



Law Council
OF AUSTRALIA

Supplementary Submission: Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill

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

30 January 2017

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About the Law Council of Australia

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

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

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

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

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

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

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- Mr Arthur Moses SC, Treasurer
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- Mr Geoff Bowyer, Executive Member

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

Acknowledgement

The Law Council is grateful for the assistance of its National Human Rights Committee in the preparation of this supplementary submission.

Executive Summary

1. Thank you for inviting the Law Council to appear before the Select Committee (**the Committee**) on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (**the Exposure Draft**) on 23 January 2016.
2. In response to questions arising from the Committee and evidence provided to the Committee by the Wilberforce Foundation, the Law Council has prepared this supplementary submission to further inform the Committee's consideration of the Bill.
3. The focus of this supplementary submission is to provide the Law Council's views on the following issues raised during the Law Council's appearance before the Committee:
 - The United Nations Human Rights Committee's (**UNHRC**) decision in *Joslin v New Zealand*¹ (**the Joslin case**) where the UNHRC found that 'a mere refusal to provide for marriage between homosexual couples' did not constitute a breach of a State Party's obligations under the *International Covenant on Civil and Political Rights* (**ICCPR**);
 - The concept of 'balancing of harms' when dealing with competing human rights;
 - The concept of a 'single entry point' for marriage celebrants; and
 - The case of *Christian Youth Camps and Anor v Cobaw Community Health Services Ltd and Ors*² (**the Cobaw case**), the dissenting judgment of Justice Redlich and the issue of religious liberty in the commercial arena.
4. In short, the Law Council considers that:
 - The increased number of States that recognise same-sex marriages in the nearly two decades since the *Joslin case* was decided, together with jurisprudence concerning the significance of the principles of equality and non-discrimination may suggest that the approach of the UNHRC in that case may no longer be followed.
 - A proportionality approach should be adopted in determining whether human rights may justifiably be limited. The balance of harms may be taken into account as part of a structured proportionality analysis and when determining how two rights may be adjusted to accommodate each other.
 - A 'single entry point' system for celebrants should not be supported. In the Law Council's view, there is no proper basis for affording an exemption to civil celebrants. The proposed single entry point system is, in essence, concerned with the practical administration of such an exemption in State law; it is no answer to whether the exemption should be afforded in the first place. The Law Council also notes that the province of Saskatchewan, Canada ultimately did not adopt a single entry point system.

¹ Human Rights Committee, *Joslin v New Zealand*, Communication No.902/1999, UN Doc CCPR/C/75/D/902/1999 (2002).

² *Christian Youth Camps and Anor v Cobaw Community Health Services Ltd and Ors* [2014] VSCA 75.

- Justice Redlich's decision in the *Cobaw case* was in dissent. Justice Neave who, along with President Maxwell, formed the majority in the *Cobaw case*, relied upon international jurisprudence as support for the proposition that protections afforded to freedom of religion are generally weaker in the commercial sphere.

The Joslin case

Committee question and context

5. During the Law Council's appearance the Committee Chair raised the following for the Law Council's further consideration:

I go particularly to the Joslin case and their comments associated with that where they make the point in their concluding remarks that it is not discriminatory for a state to afford another form of relationship recognition but not marriage. They also make the comment during their report that identical treatment is not a requirement for nondiscrimination.

...

Where [the United Nations Human Rights Committee] specifically consider marriage they have found - and it is consistent in their jurisprudence - that a state has no obligation under article 26 [of the International Protocol on Civil and Political Rights] to provide for same-sex marriage if they provide alternate forms of protection and recognition of a relationship. That position has also been supported by the European Court of Human Rights in a number of landmark decisions as recently as last year. So, I would welcome a supplementary submission by the [Law] Council, because that appears to be far more directly related to the issue at hand and balancing of rights...³

Law Council response

6. Australia's international human rights obligations with respect to the rights to equality and freedom from discrimination are particularly relevant to same-sex marriage. These obligations are outlined in articles 2, 23 and 26 of the ICCPR.
7. Article 2 of the ICCPR provides that State parties must respect the ICCPR rights of all people without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It also obliges States parties to adopt such laws or other measures as may be necessary to give effect to the rights; and to ensure that any person whose rights or freedoms under the ICCPR are violated, have access to an effective and enforceable remedy.
8. Article 23(2) states that '[t]he right of men and women of marriageable age to marry and to found a family shall be recognised'.
9. In addition, article 26 of the ICCPR outlines the right of all people to equality before the law and guarantees protection against discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³ Evidence to Senate Select Committee on the Marriage Amendment (Same-Sex Marriage) Bill, Melbourne, 23 January 2017, 2-3 (Senator Fawcett).

10. In the *Joslin case* the UNHRC found that 'a mere refusal to provide for marriage between homosexual couples' did not constitute a breach of a State Party's obligations under the ICCPR.⁴
11. This decision was based on an interpretation of the language in article 23(2) of the ICCPR which refers to 'men and women' as the primary point of reference. The UNHRC found that the relevant article meant that States were only required to recognise the union of a man and woman wishing to marry each other.
12. The United Nations Human Rights Committee did not expressly consider how article 23(2) relates to the non-discrimination and equality rights in articles 2 and 26 of the ICCPR.
13. The European Court of Human Rights came to a similar conclusion in *Schalk and Kopf v Austria*.⁵ However, it found that 'it would no longer consider that the right to marry enshrined in article 12 must in all circumstances be limited to marriage between two persons of the opposite sex'.⁶
14. While these cases conclude that the ICCPR does not impose a positive obligation on States Parties to recognise same-sex marriages, it does not prevent them from doing so.⁷
15. The Law Council considers that articles 2 and 26 of the ICCPR support a definition of marriage between 'two people'. It also considers that the issue of marriage equality may be further considered and defined by international jurisprudence taking into account State practice and principles of equality and non-discrimination developed subsequently to the *Joslin* decision.
16. International law accepts that expressions used in a treaty may evolve and change. The International Court of Justice affirmed that a treaty is not static and is '*open to adapt to emerging norms of international law*'.⁸ International human rights instruments such as the ICCPR are interpreted and applied as 'living instruments'.⁹ A treaty is not frozen and should be interpreted in light of contemporary conditions.¹⁰ The scope of the treaty may change as the treaty evolves.¹¹

⁴ Human Rights Committee, *Joslin v New Zealand*, Communication No.902/1999, UN Doc. CCPR/C/75/D/902/1999 (2002), [8.2]–[8.3].

⁵ *Schalk and Kopf v Austria* [2010] ECHR 30141/04.

⁶ *Ibid* [61].

⁷ *Ibid*; see also Kate Eastman, Law Council of Australia, *Committee Hansard* (3 May 2012) 20 in Legal and Constitutional Affairs Legislation Committee, *Senate Committee Report: Marriage Equality Amendment Bill 2010* (Cth) 21.

⁸ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Reports 7, [112], [140] and *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Reports 213, [64]–[66].

⁹ *Tyrer v United Kingdom* (1978) Series A, No. 26 [31] (European Court of Human Rights).

¹⁰ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31(3)(b).

¹¹ See also e.g. *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, CCT60/04; CCT10/05 [2005] ZACC 19; United Nations Human Rights Committee, *Yeo-Bum Yoon and Mr Myung-Jin Choi v Republic of Korea*, Communication Nos. 1321/2004 and 1322/2004, UN Doc CCPR/C/88/D/1321-1322/2004 (2006), [8.2]. See also *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 171.

17. In this context, it is important to note that the expansion of States that recognise same-sex marriages since the *Joslin case* was decided¹² and the significance of the principles of equality and non-discrimination may suggest that the approach of the UNHRC in that case may no longer be followed.

The balance of harms when dealing with human rights

Committee question and context

18. During the Law Council's appearance the Committee Chair raised the following for the Law Council's further consideration:

*The second point, which you have alluded to, is the balance of rights. A number of submitters have looked at what they are calling the 'balance of harms', which is: how can you support one right whilst minimising the harm, or the impact, on the other right? Is that a concept that you have explored or support?'*¹³

...

our own senior courts, as well as international jurisprudence, have identified that somebody's religious belief is also central to their core being -

...

and that to deny them that identity is of equal harm because it is an absolute in the case of forcing them to do something against their will.

19. The Law Council notes that the Institute for Civil Society submission to the Committee dated 13 January 2017 which supports protection for conscientious objectors to refuse to supply commercially available goods or services related to marriage to same-sex couples who are to be married. The Institute for Civil Society use the phrase 'the balancing of harms' to describe the process of the balancing of the harm that may be caused to same-sex couple as a result of a person refusing to provide a good or service for their wedding due to religious or conscientious conviction (including emotional harm and practical harms such as having to find another supplier) and the harm that may be caused to the 'conscientious objector' (including being forced to go against their belief or conviction or fines or public backlash against the company).¹⁴
20. The Institute for Civil Society argue that 'the balance should be resolved in favour of protecting the religious conscientious objector' citing in particular an article by Dr Greg Walsh in the forthcoming issue of the University of Tasmania Law Review. Dr Walsh cites Professor Thomas C Berg's article *What Same-Sex-Marriage and*

¹² At the time the case was decided, only one country (the Netherlands) had legalised same-sex marriage. Since then, a further twenty countries have done so. See Australian Human Rights Commission, *Submission to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (18 January 2017), 11.

¹³ Evidence to Senate Select Committee on the Marriage Amendment (Same-Sex Marriage) Bill, Melbourne, 23 January 2017, 3-4 (Senator Fawcett).

¹⁴ Institute for Civil Society, *Submission to Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (13 January 2017) 10-11.

Religious-Liberty Claims Have in Common, in which the Professor opines that 'the harm to the objector from legal sanctions is greater and more concrete' than the harm to the same-sex couple who 'can go to the next entry in the phone book or the Google result'.¹⁵

Law Council response

21. The Law Council supports a proportionality approach in determining whether human rights may justifiably be limited. The balance of harms is an issue that may be taken into account as part of a structured proportionality analysis and when determining how two rights may be adjusted to accommodate each other.
22. In general terms, a structured proportionality analysis involves considering whether a given law that limits important rights has a legitimate objective and is suitable and necessary to meet that objective, and whether – on balance – the public interest pursued by the law outweighs the harm done to the individual right.¹⁶
23. A structured proportionality analysis is applied in certain contexts by the High Court, including when it considers whether a law infringed the constitutional right to political communication.¹⁷ This is also the approach favoured by the Parliamentary Joint Committee on Human Rights¹⁸ and the Australian Law Reform Commission.¹⁹

Right to freedom of thought, conscience and religion

24. The right to freedom of thought, conscience and religion is protected under article 18 of the ICCPR which provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to *have* or to *adopt* a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

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

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

(emphasis added)

¹⁵ Thomas C Berg, 'What Same-Sex-Marriage and Religious-Liberty Claims Have in Common' (2010) 5 *Northwestern Journal of Law and Social Policy* 206, 229.

¹⁶ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Report 129)* (2 March 2016), [2.63]; Parliamentary Joint Committee on Human Rights, *Practice Note 1* (September 2012).

¹⁷ See e.g. *McCloy v New South Wales* [2015] HCA 34 (7 October 2015).

¹⁸ Parliamentary Joint Committee on Human Rights, *Practice Note 1* (September 2012).

¹⁹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Report 129)* (2 March 2016), [2.63].

25. In interpreting the scope of permissible limitations for an individual to manifest their religion or beliefs, the UNHRC has noted:

States Parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26 [equality and non-discrimination].²⁰

26. That is, the right to freedom of religious practice may be restricted where necessary to protect the right to equality and non-discrimination. However, a restriction must be necessary to achieve a legitimate objective and proportionate.

27. In determining whether proposed exemptions are necessary and proportionate, the Law Council supports the Australian Human Rights Commission's proportionality analysis in relation to the Exposure Draft.²¹ Key findings of this analysis include:

- Allowing celebrants and ministers of religion to refuse to solemnise a marriage on the grounds of 'conscientious belief' (proposed ss 47(3)(b)(iii) and 47A(1)(b)) is not a reasonable and proportionate limitation on the rights to equality and non-discriminations because such refusal would not necessarily be linked to the manifestation of a particular religion or belief in worship, observance practice and teaching.²² The inclusion of a conscientious belief exemption for marriage celebrants is also inconsistent with the approach taken in domestic and international human rights law to the acts of public authorities or non-government entities of the state,²³ and
- In the absence of further justification for the inclusion of the proposed religious body or religious organisation exemption, the exemption for bodies established for religious purposes in section 37(1)(d) of the *Sex Discrimination Act 1984* (Cth) is sufficient.

Single entry point

Committee question and context

28. During the Law Council's appearance the Committee Chair raised the following for the Law Council's further consideration:

My last point for you to consider, and perhaps come back to the committee on, is: in Canada, Saskatchewan have come up with a solution called a 'single entry point' - for example, somebody seeking a registrar to conduct a service, rather than approaching an individual business or licence holder, would approach a local authority. That authority would have a list of people who provide unrestricted services or some who have particular reasons they do not want to perform a service. The person would never be offended or feel harmed because they would just put an application in to the local authority, and the authority would say, 'Here is a panel of four or five who are in your area who could fulfil that function.' Do

²⁰ Human Rights Committee, *General Comment No 22: Article 18 - Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4, (1993), [8].

²¹ Australian Human Rights Commission, *Submission to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (18 January 2017).

²² *Ibid.*, 16-17; 19-23.

²³ *Ibid.*, 22.

*you see that that is the kind of balance that may achieve the freedom of the person's religion but also not offend or harm the person of the same sex who wishes to marry?*²⁴

Law Council response

29. For the reasons outlined in the Law Council's submission with respect to the proposed exemption for civil celebrants, a 'single entry point' system for celebrants is not supported. In the Law Council's view, there is no proper basis for affording an exemption to civil celebrants. The proposed single entry point system is, in essence, concerned with the administration of such an exemption in practice; it is no answer to whether the exemption should be afforded in the first place.
30. The issue of a single entry point system in the context of same-sex marriage was considered *in obiter* by the Saskatchewan Court of Appeal in *Re Marriage Commissioners Appointed Under the Marriage Act (Re Marriage Commissioners)*.²⁵ At issue in that case was a blanket exemption for marriage celebrants from solemnising same-sex marriages. Justice Richards noted that marriage commissioners were 'agents of the provincial government' and further stated that allowing a religious exemption would 'undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis'. The court did note (in obiter) that a single entry point system would be a 'less restrictive'²⁶ one and was not 'impractical, overly costly or administratively unworkable'.²⁷ However, it must be emphasised that the court's discussion of a single point entry system was 'not necessarily a determination that any such system would ultimately pass full constitutional muster'.²⁸ Thus, the court did not resolve the question of whether a single entry point system would violate the guarantee of equality in the Charter of Rights and Freedoms: though the measure may be 'less restrictive' it still may run contrary to the guarantee of equality.
31. The Law Council also understands that Saskatchewan did not pursue a single entry point system and that all marriage commissioners in that province are required to perform same-sex marriages.²⁹
32. In any event, as the Law Council noted in its submission to the Committee, the role of a civil celebrant is fundamentally secular.³⁰ As the majority said in *Re Marriage Commissioners*,

*... [p]ersons who voluntarily choose to assume an office, like that of marriage commissioner, cannot expect to directly shape the office's intersection with the public so as to make it conform with their personal religious or other beliefs.*³¹

²⁴ Evidence to Senate Select Committee on the Marriage Amendment (Same-Sex Marriage) Bill, Melbourne, 23 January 2017, 4 (Senator Fawcett).

²⁵ *Re Marriage Commissioners appointed under the Marriage Act* [2011] SKCA 3.

²⁶ *Ibid.*, [85].

²⁷ *Ibid.*, [87].

²⁸ *Ibid.*, [89].

²⁹ Evidence to Senate Select Committee on the Marriage Amendment (Same-Sex Marriage) Bill, Canberra, 25 January 2017, 23 (Ms Lee Carnie).

³⁰ Law Council of Australia, *Submission on the Marriage Amendment (Same-Sex Marriage) Bill* (19 January 2017), 9.

³¹ *Ibid.*, [97].

The Cobaw case

Issue

33. During the Wilberforce Foundation's appearance before the Committee on 23 January 2016, Mr Brohier noted the following in relation to the *Cobaw case*:

Firstly, there is the reported decision of Christian Youth Camps v Cobaw, where Christian Youth Camps was approached by a homosexual support group and asked for the use of their camp. They declined because of their religious conviction and they were sued in the anti-discrimination tribunal. The matter went to the full court of the Supreme Court and they were continued to be found to have breached the anti-discrimination act. There is a very strong dissent, and I would commend it to the committee, by Justice Redlich, and I can provide a copy to the committee, which sets out the issue of the importance of religious identity in faith and practice. It also sets out, contrary with respect to what has fallen from the Law Council, that if you enter into the commercial arena it does not mean you lose your right to your religious liberty, and Justice Redlich makes that clear at paragraphs 102 to 105 and following of his judgement.³²

...

They are predominantly personal rights. Again, there is a significant discussion of this issue of how much personal human rights can be attached to corporations, in the case of the CYC and Cobaw, and the majority said it did not attach to the religious corporation and Justice Redlich said it did. What is clear from that case is that the burden of these rights are attached to individuals³³.

...

No, I am suggesting that the right is a right of thought, conscience and religion. Your conscience, which may be informed by religion and may be informed by other convictions, should give you a liberty in this area. Justice Redlich said at 102:

... in balancing rights human rights law has in general given less precedence to religious belief in the marketplace.

So that is somewhat similar to what the Law Council is saying. But then he said:

But under human rights law, even in the commercial sphere, it may be necessary in some circumstances for religious belief to prevail over other rights.

And he referred to the case of Brockie, which is a Canadian case. That was a printing case. A printer was asked to print some material that he found offensive. The court held:

... this order shall not require Mr Brockie or Imaging Excellence to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed.

³² Evidence to Senate Select Committee on the Marriage Amendment (Same-Sex Marriage) Bill, Melbourne, 23 January 2017, 7 (Mr Frederick Brohier).

³³ *Ibid.*, 8.

So what Justice Redlich was saying there was you should not compel a person to act contrary to his or her core beliefs even in a commercial sphere. We would say it should not just be religious; it should be conscience as well because there are many people in this area who will have a view about same-sex marriage which is not religiously motivated but comes from other factors.³⁴

Law Council response

34. The Law Council notes that Justice Redlich's decision in the *Cobaw case* was in dissent.³⁵ Justice Neave who, along with President Maxwell, formed the majority in the *Cobaw case*, relied upon international jurisprudence as support for the proposition that protections afforded to freedom of religion are generally weaker in the commercial sphere.³⁶ President Maxwell noted that 'as a matter of established principle, courts should favour a construction of legislation which accords with Australia's obligations under international law.'³⁷
35. Further, the Law Council notes that currently there are no exemptions afforded to non-religious bodies or organisations in other contexts where freedom of religion might be engaged – pharmacists, for example, cannot decline to provide birth control on the basis of a religious objection to extra-marital relationships. To legislate such an exemption, in the absence of further justification, appears to be a disproportionate response, particularly in light of the exemption for bodies established for religious purposes in section 37(1)(d) of *Sex Discrimination Act 1984* (Cth).

³⁴ Ibid., 10.

³⁵ Christian Youth Camps sought leave to appeal in the High Court, which was refused. The appeal was based upon Justice Redlich's dissent. See *Christian Youth Camps Limited v Cobaw Community Health Services Limited and Ors* [2014] HCATrans 289 (12 December 2014).

³⁶ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75, at [431].

³⁷ Ibid, [192].