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Committee Secretary
Select Committee on the Exposure Draft of the *Marriage Amendment (Same-Sex Marriage) Bill*
Department of the Senate
PO Box 6100
Canberra ACT 2600

RE: Exposure Draft of the *Marriage Amendment (Same-Sex Marriage) Bill*

The Human Rights Law Alliance welcomes this opportunity to submit for the Australian Christian Lobby to the Select Committee on the Exposure Draft of the *Marriage Amendment (Same-Sex Marriage) Bill*.

The Human Rights Law Alliance implements legal strategies to protect and promote fundamental human rights. It does this by resourcing legal cases with funding and expertise to create rights-protecting legal precedents. The Alliance is especially concerned to protect and promote the right to freedom of thought, conscience and religion or belief. During 2016, the Alliance aided more than 15 legal cases, and allied lawyers appeared in State Tribunals and Magistrates, District and Supreme Courts as well as the Federal Court. The Alliance was founded with the assistance of the Australian Christian Lobby.

With more than 80,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party partisan or denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory parliaments.

Should the Committee pursue oral submissions from the submitters in relation to this document, the Director of the Human Rights Law Alliance and submission's primary author, Martyn Iles, would be available to do so.

Terms of Reference

This submission deals with the human right to freedom of thought, conscience and religion or belief, and the issue of same-sex marriage. It then discusses the relationship between these issues. These findings will then be applied specifically to the terms of reference of this inquiry, to determine the adequacy or otherwise of the government's proposed amendments to the *Marriage Act 1961* and *Sex Discrimination Act 1984* and to inform proposals for other amendments.

The Human Right to Freedom of Thought Conscience and Religion or Belief

Freedom of thought conscience and religion or belief is a fundamental human right. It is one of the only positive rights specifically contained in the Australian Constitution at section 116. A strong and inclusive statement of the right is also made under Article 18 of the International Covenant on Civil and Political Rights (ICCPR) to which Australia is signatory. Article 18 is one of a small collection of non-derogable rights in times of public emergency¹ and limitations upon are only permissible so far as is "necessary."² This is a high legal standard that goes beyond thresholds such as "reasonable" or "reasonably necessary," for example.

Freedom of religion in particular has a long history in free democracy and common law. The first clause of Magna Carta was a freedom of religion clause. Australia's own High Court has said:

*Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society*³

Consistent with Article 18 of the ICCPR and section 116 of the Constitution, their honours went on to clarify that the content of the freedom not only extends to belief, **but also practise**.

*What a man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of his legal immunity, for his freedom to believe would be impaired by restriction upon conduct to which he engages in giving effect to that belief. **The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself.***⁴
(emphasis added).

The belief and practice elements of religious freedom were recently acknowledged by Redlich J of the Victorian Court of Appeal. His honour also clarified that the right was fundamental to a pluralistic society and was a central tenet of a person's identity:

*The precepts and standards which a religious adherent accepts as binding in order to give effect to his or her beliefs are as much a part of their religion as the belief itself. The obligation of a person to give effect to religious principles in everyday life is derived from their overarching personal responsibility to act in obedience to the Divine's will as it is reflected in those principles. Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity. The person must, within the limits prescribed by the exemptions, be free to give effect to that faith.*⁵

It is important to note that the freedom of thought, conscience and religion or belief is not merely a right to believe. If that position is accepted, then it is no right at all. Governments cannot regulate to control the secret, internal thoughts and beliefs of any citizen, but only manifestations of those beliefs. That is why the history of this freedom bears out the reality that it is a right not merely to belief, but to practise. The ICCPR is clear:

¹ Clause 2, Article 4 ICCPR.

² Clause 3, Article 18 ICCPR.

³ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at [6] per Mason CJ & Brennan J.

⁴ *Ibid.*

⁵ *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 at [561].

*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.*⁶

Clause 4 of the Article goes on to extend the right to parents to ensure the moral and religious education of their children in accordance with their own convictions.

An important characteristic of religious freedom is its fundamental nature. It is often said that freedom of thought, conscience and religion or belief is the most fundamental freedom of all. This is reflected in the primacy given to religious freedom as the right protected by the First Amendment in the US Constitution and one of the only rights positively granted by the Australian Constitution.

All of the democratic freedoms, including speech, expression and association, depend on freedom of thought, conscience and religion or belief. When a citizen is free to speak, they speak their beliefs and convictions. When free to express, they live out their convictions in practice. When free to associate, they form official and unofficial groups around common causes borne out of their beliefs and convictions. Freedom of thought, conscience and religion or belief is therefore most fundamental. To revive the words of Mason CJ and Brennan J, it is for this reason “the essence of a free society.”

Freedom of religion also has a limiting effect on the power of governments, guarding against instincts of totalitarianism, censorship and control. If citizens are free to locate their beliefs and convictions outside of the state itself and give effect to them, then the state concedes that certain things lie outside of its jurisdiction. This paradigm guarantees freedom and promotes the autonomy, self-determination and flourishing of the people which has long been a treasured and relatively unique feature of Western-style democracy.

Finally, freedom of religion, like all human rights, is held by every individual. It does not accrue to a person by virtue of their holding office as clergy or some other religious role. It is not dependent on a person's attachment to an institution, whether a church, mosque or temple. It is a human right that goes to the core of every person's identity; the realm of belief and conscience. If freedom of religion is the essence of a free society, it is also the essence of individual freedom. The realm of the mind, its convictions and conscience is one into which no State authority should treat lightly.

A Human Right to Same-sex Marriage?

The first law allowing for marriage between persons of the same sex came into force on 1 April 2001 in the Netherlands. Since that time, same-sex marriage has become legal in 21 nations, either nationally or within specific jurisdictions.

Recent arguments for same-sex marriage in Australia, including those made by the Australian Human Rights Commission, have included claims that it improves human rights. In some cases it is said that same-sex marriage is itself a human right or has recently become a human right.

In international law, the right to marriage is contained in Article 23 of the ICCPR. The Article was the subject of the United Nations Human Rights Committee ruling *Joslin v New Zealand*⁷ which established the principle that there is no right to same-sex marriage under the covenant.

⁶ Clause 1, Article 18 ICCPR.

⁷ Human Rights Committee, Views: Communication No 902/1999, 75th sess, UN Doc CCPR/C/75/D/902/1999 (17 July 2002) ('*Joslin v New Zealand*').

There are no other sources of international law respecting which Australia has substantive obligations that confer anything like a right to same-sex marriage.

Many human rights lawyers refer to jurisprudence of the European Court of Human Rights (ECHR) as a source of persuasive human rights principles. Although the ECHR has no authority in respect of Australian laws, the European Convention on Human Rights which that Court applies contains rights that are often expressed similarly to those in the ICCPR.

The ECHR has ruled repeatedly that there is no such thing as a right to same-sex marriage. It has further ruled that the right to non-discrimination and equality before the law does not produce a right to same-sex marriage. It has also found that, although Europe contains the highest number of states that have enacted same-sex marriage laws, there is no consensus in Europe that would result in the creation of a right to same-sex marriage. These positions were repeated as recently as June 2016 in the case of *Chapin & Charpentier v France* - a unanimous ruling of the ECHR. The same position was affirmed by the Court in *Oliari v Italy* (2015), *Hamalainen v Finland* (2014), and *Schalk & Kopf v Austria* (2010).

Accepting that there is no standalone right to same-sex marriage, some allege that the right to non-discrimination and equality before the law is the source of the right. Claims that laws which define marriage as a man-woman relationship infringe this right fundamentally misunderstand the nature of the right to non-discrimination.

The right to non-discrimination and equality before the law is a right to protection from unjust discrimination. Unjust discrimination is a differentiation of treatment having its basis in a wholly arbitrary, subjective or unreasonable justification.

The United Nations Human Rights Committee, in General Comment 18 on Article 26 of the ICCPR (the non-discrimination article), has said:

...the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁸

The reasonable and objective criteria test is often enlivened where legal rights or immunities apply to a particular category of person. For example, the criteria to be an aged-pension recipient ought only to be a person's age. It is not unjust discrimination to exclude a 64-year old from aged pension entitlements on the basis that they are too young to qualify because the relevant criteria for the differentiation of treatment is **age** and the relevant benefit is an **aged** pension. If, however, the criteria were to be expanded so as to limit the aged pension to persons who are over the age of 65, are not lesbians and are not of Chinese descent, then two of the three criteria are unjustly discriminatory. This is because neither Chinese descent nor a lesbian sexuality can have any conceivable relevance to the criteria for receiving an **aged** pension. The criteria are arbitrary.

The legitimate purpose criteria is often enlivened where rights may be perceived to clash. For example, the criteria that a person employed by a political party be a member of that party may appear to limit equal opportunity for employment candidates, infringing their right to non-discrimination. The legitimate purpose test applies in such a case, however, because the political

⁸ UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available at: <http://www.refworld.org/docid/453883fa8.html>, paragraph [13].

party in question is pursuing its own right to freedom of association. Such norms are widely understood and legislated for.

With respect to the same-sex marriage issue, neither the reasonable and objective criteria test nor the legitimate purpose test are infringed where marriage is defined as a man-woman relationship. If marriage is a child-centred institution it reasonably follows that marriage is not a category of relationship that can reasonably apply to same-sex relationships which do not bear even the possibility of producing children. Every child has a mother and a father, therefore marriage is a mothering and fathering arrangement. Many people now have a very different vision of marriage, but it does not make this view unjustly discriminatory or mean it is in breach of human rights. The criteria are not arbitrary or subjective.

Regarding the legitimate purpose test and same-sex marriage, treating homosexual and heterosexual relationships differently is not necessarily unjust discrimination if the purpose of the differentiation is legitimate under the covenant. For example, a civil celebrant who happens to be a Christian may not wish to solemnise a same-sex wedding in order to avoid injury to their sincerely held beliefs, in pursuit of the right to freedom of thought, conscience and religion or belief.

The outcome of this contest ought to be especially clear in light of the fact that same-sex marriage is not a human right at international law whereas freedom of thought, conscience and religion or belief is a fundamental right of utmost importance.

Consequences of Changing the Legal Definition of Marriage

The law defining marriage is fundamental in nature, as opposed to peripheral. In other words, it is a foundation off of which several other laws, norms and expectations are derived. Changes to it therefore do not occur in isolation. They produce consequences.

Consequences for Family

International human rights law sees marriage as much more than a loving relationship. It defines it as “the natural and fundamental group unit of society”,⁹ thereby noting its significance not only to the couple involved, but to the norms and expectations around which society itself is ordered. It is the natural and fundamental basis for society because it is the means by which society itself is naturally produced and continued in the creation of children. It is also the means by which society coheres together and orders itself (apart from coercive state intervention) in the establishment of families. These observations rightly place marriage as the smallest link, being between two persons of the opposite sex, in the large and varied social fabric of any community.

It is on this basis that changing the definition of marriage is also an indirect change to the definition of family and, in important respects, the ordering of society.

The most obvious derivative from the definition of marriage is the definition of the family. International law confers the right to marry and establish a family together, as a compound right.¹⁰ As a benefit that flows from marriage, demands for equality would require that same-sex couples also have access to means of producing a family. This is only achieved through practises such as commercial surrogacy, including international surrogacy agreements, anonymous sperm donation, customisable birth certificates and donor eggs to name a few. Under these conditions, far from being a natural and fundamental group unit, family becomes an arbitrary amalgamation of persons

⁹ International Covenant on Civil and Political Rights Article 23(1).

¹⁰ International Covenant on Civil and Political Rights Article 23(2).

based largely on the preferences of the most powerful at the expense of the rights of the most vulnerable. Those with the power to change birth certificates, procure children, and order their lives get to define what is a "family." The result is inevitably children who are deprived of the right to be known by and raised by their parents wherever possible even though these are rights supported in international human rights law to which Australia is signatory.¹¹

Consequences for Gender

A second derivative from the definition of marriage is gender norms. The complementarity of male and female is uniquely defined in the marriage law. Where gender is erased from the fundamental group unit of society, it logically follows that gender becomes increasingly confused at all levels in the community. It is for this reason that the gender revolution and the same-sex marriage movement are linked and gain traction together.

Under these consequential changes, kinship and gender become increasingly irrelevant to society. The risk of serious injustices, especially against children, is amplified.

Consequences for Freedom

Consequences also flow for fundamental freedoms when the law on same-sex marriage is changed. This includes the freedom of thought, conscience and religion or belief, as well as freedom of association, expression and speech.

Law is normative and educative. It sets the expectations, morals and principles around which society is ordered and teaches them to the community. This is the law's undeniable pedagogical effect.

It must further be noted that law carries force. When something is law, it becomes a requirement.

If there are those who wish to believe, act and order their lives in a way that is contrary to the law, they will ordinarily have to either be in conflict with it, or live under the narrow protection of exemptions.

Changing the law on marriage gives force to certain ideas in society. As demonstrated, these include the notions that gender, kinship, sexuality and family must not matter to marriage, family or society in general. The reality is, however, that many people will continue to believe in the importance of these things and, particularly on account of religious and conscientious beliefs, will order their lives and act accordingly. These actions will include the outworking of fundamental freedoms including speech, expression, association and thought, conscience and religion or belief.

The inevitable conflicts that arise from this dynamic must be resolved. In the absence of legal protections for such beliefs and expressions, they will be marginalised and persecuted. Anti-discrimination laws will deem any differentiations in the treatment of same-sex marriages and families unlawful. Expressions of belief in a gender binary will be captured by vilification laws where transgenderism or gender identity is a protected attribute. Organisations and associations that seek to promote such beliefs will be vulnerable to adverse treatment, even forced closure.

The consequences for freedom are wide-reaching and extreme. This is perhaps best demonstrated through the use of examples, categorised below, and accompanied by subsequent recommendations.

¹¹ Convention on the Rights of the Child, Articles 7 & 9.

[Note: the small selection of examples included below is just a small sample of the many hundreds available to demonstrate the legitimacy of the need for various protections].

Protections for Beliefs about Marriage

Freedom of conscience and religion for ministers of religion and civil celebrants

As discussed, freedom of thought, conscience and religion or belief is a fundamental human right. Where it may be violated due to changes in the law on marriage, associated protections are essential.

For many ministers of religion, it would be a violation of their conscience and/or sincerely held religious beliefs to participate in or perform a same-sex marriage. No minister of religion should therefore be compelled by law to solemnise any marriage.

Recommendation 1: Ministers of religion must not be compelled to solemnise any marriage.

This protection cannot be for solely ministers of religion whose denominations officially endorse marriage as between a man and a woman. Freedom of conscience, thought and religion or belief is an individual right carried by all persons, and some denominations do not specifically endorse a certain view about marriage. Other denominations which may endorse same-sex marriage in the future will almost certainly have dissenting ministers.

Recommendation 2: The individual conscience or religious belief of ministers must be protected irrespective of denominational affiliation.

Because freedom of conscience, thought and religion or belief is a right to be enjoyed by all individuals, it must be open to civil celebrants to not be compelled to solemnise any marriage, but to conduct their work in accordance with their sincerely held conscientious or religious beliefs.

Recommendation 3: No civil celebrant shall be compelled to solemnise any marriage.

Freedom of conscience and religion for persons who are not ministers of religion or civil celebrants

Business Owners

Many businesses provide goods and services to the wedding, family and associated industries. This includes food supply, creative services, photography, venue hire, catering, event hire, event management, floristry, fashion, and any number of other services. These services may be provided to weddings, honeymoons, engagement events, anniversaries, babymoos, christenings, and others. Other businesses may be engaged in the family sector through fertility services, counselling, adoption and foster care among others.

Where a business is a small business operated by individuals with a genuinely held conscientious or religious belief about marriage and/or family, or where the business is a large business with governing principles that express a genuinely held conscientious or religious view about marriage and/or family, such businesses must be free to operate in accordance with those beliefs.

Recommendation 4: Reform or override anti-discrimination laws to the extent that they would otherwise render it unlawful to provide services to the wedding, family and associated industries in accordance with sincerely held conscientious or religious beliefs about marriage, family, sexuality and/or gender.

*Example: Liberty Ridge Farm*¹²

Liberty Ridge Farm is the home of Robert & Cynthia Gifford. The Gifford's opened their farm at certain times in the day and occasionally permitted functions to be held there. A 2014 New York Supreme Court case concerns the Gifford's refusal of a request by a lesbian couple to host their same-sex wedding. The Gifford's were fined \$13,000 and ordered "to implement re-education training classes designed to contradict the couple's religious beliefs about marriage."

*Example: Ashers Bakery*¹³

The McArthur family turned down an order for a cake bearing the slogan, "support same-sex marriage" on the basis that they could not write a political message which conflicted with their religious and conscientious convictions. The customer, who they had served on a number of previous occasions, sued them under Northern Ireland equality laws. They have lost at first instance (District Court) and on appeal to the Belfast Court of Appeal where it was ruled they could be compelled to make political statements which violated their conscience. The case is now on appeal to the Supreme Court of the United Kingdom.

*Example: Barronelle Stutzman*¹⁴

Barronelle Stutzman is a florist from Washington State who served a client and friend, Robert Ingersol, for many years. Shortly after same-sex marriage became legal in Washington state, Ingersol asked if Stutzman would do the flowers for his same-sex wedding. Stutzman sat down with Ingersol and explained that she was able to continue to serve him in any capacity, except in respect of his wedding on account of her conscience and religious convictions. She provided references to two other florists whom she could recommend for the occasion. Ingersol and the Washington State Attorney-General have sued Stutzman successfully at the County Court. She appealed the case to the Washington State Supreme Court and is now awaiting judgement.

Individuals

Individuals who have a genuinely held conscientious or religious belief about marriage and who either express that belief or do or abstain from doing any act in accordance with that belief face discrimination on account of that belief.

Recommendation 5: It must be unlawful to discriminate against any person either directly or indirectly, in employment, academic or trade or professional qualifications, engagement as a contractor, education, administration of government programs, membership of any group, provision of goods or services or facilities, or to subject to other disadvantage on the basis of a sincerely held conscientious or religious belief about marriage, family, sexuality and/or gender.

*Example: Archbishop Julian Porteous*¹⁵

The Catholic Archbishop of Tasmania distributed a pastoral letter under the banner of the Australian Catholic Bishops Conference titled "don't mess with marriage." The booklet went to Catholic schools amongst other places and was cautious and reasonable in its tone. Then Executive Director of Australian Marriage Equality, Rodney Croome, called on supporters to lodge anti-discrimination complaints against the Archbishop. A transgender person, Martine

¹² <http://www.adflegal.org/detailspages/case-details/gifford-v.-erwin>

¹³ <http://www.christian.org.uk/case/ashers-baking-company/>

¹⁴ <https://www.adflegal.org/detailspages/case-details/state-of-washington-v.-arlene-s-flowers-inc.-and-barronelle-stutzman>

¹⁵ <http://freedomwatch.ipa.org.au/tag/julian-porteous/>

Delaney did so and the complaint was ongoing until withdrawn after some 8 months. The Tasmanian government has since considered reforming the Anti-Discrimination Act.

Example: Brendan Eich¹⁶

Eich is credited as the inventor of JavaScript and co-founded the Mozilla project, the Mozilla Foundation and the Mozilla Corporation. It was revealed in 2014 that Eich had donated \$1,000 to the Californian Proposition 8 Campaign which supported man-woman marriage. Online campaigns against him and public controversy ultimately reached the point where he resigned as CEO of Mozilla. There was no evidence that Eich had ever discriminated against any gay person in his work.

Employees

Employees may from time to time come into contact with duties concerning which their conscientious belief about marriage and/or family is relevant, in the course of their employment. This could include employees in government registry offices, or in private companies or charities. Such employees may, due to sincerely held conscientious or religious beliefs about marriage, have to abstain from doing some act in the course of their employment in order to prevent injury to their rights of conscience.

Recommendation 6: It shall be unlawful to treat or propose to treat any employee or candidate for employment unfavourably due to their abstaining or proposing to abstain from doing some act in the course of their employment in order to prevent injury to their conscience on the grounds of a sincerely held conscientious or religious belief about marriage, family, sexuality and/or gender.

Example: Kelvin Cochran¹⁷

Cochran was the City of Atlanta Fire Chief before being terminated by the city and the Mayor of Atlanta over his Christian beliefs. Cochran had written a Christian book for men in his private time and used it as a Bible study resource. The book contained some material on the Christian view of sexuality and marriage in the context of what he believed to be men's calling as husbands and fathers. His termination was based on that content. His case has been heard in the Federal Court and is awaiting judgement.

Example: Richard Page¹⁸

Page was sacked from his job as a magistrate in the United Kingdom and suspended from his role as a non-executive director of the Kent & Medway National Health Service and Social Care Partnership Trust for his comments about family during a BBC television interview. Page said that, in his opinion, the best possible setting for an adopted child to be raised was with a mother and a father. The Trust Chairman said that the move was in order to "challenge stigma." Page is mounting a legal challenge to his suspension.

Associational rights, and freedom of conscience and religion of organisations

Charitable and non-profit organisations

Many charities and non-profit organisations are operated according to a faith-based ethos. The values inherent in this ethos were the reason many were established, and are the reason many continue to function.

¹⁶ <http://www.forbes.com/sites/tonybradley/2014/04/05/backlash-against-brendan-eich-crossed-a-line/#404ff80e24a0>

¹⁷ <http://www.adflegal.org/detailspages/case-details/cochran-v.-city-of-atlanta>

¹⁸ <http://www.christianconcern.com/cases/richard-page>

The ability of a charity or non-profit organisation to be established in accordance with certain values is essential to freedom of association and expression. Associational rights of this type must continue to be respected, regardless of any belief about marriage, family, sexuality or gender.

Importantly, their charitable status must be protected so that beliefs about marriage, family, sexuality and/or gender are not capable of being considered grounds for loss of charitable status.

Recommendation 7: It shall be unlawful for any charity or non-profit organisation to be treated less favourably in any way, including with respect to the allocation of funding and compliance requirements, due to sincerely held conscientious or religious beliefs about marriage, family, sexuality and/or gender, and the expression of any such beliefs through any reasonable action or omission done in good faith.

Recommendation 8: A sincerely held conscientious or religious belief about marriage, family, sexuality and/or gender, and the expression of any such beliefs through any reasonable action or omission done in good faith, shall not be reason for any entity to fail to satisfy the requirement in subparagraph (b)(i) of the definition of **charity** in section 5 of the Charities Act 2013 and does not have a disqualifying purpose within the meaning of s.11 of that Act.

Example: Family First New Zealand¹⁹

Family First are a political lobby group that advocate for the traditional family in New Zealand. Three weeks after same-sex marriage became law in New Zealand, they were informed by the Charities Board that their charitable status would be revoked. After a lengthy legal challenge, the New Zealand High Court ruled in Family First's favour in 2015 but declined to rule on whether Family First provided a "public benefit."

In addition, it would be injurious to the ethos and values, including the religious freedom and conscience rights of the officers and employees of the entity to be compelled to provide goods and services of the charity/non-profit entity in contravention of sincerely held beliefs about marriage, family, sexuality and/or gender. This may include relationship and family counselling, adoption and foster services, fertility services and such matters.

Recommendation 9: Reform or override anti-discrimination laws to the extent that they would otherwise render it unlawful for charities and not-for-profit entities to provide goods and services in accordance with sincerely held conscientious or religious beliefs about marriage, family, sexuality and/or gender.

Churches

The associational rights of churches to form communities that expressly share traditional beliefs about marriage, family, sexuality and/or gender, and the free speech rights needed to give expression to these beliefs must be protected.

Recommendation 10: It shall be unlawful to treat or propose to treat any church unfavourably on the basis of their tenets, doctrines and beliefs, including their expression and teaching, where they relate to issues of marriage, family, sexuality and/or gender. It shall further be unlawful to proscribe the codification and good faith expression of such sincerely held beliefs. This prohibition shall apply whether or not the beliefs are formally articulated in a statement of belief or similar document.

¹⁹ http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11473926

Recommendation 11: No church or religious body shall be in breach of any law where their facility use and hire policies are shaped around a particular view on marriage, family, sexuality and/or gender.

Associational rights relating to memberships

Most associations in Australian society have certain rules of membership which may also comply with an organisational ethos, values or purpose. The existence of such organisations is protected due to freedom of association, whilst their ability to function as associations which uphold and share certain values is protected due to freedoms such as expression and speech.

The Equal Opportunity Amendment (Religious Exceptions) Bill 2016 introduced by the Andrews Government in Victoria aimed to limit the ability of religious organisations to hire staff who share their ethos. The University of Sydney Union recently moved against two religious groups on campus that required their members to affirm a statement of faith. Such moves become more aggressive and systematic where groups hold particular conscientious or religiously held views about marriage, family, gender and/or sexuality that are contrary to a reformed marriage Act.

Recommendation 12: It shall be unlawful to prohibit any entity, association or group from adopting a genuine conscientious or religiously held belief about marriage, family, sexuality and/or gender. It shall be unlawful for any such entity, association or group to be treated less favourably or subjected to any detriment because of this belief or the good faith expression of it.

It is also the case that those who have a genuinely held conscientious or religious belief about marriage, whether as individuals or entities, have been treated less favourably in relation to professional memberships and accreditations. Trinity Western Law School in Ontario, Canada, has had its recognition by the Ontario Bar Association revoked because it requires its students to adhere to such beliefs in practice whilst studying at the law school. Trinity Western law school graduates are no longer able to be admitted to practice in Ontario.

Recommendation 13: It shall be unlawful for any professional association, professional accreditation body, or professional standards body to deny or restrict registration or membership on the ground of, or to impose any condition on registration or membership that would have the effect of disadvantaging groups or persons who have a particular conscientious or religious belief about marriage, family, sexuality and/or gender, where such belief is not an inherent requirement relating to the very nature of the membership or accreditation.

Example: Trinity Western Law School

Trinity Western University is a Christian University in British Columbia founded in 1969 that proposed to start offering a law degree. The Law Societies of Nova Scotia, Ontario and British Columbia denied accreditation to Trinity Western graduates to practise law because students and faculty of the university were asked to sign a Community Covenant that they will abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman”. The long-running legal saga that ensued saw the Nova Scotia ban overturned by a trial judge and on appeal. The Ontario ban was, however, upheld by a trial judge and on appeal. The British Columbia ban was recently overturned on appeal. The cases will likely continue to the Supreme Court of Canada.

Education and children

Same-sex marriage and its consequential redefinition of norms relating to family, gender and sexuality changes education curricula. The controversial Safe Schools Coalition program has emerged prior to the redefinition of marriage, but other jurisdictions show that even more radical and explicit

“comprehensive sexuality education” programs are the norm where same-sex marriage is legalised. Gender diversity is also embedded across curricula. Much of this content is taught without parental consent and, in Australian jurisdictions, where parents seek to remove their child from such lessons, they can be severely penalised for unjustified absences. It is the mark of an undemocratic society to put distance between the values of parents and their children, and to seek to influence children against those values. Within limits, families must be left to bring up their children in their own way.

Recommendation 14: In pursuance of the right contained in Article 18(4) of the International Covenant on Civil and Political Rights, parents must be able to take certain reasonable actions to ensure that their children are educated in accordance with their own moral and religious convictions. Parents should be able to opt their children out of any classes or activities that are in direct contravention of their sincerely held moral and religious beliefs about marriage, family, sexuality and/or gender.

Example: Chamberlain v Surrey School District²⁰

A local school board passed a resolution refusing to authorise three books in the school which dealt with same-sex parent families. The Supreme Court of Canada held that the school and its parents could not act consistent with its religious convictions in this regard, but must permit use of the books.

Example: Parker v Hurley²¹

Two couples from a school in Massachusetts raised concerns when a book about a same-sex love story and wedding was read in their children's primary school class. The Federal Court ruled that the couples could exempt their children from such activities in pursuance of their religious beliefs.

Interference in parental rights in the home to bring up their children in accordance with their moral and religious beliefs is also a concern. This interacts also with the way these beliefs might be viewed by government authorities in relation to their suitability as parents of their own children as well as adopted children and foster children. Cause for concern already exists in the Labor party's national platform as amended at the 2015 National Conference. The platform states that Labor will make it unlawful for certain discouragements of homosexual behaviour by parents in their children. Such action may be deemed “serious psychological abuse” and “domestic violence”.²²

Recommendation 15: It shall be unlawful for any government authority to treat or propose to treat any parent or child less favourably, or to take or propose to take any adverse action in relation to any parent or child on the basis of sincerely held conscientious or religious beliefs about marriage, family, gender and sexuality, and the good faith, reasonable application of those beliefs in family life and/or the raising of their children. This shall apply, for example, with respect to adoption and foster care selection processes and in decisions relating to suitability as parents, guardians and/or carers by government agencies.

Example: Bodnariu Family²³

Allegations emerged out of Norway in 2015 that 5 children had been removed from their parents, Marius and Ruth Bodnariu either wholly or partly because of concerns about the

²⁰ https://en.wikipedia.org/wiki/Chamberlain_v_Surrey_School_District_No_36

²¹ <https://berkleycenter.georgetown.edu/cases/parker-v-hurley>

²² Resolution 202R, ALP National Conference 2015.

²³ <https://www.lifesitenews.com/news/norways-child-welfare-seizes-familys-five-kids-for-alleged-christian-indoct>

“very Christian” beliefs and practises of their parents. As further details of the case and the contents of letters from Norwegian authorities came to light which elevated these concerns, a global campaign of protests, petition-signing and pressure on the Norwegian government was instigated. Ultimately, the 5 children were returned to their parents. These concerns are not isolated, as subsequently documented on SBS’s Dateline in the program entitled, “Norway’s Stolen Children?”²⁴

Family

Marriage confers a right to found a family according to international law. It is not possible to have marriage equality without also conferring the benefits that flow from marriage to same-sex marriages. This is achievable only through ethically dubious practises such as commercial surrogacy, anonymous sperm donation and assisted reproductive technologies. In some cases, provision is also made to remove the biological parent or parents from a child’s birth certificate to substitute the name of the same-sex couple who wish to become its parents, to further give the appearance of a natural family unit.

The bonds of biology and kinship are essential to a person’s identity. Those who are separated from one or both parents, or even from siblings, normally long to discover them and suffer significant anguish.

Recommendation 16: It shall be unlawful to not declare a child’s true, biological parentage on their birth certificate.

Recommendation 17: The practice of donor conception shall be illegal where the true identity of both a child’s biological parents cannot be known and recorded on the birth certificate.

*Example: Millie Fontana*²⁵

Millie is an Australian woman raised by Lesbian mothers and born as a result of donor-conception. She was denied knowledge of her biological father and speaks widely of the detrimental impact it had on her life and her concerns for the rights of children in the same situation. Millie has said, "There are certain families that have it right where they've given access to their biological parents and that is absolutely spot on and that's what I'd like to see, but there's a huge dark side regarding third-party reproduction."

*Example: Anonymous Us and Tangled Webs*²⁶

Both are support organisations for people whose lives have been affected by donor conception and surrogacy. The very existence and purpose of the groups tells its own story about the lifelong impact of these practises on children.

The ethically dubious and often exploitative practice of commercial surrogacy remains illegal in Australia for good reason. However, donor wombs and eggs are in high demand where the creation of same-sex families is increasing. Already there are calls in Australia to revisit this ban. International commercial surrogacy remains popular, though it is exploitative of poor women in developing nations and has led to several serious and high profile cases of abuse such as the Baby Gammy case. This practice also ensures many children will never know one or both parents.

Recommendation 6.3: Commercial surrogacy will remain illegal in Australia.

²⁴ <http://www.sbs.com.au/news/dateline/story/norways-stolen-children>

²⁵ <http://www.abc.net.au/triplej/programs/hack/what-life-is-like-with-two-mums/7921674>

²⁶ <http://www.tangledwebs.org.uk/tw/>; <https://anonymousus.org/>

Recommendation 6.4: Any person who procures the services of a surrogate or the services of an agency that facilitates surrogacy arrangements in a jurisdiction other than Australia shall be guilty of a criminal offense, punishable by law.

Example: Baby Gammy²⁷

Baby Gammy was the twin brother of a girl, Pipah. The twins were born to a Thai woman following a commercial surrogacy arrangement with an Australian couple. The case raised questions about the ethics of surrogacy because the couple requested the surrogate abort Gammy when it was discovered he had Down Syndrome. She refused, citing religious convictions, but the couple would only take his twin sister to Australia, leaving the surrogate to raise Gammy on her own with insufficient financial means and healthcare arrangements. It also emerged that the child's Australian father was a convicted sex-offender, having been sentenced to 3-years in jail for molesting young girls aged 7 and 10. A court has since ruled that Pipah may not be alone with her father and must be read an age-appropriate story book every 3-months that explains her father's offences.

National Security

Due to global issues around extremism and terrorism, many nations have enacted laws that prohibit the propounding of doctrines, tenets and beliefs which constitute extremism. A current example is the United Kingdom's proposed EDO framework (Extremism Disruption Orders) to combat individuals and activities who "spread hate but do not break the law." The orders would also apply to venues and facilitators who "help extremists continue their activities." The low harm threshold proposed, along with its wide reach through all religious and political activities, has raised serious concerns about impacts on free speech and freedom of religion. Calls have already been made to include teachings on marriage, family, gender and sexuality within the scope of the laws as examples of "extremism".

Recommendation 18: No particular belief about, or teaching with respect to marriage, family, sexuality and/or gender held and/or expressed in good faith shall be a basis for enlivening any law relating to national security, extremism or terrorism. Such laws will not be applied to any person or entity on this basis.

Example: Extremist Disruption Orders²⁸

Extremist Disruption Orders (EDOs) are the subject of a proposed new legislative regime in the UK. The laws have a national security function in that they purport to allow the authorities to identify and prevent extremism in its early stages through enlivening special powers to prevent persons and organisations from saying and/or doing things that promote extremism. The wording of the legislation and the definition of "extremism" is vague and broad and has concerned many religious and secular groups alike.²⁹ UK Conservative government MP, Mark Spencer, in a letter to a constituent recently said that school teachers who say that same-sex marriage is "wrong" ought to be dealt with by way of an EDO.

Conclusion

The religious freedom provisions and amendments to the *Sex Discrimination Act 1984* contained within the *Marriage Amendment (Same-Sex Marriage) Bill* are insufficient as a regime to protect human rights in Australia if same-sex marriage becomes legal. A more effective human rights

²⁷ https://en.wikipedia.org/wiki/2014_Thai_surrogacy_controversy

²⁸ <https://www.lifesitenews.com/news/christians-equated-with-terrorists-by-defenders-of-proposed-uk-law>

²⁹ <http://defendfreespeech.org.uk/>

protection regime would require the enactment of additional legislation to prevent all forms of discrimination on the basis of beliefs about marriage, family, sexuality and/or gender, and to promote the relevant rights of parents and children.

Yours Sincerely,

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