AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

Australian Lawyers for Human Rights
Position Statement on Marriage Equality

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1. Summary

1.1 ALHR supports the concept of marriage equality as a reflection of the human rights of the participants and encourages voters in the Australian plebiscite to vote "Yes". Lesbian, gay, bisexual, transgender, intersex and queer partnerships deserve equal status to heterosexual partnerships under the *Marriage Act 1961* (Cth) (**Marriage Act**).

1.2 What is a human right? It can be described as a right to be allowed to express a basic aspect of one's humanity in the context of the "the inherent dignity and of the equal and inalienable rights of all members of the human family" as recognised by the *Universal Declaration of Human Rights*.

1.3 The right of two adults to marry, irrespective of gender, is a reflection of the human rights of equality and to equal protection of the law, freedom of religion (which includes freedom to be secular) and freedom from discrimination on the grounds of sexuality or gender. The right to be treated with dignity and the right to freedom from arbitrary interference with family matters are also relevant.

1.4 At present LGBTI couples do not have the same legal rights as married couples in Australia, as explained further below, even where their relationship is registered. Since the amendments made to the Marriage Act in 2004, LGBTI couples do not have the right to marry in either a civil or religious ceremony. For these reasons, LGBTI couples therefore do not have equal protection of the law. They are discriminated against by Commonwealth legislation on the grounds of their sexuality or gender. Their rights to marry and to a married family life are restricted arbitrarily.

1.5 The European Court has emphasised that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship. The restrictions on LGBTI couples marrying need to be removed in order to protect and respect their human rights as members of the 'human family'.

1.6 Originally the *Marriage Act* was not limited to marriage between a man and a woman. The definition of 'marriage' as meaning "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" was added in 2004, together with some consequential changes (see Schedule).

1.7 For those changes to be reversed back to the way the legislation originally read from 1961 to 2004 would, in our view, have no deleterious impact upon Australian law or society. Reversing the changes should also be undertaken by the Parliament without a divisive public opinion poll, as was done in 2004.

1.6 Within a Commonwealth which is not based on any specific religion (nor indeed upon any faith at all), at the very least, civil marriage and any services related to civil marriage should be available, without discrimination, to all couples regardless of their sexual orientation or gender identity.

1.7 There is no hierarchy of human rights. The right to express one's religious beliefs does not necessarily 'trump' other rights, such as the right to be free from discrimination, but must be considered in context. A secular government should not necessarily privilege the right to act on religious views above other human rights. **Where protection is desired for particular behaviour it will be relevant to what extent that behaviour impacts on the rights of others or, conversely, reflects respect for the rights of others.**

1.8 Should exceptions be granted to those who say that their religious beliefs make it unpalatable for them to provide goods or services to persons whose behaviour demonstrates views contrary to the provider's religious beliefs? ALHR believes not. Even if accommodation of a religiously-motivated individual's refusal to serve others for a reason prohibited by anti-discrimination law entails minimal cost or disruption to the customer (because they can find another provider), such accommodation should be rejected because of the harm to the customer that it would cause. The mere knowledge that the law permits self-identified 'religious' individuals to discriminate on the basis of sexual orientation or gender identity is itself an affront to LGBTI individuals and perpetuates negative stereotyping.[1] Given that discrimination on the basis of sexual orientation or gender identity is (generally) not permitted to those organisations or people self-identifying as holding contrary religious beliefs in other contexts, why should similar discrimination be permitted in relation to events surrounding a marriage?

1.9 To provide exceptions to the *Marriage Act* or the *Sex Discrimination Act 1984* (Cth) which allow discrimination against same sex marriages in relation to the provision of goods or services would be to favour members of every religion which is against same-sex marriage above those persons wishing to have the freedom to marry whoever they wish, **even though the behaviour to be protected or exempted (refusal to marry or provide related services to LGBTI persons):**

- does not reflect respect for the rights of others, and
- is likely to cause distress to the persons wishing to utilise the services; and
- gives a negative message to society that it is valid or reasonable for self-identified 'religious' individuals to discriminate against others on the basis of sexual orientation or gender identity.

1.10 Under Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law" and this principle extends, in the view of ALHR, to marriage equality[2]. Article 26 is a 'stand-alone' right which forbids discrimination in *any law* and in *any field regulated by public authorities*, even if those laws do not relate to a right specifically mentioned in the ICCPR.[3] Australia, as a signatory to the ICCPR, therefore has an obligation at international law to grant equal protection of the law to all persons in the context of marriage.

1.11 Commentators have pointed out that the European Court of Human Rights has in the past not agreed that same sex 'marriage' is a human right which members of the European Union are obliged to implement. However these comments fail to take into account the overlap between civil and religious ceremonies and their different levels of availability in

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1 See *The right to freedom of religion or belief and its intersection with other rights* (2015) Dr Alice Donald and Dr Erica Howard, Middlesex University, ILGA Europe website at http://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights_.pdf, accessed 2 January 2017, p 13, citing R. Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to serve others," (2014) 77 (2) *Modern Law Review*, 223 and M. Malik, 'Religious Freedom in the 21st Century,' Westminster Faith Debates, 18 April 2012 accessed at: <http://faithdebates.org.uk/debates/2012-debates/religion-and-public-life/what-limits-to-religious-freedom/>

2 See further below in Section 5 for the European Court of Human Rights decisions in this area.

3 Australian Human Rights Commission (AHRC), *Position Paper on Marriage Equality: Marriage equality in a changing World*, September 2012, available at: <https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0> , accessed 10 January 2017

different jurisdictions , and the contextual balancing process that is an essential part of human rights law, as discussed further below.

1.12 Australia should legislate to provide for civil marriages which are open to all.

1.13 It must be remembered in discussing differences between civil and religious marriages that the types of socially accepted permissible marriages, and the rights and obligations consequential upon marriage, have changed and will continue to change over time and between jurisdictions.

1.14 Thus In the past, inter-racial and/or inter-faith marriages were not permitted in many countries, a situation which has changed in some but not all countries.

1.15 Traditionally marriage has in generally been regarded as a socially recognised union between males and females. However in the past marriage has in most countries not involved equal rights between the two participants, with women's marital personal, property and parental rights, including the right to leave the marriage, lagging well behind, and being restricted by, men's rights. [4]

1.16 In developed countries, in comparatively recent years there has been a general trend towards ensuring equal rights within marriage for women, and towards easier marriage termination, for example by removing the pre-condition of fault for a divorce to be sanctioned. There has also been a general trend towards legal recognition of marriage for same-sex or non-gender specific couples. These trends are all informed by the broader human rights movement.

2. Background

2.1 ALHR's primary concern is that Australian legislation and judicial decisions should adhere to international human rights law and standards.

2.2 Many religions attempt to restrict and/or compel the behaviour of persons both:

- within that religion in ways inconsistent with the human rights of those persons; and
- externally by not extending tolerance to, or actively discriminating against, adherents of other religions (or of no religion) and other categories of people chosen on a discriminatory basis.

We believe that the promotion of other human rights in addition to the right to freedom of religion, and a more nuanced view of the accommodations that need to be made between competing human rights, can assist Australian society because it teaches people how and why to challenge those aspects of their own religions which do not accord with human rights, and fosters pluralism and tolerance as a means of promoting and preserving democracy.

2.3 We endorse the views of the Parliamentary Joint Committee on Human Rights expressed in Guidance Note 1 of December 2014[5] as to the nature of Australia's human, civil and political

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4 Even in developed countries changes are comparatively recent. In France, married women obtained the right to work without their husband's permission in 1965, and in West Germany women obtained this right in 1977 (by comparison women in East Germany had many more rights). In Spain, during Franco's era, a married woman needed her husband's consent, referred to as the *permiso marital*, for almost all economic activities, including employment, ownership of property, and even traveling away from home; the *permiso marital* was abolished in 1975: Wikipedia entry on Marriage at https://en.wikipedia.org/wiki/Marriage accessed 20 September 2017.

5 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1*: *Drafting Statements of Compatability*, December 2014, available at

rights obligations, and agree that the inclusion of human rights 'safeguards' in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.

2.4 We also endorse, and draw upon, many of the points made in the paper *The right to freedom of religion or belief and its intersection with other rights* by Dr Alice Donald and Dr Erica Howard, Middlesex University, for ILGA Europe[6].

3. Relevant international law[7]

3.1 The right to freedom of religion or belief is reflected in:

- Article 18 of the *Universal Declaration of Human Rights* 1948 (UDHR),
- Article 18(1) of the *International Covenant on Civil and Political Rights* 1966 (ICCPR),
- Article 1 of the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* of 1981 (the 'Declaration on Religion or Belief')

which include freedom to change one's religion or belief and freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief, in worship, teaching, practice and observance.

3.2 Within the EU, the right to freedom of religion or belief is reflected in:

- Article 9(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (ECHR), and
- Article 10 of the *Charter of Fundamental Rights of the European Union* (EUCFR).

3.3 Discrimination on the grounds of sexual orientation or gender identity is prohibited under the UN instruments. Article 2 of the UDHR enshrines the right to non-discrimination (that is, to be free of discrimination on grounds including sex and status), Articles 2(2) and 26 (as mentioned) of the ICCPR have been held to include sexual orientation,[8] as well as Articles 2(2) and 3 of the ICESCR.[9]

3.4 Also relevant are the rights to be treated with dignity (UDHR Preamble and Article 1) and to equal protection of the law without discrimination (UDHR Article 7), and the right to freedom from arbitrary interference with family matters (UDHR Article 12). The right to marry and to found a family expressed in Article 16 of UNHR does refer to men and women (as does Article 23 of the ICCPR) but does not necessarily imply that marriage must necessarily be solely between men and women, given the development of case law on this point in recent years.[10]

<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note* 1 which was replaced by the Guidance Note, available at< https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>, accessed 16 January 2015.

6 Donald and Howard, op cit.

7 See Donald and Howard, op cit, pp 1 to 2.

8 The United Nations Human Rights Committee has considered two cases from Australia, in which it has expressed the view that one or the other of the categories of '*sex*' or '*other status*' protect people from discrimination on the basis of sexual orientation under the ICCPR - see Toonen v Australia (488/1992) CCPR/C/50/488/1992, 1-3 IHRR 97 (1994), par 8.7.

9 Donald and Howard, op cit, p 4, footnotes 8 and 9.

10 The 1999 case of *Joslin v New Zealand* which found to the contrary appears to have been superseded by cases such as *Schalk and Kopf v Austria* [2010] ECHR 30141/04, [61] where the European Court of

4. The nature of marriage and rights under Australian law

4.1 Anthropologists, it is said, have struggled to determine a definition of marriage that absorbs commonalities of the social construct across cultures around the world.[11]

4.2 There are a variety of ways in which countries have legislated to permit same sex unions, including registered partnerships, civil unions and 'full' (but not necessarily religious) marriage.

4.3 The overlap between civil and religious ceremonies and their different levels of availability in different jurisdictions can cause confusion in the use of the word 'marriage' which is in general a term used (in the context of discussions about marriage equality) to indicate **the highest available level of socially-sanctioned union in the relevant jurisdiction, giving legal rights (both within that jurisdiction, nationally and internationally) by virtue of the status conferred**. The distinction is that legal rights flow from the existence of a marriage, rather than from the existence of various interdependency criteria in the couple's relationship. Also relevant is that those legal rights are recognised internationally in the case of marriage, but not necessarily in the case of other relationships.

4.4 In some countries, a civil marriage may take place as part of the religious marriage ceremony, although the two are theoretically distinct. Some jurisdictions allow civil marriages in circumstances which are not allowed by particular religions, such as LGBTI marriages or civil unions.[12] It is possible to have a civil marriage - or a civil divorce – which is deemed invalid by a religion. The opposite case may happen as well: two people may be recognised as married by a religious institution, but not by the state, and hence without the legal rights and obligations of marriage.

> *In various European and some Latin American countries, any religious ceremony must be held separately from the required civil ceremony. Some countries – such as Belgium, Bulgaria, France, the Netherlands, Romania and Turkey – require that a civil ceremony take place before any religious one. In some countries – notably the United States, Canada, the United Kingdom, the Republic of Ireland, Norway and Spain – both ceremonies can be held together; the officiant at the religious and civil ceremony also serving as agent of the state to perform the civil ceremony. To avoid any implication that the state is "recognizing" a religious marriage (which is prohibited in some countries) – the "civil" ceremony is said to be taking place at the same time as the religious ceremony. Often this involves simply signing a register during the religious ceremony. If the civil element of the religious ceremony is omitted, the marriage ceremony is not recognized as a marriage by government under the law.*
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> *… A civil union, also referred to as a civil partnership, is a legally recognized form of partnership similar to marriage. Beginning with Denmark in 1989, civil unions under one name or another have been established by law in several countries in order to provide same-sex couples rights, benefits, and responsibilities similar (in some countries, identical) to opposite-sex civil marriage. In some jurisdictions, such*

Human Rights found that 'it would no longer consider that the right to marry …. must in all circumstances be limited to marriage between two persons of the opposite sex'- AHRC (2012) op cit. Note also, as the AHRC comments, that '*Joslin* and *Schalk* do not prevent the recognition of same-sex marriage, they merely conclude that the ICCPR does not impose a positive obligation on states to do so.'

11 Wikipedia entry on Same-sex marriage at https://en.wikipedia.org/wiki/Same-sex_marriage, accessed 20 September 2017.

12 Wikipedia entry on Marriage at https://en.wikipedia.org/wiki/Marriage accessed 20 September 2017.

> *as Brazil, New Zealand, Uruguay, Ecuador, France and the U.S. states of Hawaii and Illinois, civil unions are also open to opposite-sex couples*. [13]

4.5 In Australia there is not precisely the same choice or distinction between civil unions and marriages. While in Australia we permit alternative processes for marriage – one civil process with a 'celebrant' and one religious process with a religious minister – both processes are intended to bring about 'marriage' and neither process is at present legally open to LBGTI couples.

4.6 In Australia there are many differences, both legally and procedurally, resulting from the difference in status brought about by either marriage, a de facto relationship, or registration of a same sex relationship. The rights that result from the status of marriage are generally automatic (which is not necessarily the case for other types of relationship) and broader in scope. Thus the *Family Law Act 1975* (Cth) protects the property rights of de facto partners who meet certain criteria (but with some differences in procedural requirements from married couples). But a de facto relationship or even a registered relationship is not recognised outside Australia in the way that an Australian marriage is recognised. And different criteria apply to de facto partnerships from state to state depending on the rights in question and social services apply different criteria to the rules under migration law. De facto relationships do not overturn an existing Will, as can occur with entry into marriage.

4.7 As Hannah Robert and Fiona Kelly comment about the Australian situation: "in all contexts, de facto relationships require significant proof".

> *While de facto couples may be able to assert some of the same rights as married couples, they often have to expend significant time, money and unnecessary heartache to do so.*
>
> *Marriage allows people to access a complete package of rights simply by showing their marriage certificate or ticking a box, and is based on their mutual promises to one another rather than proving their relationship meets particular interdependency criteria.* [14]

5. Human rights law decisions

5.1 On 26 June 2015, in the case of *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al*, the Supreme Court of the United States held that same-sex couples may exercise the fundamental right to marry in all States, and that there was no lawful basis for a State to refuse to recognise a lawful same-sex marriage performed in another State on the ground of its same-sex character.

5.2 That case was referred to later in 2015 in *Oliari and Others v Italy* [15] in which the European Court of Human Rights acknowledged that same-sex couples are in need of legal recognition and protection of their relationship. However, the court was divided as to whether the European Convention should be interpreted as embodying a positive obligation to accord appropriate legal recognition and protection to same-sex unions. The Court did hold that the Italian government had an obligation to legislate for same-sex unions (although the

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13 Wikipedia entry on Marriage at https://en.wikipedia.org/wiki/Marriage accessed 20 September 2017.

14 Hannah Robert and Fiona Kelly, "Explainer: what legal benefits do married couples have that de facto couples do not?" *The Conversation* 21 September 2017 at https://theconversation.com/explainer-what-legal-benefits-do-married-couples-have-that-de-facto-couples-do-not-83896?, accessed 25 September 2017.

15 CASE OF OLIARI AND OTHERS v. ITALY (Applications nos. 18766/11 and 36030/11), available at https://hudoc.echr.coe.int/eng#{"itemid":["001-156265"]}, accessed 19 September 2017

reasoning varied between the majority and minority) with the majority describing the right to marriage equality as a 'core' right.

5.3 Mark Fowler[16] argues that both the United Nations Human Rights Committee and the European Court of Human Rights "have held that there is no inequality where a state retains the traditional definition of marriage [as being between a man and a woman]," saying that:

> *In decisions handed down in 2010, 2014, 2015 and 2016, the court has also concluded that the European Convention on Human Rights does not impose an obligation to grant same-sex couples access to marriage.*

5.4 There are various issues that need to be considered for those cases to be seen in context. Firstly, the decisions considered rather different situations in Europe - where the legal requirements for marriage and hence the concept of marriage are not necessarily the same as in Australia, as explained in the previous section. Secondly, Fowler misunderstands the balancing nature of human rights law, apparently citing the decisions as evidence of a unchanging interpretation of human rights law, whereas the European Court has made it clear that its interpretation of same sex marriage rights involves a contextual and flexible balancing that can and will change over time in response to social changes.

Background to the *Oliari Case*

5.5 In Europe there are a variety of ways in which countries have legislated to permit same sex unions, including registered partnerships, civil unions and 'full' (but not necessarily religious) marriage.

5.6 Denmark, Norway, Sweden and Iceland used to provide for registered partnership in the case of same-sex unions, but the relevant legislation was abolished in favour of same-sex marriage.

5.7 At the time of the *Oliari case* in 2015, eleven European countries (Belgium, Denmark, France, Iceland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom) recognised same-sex marriage.

5.8 Eighteen EU member States (Andorra, Austria, Belgium, Croatia, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Liechtenstein, Luxembourg, Malta, the Netherlands, Slovenia, Spain, Switzerland and the United Kingdom) authorised some form of civil partnership for same-sex couples. In many cases that civil partnership conferred the full set of rights and duties applicable to the institute of marriage, being therefore equal to marriage "in everything but name". Estonia also legally recognised same-sex unions from 2016 under a Registered Partnership Act. Portugal does not have an official form of civil union, but the law recognises *de facto* civil unions, which have automatic effect and do not require the couple to take any formal steps for recognition.

5.9 Italy had not enacted legislation permitting same-sex couples to have their relationship recognised as a legal marriage or as a form of civil union or registered partnership at the time of the *Oliari Case,* but as a result of that case in 2016 it made provision for civil unions, which are open to same sex couples.

The Oliari case

5.10 The court in the *Oliari Case* considered whether Italy failed to comply with a positive obligation to ensure respect for the applicants' private and family life, in particular through

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16 Mark Fowler, "Same-sex marriage: What does human rights law say about claims of equality", ABC News, 1 September 2017, accessed 19 September 2017 at < http://www.abc.net.au/news/2017-09-01/what-does-human-rights-law-say-about-marriage-and-equality/8856552>

the provision of a legal framework allowing them to have their relationship recognised and protected under domestic law. The applicants complained that the Italian legislation did not allow them to marry or enter into any other type of civil union and thus they were being discriminated against as a result of their sexual orientation. They cited Articles 8, 12 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

5.11 The Court emphasised that it had already held that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.[17] It viewed marriage rights as 'core' rights and "facets of an individual's existence and identity."[18] It also noted that purportedly neutral marriage requirements available only to heterosexual couples might effectively discriminate indirectly against same-sex couples.[19]

5.12 In 2010 the applicants in *Schalk and Kopf v. Austria* had already obtained the opportunity to enter into a registered partnership. The Court in that case had only to determine whether Austria should have had provided the applicants with an alternative means of legal recognition of their partnership any earlier than it did (that is, before 1 January 2010).[20] While the Court did find that Article 14 of the European Convention taken in conjunction with Article 8 did not impose an obligation on Contracting States to grant same-sex couples access to marriage, this decision was in the context of other means of legal recognition being available to same sex couples in Austria.

5.13 The Court in the *Oliari Case* described the manner in which it would asses the principles applicable to assessing a State's positive and negative obligations under Article 8 of the Convention[21], being to strike a fair balance between the competing interests of the individual and of the community as a whole,[22] having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, and noting that the requirements of related concepts such as 'respect' (a key term in Article 8 in the context of 'respect for family life') will vary considerably from case to case.[23]

5.14 The Court also said that it would have regard to any discordance between social reality and the law, in the interests of maintaining the coherence of the administrative and legal practices within the relevant domestic system[24] as well as to the nature and extent of any obligations that would be imposed upon the State should it be found to have a positive obligation to take legislative action. [25] While the Court noted that "In the context of

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17 Par 165, referring to *Schalk and Kopf*, § 99 (2010), and *Vallianatos*, §§ 78 and 81 (2013).

18 Par 177.

19 Par 142.

20 This is according to the Court in Oliari and others v Italy, op cit, par 163.

21 Article 8: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

22 Par 160 and see 175

23 Par 161

24 Par 161

25 Par 161 and see par 173 where the court did find a conflict between Italian social mores and the Italian law. The Court also found that "an obligation to provide for the recognition and protection of same-sex unions, and thus to allow for the law to reflect the realities of the applicants' situations,

"private life" …. where a particularly important facet of an individual's existence or identity is at stake the margin allowed to the State will be restricted"[26] at the same time the Court held that "[w]here, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider."[27]

5.15 The Court noted that when *Schalk and Kopf* had been decided in 2010, there was not then a majority European consensus for legal recognition of same-sex couples (being at the time six countries out of 47).[28] That situation had changed so that by 2015 there was a 'thin' majority of 24 out of 47 EU countries which had legislated in one way or another for legal recognition of same-sex couples as well as "continuing international movement towards legal recognition, to which the Court cannot but attach some importance."[29] The Court also noted that the Italian Constitutional court had supported legislating for marriage equality, but that the Parliament had not followed the Court's recommendations, saying that "while the Government is usually better placed to assess community interests, in the present case the Italian legislature seems not to have attached particular importance to the indications set out by the national community, including the general Italian population and the highest judicial authorities in Italy."[30]

5.16 The Court's majority opinion concluded that:

> *in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' momentous interests as identified above, and in the light of domestic courts' conclusions on the matter which remained unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions."*

5.17 The Court's minority opinion supported the majority opinion but on the narrower ground that a specific legal framework providing for the recognition and protection of same-sex unions was required under Italian Constitutional law, rather than under the Convention.

5.18 In its concluding remarks the Court explained how its balancing procedure had resulted in a different position being taken from that in the earlier cases, saying that while in 2010:

> *in Schalk and Kopf the Court found under Article 12[31] that it would no longer consider that the right to marry must in all circumstances be limited to marriage between two persons of the opposite sex … as matters stood (at the time only six out of forty-seven CoE member States allowed same-sex marriage), the question whether or not to allow same-sex marriage was left to regulation by the national law of the Contracting State. The Court felt it must not rush to substitute its own judgment in place of that of the*

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would not amount to any particular burden on the Italian State be it legislative, administrative or other. Moreover, such legislation would serve an important social need – as observed by the ARCD, official national statistics show that there are around one million homosexuals (or bisexuals), in central Italy alone." – par 173.

26 Par 162

27 Par 162

28 Pars 163 and 191.

29 Par 178

30 Par 179

31 "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

> *national authorities, who are best placed to assess and respond to the needs of society. It followed that Article 12 of the Convention did not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage (§§ 61-63). The same conclusion was reiterated in the more recent Hämäläinen (cited above, § 96), where the Court held that while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples.*

5.19 That is, the European Court of Human Rights has since 2010 acknowledged that the right to marry should not necessarily be limited to marriage between persons of the opposite sex. It had not generally regarded this interpretation (of Article 12) as imposing an obligation upon EU States to legislate for marriage equality, but in the *Oliari Case* the majority regarded Article 8, in the light of domestic Italian courts' supporting conclusions, as imposing a positive obligation upon the Italian Government to provide a specific legal framework providing for the recognition and protection of same-sex unions.

6. What does 'freedom of religion or belief' mean?

6.1 The international instruments do not themselves define "freedom of religion" nor "freedom of belief." However it is generally agreed that "freedom of religion and belief":

(a) includes the freedom to hold secular or atheistic beliefs; and

(b) is further divided into the right to hold or change a belief or no belief (which is unlimited, having no impact on others), and the right to manifest one's beliefs (which, because of potential impact upon others, must be balanced against other rights).[32]

6.2 In relation to the freedom to hold secular or atheistic beliefs, the United Nations Human Rights Committee has stated that Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief, and is not limited to traditional religions.[33] The European Court of Human Rights has also given a wide interpretation to the meaning of religious beliefs as including non-religious beliefs such as pacifism, veganism and atheism[34] and religious or philosophical convictions or beliefs

> *if they attain a certain level of cogency, seriousness, cohesion and importance; are worthy of respect in a democratic society; are not incompatible with human dignity; do not conflict with fundamental rights; and, relate to a weighty and substantial aspect of human life and behaviour.*[35]

6.3 **References in this paper to 'religious' beliefs therefore include references to non-theistic and atheistic beliefs and philosophical convictions within the meanings given by the European Court of Human Rights.**

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32 Donald and Howard, op cit, p 2. Note that there is no absolute right to 'freedom of conscience' because this is used as a justification for various manifestations of religious behaviour, such as refusal to enlist in the military, or provide abortions, and has thus been held by European courts (though not by the Human Rights Committee of the United Nations) to be related rather to manifestation of religious belief, not to the simple holding of religious belief: see Donald and Howard, op cit, p 10 and following.

33 Human Rights Committee, *Comment 22: The right to freedom of thought, conscience and religion (Article 18)*, par 2

34 Donald and Howard, op cit, p 2.

35 Donald and Howard, op cit, p 2.

6.4 It must also be remembered that there is a great range of differentiation within traditional religious beliefs and organisations and that it is important not to attribute any specific views to every member of a religious community.

7. Principles to be followed in legislation

7.1 Legislation should represent an **appropriate and proportionate response** to the harms intended to be remedied by the legislation, and adherence to international human rights law and standards is one indicator of proportionality. [36]

7.2 Legislation should not privilege the followers of one religion or belief against another, nor against those who choose no religion. Legislation should not discriminate between 'religions' or beliefs. Any protection or restriction relating to 'religion' should be 'generic'.[37]

7.3 In applying human rights law, Donald and Howard point out that European case law establishes the principle that **there is no hierarchy of rights amongst human rights**, "meaning that in each instance, an attempt [must be] made to maximise each of the rights engaged and to ensure that none is inappropriately sacrificed."[38]

7.4 Similarly, respect for the right of others to believe, or not believe, is a principle to be applied when assessing the value of behaviour which seeks to be protected. **Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.** Proponents of intolerant religions cannot expect tolerance for their intolerance. Donald and Howard describe this principle as 'respecting the believer rather than the belief.'[39] This is related to the wider principle of fostering pluralism and tolerance as a means of promoting and preserving democracy.[40]

7.5 That is, as the European Court of Human Rights has held,

> *Those who choose to exercise the freedom to manifest their religion … cannot reasonably expect to be exempt from all criticism*.[41]

This is because the criticism is of their views, not of them as individuals. The criticism of beliefs that are freely chosen is not a breach of human rights. This is not the case with criticism of, or refusal to provide services to, a person because of an inherent personal characteristic - which clearly amounts to personal discrimination on the basis of that characteristic.

7.6 The logical conclusion from the principles mentioned above is that constraints upon manifestations of religious freedom, and constraints sought upon other freedoms by those wishing to manifest their own religions or beliefs, should in both cases be proportional to the harm identified. Donald and Howard note that:

> *in determining whether an interference with the right to manifest one's religion is justified … the restriction must have a legitimate aim and the means used to achieve*

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36 See generally Law Council of Australia, *"Anti-Terrorism Reform Project"* October 2013, <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf> accessed 2 October 2014.

37 See Donald and Howard, p 17.

38 Donald and Howard, op cit, p I and see the text on page 7 relating to footnotes 27 and 28.

39 Donald and Howard, op cit, p 17.

40 Donald and Howard, op cit, p 18.

41 Larissis and others v Greece (1998) Nos 23372/94, 26377/94 and 26378/94, quoted in Donald and Howard, op cit, p 17.

> *that aim must be proportionate and necessary. This means that a fair balance needs to be struck between the rights of the individual and the rights of others.*[42]

7.7 They note also that in European case law:

> *The proportionality analysis – the balancing act - is highly contextual and fact-specific and precludes making abstract determinations about competing rights or the outcome of any specific case.*[43]

8. Valid Restrictions

8.1 The right to manifest one's religion or belief can validly be restricted, according to Articles 9(2) of the ECHR and 18(3) of the ICCPR, if the restriction is prescribed by law and is necessary[44] for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others.

8.2 Other freedoms which are relevant to the intersection with 'religious' freedom are: freedom of expression, freedom of assembly, freedom from racism, freedom from sexual discrimination, and the right to be free from discrimination (to the extent necessary to secure the enjoyment of the other rights referred to in the relevant international or European instrument)[45].

8.3 No 'freedom' can be truly experienced in the absence of safety. If one feels unsafe, for example because of racist or religious hate speech against one's group, one's own freedoms are being unreasonably restricted and, conversely, it is justifiable to restrict the behaviour which is unreasonably impinging upon one's own freedoms.

9. Reasonable Accommodation

9.1 Similarly, other rights can validly be restricted to allow or accommodate appropriate and proportional manifestations of religious belief. However, in accordance with the contextual principles mentioned above, it is relevant whether the 'religious' manifestation itself amounts to a beneficial or a harmful activity. Is the manifestation requiring accommodation a 'diversity-friendly' expression of religion? As the Special Rapporteur on Freedom of Religion or Belief has said, 'the purpose of reasonable accommodation is not to 'privilege' religious or belief-related minorities, at the expense of the principle of equality.'[46]

9.2 ALHR believes that there is no 'right of conscientious objection' for persons holding discriminatory 'religious' beliefs to:

- refuse to provide goods or services to persons because of those persons' sexual orientation or gender identity, or
- vilify persons because of those persons' sexual orientation or gender identity.

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42 Donald and Howard, op cit, p i.

43 Donald and Howard, op cit, p i.

44 Article 9(2) adds: 'in a democratic society.' The European Court of Human Rights has held that 'necessary in a democratic society' means that the interference must fulfill a pressing social need and must be proportionate to the legitimate aim pursued. This means that there must be a reasonable relationship between the aim of the restriction and the means used to achieve that aim – see Donald and Howard, op cit, p 2.

45 Donald and Howard, op cit, pp 3 – 4.

46 Interim Report of the Special Rapporteur on Freedom of Religion or Belief (2014) cited in Donald and Howard, op cit, pp 15-16, accessed 10 January 2017 at <http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>.

9.3 It is legitimate in Australian society for employers to have the aim of providing goods or services on a non-discriminatory basis, so that access to lawful goods and services is guaranteed to everybody. A desire by some employees to manifest the discriminatory aspects of their religion by refusing service to customers on the basis of the customers' sexual orientation or gender identity is not a sufficiently compelling justification to allow a discriminatory practice.

9.4 Even if accommodation of a religiously-motivated individual's refusal to serve others for a reason prohibited by anti-discrimination law entails minimal cost or disruption to the customer (because they can find another provider) it should be rejected because of the harm to the customer that it would cause. The mere knowledge that the law permits 'religious' individuals to discriminate on the basis of sexual orientation or gender identity is itself an affront to LBBTI individuals and perpetuates negative stereotyping.[47]

10. Proposed Solemnisation Exemptions

10.1 ALHR opposes the inclusion of exemptions to the principle of non-discrimination in any amendments to the *Marriage Act*, especially in relation to the solemnisation of marriage.

10.2 Equal rights under the law will not be afforded to the LGBTI community if amendments are passed to identify LGBTI relationships – and/or any religion - as a justifiable basis for discrimination.

Civil celebrants

10.3 ALHR strongly opposes the creation of a right for civil celebrants to refuse to marry LGBTI couples. Civil celebrants conduct the vast majority of weddings in Australia and as their role is secular and not religious, they should not be exempt from anti-discrimination law due to personal convictions, whether religious or otherwise.

10.4 Civil celebrants are not granted any other exemptions from anti-discrimination law in the context of marriage legislation and so this provision unfairly targets the LGBTI community.

10.5 The role of a civil celebrant is not related to religion and therefore exemptions are not connected to religious freedom but rather would establish a 'freedom to discriminate'. The creation of such an exemption undermines the equal status of LGBTI Australians.

10.6 To allow the refusal of service based on religion in such a manner unfairly privileges the right of a civil celebrant to act in a discriminatory manner because of their discriminatory beliefs. To create such an exemption reinforces the notion that lesbian, gay, bisexual, transgender, intersex and queer people deserve second class rights because of their gender or sexuality and that to hold discriminatory beliefs against such people, and act on those beliefs, is valid and reasonable behaviour. This is a divisive and intolerant attitude which should not be enshrined in Australian Commonwealth legislation.

Ministers of religion

10.7 Ministers of religion have no obligation to solemnise a marriage, and indeed can impose additional 'religious' conditions over and above the legal requirements.[48] As stated in the

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47 See Donald and Howard, op cit, p 13, citing R. Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to serve others," (2014) 77 (2) *Modern Law Review*, 223 and M. Malik, 'Religious Freedom in the 21st Century,' Westminster Faith Debates, 18 April 2012 accessed at: <http://faithdebates.org.uk/debates/2012-debates/religion-and-public-life/what-limits-to-religious-freedom/>

48 Section 47 of the Marriage Act: Nothing in this Part: (a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage; or (b) prevents such an authorised

Commonwealth Government's *Guidelines on the Marriage Act 1961 for Marriage Celebrants:*

> *Where a marriage is solemnised by a minister of religion of a recognised denomination, the minister may use any form and ceremony recognised as sufficient by the denomination.*[49] *Such celebrants are not authorised to solemnise ceremonies other than for the recognised denomination that nominated them and in accordance with the rites or form and ceremony recognised by that body. A registration under this category confers no authority to solemnise ceremonies of a minister's own devising. Therefore any deviation from a form of ceremony recognised by a religious organisation needs to be approved by the religious organisation concerned.*
>
> *A minister of religion of a recognised denomination is not under any obligation to solemnise any marriage and may impose additional requirements (such as attendance at services or Church counselling) as a condition of solemnising the marriage.*[50]

Thus religions such as Catholicism are, for example, not obliged to solemnise the marriages of divorced people on the basis that this would be against their beliefs – even though Australian society overwhelmingly supports the right to divorce.

To create a further exemption from LGBTI marriages in the Marriage Act for ministers of religion – as has been suggested - is both legally without purpose and further highlights the LGBTI community as a target for discrimination.

Similarly, religious bodies and organisations are already able to refuse goods and services to LGBTI couples under existing religious exemptions to anti-discrimination laws – see for example Sections 37 and 38 of the Sex Discrimination Act.

Defence Force chaplains

10.8 It is particularly concerning that a person employed by a government department, let alone the very large Department of Defence, should be allowed to discriminate against any person on religious grounds.

10.9 The creation of an exemption for Defence Force chaplains to refuse to marry members of the LGBTI community will only sanction and encourage discrimination within the Commonwealth Public Service. Indeed, an exemption will highlight, alienate and harm those members of the Defence Force who serve proudly but also identify as LGBTI, and will discourage members of the LGBTI community from seeking employment in Defence.

10.10 In a secular country like Australia, Defence Force chaplains are public servants who owe duties to their employer and other public servants. Those duties should be superior to any personal right to express their own religion in ways that discriminate against others.

11. Unforeseen consequences?

A number of arguments have been put that to allow persons to marry irrespective of their gender (as was arguably possible up until 2004) may have unforeseen consequences.

We set out those arguments and our responses below.

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celebrant from making it a condition of his or her solemnising a marriage that: (i) longer notice of intention to marry than that required by this Act is given; or (ii) requirements additional to those provided by this Act are observed.

49 Subsection 45(1) of the Marriage Act.

50 July 2014, p 21, available at https://www.ag.gov.au/FamiliesAndMarriage/Marriage/marriagecelebrants/Pages/Celebrant-resources.aspx, accessed 6 October 2017.

LGBTI couples already have the same legal rights as married couples in Australia

There are very real legal differences between marriage and de facto or registered relationships in Australia, as explained by Hannah Robert and Fiona Kelly.[51]

Basically, with 'marriage' – whether celebrated as a civil or religious union – a person obtains various State and Federal legal rights based purely on the fact of their status as a married person. With other registered or non-registered relationships it is generally still necessary to prove one's relationship before obtaining those rights and, often, this is a repeated effort for de facto LGBTI couples working or travelling interstate. For example, a de facto relationship registered in NSW is evidence of that fact in NSW but is not binding on the Family Court.

It will limit religious freedom

Whose religious freedom are we talking about? Bear in mind that:

1. religious freedom includes the right not to espouse a religion – to be secular and not be subjected to other peoples' religions, and
2. religious freedom in the sense of the right to express one's religion (or secularity) must be balanced against other human rights.

So, through the religious freedom lens, we need to consider the impact of marriage equality, or of not allowing marriage equality, on the freedoms of all involved, not only the freedoms of service providers.

Of primary importance is that the parties wishing to marry must have their freedoms respected and that includes their religious freedoms to be married in a religion that permits marriage equality, or to be married with no religion, as an intrinsic aspect of their rights to exercise their own religious freedom.

Under section 47 of the Marriage Act, ministers of religion have no obligation to solemnise any marriage, and so to create a specific exemption for them in relation to LGBTI persons is both legally unnecessary and selects the LGBTI community as a target for discrimination.

When LGBTI marriages become permitted by law, then where a religion so permits – as does the Quaker religion – ministers of that religion will be free to solemnise the marriages of LGBTI couples. However unless section 47 of the Marriage Act is amended, there would be no obligation upon ministers of other religious denominations to marry LGBTI couples if that denomination does not permit such marriages.

Religious bodies and organisations are already able to refuse goods and services to LGBTI couples under existing religious exemptions to anti-discrimination laws. For example, in NSW the law grants any "private educational authority" immunity from homosexual discrimination laws with respect to employees and applicants for employment. Similar exemptions exist under Commonwealth laws, for example in Section 37 of the Sex Discrimination Act.

This situation will not change because of a 'yes' vote or with LGBTI civil marriages. As Robyn Whitaker states:

> *What is clear …. is that no one can compel any official church leader in Australia to perform marriages against its own policy, and no church will be forced to change its current marriage policy, rituals or doctrines*.[52]

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51 "Explainer: what legal benefits do married couples have that de facto couples do not?", *The Conversation*, 21 September 2017, accessed 3 October 2017 at <https://theconversation.com/explainer-what-legal-benefits-do-married-couples-have-that-de-facto-couples-do-not-83896?>

To refuse to extend exemptions to individuals who self-identify as having opposed religious views (for example so they do not have to provide services with respect to marriages of LGBTI persons) may limit the expression of those individuals' religions – but in a balanced and justifiable manner, taking into account the harms that would be caused by allowing them to express their own religion in a discriminatory manner, and bearing in mind the rights of the parties wishing to marry to exercise their own religious freedoms and family rights.

It will limit free speech. It will become illegal to oppose marriage equality in word or even thought. If the state redefines marriage, it also redefines how you can speak, think, advocate and believe about marriage.

Legislation does not and cannot limit how people think. Freedom of private, unexpressed belief is an essential aspect of both freedom of religion and of freedom of speech.

But expression of one's beliefs through speech or action is not privileged above other human rights and has to be weighed against the rights of others that might be impacted, and the potential harms caused by that expression. In Australia, unlike in America, freedom of speech is not enshrined in our constitution. The common law in Australia has identified an implied freedom of political communication but those propounding freedom of speech in Australia are wrong to state that it is a freedom that trumps any other human right or is found expressly in our constitution in an unqualified way.

From 1961 to 2004, the Marriage Act did not contain a definition of marriage as being between a man and a woman and during that time none of these arguments or concerns were put forward.

Legislation is also unlikely to prohibit expression of opinions contrary to marriage equality, or even advocacy against marriage equality, so long as the speech involved does not amount to vilification. And anti-vilification law is often legislated to make it hard for a plaintiff to prosecute. For example, in NSW a defendant to a vilification complaint can rely on multiple defences including public acts "*done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter*": s 49ZT of the NSW Anti-Discrimination Act.

Religious clerics will not be able to refuse to celebrate marriages that they do not approve of without being in breach of the law

This would not be the situation unless existing exemptions for those holding religious ceremonies (discussed above) are removed by any amending legislation, which is extremely unlikely.

Marriage celebrants will not be able to refuse to celebrate marriages that they do not approve of without being in breach of the law

This may well be the case under any amending legislation. ALHR believes this is the correct outcome as people should not become marriage celebrants if they hold prejudices about which persons should be allowed to marry.

Granting a legal right to marriage celebrants to refuse to marry LGBTI couples is no different to accepting that they should have a right to refuse to marry an inter-racial or inter-religious couple should the celebrant's religious beliefs be against such marriages.

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52 'If Australia says 'yes', churches are still free to say 'no' to marrying same-sex couples', *The Conversation, 2 October 2017, at* https://theconversation.com/if-australia-says-yes-churches-are-still-free-to-say-no-to-marrying-same-sex-couples, accessed 3 October 2017

Private service providers will not be able to refuse to provide goods and services in relation to weddings they don't approve of without being in breach of the law

That is already the situation in that anti-discrimination laws protect LGBTI Australians from being discriminated against by businesses or public officials. ALHR believes that this is the correct approach.

Our society has evolved to the point that we no longer accept that private service providers should be able to refuse service or entry to any group which is identified on a discriminatory basis (such as "non-whites"). This means that our society should not accept any purported 'right to refuse' service to people based on their being a member of the LGBTI community.

It will lead to an officially sanctioned 'de-gendering' of marriage

Yes. ALHR believes that this is a desirable and necessary outcome in order to realise equality before the law for all members of our community.

It will lead to changes in what is taught in schools

There is no connection whatsoever between the curriculum in public schools and amending the Marriage Act to allow marriage equality. If this is a reference to the 'safe schools' programme, that is not a compulsory part of the Australian curriculum either, and is not related to the issue of marriage equality[53]: see this Conversation Fact Check.

We cannot comment on what is taught in the curricula of religiously-based schools. However it should be noted that, as one writer says, the religious concept of marriage already differs from the civil concept of marriage:

> *… the passage of marriage equality will have no impact on religious teaching on marriage ethics. It will merely continue our history of divergent and wider views of marriage.* [54]

As mentioned in paragraph 1.15 above, even in first world countries the nature of marriage as a source of rights and obligations has changed substantially over the last fifty or sixty years. The consequence of the continuing distinction between civil and religious marriage is that:

> *Religious communities can continue to make decisions about their own ethical and moral standards for relationships. Marriage equality won't change that. But they should also respect the changed moral compass of Australian society with regard to marriage.*[55]

Note also the exemptions for religious educational institutions in section 38 of the Commonwealth *Sex Discrimination Act*. Subsections (1) and (2) allow discrimination by such institutions in employment and independent contractor relationships and subsection (3) allows discrimination to avoid affront to religious susceptibilities 'in connection with' education or training:

> *(3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by*

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53 Bill Louden, "Fact Check: will Safe Schools be 'mandatory' if same-sex marriage is legalised?" *The Conversation*, 2 October 2017 at < https://theconversation.com/factcheck-will-safe-schools-be-mandatory-if-same-sex-marriage-is-legalised-84437>, accessed 3 October 2017.

54 Timothy W Jones, "Breaking news: marriage has very little to do with religion (and vice versa)", *The Conversation*, 15 September 2016 at https://theconversation.com/breaking-news-marriage-has-very-little-to-do-with-religion-and-vice-versa-63041, accessed 3 October 2017.

55 Timothy W Jones, "Breaking news: marriage has very little to do with religion (and vice versa)", *The Conversation*, 15 September 2016 at https://theconversation.com/breaking-news-marriage-has-very-little-to-do-with-religion-and-vice-versa-63041, accessed 3 October 2017.

an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

It will impact upon parental rights

There is no legal connection between parental rights and amending the Marriage Act to allow marriage equality.

If the reference is to changes in curricula: parents have no direct rights over the curriculum that is taught in public schools. We cannot comment on the situation in religiously-based schools.

It will impact upon employment

Under Australia's anti-discrimination laws, churches already enjoy very wide-ranging exemptions allowing them to hire and fire on the basis of sexual orientation, marital status and other personal characteristics, as described above (section 38 of the Sex Discrimination Act). While we do not agree that this is desirable, the situation is unlikely to change.

The ability to marry will not of itself impact on that nature of any person's employment relationship or employment responsibilities.

We note that the Catholic Church has said that it will not employ, or will dismiss if already employed, persons married to LGBTI partners. [56]

It will impact upon retirement homes

The religious bodies exemptions described above permit discrimination in employment by religious aged care facilities. If religious aged care facilities wish to be able to reject married LGBTI couples, it is possible that they are able to do so under existing discrimination law exemptions – except if Commonwealth funding is involved (see section 37(2) of the Sex Discrimination Act). However ALHR does not agree that this is desirable and supports non-discrimination in nursing and retirement home entry.

It will impact upon business

This would appear to be the case only if employers wish to discriminate against employees married to LGBTI partners. Where employers do not wish to discriminate, it is likely rather that they will find employee well being and productivity enhanced in a workplace which is not discriminatory. The recognition of one's family life and status is crucial for the existence and well-being of an individual and for their dignity.

If the meaning of this argument is that anti-discrimination provisions will have a negative effect upon business income, we fail to see how this argument can be made out.

It will affect the freedoms of all Australians, not just professional clerics

It will only affect the freedoms of Australians who wish to act in a discriminatory manner on the basis of a person's sexuality or gender, contrary to existing anti-discrimination legislation. Other Australians will not be affected.

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56 Michael Koziol, "Married Sunday, fired Monday: Churches threaten to dismiss staff who wed same-sex partners", *Sydney Morning Herald* 20 August 2017, at http://www.smh.com.au/federal-politics/political-news/married-sunday-fired-monday-churches-threaten-to-dismiss-staff-who-wed-samesex-partners-20170817-gxy4ds.html

European Court of Human Rights decisions do not support marriage equality as a human right imposing positive obligations

This argument misunderstands the dynamic and contextual nature of human rights law which balances the rights of governments to legislate in the best interests of the community, on the one hand, against the impact on individuals when governments fail to legislate so as to reflect social realities and that failure results in discriminatory or harmful treatment of those individuals in breach of their human rights.

The European Court of Human Rights has noted how the social acceptance and support for marriage equality has grown over the years and in 2015 in the case of *Oliari and Others v. Italy* [57] the Court required that Italy legislate to allow same sex unions (although the reasons given by the majority and minority differed.) As a result, in 2016 Italy introduced civil unions, which had previously not been possible, and which are open to LGBTI couples.

About ALHR

ALHR was established in 1993 and is a national network of over 800 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees as well as specialist national thematic committees.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international human rights law in Australia in order to

- Promote and support lawyers' practice of human rights law in Australia.
- Promote Federal and State laws across Australia that comply with the principles of international human rights law.
- Engage with the United Nations in relation to Australian human rights violations.
- Engage internationally to promote human rights and the rule of law.

Through the provision of training, education, publications, CLE courses, conferences, seminars and mentoring, ALHR assists members to continue to develop their knowledge of human rights law and incorporate human rights principles into their areas of legal practice in Australia.

57 op cit.

Schedule – 2004 Amendments to the Marriage Act 1961 (Act No. 126)

1 Subsection 5(1)

Insert:

marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

2 At the end of section 88B

Add:

(4) To avoid doubt, in this Part (including section 88E) ***marriage*** has the meaning given by subsection 5(1).

3 After section 88E

Insert:

88EA Certain unions are not marriages

A union solemnised in a foreign country between:

(a) a man and another man; or

(b) a woman and another woman;

must not be recognised as a marriage in Australia.