE describes the process of identifying a person as a religious marriage celebrant, includes annotations, notice requirements, providing reasons and a right of review, in line with subsection 39D(7) of the Marriage Act.

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

Item 9-17 & 61—Updating religious marriage celebrant references and administrative procedures

30. Item 9 requires a marriage celebrant or religious marriage celebrant to accurately describe their identification as either a religious marriage celebrant or a marriage celebrant in any document relating to the services they provide, including online and paper advertisements and information. This provision will ensure that couples seeking the services of a celebrant are able to make informed decisions about whether to engage the services of a celebrant in the knowledge that a religious marriage celebrant may refuse to solemnise their marriage for religious reasons.

31. Items 10, 11, 12 and 14 establish administrative procedures for a Registrar to identify a person as a religious marriage celebrant, suspend or remove identification as a religious

marriage celebrant, take disciplinary measures against religious marriage celebrants or notify religious marriage celebrants of their identification status.

32. The term ‘a material particular’ in item 11 requires that the information must be significant and not trivial or inconsequential.

33. Item 13 makes clear that where a person is no longer identified on the register as a religious marriage celebrant, the exemption for religious marriage celebrants under section 47A of the Marriage Act would no longer apply.

34. Items 10 to 14 ensure that necessary steps to maintain the integrity of the register of marriage celebrants can be taken by the Registrar in line with existing provisions for the identification of marriage celebrants on the register.

35. Item 15 provides a right of review for the Registrar’s decisions relating to identification of religious marriage celebrants.

36. Item 16 inserts a presumption that a Registrar has decided not to identify a person as a religious marriage celebrant if the person has not received notice of a decision after 3 months.

37. Items 15 and 16 ensure that evidence of registration requirements are consistent for marriage celebrants and religious marriage celebrants. These items ensure that there is consistency and procedural fairness for people who apply to be identified as religious marriage celebrants on the register.

38. Item 17 provides that a certificate signed by the Registrar that a person is, or is not, identified as a religious marriage celebrant on the register is prima facie evidence of that fact.

Items 18 & 19—Wording of the monitum

39. Subsection 45(2) of the Marriage Act 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).

40. Subsection 45(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).

41. Item 18 amends the monitum by adding the gender neutral term ‘spouse’ to existing terms ‘husband or wife’. This amendment will enable marrying couples to word their marriage vows in a manner that best reflects their relationship.

42. Item 19 amends the monitum to reflect the updated definition of marriage in this Bill.

43. 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 20—Section 47

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

45. ‘Minister of religion’ is defined in subsection 5(1) of the Marriage Act to mean a person:

- nominated to solemnise marriages on behalf of a religious body or religious organisation that is a proclaimed ‘recognised denomination’ under the Marriage Act (see section 26), or
- whose religion is not a ‘recognised denomination’, and who is registered as a marriage celebrant under section 39B of the Marriage Act .

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

47. 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.

48. 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.

49. 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 religion under the Marriage Act:

- subparagraph 47(3)(a) ensures that conduct that conforms to religious doctrine, tenets or beliefs is protected,
- subparagraph 47(3)(b) ensures conduct that avoids injury to the susceptibilities of a religious community is protected, and
- subparagraph 47(3)(c) ensures the minister’s religious 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).

50. In addition, subparagraphs 47(3)(a) and (b) are consistent with the existing religious exemption in subsection 37(1)(d) of the Sex Discrimination Act and broadly consistent with exemptions found in other state and territory anti-discrimination laws. Subparagraph 47(3)(c) provides an additional circumstance where a minister of religion can refuse to solemnise a marriage. If an individual minister’s religious 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.

51. 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

52. 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). Unless subsections 47(1), (2) or (3) apply, ministers of religion will still be required to comply with other laws, including anti-discrimination laws (e.g. *Racial Discrimination Act 1975*).

Item 21—Before section 48

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

53. New section 47A will allow religious marriage celebrants to refuse to solemnise marriages based on their religious beliefs. A religious marriage celebrant's decision may be based on their own religious beliefs. A religious marriage celebrant may also take into account his or her religion's doctrines or tenets in determining their religious beliefs.

54. The majority of religious marriage celebrants will be covered by the exemption under section 47 of the Marriage Act as they are ministers of religion. Section 47A will ensure that the small number of religious marriage celebrants under the transitional provisions in this Bill will also be able to solemnise marriages in accordance with their religious beliefs.

Grounds for refusal not limited by this section

55. The Marriage Act does not require a religious marriage celebrant to solemnise any marriage. New subsection 47A(2) ensures that section 47A does not limit the grounds on which a religious 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). Unless subsection 47A(1) applies, religious marriage celebrants will still be required to comply with other laws, including anti-discrimination laws (e.g. *Racial Discrimination Act*).

56. State and territory officers and 'civil' marriage celebrants (who are not religious marriage celebrants) may not refuse to solemnise marriages on religious grounds, in accordance with the existing Code of Practice and anti-discrimination laws. All marriage celebrants registered after this Act commences are required, as agents of the Commonwealth, to uphold the definition of marriage under the Marriage Act without discrimination.

Section 47B—Body established for religious purposes may refuse to make facilities available or provide goods or services

57. New section 47B provides that a body established for religious purposes will be able to refuse to provide facilities, goods or services provided on a commercial or non-commercial basis provided two preconditions are met:

- new subsection 47B(1) provides a purpose test requiring that the facility to be made available, or the goods or services to be provided, must be related to the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, and

- new paragraphs 47B(1)(a) and (b) require that the refusal conforms to the doctrines, tenets or beliefs, or is necessary to avoid injury to the susceptibilities of adherents of that religion.

58. This provision ensures that freedom of religious belief is protected while ensuring this is consistent with the existing exemption available religious bodies under subsection 37(1)(d) of the Sex Discrimination Act. This ensures that facilities, goods and services are provided or refused consistently whether providing for a marriage-related or other purpose.

59. It enables bodies established for religious purposes – defined in the same way as under the Sex Discrimination Act – to maintain their own religious practices and observances in relation to marriage while ensuring that non-religious businesses provide facilities, goods and services without discrimination.

60. New subsection 47B(3) ensures that section 47B does not limit the lawful grounds for refusal (e.g. a double-booking or a lack of availability). Unless subsection 47B(1) applies, a body established for religious purposes will still be required to comply with other laws, including anti-discrimination laws (e.g. Racial Discrimination Act).

61. Subsection 47B(5) provides that facilities, goods and services must be intrinsic to, or directly associated with, the solemnisation of the marriage. This definition ensures that there is a close nexus between the facilities, goods and services and the solemnisation of marriage.

62. Bodies established for religious purposes will be able refuse to provide facilities, goods and services where this is required to protect their freedom of religion. This is balanced with ensuring that people are not unfairly discriminated against where there is only a distant or tenuous connection between the facility, good or service and the solemnisation of a marriage. For example, hires of church halls, premises or catering providers, owned by bodies established for religious purposes, would be able to lawfully refuse the use of the church hall or premises or to provide catering for both a wedding ceremony and a wedding reception.

63. Any individual or organisation that is not a ‘body established for religious purposes’ may not lawfully refuse to provide facilities, goods or services for marriages on the basis of their beliefs or views about marriage, as this is already unlawful under anti-discrimination laws.

64. Commercial businesses, their employees and independent operators who provide goods or services, or make facilities available, are currently prohibited from discriminating in connection with marriages on various grounds including race, age and disability. These prohibitions have been in place for significant periods of time and ensure that people are treated equally in public life and protected from discrimination.

65. The Bill does not propose any new carve-outs from discrimination law for individuals in relation to lesbian, gay, bisexual, transgender or intersex people. For example, a taxi driver, florist, baker or photographer who does not work for a body established for religious purposes cannot lawfully refuse to drive a person to a wedding reception, provide flowers, prepare a wedding cake or take photographs at a wedding ceremony on the basis of their religious or other beliefs about marriage. This is consistent with existing anti-discrimination laws which do not allow refusals of service (e.g. for a commitment ceremony for a same-sex couple or a wedding of an inter-racial couple).

Item 23—Marriage officers

66. New section 71A allows an officer authorised in writing by the Chief of the Defence Force to solemnise marriages under Division 3 of Part V of the Marriage Act.

67. An officer shares the same meaning as 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
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 26—Subsection 72(2)

68. 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.

69. 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 these authorised celebrants consider it unnecessary for the parties to do so having regard to the form and ceremony of the marriage.

70. 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).

71. Item 26 amends the monitum by adding the gender neutral term ‘spouse’ to existing terms ‘husband or wife’.

72. 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.

Item 48—New provisions at the end of section 81

73. Item 48 inserts new provisions at the end of section 81 to clarify situations in which a chaplain, but not an officer, may refuse to solemnise a marriage.

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

74. 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 religious beliefs. This provision maintains the protection of freedom of religion 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.

75. This provision provides important three-tiered protections for freedom of religion by allowing a Defence Force chaplain to refuse to solemnise a marriage:

- subparagraph 81(2)(a) ensures that conduct that conforms to religious doctrine, tenets or beliefs is protected,
- subparagraph 81(2)(b) ensures conduct that avoids injury to the susceptibilities of a religious community is protected, and
- subparagraph 81(2)(c) ensures the chaplain's religious 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).

76. Like subsection 47(3), subparagraphs 81(2)(a) and (b) are consistent with the existing religious exemption in subsection 37(1)(d) of the Sex Discrimination Act and broadly consistent with exemptions found in other anti-discrimination laws.

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

Grounds for refusal not limited by this section

78. The Marriage Act does not require a chaplain to solemnise any marriage. New subsection 81(3) ensures that section 81 does not limit the grounds on which a chaplain may otherwise refuse to solemnise a marriage.

79. Chaplains will still be required to comply with other laws, including anti-discrimination laws (e.g. Racial Discrimination Act). However, chaplains already have broader discretion to refuse to solemnise a marriage (e.g. lack of time to solemnise a marriage because of other chaplain's duties). Subsection 81(1) of the Marriage Act will continue to allow a chaplain to refuse to solemnise a marriage where the chaplain is of the opinion that it would be inconsistent with international law or the comity of nations.

Items 57-58—Subsection 88B(4) and Section 88EA

80. Subsection 88B(4) and section 88EA were inserted into the Marriage Act by the *Marriage Amendment Act 2004* to prevent foreign same-sex marriages solemnised overseas from being recognised in Australia.

81. The removal of these provisions 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).

Part 2—Amendment of the Sex Discrimination Act 1984

Sex Discrimination Act 1984

Item 63—Subsection 40(2A)

82. 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.

83. The Bill proposes amendments to subsection 40(2A) of the Sex Discrimination Act to ensure the exemptions for ministers of religion and religious marriage celebrants contained in sections 47 and 47A are given effect to. New subsection 40(2AB) creates an equivalent protection for chaplains in the Defence Force.

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

85. Item 63 also includes a note that cross-references subsection 37(1)(d) of the Sex Discrimination Act to make readers aware of the existing 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.

86. These amendments are required to give full effect to items 20 and 21 of this Bill. It makes clear that a minister of religion, religious marriage celebrant or chaplain’s refusal to solemnise marriages in prescribed circumstances does not constitute unlawful discrimination under the Sex Discrimination Act.

**Part 3—Amendments if Schedule 9 to the Civil Law and Justice Legislation
Amendment Act not yet commenced**

Item 64—Paragraph 115(2)(b)

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

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

89. The new subsections 115(2)(b)(i) and (iii) provide that the published list shall show the religious 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.

90. 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 religious marriage celebrants.

Item 65—The Schedule (table item 1 of Part III)

91. 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.

92. 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.

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

Part 4—Amendments once Schedule 9 of the Civil Law and Justice Legislation Amendment Act 2017 commences

94. Items 66, 67 and 68 provide for religious marriage celebrants to be listed on the register of marriage celebrants (as will occur as discussed above at item 64 in the event that amendments to Schedule 9 of the Civil Law and Justice Legislation Amendment Act commence).

95. 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 5 - Application and transitional provisions

96. Part 5 of Schedule 1 sets out the application provisions necessary to support the commencement of the amendments. Part 5 of Schedule 1 also includes transitional provisions necessary to give full effect to the Marriage Act amendments.

Item 69—Definitions

97. 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 70—Application of amendments

98. Subitem 70(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.

99. Subitem 70(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.

100. Subitem 70(3) clarifies that any foreign marriages involving a prohibited relationship will not be recognised in Australia.

Item 71—Recognition of certain marriages by foreign diplomatic or consular officers that occurred in Australia before commencement

101. 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.

102. In order to recognise such marriages, item 71 will treat the marriage as though it took place in the foreign country under whose laws it was solemnised.

103. This item uses the term ‘foreign country’ rather than ‘overseas country’. ‘Overseas country’ is restrictively defined in the Marriage Act as a country or place other than a part of the Queens Dominions. The term ‘foreign country’ is not limited in this way and will ensure same-sex marriages solemnised by foreign diplomatic or consular officers, including officers of Queens Dominions, will be able to be recognised.

104. 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).

105. Item 71 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 foreign country.

106. Subitem 71(2) sets out definitions that apply in item 71 to give effect to items 70 and 71.

Schedule 2 – Additional amendment of the *Sex Discrimination Act 1984*

Item 1—Subsection 4(1) (definition of official record of a person’s sex)

107. This item repeals the definition of ‘official record of a person’s sex’ in subsection 4(1) of the Sex Discrimination Act.

108. The definition is consequential to the operation of subsection 40(5) of the Sex Discrimination Act which will be repealed by Item 2. The definition is not used elsewhere in the Sex Discrimination Act.

Item 2— Subsection 40(5)

109. This item repeals subsection 40(5) of the Sex Discrimination Act.

110. Subsection 40(5) provides an exemption from the operation of Division 2 of the Sex Discrimination Act for a refusal to make, issue or alter an official record of a person’s sex if a law of a state or territory requires the refusal because the person is married. This is a protection for Registries of Births, Deaths and Marriages that refuse to make, issue or alter a person’s sex on an official record on the grounds that they are married; in such circumstances, Registries are not considered to be acting in breach of the protections against discrimination in the Sex Discrimination Act.

111. Subsection 40(5) was introduced into the Sex Discrimination Act by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) and it was intended to preserve the operation of state and territory laws which prevent Registries of Births, Deaths and Marriages from changing a person’s sex on an official record, such as a birth certificate, where the person applying for the change is married.

112. State and territory legislation (except in the Australian Capital Territory and South Australia) prevents Registrars of Registries of Births, Deaths and Marriages from either accepting an application for alteration of an official record, or from altering official records, such as birth certificates, based on an apparent concern that that doing so may be facilitating, or be seen to be facilitating, a same-sex marriage. With the legalisation of same-sex marriage, same-sex marriage can no longer be a basis for states and territories continuing to require a person to be unmarried to change the sex recorded on their birth certificate.

113. The Australian Government recognises that individuals may identify, and be recognised within the community, as a gender other than the sex they were assigned at birth or during infancy, or as a gender which is not exclusively male or female. However, under most state and territory laws, some individuals who entered into marriage in their previous sex or gender are faced with a choice between divorcing their spouse in order to obtain records reflecting their gender identity, or not having these records.

114. Repealing subsection 40(5) is intended to provide a catalyst for states and territories with such laws (other than the Australian Capital Territory and South Australia) to amend them by making it unlawful discrimination under the Sex Discrimination Act to refuse to make, issue or alter an official record of a person’s sex if a law of a state or territory requires the refusal because the person is married. Repealing subsection 40(5) will enable complaints of discrimination to be brought under the Sex Discrimination Act.

115. This amendment is consistent with the Australian Government Guidelines on the Recognition of Sex and Gender.

116. The repeal of subsection 40(5) will commence 12 months after the commencement of Schedule 1, Parts 1 and 2 of the Bill. Commencement will be delayed for 12 months in order to provide states and territories with such laws with an opportunity to amend their legislation, and associated policies and procedures, to allow people who are married to change the sex marker on their official records.

Schedule 3 – Consequential amendments

117. Schedule 3 of the Bill provides for consequential amendments to 20 pieces of Commonwealth legislation to ensure consistency with, and support the changes made by the Bill. The consequential amendments in Schedule 3 will:

- include the term ‘spouse’ alongside references to ‘husband’ and/or ‘wife’. The Acts amended in this way by the Bill are:
 - *Australian Defence Force Cover Act 2015*
 - *Defence Force Discipline Appeals Act 1955*
 - *Defence Force Retirement and Death Benefits Act 1973*
 - *Defence (Visiting Forces) Act 1963*
 - *Federal Circuit Court of Australia Act 1999*
 - *Governor-General Act 1974*
 - *Judges’ Pensions Act 1968*
 - *Maintenance Orders (Commonwealth Officers) Act 1966*
 - *Military Rehabilitation and Compensation Act 2004*
 - *Parliamentary Contributory Superannuation Act 1948*
 - *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*
 - *Safety, Rehabilitation and Compensation Act 1988*
 - *Seafarers Rehabilitation and Compensation Act 1992*, and
 - *Superannuation Act 1976*.
- insert a definition of ‘spouse’ into the *Acts Interpretation Act 1901*, to provide that, for the purposes of any Act, a person is the spouse of another person if the person is legally married to the other person. This definition applies irrespective of the gender identity or the sex of the parties to the marriage. This definition will apply across Commonwealth legislation unless there is a contrary intention for the definition of ‘spouse’ in that legislation.
- amend the *Evidence Act 1995* to replace ‘a man and a woman cohabiting’ with ‘2 persons cohabiting’ to be consistent with the new definition of marriage proposed by the Bill.
- amend the *Financial Transaction Reports Act 1988* to replace a reference to a ‘woman’ who has previously changed her surname to be a non-gendered reference to a ‘signatory’ who has previously changed their surname.
- amend the *Migration Act 1958* definition of ‘spouse’ to apply irrespective of the gender identity or the sex of the parties to the marriage, and replace reference to ‘husband and wife’ with ‘married couple’.

118. Part 1 also contains amendments to the *Family Law Act 1975* (Cth) to amend references, such as ‘man’, ‘woman’, ‘husband’ and ‘wife’, to ensure equal treatment of all married couples, including same-sex couples.

Part 1—Attorney-General

Acts Interpretation Act 1901

Item 1—Section 2B

119. Item 1 inserts a definition of ‘spouse’ in section 2B ‘Definitions’ of the Acts Interpretation Act, which will provide that ‘spouse’ is defined in section 2CA of the Act.

Item 2—After section 2C

120. Item 2 inserts a definition of ‘spouse’ into the Acts Interpretation Act which will provide that a reference in an Act to a spouse of another person includes any person who is legally married to the other person. This definition will apply irrespective of the gender identity or the sex of the parties to the marriage.

121. New subsection 2CA(2) provides that the definition in new subsection 2CA(1) of the Acts Interpretation Act has effect in addition to any provision of an Act that affects the meaning of spouse in that Act. This means that the new Acts Interpretation Act definition will apply across Commonwealth legislation unless there is a contrary intention for the definition of ‘spouse’ in that legislation.

122. The definition will not apply to legislation where there is a contrary intention for the meaning of ‘spouse’ provided for in that legislation. A contrary intention will exist in the case where the relevant legislation sets out requirements that apply in addition to the basic requirement to be legally married. For example, where the definition of ‘spouse’ requires a couple to have been living together on a permanent domestic basis for a particular period of time (such as subsection 6A(2) of the *Defence Force Retirement and Death Benefits Act 1973*, which requires a couple to be living together for a continuous period of at least three years). The Acts Interpretation Act definition of spouse will not override this contrary intention.

Item 3—Application of definition of spouse

123. Item 3 provides that the new definition of spouse will apply on or after commencement, and apply to Acts enacted or instruments made before, on or after that commencement.

Defence Force Discipline Appeals Act 1955

Item 4—Paragraph 31(1)(c)

124. Currently, paragraph 31(1)(c) of the Defence Force Discipline Appeals Act provides that a supplementary power of the Defence Force Discipline Appeals Tribunal is receiving the evidence, on the application of the appellant, of the husband or wife of the appellant where such evidence could not have been given without such an application.

125. Item 4 amends paragraph 31(1)(c) of the Defence Force Discipline Appeals Act to generalise the power of the Defence Force Discipline Appeals Tribunal to receive evidence from a ‘spouse’ of the appellant.

Item 5—Application of amendment—evidence of spouses in proceedings

126. Item 5 clarifies that the amendments made to the Defence Force Discipline Appeals Act by this Bill apply from commencement in relation to proceedings instituted either before or after commencement.

Defence (Visiting Forces) Act 1963

Item 6—Subsection 5(1) (paragraph (a) of the definition of *dependant*)

127. Currently, paragraph (a) of the subsection 5(1) definition of ‘dependant’ in the Defence (Visiting Forces) Act, captures a ‘wife or husband’ of a member of a visiting force or of a civilian component of a visiting force.

128. Item 6 amends paragraph (a) of the subsection 5(1) definition to include the word ‘spouse’ alongside the words ‘wife or husband’ to cover any person who is legally married to a member of a visiting force or of a civilian component of a visiting force.

Evidence Act 1995

Item 7—Paragraph 73(1)(b)

129. Currently, paragraph 73(1)(b) of the Evidence Act provides that the hearsay rule does not apply to evidence of reputation concerning whether a ‘man and a woman’, cohabiting at a particular time, were married to each other at that time.

130. Item 7 amends paragraph 73(1)(b) of the Evidence Act to provide that the hearsay rule does not apply to evidence of reputation concerning whether ‘2 people’, cohabiting at a particular time, were married to each other at that time.

Item 8—Application of amendment—evidence concerning relationships

131. Item 8 clarifies that the amendments made to the Evidence Act by this Bill apply from commencement to evidence adduced in proceedings, whether those proceedings were instituted either before or after commencement.

Family Law Act 1975

Item 9—Subsection 4(1) (definition of child of a marriage)

132. The current definition of ‘child of a marriage’ refers to subsections 60F(1), (2) and (3) of the Family Law Act. Item 15 repeals and replaces subsection 60F(1) of the Family Law Act to remove use of the gendered terms ‘husband’ and ‘wife’, and replace these with references to the ‘parties to the marriage’. Item 9 amends the definition of ‘child of a marriage’ in subsection 4(1) of the Family Law Act to reflect the amended wording of subsection 60F(1). As a consequence of the amendments proposed in item 15, it will also no longer be necessary to retain existing paragraph 60F(1)(c).

133. This amendment is intended to support the amendments to section 60F of the Family Law Act, and is not intended to have substantive effect beyond those amendments.

Item 10—Paragraph 43(1)(a)

134. Section 43 of the Family Law Act lists the principles to be applied by courts when exercising jurisdiction under that Act. Paragraph 43(1)(a) provides that one of the principles is ‘the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life’.

135. Item 10 amends paragraph 43(1)(a) of the Family Law Act to remove the gendered reference to ‘a man and a woman’ and replace it with a reference to ‘2 people’.

Items 11, 12 and 13—Subsections 55A(3) and 55A(4)

136. Section 55A of the Family Law Act provides that a divorce order will not take effect unless the court has declared, by order, that it is satisfied that certain conditions are met. These conditions relate to ensuring that proper arrangements have been made for the care, welfare and development of any children of the marriage who have not attained the age of 18.

137. In subsections 55A(3) and 55A(4) of the Family Law Act, the phrase ‘husband [and/or] wife’ is used a number of times. The amendments made by items 11, 12 and 13 of this Bill amend subsections 55A(3) and 55A(4) of the Family Law Act to replace these gendered references with references to a party or the parties to the marriage (as appropriate).

Item 14—Section 60E

138. Section 60E of the Family Law Act applies Part VII of that Act to void marriages as if they were marriages. Paragraph 60E(b) provides that Part VII of the Family Law Act applies to the parties of the purported marriage as if the parties were ‘husband and wife’. The proposed amendment in item 14 effectively removes paragraph 60E(b) of the Family Law Act. This amendment is intended to remove the gendered language ‘husband and wife’. With the proposed removal of restrictions that limit marriage to the union of a man and a woman, paragraph 60E(b) becomes redundant—if a void marriage is to be treated as a marriage, a necessary consequence is that the parties to the void marriage are to be treated as parties to a marriage. As such, the fact that the new section 60E will not contain an analogue to current paragraph 60E(b) of the Family Law Act is not intended to have a substantive effect.

Item 15—Subsection 60F(1)

139. Section 60F of the Family Law Act clarifies when a child is and is not a child of a marriage for the purposes of that Act and related subordinate legislation. Current subsection 60F(1) contains an inclusive list of situations in which a child is taken to be a child of the marriage. Each of the paragraphs of subsection 60F(1) contains a reference to ‘husband and wife’.

140. Item 15 repeals subsection 60F(1) of the Family Law Act and replaces it with a new subsection modelled on subsection 60HA(1). Subsection 60HA(1) provides when a child is a child of de facto partners for the purposes of the Family Law Act. The new subsection 60F(1) provides a list of situations where a child is the child of the marriage.

141. The intention behind the amendment is to remove the gendered language of ‘husband and wife’ and to update the provision to modern drafting standards. The substantive effect of this provision is limited to ensuring that a reference to a child of a marriage includes children

of same-sex marriages. Apart from this, this amendment is not intended to change who will be considered a child of the marriage.

142. Paragraph 60F(1)(c) expressly provides that a reference to a ‘child of a marriage’ includes a child of the husband and wife as provided for under subsection 60H(1) or section 60HB of the Family Law Act. As a consequence of removing the references to ‘husband’ and ‘wife’, and replacing these with references to the ‘parties to the marriage’, existing paragraph 60F(1)(c) becomes redundant (and, accordingly, has been omitted).

Item 16—Subsection 60F(4A)

143. Item 16 repeals subsection 60F(4A) of the Family Law Act. Subsection 60F(4A) is an avoidance of doubt provision that provides, for the purposes of the Family Law Act, that a child of a marriage is a child of the husband and of the wife of the marriage.

144. As a consequence of the amendments to subsection 60F(1) proposed in item 15, subsection 60F(4A) becomes redundant. Accordingly, item 16 repeals subsection 60F(4A) of the Family Law Act.

145. Beyond the removal of gendered language, it is not intended that the repeal of subsection 60F(4A) have a substantive effect on determining whether a child is the child of each of the parties to a marriage.

Items 17, 18 and 19—Subsections 98A(3) and 98A(4)

146. Section 98A of the Family Law Act relates to proceedings in the absence of the parties. Subsections 98A(3) and 98A(4) relate to when a child should be considered a child of the marriage for the purposes of section 98A. These subsections contain a number of references to ‘husband [and/or] wife’.

147. Items 17, 18 and 19, collectively, omit references to ‘husband’ and ‘wife’ and replace them with non-gendered references to a party, or parties, to the marriage. These amendments are consequential to removing restrictions that limit marriage to the union of a man and a woman, and are not intended to have substantive effect beyond the replacement of gendered language.

Item 20—Section 100 (heading)

148. This item repeals and replaces the existing heading of section 100 of the Family Law Act. Currently, the title of section 100 is ‘Evidence of husbands and wives’, which will be amended to be ‘Evidence of parties to a marriage’. Section 100 is otherwise unchanged and will continue to apply to all parties to a marriage who are parties to proceedings. This amendment is consequential to removing the restriction that limits marriage to the union of a man and a woman, and is not intended to have substantive effect beyond the replacement of gendered language from the title, as the text of section 100 does not contain gendered language.

Item 21—Application of amendments

149. Item 21 is an application provision that provides for when the amendments made by items 11-13 and 15-19 will apply. This item is intended to ensure that from commencement

children of same-sex married couples are considered children of the marriage regardless of when the same-sex marriage occurred.

Financial Transaction Reports Act 1988

Item 22—Paragraph 21A(1)(b)

150. Item 22 repeals existing paragraph 21A(1)(b) of the Financial Transactions Reports Act and replaces it with a new paragraph 21A(1)(b).

151. Currently, paragraph 21A(1)(b) of the Financial Transactions Reports Act provides that one of the circumstances in which subsections 21A(1A) and (1B) will apply is where a woman wishes to open an account, with an identifying cash dealer, in the name she was known by prior to changing her name to that of her spouse or de facto spouse.

152. New paragraph 21A(1)(b) broadens the scope of this application to cover all persons, regardless of sex/gender, who wish to open an account, with an identifying cash dealer, in the name they were known by prior to changing their name to that of their spouse or de facto spouse. This amendment is in recognition of the fact that there are circumstances where it is not a woman who has changed their name to that of their spouse or de facto spouse. The amendment also recognises that such circumstances may be more prevalent with the availability of same-sex marriage.

Maintenance Orders (Commonwealth Officers) Act 1966

Item 23—Section 3 (definition of *maintenance order*)

153. The Maintenance Orders (Commonwealth Officers) Act provides for the adoption of certain provisions of state and territory law as Commonwealth law. In effect, this allows attachment of earnings orders (orders to allow a creditor to take funds directly from the debtor's wages) made under state or territory law to be served on Commonwealth entities to enforce maintenance orders.

154. Section 3 of the Maintenance Orders (Commonwealth Officers) Act contains definitions relevant to that Act. The definition of maintenance order in section 3 provides for the types of orders that can be considered maintenance orders for the purposes of the Act. The definition currently utilises gendered language as it refers to 'an order for the payment of money... that makes provision in relation to the maintenance of wives, children, or other persons'.

155. Item 23 extends the reference to 'wives' to also include a reference to both 'husbands' and 'spouses'. This is intended to remove a discriminatory assumption underlying the original provision that when the court makes a maintenance order regarding a spouse, it will necessarily be an order requiring a husband to maintain a wife. The amended provision contains no assumptions as to the gender of either party to a maintenance order.

156. This amendment is solely technical in nature. The current definition of maintenance order already provides for orders that make provision in relation to 'other persons'. As a result the definition of maintenance order already applies to existing orders regardless of the genders of the parties.

Marriage Act 1961

Item 24—Subsection 42(10)

157. Item 24 amends subsection 42(10) of the Marriage Act to remove reference to a person being a ‘widow or widower’, and refer instead to the situation where the person’s last spouse has died, irrespective of the sex of both of the people.

Item 25—Application of amendments

158. Item 25 provides that this amendment of the Marriage Act applies on and after the commencement of this item, even if the marriage took place before that commencement.

Part 2—Defence

Australian Defence Force Cover Act 2015

Item 26—Subsections 7(1) and (2)

159. Section 7 of the Australian Defence Force Cover Act defines ‘marital or couple relationship’ for the purposes of that Act. Item 26 includes the word ‘spouse’ alongside references to ‘husband or wife’ in the definition. The amendment is intended to ensure that any married person, regardless of their gender identity or sexual orientation, will be included in the definition of marital or couple relationship for the purposes of the Act.

Defence Force Retirement and Death Benefits Act 1973

Item 27—Subsections 6A(1) and (2)

160. Section 6A of the Defence Force Retirement and Death Benefits Act defines ‘marital or couple relationship’ for the purposes of the Act. Item 27 includes the term ‘spouse’ alongside references to ‘husband or wife’ in the definition. The amendment is intended to ensure that any married person, regardless of their gender identity or sexual orientation, will be included in the definition of marital or couple relationship for the purposes of the Act.

Part 3—Employment

Safety, Rehabilitation and Compensation Act 1988

Item 28—Subsection 4(1) (paragraph (b) of the definition of spouse)

161. The definition of ‘spouse’ in paragraph 4(1)(b) of the Safety, Rehabilitation and Compensation Act provides for the recognition of a person as the spouse of an Indigenous employee or deceased employee, if the person is recognised as the Indigenous employee’s husband or wife by the custom prevailing in the tribe or group to whom the Indigenous employee belongs or belonged.

162. Item 28 includes the term ‘spouse’ alongside references to ‘husband or wife’ in the definition, to put beyond doubt that the provision will apply to any person who is recognised under customary law as married to the Indigenous employee or deceased employee, regardless of the person’s gender identity or sexual orientation. Notwithstanding this amendment, the decision whether to recognise a same-sex marriage as a marriage under Indigenous customary law remains a matter for the tribe or group to determine. This amendment will not impose a requirement for Indigenous customary law to recognise same-sex marriages under customary law, but will provide for that possibility if that was the position adopted by the particular tribe or group.

Seafarers Rehabilitation and Compensation Act 1992

Item 29—Section 3 (paragraph (b) of the definition of spouse)

163. Paragraph (b) of the definition of ‘spouse’ in section 3 of the Seafarers Rehabilitation and Compensation Act provides for the recognition of a person as the spouse of an Indigenous employee or deceased employee, if the person is recognised as the Indigenous employee’s husband or wife by the custom prevailing in the tribe or group to whom the Indigenous employee belongs or belonged.

164. Item 29 includes the term ‘spouse’ alongside references to ‘husband or wife’ in the definition, to put beyond doubt that the provision will apply to any person who is recognised under customary law as married to the Indigenous employee or deceased employee, regardless of the person’s gender identity or sexual orientation. Notwithstanding this amendment, the decision whether to recognise a same-sex marriage as a marriage under Indigenous customary law remains a matter for the tribe or group to determine. This amendment will not impose a requirement for Indigenous customary law to recognise same-sex marriages under customary law, but will provide for that possibility if that was the position adopted by the particular tribe or group.

Part 4—Finance

Federal Circuit Court of Australia Act 1999

Item 30—Subclause 9E(5) of Schedule 1

165. Subsection 9E(5) of Schedule 1 to the Federal Circuit Court of Australia Act provides a definition of ‘marital or couple relationship’ for the purposes of that Act. Item 30 includes the term ‘spouse’ alongside references to ‘husband or wife’ in that subsection. The amendment is intended to ensure that any married person, regardless of their gender identity or sexual orientation, will be included in the definition of marital or couple relationship for the purposes of the Act.

Governor-General Act 1974

Item 31—Subsections 2B(2) and (3)

166. Section 2B of the Governor-General Act provides a definition of ‘marital or couple relationship’ for the purposes of that Act. Item 31 includes the term ‘spouse’ alongside references to ‘husband or wife’ in the definition. The amendment is intended to ensure that any married person, regardless of their gender identity or sexual orientation, will be included in the definition of marital or couple relationship for the purposes of the Act.

167. The Governor-General Act also provides a definition for ‘spouse of a deceased person’ in section 2C of the Act. This provision sets out when a person is a spouse of a deceased person for the purposes of the Act. It is not intended for amended section 2B (which will include the term ‘spouse’ alongside ‘husband or wife’) to create any circularity with existing section 2C (which already uses the term ‘spouse’). Amended section 2B and existing section 2C will deal with a person being a spouse at two different points in time. For section 2B, that time will be before the person died (and so ‘spouse’ will have its ordinary meaning, as affected by proposed section 2CA of the Acts Interpretation Act provided in item 1 of this Bill). For section 2C, that time is after the person has died, and the additional requirements in section 2C will apply.

Judges’ Pensions Act 1968

Item 32—Subsections 4AB(1) and (2)

168. Section 4AB of the Judges’ Pensions Act provides a definition of ‘marital or couple relationship’ for the purposes of that Act. Item 32 includes the term ‘spouse’ alongside references to ‘husband or wife’ in the definition. The amendment is intended to ensure that any married person, regardless of their gender identity or sexual orientation, will be included in the definition of marital or couple relationship for the purposes of the Act.

169. The Judges’ Pensions Act also provides a definition for ‘spouse who survives a deceased Judge’ in section 4AC of the Act. This provision sets out when a person is a spouse who survives a deceased Judge for the purposes of the Act. It is not intended for amended section 4AB (which will include the term ‘spouse’ alongside ‘husband or wife’) to create any circularity with existing section 4AC (which already uses the term ‘spouse’). Amended section 4AB and existing section 4AC will deal with a person being a spouse at two different points in time. For section 4AB, that time will be before the Judge died (and so ‘spouse’ will

have its ordinary meaning, as affected by proposed section 2CA of the Acts Interpretation Act provided in item 1 of this Bill). For section 4AC, that time is after the Judge has died, and the additional requirements in section 4AC will apply.

Parliamentary Contributory Superannuation Act 1948

Item 33—Subsections 4B(1) and (2)

170. Section 4B of the Parliamentary Contributory Superannuation Act provides a definition of ‘marital or couple relationship’ for the purposes of that Act. Item 33 includes the term ‘spouse’ alongside references to ‘husband or wife’ in the definition. The amendment is intended to ensure that any married person, regardless of their gender identity or sexual orientation, will be included in the definition of marital or couple relationship for the purposes of the Act.

171. The Parliamentary Contributory Superannuation Act also provides a definition for ‘spouse who survives a deceased person’ in section 4C of the Act. This provision sets out when a person is a spouse of a deceased person for the purposes of the Act. It is not intended for amended section 4B (which will include the term ‘spouse’ alongside ‘husband or wife’) to create any circularity with existing section 4C (which already uses the term ‘spouse’). Amended section 4B and existing section 4C will deal with a person being a spouse at two different points in time. For section 4B, that time will be before the person died (and so ‘spouse’ will have its ordinary meaning, as affected by proposed section 2CA of the Acts Interpretation Act in item 1 of this Bill). For section 4C, that time is after the person has died, and the additional requirements in section 4C will apply.

Superannuation Act 1976

Item 34—Subsections 8A(1) and (2)

172. Section 8A of the Superannuation Act provides a definition of ‘marital or couple relationship’ for the purposes of that Act. Item 34 include the term ‘spouse’ alongside references to ‘husband or wife’ in the definition. The amendment is intended to ensure that any married person, regardless of their gender identity or sexual orientation, will be included in the definition of marital or couple relationship for the purposes of the Act.

173. The Superannuation Act also provides a definition for ‘spouse who survives a deceased person’ in section 8B of the Act. This provision sets out when a person is a spouse who survives a deceased person for the purposes of the Act. It is not intended for amended section 8A (which will include the term ‘spouse’ alongside ‘husband or wife’) to create any circularity with existing section 8B (which already uses the term ‘spouse’). Amended section 8A and existing section 8B will deal with a person being a spouse at two different points in time. For section 8A, that time will be before the person died (and so ‘spouse’ will have its ordinary meaning, as affected by proposed section 2CA of the Acts Interpretation Act in item 1 of this Bill). For section 8B that time is after the person has died, and the additional requirements in section 8B will apply.

Part 5—Immigration and Border Protection

Migration Act 1958

Items 35 and 36—Subsection 5F(1) and Paragraph 5F(2)(b)

174. Section 5F of the Migration Act provides definitions of ‘spouse’ and ‘married relationship’ for the purposes of that Act. Item 35 is intended to clarify that the definition of ‘spouse’ includes any person who is legally married to the other person, irrespective of the gender identify or sex of a person, by inserting the words ‘(whether of the same sex or a different sex)’. Item 36 omits the terms husband and wife and replaces them with the term spouse.

Part 6—Veterans’ Affairs

Military Rehabilitation and Compensation Act 2004

Item 37—Subsection 5(1) (paragraph (a) of the definition of partner)

175. Paragraph (a) of the definition of partner in subsection 5(1) of the Military Rehabilitation and Compensation Act provides for the recognition of a person as the partner of an Indigenous member, if the person is recognised as the Indigenous member’s husband or wife by the custom prevailing in the tribe or group to whom the Indigenous member belongs.

176. Item 37 includes the term ‘spouse’ alongside references to ‘husband or wife’ in the definition, to put beyond doubt that the provision will apply to any person who is recognised under customary law as married to the Indigenous member, regardless of the person’s gender identity or sexual orientation. Notwithstanding this amendment, the decision whether to recognise a same-sex marriage as a marriage under Indigenous customary law remains a matter for the tribe or group to determine. This amendment will not impose a requirement for Indigenous customary law to recognise same-sex marriages under customary law, but will provide for that possibility if that was the position adopted by the particular tribe or group.

Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988

Item 38—Subsection 4(1) (paragraph (b) of the definition of spouse)

177. Paragraph (b) of the definition of spouse in subsection 4(1) of the Safety, Rehabilitation and Compensation (Defence-related Claims) Act provides for the recognition of a person as the spouse of an Indigenous employee or deceased employee, if the person is recognised as the Indigenous employee’s husband or wife by the custom prevailing in the tribe or group to whom the Indigenous employee belongs or belonged.

178. Item 38 includes the term ‘spouse’ alongside references to ‘husband or wife’ in the definition, to put beyond doubt that the provision will apply to any person who is recognised under customary law as married to the Indigenous employee or deceased employee, regardless of the person’s gender identity or sexual orientation. Notwithstanding this amendment, the decision whether to recognise a same-sex marriage as a marriage under Indigenous customary law remains a matter for the tribe or group to determine. This amendment will not impose a requirement for Indigenous customary law to recognise same-sex marriages under customary law, but will provide for that possibility if that was the position adopted by the particular tribe or group.

Schedule 4—Additional application and transitional provisions

179. Schedule 4 to this Bill provides additional application and transitional provisions relating to family law and other matters. Parts 1 and 2 of Schedule 4 provide for:

- proceedings already brought under the de facto provisions of the Family Law Act or *Family Court Act 1997* (WA) to be dealt with under the marriage provisions of the Family Law Act—this will apply to a same-sex marriage that was not recognised in Australia prior to commencement of Part 1 of Schedule 1 to the Bill;
- maintenance orders to be ceased if the recipient is party to an overseas same-sex marriage that was entered into before the commencement of Part 5 to Schedule 1 of the Bill—this is to reflect that overseas same-sex marriages entered into before commencement of Part 1 of Schedule 1 to the Bill will now be recognised in Australia;
- recognition of overseas divorces, annulments and other legal separations that occurred prior to the Part 5 to Schedule 1 of the Bill; and
- de facto financial agreements made under the Family Law Act and the Family Court Act (WA) to be dealt with under the equivalent marriage provisions in Part VIIIA of the Family Law Act—this will apply to an agreement made relating to a same-sex marriage that was not recognised in Australia before commencement of Part 1 to Schedule 1 of the Bill.

180. Part 3 of Schedule 4 enables the Attorney-General to make transitional rules, by legislative instrument, to prescribe matters of a transitional nature relating to the amendments or repeals that would be made by this Bill.

Part 1—Application and transitional provisions relating to family law matters

181. Proceedings in relation to the separation of parties to an overseas same-sex marriage are currently dealt with through the de facto provisions of the Family Law Act or the Family Court Act (WA)). After the commencement of Part 5 of Schedule 1 to the Bill (the recognition time), overseas same-sex marriages solemnised (but not recognised in Australia) prior to the recognition time, will now ordinarily be recognised as marriages in Australia. These marriages are referred to in Part 1 of Schedule 4 to the Bill as a ‘pre-commencement same-sex marriage’.

182. Part 1 of Schedule 4 to the Bill provides for transitional arrangements necessary to accommodate recognition of pre-commencement same-sex marriages for the purposes of the family law. This includes proceedings on foot in the de facto jurisdiction of the courts at the recognition time.

183. The provisions provide for the following:

- transition of proceedings pending in the family law courts (including the Family Court of Western Australia) from the de facto jurisdiction of the Family Law Act (or the Family Court Act (WA)) to the matrimonial jurisdiction of the Family Law Act;

- maintenance orders to be ceased if the recipient is party to an overseas same-sex marriage that was entered into before recognition time unless special circumstances exist;
- recognition of overseas divorces, annulments and other legal separations that occurred in an overseas jurisdiction prior to recognition, even in circumstances where that divorce, annulment or legal separation would not otherwise be recognised under Australian law; and
- recognition of overseas divorces, annulments and other legal separations that occurred in an overseas jurisdiction prior to recognition, even in circumstances where that divorce, annulment or legal separation would not otherwise be recognised under Australian law; and
- de facto financial agreements made under Division 4 of Part VIIIAB of the Family Law Act, or Part 5A of the Family Court Act (WA), to be transitioned and dealt with under Part VIIIA of the Family Law Act, which are the equivalent provisions that apply to agreements entered into by married or marrying couples.

184. Part 1 of Schedule 4 to the Bill is intended to make the transition of proceedings possible, while imposing the least possible administrative and financial burden on the parties and the family law courts.

185. Division 1 of Part 1 of Schedule 4 provides definitions for terms to be used in the Schedule. Division 2 provides the transitional arrangements for parties to a pre-commencement same-sex marriage that is currently recognised as a de facto relationship under the Family Law Act. Division 3 provides the transitional arrangements for parties to a pre-commencement same-sex marriage that is currently recognised as a de facto relationship under the Family Court Act (WA).

Division 1—Preliminary

Item 1—Definitions

186. Item 1 provides definitions for the purposes of Schedule 4 to the Bill.

187. Subitem 1(1) provides two defined terms for the purposes of the Schedule, these are:

- Pre-commencement same-sex marriage: this term will be defined to mean a marriage that:
 - was solemnised prior to the recognition time
 - is recognised as a valid marriage under Australian law upon and because of the commencement of Part 5 of Schedule 1 to the Bill, and
 - was not recognised as a valid marriage under Australian law prior to the recognition time.
- Recognition time: this term will be defined to mean the commencement of Part 5 of Schedule 1 to the Bill. It is referred to as ‘recognition time’ as it is the time from which same-sex marriages will be recognised in Australia.

188. As a pre-commencement same sex marriage is a defining feature of the transitional cohort of cases, it aids the clarity of Schedule 4 to include a definition of this term.

189. Subitem 1(2) provides that a defined term in the Family Law Act has the same meaning in Schedule 4 as it has in that Act. This avoids duplication of definitions.

Division 2—Matters under the Family Law Act 1975

Item 2—Proceedings pending under the *Family Law Act 1975* in relation to pre-commencement same-sex marriage

190. Item 2 is intended to ensure that where parties to a ‘pre-commencement same-sex marriage’ have commenced family law proceedings as a de facto couple, these proceedings are able to continue after recognition time as proceedings between parties to the marriage.

191. Subitem 2(1) provides the proceedings to which item 2 would apply. The affected proceedings will be proceedings that:

- were instituted under the Family Law Act before the recognition time, and
- relate to a de facto relationship that:
 - existed before or when the proceedings were instituted and
 - was between 2 persons who were parties to a single ‘pre-commencement same-sex marriage’ that was solemnised before the proceedings were instituted.

192. The term ‘single pre-commencement same-sex marriage’ is intended to limit the application to parties who are married to one another (i.e. are part of a single marriage), it is not intended to limit application when a party has been in multiple pre-commencement same-sex marriages.

193. It is intended that this transitional provision will capture all members of the transitional cohort who have proceedings pending under the Family Law Act at the recognition time.

194. Paragraph 2(2)(a) provides that the proceedings described by subitem 2(1) will continue after recognition time as though the proceedings were in relation to a marriage that was solemnised at the time the pre-commencement same-sex marriage was solemnised. This is intended to ensure that the proceedings can continue under the appropriate provisions of the Family Law Act.

195. It is necessary to transition from proceedings under the de facto provisions to proceedings under the matrimonial provisions because the provisions governing the two jurisdictions are subtly different. These differences arise due to the provisions being made under different heads of power, and due to the different subject matters necessarily involving different considerations.

196. Paragraph 2(2)(b) provides that in the case of proceedings that were a de facto financial cause (as defined by section 4 of the Family Law Act), anything done under Part VIIIAB of the Family Law Act can be taken as being done for the corresponding provision of Part VIII of that Act.

197. Part VIIIAB of the Family Law Act relates to financial matters relating to de facto relationships. Part VIII of the Family Law Act relates to property, spousal maintenance and maintenance agreements. Part VIII only applies to parties to a marriage. The two parts contain similar, but not identical, provisions relating to property disputes and maintenance agreements.

198. The intention behind the amendment proposed in paragraph 2(2)(b) is to ensure that proceedings involving financial matters would transition from the financial provisions relating to de facto couples to the financial provisions relating to parties to a marriage without the parties or the court needing to repeat steps already completed in proceedings. For example, a notification originally made under section 90VA will be treated as a notification made under section 79B, and will enable the court to stay proceedings under subsection 79C(1) (which requires the court to stay proceedings if they receive a notice under section 79B).

199. Financial agreements are not dealt with under Part VIII of the Family Law Act. For provisions relating to the transition financial agreements, see item 5.

200. A similar provision to paragraph 2(2)(b) is not required for child related matters, as Part VII addresses child related matters in the same way for both married and de facto couples.

Item 3—Cessation of maintenance at recognition time

201. Under subsections 82(4) and 90SJ(2) of the Family Law Act, a maintenance order will cease if the maintained party marries, unless the court orders otherwise after determining that special circumstances exist.

202. What constitutes special circumstances is ultimately a question for the court and there has been little case law on the issue. It may, for example, include circumstances where the maintained party has particular health issues, or maintains care and control of a child to the previous relationship, and the financial circumstances of the new marriage cannot reasonably cover the costs.

203. In the case of the transition cohort, as their marriages are not currently recognised in Australia, any existing maintenance agreements will not have ceased due to the marriage/remarriage of the maintained party. Item 3 will ensure that the provisions that cause the maintenance agreements to cease on marriage and remarriage will apply to a maintained person in the transitional cohort as if the maintained person had married/remarried at the recognition time.

204. The item treats the marriage as having commenced at the recognition time, rather than on the date of the marriage, to avoid retrospective application. Retrospective cessation of a maintenance agreement could require a maintained person to repay years' worth of maintenance payments. This repayment would not be fair or equitable as a person who was maintained under a maintenance agreement will have been using those payments to maintain their lifestyle in good faith. In the situation where a person has been maintained while they are in a pre-commencement same-sex marriage, the court has been able to (under section 83 of the Family Law Act) consider the impact of the relationship on the person's financial situation and make an order adjusting maintenance accordingly.

205. Subitem 3(1) provides that provisions relevant to the maintenance of a party to a marriage (subsections 82(4), (6), (7) and (8) of the Family Law Act) will apply to a party to a pre-commencement same-sex marriage as if the party had remarried at the recognition time.

206. Subitem 3(2) provides that provisions relevant to the maintenance of a party to a de facto relationship (subsections 90SJ(2), (3), (4) and (5) of the Family Law Act) will apply to a party to a pre-commencement same-sex marriage as if the party had remarried at the recognition time.

Item 4—Recognition of overseas divorces, annulments and legal separations relating to pre-commencement same-sex marriages

207. Divorce and annulment of marriage are dealt with by Part VI of the Family Law Act. This Part does not currently apply to pre-commencement same-sex marriages, as their relationships are not currently recognised as marriages for the purposes of the Family Law Act. From the commencement of the Part 1 of Schedule 1 to the Bill, these provisions will apply generally to all marriages.

208. Recognition of foreign divorce and annulment decrees is governed by section 104 of the Family Law Act. Each of the paragraphs of subsection 104(3) provide a circumstance in which a foreign divorce, annulment, or legal separation would be recognised as valid in Australia.

209. Subitem 4(1) provides that, to avoid doubt, subsection 104(3) of the Family Law Act extends to the divorce, annulment, or legal separation of a pre-commencement same sex marriage, even if proceedings for the order were instituted before the recognition time, or the divorce, annulment or legal separation occurred before the recognition time.

210. It is important that divorces of parties to a pre-commencement same-sex marriage are recognised under Australian law. Item 4 effectively provides that where a couple divorced under the law of an overseas jurisdiction prior to the recognition time their marriage will not be re-enlivened under Australian law.

211. Subitem 4(2) is intended to ensure that divorces from pre-recognition same-sex marriage effected under foreign laws prior to the recognition time are recognised under Australian law. This is intended to operate even in circumstances where the divorce would not satisfy the requirements in subsection 104(3).

212. Each of the paragraphs of subsection 104(3) of the Family Law Act requires some nexus between the country providing the divorce and the applicant. For example, a divorce where the respondent was ordinarily resident in the overseas jurisdiction at the date proceedings were instituted, would be as recognised as valid under paragraph 104(3)(a).

213. Not all foreign divorces will meet the subsection 104(3) nexus requirements. For example, Canada (refer *Civil Marriage Act* (S.C. 2005, c. 33)) allows same-sex couples married under Canadian law to divorce if each of the spouses has been residing, for at least a year, in a state where a divorce cannot be granted because that state does not recognise the validity of the marriage.

214. Applying for divorce under a foreign jurisdiction's laws, such as the Canadian *Civil Marriage Act*, may have been the only way for the same-sex couple to divorce. Given this, it

is appropriate to recognise such divorce orders made prior to the recognition time as the divorce represents the intention of the parties to end the marriage in the only way available at that time.

215. This provision only applies to divorces obtained prior to recognition time. After recognition time, same-sex couples (whether married before or after recognition time) will have access to Australian divorce law. Therefore, it is appropriate that subsection 104(3) apply to all married couples after that date.

216. Paragraph 104(4)(b) of the Family Law Act provides that a divorce, annulment or legal separation shall not be recognised as valid under subsection 104(4) where the recognition would ‘manifestly be contrary to public policy’. Subitem 4(3) provides that recognition of the divorce of a couple to a pre-commencement same-sex marriage is not manifestly contrary to public policy merely because it involves a same-sex marriage. This applies irrespective of the public policy that applied at the time of the same-sex marriage or divorce.

Item 5—Financial agreements and separation declarations

217. Financial agreements are agreements made under the Family Law Act that oust the jurisdiction of the family law courts to make an order under the property settlement or spousal maintenance provisions of the Act about the financial matters to which the agreement applies.

218. Part VIIIA of the Family Law Act sets out the requirements for financial agreements made in relation to marriage, or in the contemplation of marriage. Division 4 of Part VIIIAB of the Family Law Act sets out the requirements for financial agreements made in relation to, or in contemplation of, de facto relationships in jurisdictions other than Western Australia (in Western Australia, de facto financial agreements are governed by Division 3 of Part 5A of the Family Court Act (WA)).

219. To date, parties to a pre-commencement same-sex marriage are only able to make financial agreements as a de facto couple under the Family Law Act, notwithstanding that they are considered married in an overseas jurisdiction.

220. Under subsection 90UJ(3) of the Family Law Act, a Part VIIIAB financial agreement ceases to be binding if, after making the agreement, the parties subsequently marry each other. To date, this provision has not applied to same-sex couples that married outside Australia because their marriage was not recognised in Australia. However, there is a risk that upon recognition of the marriage due to the commencement of Part 1 of Schedule 1 to the Bill, subsection 90UJ(3) could result in current Part VIIIAB financial agreements made between parties to a pre-commencement same-sex marriage ceasing to be binding.

221. The operation of subsection 90UJ(3) is intended to reflect that, under section 90SC, of the Family Law Act, Division 2 of Part VIIIAB no longer applies if the parties to the de facto relationship subsequently marry each other. De facto couples who marry have no capacity to maintain the terms of their relationship set out in a Part VIIIAB agreement by making a similar agreement under Part VIIIA.

222. Given that de facto same-sex couples are currently unable to make an agreement under Part VIIIA, their only choice to set out financial arrangements for their relationship is

in a Part VIIIAB financial agreement. As such, it is reasonable that an existing Part VIIIAB financial agreement can be considered to demonstrate the terms under which parties to a pre-commencement same-sex marriage have agreed financial matters should operate in their married life.

223. It would be inappropriate for subsection 90UJ(3) to cause de facto agreements made between the parties to a pre-commencement same-sex marriage to cease to be binding in circumstances where the relevant agreement was made prior to recognition time. Similarly, it would also be inappropriate for a financial agreement to continue as a Part VIIIAB agreement after recognition time, as that agreement would not be an agreement between de facto partners.

224. Item 5 is intended to transition financial agreements made under Part VIIIAB the Family Law Act by parties to a pre-commencement same-sex marriage, to an agreement made under Part VIII, without the parties to the marriage needing to make a new agreement.

225. Subitem 5(1) specifies when item 5 would apply. It is intended that this provision will capture all current Part VIIIAB financial agreements made by parties to a pre-commencement same-sex marriage where the agreement related to the marriage, including agreements made before, on and after the date that the parties married. Paragraph 5(1)(b) is intended to ensure that this subitem does not enliven agreements that are not at the recognition time binding, including agreements that were never binding.

226. Subitem 5(2) provides that for the purposes of the Family Law Act, at and after the recognition time, an agreement to which item 5 applies is, with necessary changes, taken to be a financial agreement relating to contemplated, actual or former marriage between the parties.

227. The intention behind the phrase ‘with necessary changes’ is to allow the agreement to be read as if the agreement was originally written to apply to a contemplated, actual or former marriage (as appropriate). For example, a reference to the parties to the de facto relationship could be read as a reference to the parties to a marriage. This is not intended to alter essential facts or substance of the agreement (such as on what date the agreement would commence, or replacing separation with divorce); rather, it is merely intended to ensure the agreement remains effective following recognition of the married relationship.

228. Subitem 5(3) provides that a provision of the original agreement that could not validly have been dealt with in a Part VIIIAB financial agreement is taken to not be included in the agreement, even if the matter could have been validly dealt with in a financial agreement.

229. This provision is intended to ensure that provisions of a Part VIIIAB financial agreement that are void or beyond power are not enlivened by the transition to a financial agreement made under Part VIIIA. Due to the broader scope of power available to the Commonwealth under paragraphs 51(xxi) and 51(xxii) of the *Constitution of the Commonwealth of Australia*, as compared to the referral of powers relating to de facto couples, the provisions of Part VIIIA of the Family Law Act provide for financial agreements to have a broader scope than that which is provided for Part VIIIAB financial agreements. For example, paragraph 90B(3)(b) of the Family Law Act provides that a financial agreement made under subsection 90B(1) may contain ‘other matters’. There is no similar provision for a Part VIIIAB financial agreement.

230. Subitem 5(3) is intended to ensure that the transition to a financial agreement under Part VIII of the Family Law Act involves as little change to the operative provisions of the agreement as possible, including by limiting the scope of the transitioned agreement to the scope of the original agreement.

231. Subitem 5(4) relates to a separation declaration made for the purposes of section 90UF of the Family Law Act. Under section 90UF, separation declarations must be made before certain provisions of Part VIIIA financial agreements can take effect. Section 90UF of the Family Law Act mirrors section 90DA, which relates to financial agreements made under Part VIIIA.

232. Subitem 5(4) treats a separation declaration made by parties to a pre-commencement same-sex marriage, for the purposes of subsection 90UF, to be treated as a separation declaration made for the purposes of section 90DA. This provision is consequential to the transitional provision contained in subitem 5(2).

233. Subitems 5(5) and (6) relate to separation declarations made for the purposes of subsections 90MP(8), (9) and (10) of the Family Law Act. Subsections 90MP(8), (9) and (10) relate to the requirements for separation declarations made between parties to a de facto relationship for the purposes of superannuation payment splitting or flagging under Division 2 of Part VIIIB of the Family Law Act. These provisions mirror requirements under subsections 90MP(3), (4) and (4A) that relate to parties to a marriage.

234. Subitem 5(5) treats a separation declaration made by parties to a pre-commencement same-sex marriage for the purposes of subsections 90MP(8), (9) or (10) to be treated as a separation declaration made for the purposes of subsections 90MP(3), (4) or (4A). This provision is consequential to the transitional provision contained in subitem 5(2).

235. Subitem 5(6) ensures that subitem 5(5) applied regardless of whether the separation declaration was included in the superannuation agreement. This is to remove doubt given that subsection 90MP(1) provides that the separation declaration may, but is not required to, be included in the superannuation agreement to which it relates.

Division 3—Matters under the *Family Court Act 1997* (WA)

236. Under paragraph 51(xxii) of the Constitution, the federal government has the power to make laws for the peace, order, and good government of the Commonwealth with respect to ‘divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants’. No similar head of power exists that gives the Commonwealth legislative authority over de facto couples and ex-nuptial children. All the states except Western Australia have referred power over de facto couples and ex-nuptial children to the Commonwealth under paragraph 51 (xxxviii) of the Constitution. As Western Australia has not referred those powers to the Commonwealth, provision of the Family Law Act relating to these cohorts do not extend to Western Australia.

237. In the absence of Commonwealth power over these issues, the laws governing de facto financial causes and ex-nuptial children are found in the Family Court Act (WA). This Act also establishes the Family Court of Western Australia, which is a state family law court for the purposes of section 41 of the Family Law Act. Due to section 41 of that Act, the Family Court of Western Australia also exercises jurisdiction under the Family Law Act. No other state has a family court of this type.

Item 6—Proceedings pending under the *Family Court Act 1997* (WA) before the recognition time

238. Item 6 provides transitional provisions that are intended to ensure that where parties to a pre-commencement same-sex marriage have proceedings related to their relationship pending under the Family Court Act (WA) at the time of commencement, those proceedings would, from commencement, become proceedings under the Family Law Act's jurisdiction over matrimonial causes. This intention is informed by the overall intention of Part 1 of Schedule 4 to the Bill that parties to a pre-commencement same-sex marriage be treated under the Family Law Act as a married couple from commencement of that schedule.

239. Subitem 6(1) specifies the type of proceedings to which item 6 would apply. These are proceedings that are:

- pending under the Family Court Act (WA) immediately before the recognition time; and
- related to a de facto relationship that existed before or when the proceedings were instituted that was between two persons who were parties to a single pre-commencement same-sex marriage solemnised before the proceedings were instituted.

240. This is intended to ensure that item 6 applies to all proceedings under the Family Court Act (WA) that relate to a pre-commencement same-sex marriage, where the proceedings are pending at the time of the recognition time.

241. Paragraph 6(2)(a) provides for how proceedings are to continue after the recognition time. The intention of this provision is that the proceedings would continue in the same court, but that the court would be exercising jurisdiction under the Family Law Act's provisions related to parties to a marriage, rather than jurisdiction under the Family Court Act's provisions relating to de facto relationships.

242. Paragraph 6(2)(b) provides that anything done before recognition time for the purposes of the provisions of Part 5A of the Family Court Act (WA) is taken to be done for the corresponding provisions of Part VIII of the Family Law Act.

243. Part 5A of the Family Court Act (WA) and Part VIII of the Family Law Act both deal with property division and maintenance of parties to a relationship after breakdown. Part 5A of the Family Court Act (WA) deals with de facto couples under Western Australian law, while Part VIII of the Family Law Act deals with married couples.

244. No list is provided of 'corresponding provisions'. It is intended that a court have flexibility to determine most accurately what is considered a corresponding provision. As a starting point, it should be noted that many provisions of Part 5A of the Family Court Act (WA) reference the provision of the Family Law Act on which they were based (e.g. section 205ZA of the Family Court Act (WA) is entitled 'Declaration of interests in property — FLA s. 78', referring to section 78 of the Family Law Act which is likewise entitled 'Declaration of interests in property'). While indicative, it is possible that the referenced provision is not always the corresponding provision. Additionally, there exist some provisions of the Family Court Act (WA) which have no corresponding provision in the Family Law Act (e.g. section 205V, which limits a de facto partner's right to apply for a

property order in the equitable jurisdiction of the Supreme Court, would likely have no corresponding provision in the Family Law Act).

245. To minimise the impact of the changes on the parties to the proceedings, subitem 6(3) is intended to ensure that whichever court is hearing the proceedings prior to the commencement of this Schedule can continue to hear the proceedings after commencement. While it is possible that both the Magistrates Court of Western Australia and the Family Court of Australia would have jurisdiction over a matter at first instance, due to both being invested with Commonwealth family law jurisdiction, this provision would remove any doubt.

246. Additionally, subitem 6(3) also ensures that the Family Court of Western Australia and the Court of Appeal Division of the Supreme Court of Western Australia would continue to be able to hear any proceedings pending in their appellate jurisdiction. This is intended to ensure these courts have jurisdiction to continue to hear these cases despite the fact that these courts are not usually invested with appellate jurisdiction in Commonwealth family law proceedings.

247. Where the Court of Appeal Division of the Supreme Court of Western Australia does not wish to exercise Commonwealth family law jurisdiction it may, of its own motion, refer an appeal to the Full Court of the Family Court of Australia under subitem 6(6).

248. Subitems 6(4) and 6(5) relate to evidence. Evidence law for proceedings under the Family Law Act is governed by the Evidence Act (Cth), except where the Family Law Act provides otherwise (e.g. subsection 69ZT(1) of the Family Law Act provides that certain provisions of the Evidence Act do not apply in child-related proceedings). Evidence law for proceedings under the Family Court Act (WA) is governed by the *Evidence Act 1906* (WA), except where the Family Court Act (WA) provides otherwise. While the two Evidence Acts are quite similar, they are not identical and it is possible that the discrepancies could lead to evidence that is admissible in one jurisdiction not being admissible in the other.

249. Subitem 6(4) is intended to save any decisions relating to evidence made in proceedings under the Family Court Act (WA) that, as a result of subitem 6(2), are proceeding under the Family Law Act. This is intended to avoid re-litigation of whether a piece of evidence is admissible given the different legal frameworks.

250. Subitem 6(5) provides the court exercising Commonwealth jurisdiction a broad power to ask questions of, and seek evidence or the production of documents or other things from parties, witnesses and experts on matters relevant to the proceedings. This is similar to the court's existing power under paragraph 69ZX(1)(e) of the Family Law Act, which relates to proceedings under Part VII of that Act. This is intended to ensure that the court has the ability to receive any evidence it considers appropriate that was not adduced in the original proceedings, due to the differences between Commonwealth and Western Australian evidence laws.

251. Subitems 6(6) and 6(7) relate to proceedings where the case is before the Court of Appeals Division of the Supreme Court of Western Australia. These subitems have been included as the Supreme Court of Western Australia does not usually exercise Commonwealth family law jurisdiction.

252. Subitem 6(6) provides that if the proceedings are an appeal instituted in or made to the Court of Appeal under Part 7 of the Family Court Act (WA), the court may, on its own motion, or on application of a party, refer the appeal to a Full Court of the Family Court of Australia. This is intended to provide the court with the discretion to proceed in the manner most appropriate to the circumstances of the proceedings, whether that is to continue the proceedings in the Court of Appeal, or to refer the proceedings to the Full Court of the Family Court. For example, if the proceedings are close to resolution, it may be more appropriate for the Court of Appeal to continue to hear the proceedings.

253. Subitem 6(7) provides for the jurisdiction and powers of the Family Court of Australia should the Supreme Court of Western Australia make a referral under subitem 6(6). The overall intention of this subitem is to ensure that the proceedings are treated, as much as is possible, no differently to any other appeal before the Full Court of the Family Court of Australia.

254. Paragraph 6(7)(a) provides that the Full Court of the Family Court of Australia has jurisdiction to hear and determine the appeal referred under subitem 6(6).

255. Paragraph 6(7)(b) provides that certain provisions of the Family Law Act, and the standard Rules of Court (as defined in section 4 of the Family Law Act) apply to an appeal referred from the Supreme Court of Western Australia as if the appeal were made under subsection 94(1) of the Family Law Act (subsection 94(1) provides in what proceedings an appeal lies to the Full Court of the Family Court). The applicable provisions are found in Part X of the Family Law Act, which deals with appeals. The applicable provisions are:

- Subsection 93A(2) which relevantly requires that the Full Court of the Family Court of Australia shall have regard to evidence given in the proceedings from which the appeal arose, has power to draw inferences of fact and has the discretion to receive further evidence on questions of fact.
- Subsections 94(2)–(2f) which relate to the powers of the Full Court of the Family Court of Australia in hearing an appeal, and its ability to manage the proceedings.
- Section 94AAB which relevantly relates to the Full Court of the Family Court of Australia dealing with an appeal without an oral hearing with the consent of all parties to the matter.
- Section 96AA which provides the Full Court of the Family Court of Australia with the power to dismiss an appeal if the matter has no reasonable prospect of success.

256. The purpose of applying these provisions is to ensure that the Full Court of the Family Court of Australia has the ability to manage and decide on a referred appeal.

257. Paragraph 6(7)(c) provides that the Full Court of the Family Court of Australia may proceed by way of a hearing *de novo*, but may receive as evidence any evidence given in the Court of Appeal Division of the Supreme Court of Western Australia or the court from which the appeal lay. This is consistent with the court's existing powers under paragraph 96(6)(a) of the Family Law Act to deal with appeals from courts of summary jurisdiction. It is intended that this provision will allow the Full Court of the Family Court of Australia to treat the hearing as *de novo* if the court determined that transitioning to Commonwealth jurisdiction could have a material effect on how the case should be decided, and needs to consider issues not brought in the appeal.

258. Subitem 6(8) provides that the Full Court of the Family Court of Australia cannot require the Court of Appeal Division of the Supreme Court of Western Australia to rehear a case. This is intended to reinforce that these cases are being dealt with under Commonwealth jurisdiction.

259. Subitem 6(9) provides that, despite subitem 6(1), item 6 does not apply to proceedings or part of proceedings that relate to the appointment or removal of a guardian under section 71 of the Family Court (WA). Item 6 will not apply to these proceedings as the Commonwealth does not have legislative authority in relation to the appointment or removal of guardians.

Item 7—Cessation of maintenance at recognition time

260. Division 2 of Part 5A of the Family Court Act (WA) allows the court to make orders, where there has been a de facto relationship, to provide for the maintenance of a party to that relationship by the other party to the relationship.

261. Under subsection 205ZK(3) of the Family Court Act (WA), maintenance orders made under that Act will cease on the marriage of the maintained person unless the court determines that special circumstance apply. This mirrors the effect of subsections 82(4) and 90SJ(2) of the Family Law Act on maintenance orders made under that Act.

262. Item 7 will, in the case of a pre-commencement same-sex marriage, from the date of recognition apply section 82 of the Family Law Act to any Western Australian maintenance orders made in favour of one of the parties to a pre-commencement same-sex marriage, as if they were married on the day that the Bill commences.

263. The intention of item 7 is the same as item 3; that is, it is intended that the provisions of the Family Law Act that cause maintenance agreements to cease on marriage and remarriage will also cause agreements to cease at the recognition time where the maintained party was in a pre-commencement same-sex marriage.

264. The maintenance agreements will cease at the time of recognition rather than at the time the pre-commencement same-sex marriage was solemnised to avoid retrospective cancellation of maintenance orders.

Item 8—Financial agreements and separation declarations

265. Item 8 provides transitional provisions related to financial agreements made under Part 5A of the Family Court Act (WA) between the parties to a pre-commencement same-sex marriage where the agreement was made prior to the recognition time (a ‘WA financial agreement’). The provisions are intended to ensure that a WA financial agreement will continue to apply to the parties to the agreement after the recognition time. To ensure a WA financial agreement continues to apply to the parties, the agreement, with the necessary changes, will be taken to be a financial agreement made under Part VIIIA of the Family Law Act.

266. Currently, Western Australian couples in same-sex relationships can only make agreements as a de facto couple under Division 3 of Part 5A of the Family Court Act (WA), regardless of whether they are parties to a pre-commencement same-sex marriage.

267. Unlike a Part VIIIAB financial agreement made under the Family Law Act, there is nothing in the Family Court Act (WA) that causes a financial agreement to cease if the parties subsequently marry.

268. Item 8 is intended to transition financial agreements made under Part 5A of the Family Court Act (WA) by parties to a pre-commencement same-sex marriage, to an agreement made under Part VIIIA of the Family Law Act. This will reflect their status as a married couple.

269. Subitem 8(1) provides when item 8 applies. It is intended that item 8 would apply to all current financial agreements made under Part 5A of the Family Court Act (WA) by parties to a pre-commencement same-sex marriage. This includes agreements made before, on and after the date that the parties married.

270. Paragraph 8(1)(b) is intended to ensure that this subitem does not enliven agreements that are not binding at the recognition time, including agreements that were never binding.

271. Subitem 8(2) provides that, for the purposes of a law of the Commonwealth, at and after the recognition time, an agreement to which item 8 applies is, with necessary changes, taken to be a financial agreement relating to contemplated, actual or former marriage between the parties, and that that agreement is also taken to be binding under section 90G of the Family Law Act.

272. The intention behind the phrase ‘with necessary changes’ is to allow the agreement to be read as if the agreement was originally written to apply to a contemplated, actual or former marriage (as appropriate). For example, a reference to the parties to the de facto relationship could be read as a reference to the parties to a marriage. This is not intended to alter essential facts or substance of the agreement (such as on what date the agreement would commence, or replacing separation with divorce). It is merely intended to ensure the agreement is maintained despite the recognition of the married relationship.

273. Subitem 8(3) provides that a provision of the original agreement that could not validly have been dealt with in a financial agreement made under Part 5A of the Family Court Act (WA) is taken to not be included in the agreement, even if the matter could have been validly dealt with in a financial agreement made under Part VIIIA of the Family Law Act.

274. This provision is intended to ensure that provisions of a financial agreement that are void or beyond power are not enlivened by the transition of the agreement to a financial agreement made under Part VIIIA.

275. Subitem 8(3) is intended to ensure that the transition to a financial agreement under Part VIIIA of the Family Law Act involves as little change to the operative provisions of the agreement as possible, including by limiting the scope of the transitioned agreement to the scope of the original agreement.

276. Subitem 8(4) relates to former financial agreement (as defined by section 205T of Part 5A of the Family Court Act(WA)), and provides that, in the case of a ‘former financial agreement’, section 90E of the Family Law Act does not apply in relation to the agreement.

277. A ‘former financial agreement’ is an agreement made between de facto partners prior to the commencement of Part 5A of the Family Court Act (WA) that deals with any of the

matters mentioned in paragraphs 205ZN(2)(a), 205ZN(2)(b), 205ZP(2)(a) or 205ZP(2)(b) of that Act, or any matters incidental or ancillary to those matters.

278. Section 205ZQ of the Family Court Act (WA) is the equivalent provision of section 90E of the Family Law Act. Section 205ZQ voids certain provisions of financial agreements, but does not apply to former financial agreements. Subitem 8(5) provides that section 90E of the Family Law Act does not apply to a former financial agreement that is transitioned to a financial agreement under the Family Law Act. This is intended to reflect that the agreement would not have been subject to the equivalent provision in the Family Court Act (WA).

279. Subitem 8(6) provides that section 90DA of the Family Law Act does not apply in relation to an agreement to which item 8 applies unless the separation occurs after the recognition time. Separation declarations are not required under the Family Court Act (WA). Subitem 8(6) is intended to reflect that such an agreement may have already commenced prior to the recognition time, and it would be inappropriate for those provisions not to be in effect after the recognition time.

Part 2—Other transitional provisions

Item 9—Second marriage ceremonies for certain marriages by foreign diplomatic or consular officers that occurred in Australia before commencement

280. Item 9 of Part 2 of Schedule 4 to the Bill provides for recognition of same-sex marriages solemnised in Australia by foreign diplomatic or consular officers, pursuant to a foreign law, before commencement of this item.

281. Subsection 113(1) of the Marriage Act provides that a couple who is already legally married is not permitted to go through a second marriage ceremony. However, subsection 113(2) provides exceptions to this general rule—one of the exceptions is where the first marriage ceremony took place outside Australia and there is a doubt whether the marriage would be recognised as valid by a court in Australia.

282. To allow for situations where there is a doubt about the validity of a marriage that was solemnised in Australia by a foreign diplomatic or consular officer, pursuant to a foreign law that recognised same-sex marriage, prior to commencement of this item, Item 9 enables couples to go through a second marriage ceremony in Australia, pursuant to subsections 113(2) and (5) of the Marriage Act.

283. This transitional provision will only be available to parties to a pre-commencement same-sex marriage that was performed in Australia by a foreign diplomatic or consular officer.

Part 3—Transitional rules

Item 10—Transitional Rules

284. Part 3 of the Bill enables the Attorney-General to make transitional rules, by legislative instrument, to prescribe matters of a transitional nature relating to the amendments or repeals that would be made by this Bill.

285. The power to make transitional rules will provide an efficient mechanism for the government to address any unforeseen or unintended consequences in the application of the amendments outlined in this Bill, necessary to facilitate full recognition of same-sex marriages in Commonwealth law.

286. Subitem 10(1) makes clear that the rule-making power only applies to prescribing matters of a transitional nature, including savings or application provisions relating to the amendments in this Bill, and is not designed to undermine Parliament's legislative responsibility. Subitem 10(2) provides limitations on the Attorney-General's power to make the transitional rules provided for by this item, for example, they must not create an offence or civil penalty, or impose a tax.

287. Subitem 10(3) provides that the retrospectivity of this rule-making power is limited to 12 months from the commencement of the item.

288. Any rules made under this power would disallowable legislative instruments for the purposes of section 42 of the *Legislation Act 2003*.

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

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

The objective of the Bill is remove the restrictions that limit marriage in Australia to the union of a man and a woman, and to allow two people the freedom to marry in Australia, regardless of their sex or gender. To achieve this, the Bill amends the *Marriage Act 1961*:

1. to allow all couples to marry and to have their marriages recognised regardless of their sex, sexual orientation, gender identity or intersex status
2. to allow ministers of religion, religious marriage celebrants, chaplains and bodies established for religious purposes to refuse to solemnise or provide facilities, goods and services for marriages on religious grounds.

Human rights implications

The Bill engages the following rights:

- *rights to equality before the law and to non-discrimination*, which the Bill promotes.

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.

By defining marriage as the union of ‘2 people’ rather than ‘a man and a woman’, the Bill allows couples to marry regardless of their sex or gender. The Bill also allows for recognition of foreign marriages between two adults under Australian law, regardless of sex or gender. The Bill provides all people in Australia with equal rights with respect to marriage, removing discrimination on the basis of sexual orientation, gender identity, or intersex status.

- *the right to marry and found a family*, which the Bill promotes.

The right to marry and to found a family is contained in Article 23 of the ICCPR. 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.

By providing the ability to lawfully marry to all couples, the Bill more accurately recognises the diversity of relationships and families in the Australian community, and ensures their equal status under Commonwealth law. 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.

By enabling the recognition of foreign same-sex marriages under Australian law, the rights and responsibilities pertaining to the dissolution of those foreign marriages will

apply equally to all lawful marriages, in accordance with Article 23 of the ICCPR. These measures in the Bill protect and promote the right to respect for the family.

- *the right to freedom of thought, conscience and religion or belief*, which the Bill limits to a permissible extent.

Article 18(1) of the ICCPR provides for the right to freedom of thought, conscience and religion. This right includes the freedom to have or adopt a religion or belief of choice, and freedom to manifest a religion or belief in worship, observance, practice and teaching. Article 18(3) of the ICCPR provides that freedom to manifest one's religion or beliefs may be subject only to limitations under law that are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Where freedom of thought or conscience, or to have a religion or belief are protected unconditionally, the manifestation of religion or belief are subject to limitations under the ICCPR.

All Australians are free to choose their religion and are able to express and practise their religion and their beliefs without intimidation and without interference, as long as those practices are within the framework of Australian law and do not limit the rights and freedoms of others.

The Marriage Act regulates legal marriages and provides a framework by which religious marriages can have legal status if certain requirements are met. There are a diverse range of community views on the definition of marriage, including those of religious groups. Marriage is closely tied with religious belief and practice. A marriage ceremony can involve religious rituals and recitation of religious passages within a place of worship primarily built and retained for people of faith to practise their religion. Where there is a close and direct connection between religious belief and the conduct of religious marriage ceremonies, the Bill allows for religious organisations and people of faith to carry out marriages and related religious activities in a manner that accords with their faith. The Bill allows this to occur even when this involves a refusal to solemnise a same-sex marriage or to provide facilities, goods and services for same-sex marriages.

The Bill allows ministers of religion to refuse to solemnise marriages on religious grounds – where in accordance with their religion's doctrines, tenets and beliefs, where necessary to avoid injury to the religious susceptibilities of adherents of that religion, or where the minister's religious beliefs do not allow the minister to solemnise the marriage.

The Bill extends this protection for existing marriage celebrants (but not celebrants registered after commencement) if they elect to register as religious marriage celebrants, in order to allow for a smooth transition to the new legislative framework. This maintains a clear distinction between those celebrants performing civil ceremonies in accordance with civil law, and celebrants performing marriages in accordance with religious beliefs.

The Bill also allows ministers of religion not from recognised denominations and existing marriage celebrants who request to register as a religious marriage celebrant to refuse to solemnise a marriage where the religious marriage celebrant's religious beliefs do not allow this.

The Bill further provides that a body established for religious purposes may refuse to make a facility available, or provide goods or services, for the purpose of the solemnisation of a marriage on religious grounds, or for purposes reasonably

incidental to the solemnisation of a same-sex marriage. The refusal must conform to the doctrines, tenets or beliefs of the religious body or organisation, or be necessary to avoid injury to the religious susceptibilities of adherents of that religion.

These religious exemptions are consistent with sections 40(2A) and 37(1)(d) of the Sex Discrimination Act.

The Bill requires marriage celebrants who are not religious marriage celebrants or ministers of religion to perform marriages in accordance with civil law, regardless of their personal beliefs. Further, the Bill re-introduces the category of marriage officers within the Australian Defence Force who will be able to solemnise marriages of Australian Defence Force officers overseas. This amendment will ensure that members of the Australian Defence Force will have a secular (non-religious) option to marry available to them.

The limitation imposed by the Bill is permissible because:

1. The Bill addresses a *legitimate objective* in that extending the operation of the Marriage Act to same sex couples is a pressing and substantial public concern. In 2013, the Commonwealth Parliament passed amendments to the Sex Discrimination Act to make discrimination on the grounds of sexual orientation, gender identity and intersex status unlawful in many areas of public life, but specifically excluded anything done by a person in direct compliance with the Marriage Act. There is a pressing need to ensure that the Marriage Act is non-discriminatory in its operation, evidenced by numerous reports and consistent majority support for same-sex marriage in polls and surveys.
2. The limitation is
 - a. *reasonable*, in that it is clear and precise in the scope of its operation. Ministers of religion, chaplains and religious marriage celebrants may refuse to marry same-sex couples. However, state and territory registry officers, civil marriage celebrants and military officers authorised to perform marriages overseas will not be able to refuse to solemnise a marriage which is lawful under the Marriage Act because of a person's sex, gender, race, disability, age or other attribute protected under anti-discrimination law.

The Bill ensures that authorised celebrants must accurately describe and advertise their services (e.g. a religious marriage celebrant must advertise as a religious marriage celebrant) to ensure couples contacting a celebrant will be aware of whether a celebrant can or cannot lawfully refuse to solemnise their marriage. Couples in the community will be able to identify and engage the services of authorised celebrants appropriate for their intended marriage ceremony.

Similarly, couples will be able to engage providers of facilities, goods and services appropriate for their marriages. The Bill uses the same definition as the Sex Discrimination Act to ensure that bodies established for religious purposes can lawfully refuse to provide facilities, goods or services for a marriage on religious grounds. In contrast, service providers and commercial businesses that are not established for religious purposes cannot lawfully refuse to provide facilities, goods or services to a couple where this would amount to unlawful discrimination.

It is reasonable that this exemption is restricted to religious organisations rather than commercial businesses or individuals, because the hiring of facilities and

delivery of goods and services is connected to marriage but one step removed from the solemnisation of the marriage itself.

- b. *necessary*, in that without the limitation the Bill would not achieve the objective, and
- c. *proportionate*, in that the Bill accommodates the right to religion to the greatest extent possible while still achieving the objective; that is, the Bill adopts the least rights-restrictive means of achieving its objective. The Bill protects the manifestation of religion or belief in so far as this belief is manifested in religious marriage ceremonies and marriage related activities provided by religious organisations such as receptions held at Church halls. This is because marriage ceremonies and celebrations are closely linked to the rituals and practices of religion. However, the performance of marriage ceremonies by marriage celebrants on behalf of the state is not sufficiently closely connected to the observance, practice, worship or teaching of religion or belief in order to justify the limitation on the right to non-discrimination. A personal moral objection to same-sex marriage is also not a sufficient basis to permit discrimination in marriage ceremonies or marriage related services.

Conclusion

The Bill is therefore compatible with human rights because it advances the protection of human rights, particularly the rights to equality and non-discrimination, while protecting the right to freedom of thought, conscience and religion or belief. To the extent that it may also limit these rights, those limitations are reasonable, necessary and proportionate.