



Religious exemptions for the solemnisation of same sex unions

Constitutionality of Section 6 of the Civil Union Act, 2006 in South Africa

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EXECUTIVE SUMMARY

(a) Introduction

1. OPBP has been instructed by the Legal Resources Centre (LRC), South Africa, to prepare a report on how the issue of conscientious objection on the grounds of religion to the solemnising of same sex unions is dealt with in comparative jurisdictions. The LRC is being instructed by 'Free Gender'. Free Gender is a black lesbian organisation based in Cape Town. Founded in 2008, Free Gender aims to challenge discrimination and defend human rights.
2. The LRC are instructed to prepare a constitutional challenge to s 6 of the Civil Union Act 17 of 2006. This section provides: *"A marriage officer, other than a marriage officer referred to in section 5, may in writing inform the Minister that he or she objects on the ground of conscience, religion or belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such a civil union."* This therefore permits non-religious (state) marriage officers to refuse to conduct same sex marriages on the grounds of conscientious objection. Section 5 of the legislation, which Free Gender is not challenging, permits private religious marriage officers to be exempted from performing same sex civil unions.
3. Many state marriage officers have taken advantage of s 6 of the Civil Union Act: approximately 40% have formally informed the relevant Minister that they will not marry same sex couples. In the majority of Home Affairs offices, there is no marriage officer willing to conduct a same sex civil union.
4. As a result, same sex couples face barriers to the solemnisation of their unions that are not faced by opposite sex couples. The LRC will most likely launch this constitutional challenge in April 2018.

(b) The research questions

Question 1: Do the jurisdictions in question exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

- The LRC has asked for comparative research on both unconditional (whereby the state marriage officer can object no matter the consequences for the same sex couple, as the

South African legislation being challenged indicates) and conditional (whereby a state marriage officer may object, but the state has a responsibility to ensure that the same sex couple in question can still solemnise their union) exemptions.

Question 2: Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

- The LRC has asked for comparative research on exemptions for non-state religious marriage officers. While in some jurisdictions considered, religious marriages are recognised per se, in others, these must be accompanied by civil marriages to be legally valid. Therefore, these exemptions may have different consequences depending on the jurisdiction.

Question 3: Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

- The LRC has asked for comparative research on litigation (constitutional and otherwise) generated by these exemptions (or lack of) in the selected jurisdictions. This question requires examination of cases where the judiciary has evaluated exemptions (or lack thereof) to determine whether these strike a permissible balance between freedom of religion and the rights of same sex couples.

Question 4: For countries without exemptions, if any, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

- The LRC has asked for comparative research regarding the ways in which jurisdictions might balance freedom of religion and the rights of same sex couples, in jurisdictions that do not allow for exemptions to marriage officers (state or non-state religious marriage officers).

(c) Jurisdictions

5. The jurisdictions examined were chosen as they all provide for some form of same sex unions and simultaneously protect freedom of religion. Of the jurisdictions considered, most allow for same sex marriages. Only Northern Ireland within the United Kingdom does not allow for same sex marriages, but allows same sex couples to enter into civil partnerships. This report draws on the following jurisdictions:

- (1) The European Convention on Human Rights (Council of Europe)
- (2) The European Union
- (3) Belgium
- (4) Germany
- (5) Ireland
- (6) The Netherlands
- (7) The United Kingdom¹
- (8) Canada
- (9) USA
- (10) Argentina
- (11) Brazil
- (12) Colombia
- (13) Australia
- (14) New Zealand

(d) Summary conclusions

6. The majority of countries investigated treated state and religious marriage officers differently: the former were rarely given an exemption from performing same sex unions, whilst the latter were given an exemption, or this issue was devolved to the religion in question. This reflects the idea that state civil solemnisers are viewed as vehicles of the state. In contrast, religious solemnisers are more obviously protected under freedom of religion. This difference in treatment went to the separation of church and state in numerous jurisdictions.

¹ In the United Kingdom marriage is a devolved issue. This means that the law in relation to same-sex marriages is different in England and Wales, Scotland and Northern Ireland, hence the research questions will be answered separately for each of these within the section on 'United Kingdom'.

Table 1: Comparative express exemptions across national jurisdictions in legislation, regulation, policy and practice (research questions 1 and 2)²

	Unconditional exemption for state marriage officers	Conditional exemption for state marriage officers	Exemption for religious marriage officers
Belgium			
Germany			
Ireland			
The Netherlands			
United Kingdom ³			
Canada			
USA			
Argentina			
Brazil			
Colombia			
Australia			
New Zealand			

Key:

	No exemption
	Federal unit dependent, but majority no exemption
	Devolved to the religion in question
	Express exemption
	N/A – marriage must be civil to have legal effect
	Law is silent – constitutional provisions guarantee freedom of religion

² Please see the individual jurisdiction reports below for details. ‘Unconditional’ exemption here means an exemption which applies irrespective of whether the refusal has the effect that the same sex couple are unable to solemnise their union. ‘Conditional’ exemption here means an exemption which is permitted as long as the couple is not prevented, as a result of the refusal, from solemnising the union.

³ In England and Wales, Scotland and Northern Ireland, no exemptions are available to state marriage officers. In England and Wales, and in Scotland exemptions are available to religious marriage officers. However, in Northern Ireland civil partnerships can only be conducted by state officers, hence the issue of exemptions for religious marriage officers does not arise.

Question 1: Do the jurisdictions in question exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

7. The majority of jurisdictions provided for no such exemption, and only the Canadian Prince Edward Island jurisdiction provided an unconditional exemption from solemnising marriage on grounds of religious belief in civil services.
8. Some jurisdictions used a conditional model of exemption. This was particularly seen in a small number of states in the USA. The 'conditional model' provides that a state registrar may object on conscientious grounds but no same sex couple should be prevented, by that refusal, from having their union solemnised. For example, in North Carolina, the relevant statute provides that although registrars may recuse themselves from performing marriages on grounds of 'sincerely held religious beliefs', the chief judge of the district court in each area must ensure that marriages before a magistrate are available to be performed for at least three business days a week. A similar recommendation has been made in Colombia, permitting judges responsible for performing marriages to claim an exemption on grounds of conscientious objection, as long as there are other legal actors capable of performing the act of legal union. However, this is a non-binding recommendation, being *obiter dicta* in the concurring opinion of a single judge in the judgment that recognized same-sex marriage in Colombia.
9. Some jurisdictions emphasise that there is no exemption by imposing additional penalties on any registrar who attempts to refuse to solemnise a same sex union. This is particularly common in European states. The penalties may come in the form of employment legislation, hiring practices, or fines. For example, in Ireland a recusing marriage officer may be liable on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 6 months or both. In the Netherlands, the 2014 Act prohibited municipalities from hiring state marriage officers unwilling to perform same sex unions. Similarly, in Brazil, a refusal to perform same-sex unions can result in administrative sanctions.
10. The opposite is true in Utah, USA where recusing officials under the conditional model are specifically protected from retaliatory measures by the government.

Question 2: Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

11. No jurisdiction surveyed compels a religious minister to officiate a marriage with which they or their religious organisations disagree.
12. In New Zealand, no “marriage celebrant” - religious ministers, members of approved organisations or independent applicants - is obliged to solemnise a marriage. Moreover, religious ministers, along with members of approved organisations, have been granted a specific exemption from solemnising marriages, based on the belief of the organisation, rather than that of individuals. Wider exemptions are available in Australia to religious marriage celebrants, ministers of religion and chaplains.
13. In some jurisdictions, such as Germany and Argentina, this question was not applicable as for a marriage to have legal effect it must be conducted by a state official. Similarly, in Northern Ireland, the question is not applicable as civil partnerships can only be solemnised by state officials.

Question 3: Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

14. Although there has been litigation, no jurisdiction has found a lack of exemption for state solemnisers to be unconstitutional or contrary to the applicable human rights treaty/legislation.
15. Litigation has occurred in several jurisdictions over the existence of conditional exemptions. These claims have normally been resolved in favour of the same sex couple. A few key cases have been dismissed for failure to fulfil standing requirements, so we lack the full information on what the outcome of these cases might have been.

Table 2: Litigation generated in response to exemptions or lack thereof:

Jurisdiction	Claim	Outcome
ECHR	<p><i>Orlandi and others v Italy</i> (2017): Officials employed by municipalities refused to register same sex marriage conducted abroad.</p> <p><i>Eweida and others v United Kingdom</i> (2007) (2013): A civil public official refused to conduct same sex ceremonies.</p>	<p>A violation of Article 8 (Right to private and family life) was found.</p> <p>In the case of a clash of rights under Articles 8 and 9 (right to religion and belief) in case of conscientious objections, a broad margin of appreciation is given to states. In this case, the policy of requiring the applicant to officiate same sex unions was not indirectly discriminatory, nor did it violate Article 9.</p>
EU	No directly relevant litigation.	
Belgium	No directly relevant litigation.	
Germany	No directly relevant litigation.	
Ireland	No directly relevant litigation.	
The Netherlands	<p><i>Rb. Den Haag</i> (2013) and <i>Centrale Raad van Beroep</i> (2016): this case concerned a recusing civil servant in The Hague who was subsequently dismissed.</p> <p><i>Commissie Gelijke Behandeling, oordeel</i> (2008): This case has similar facts.</p>	<p>The court (non-constitutional) considered the ECtHR <i>Eweida</i> case, and deemed the rights of same sex couples to a legitimate aim. The Court considered that one of the “core tasks” of the civil servant in question was the performance of marriages, and that the civil servant was an external representative of the municipality which wanted to promote social acceptance of LGBTQ persons. The dismissal was therefore ruled proportionate. This was confirmed by the court of Appeals.</p> <p>The equality body gave overriding importance to the requirement of equal treatment on the basis of sexual orientation. The only way of accommodating the religious objection was to prevent the civil servant performing any marriages, which was not an option given that the officer in the case was an extraordinary civil servant for officiating marriages and therefore their “core task” was officiating marriages.</p>
United Kingdom	No directly relevant litigation, except the case of <i>Ladele v The London Borough of Islington</i> (2009) under the Civil Partnerships Act in England and Wales: This	The Court of Appeal dismissed her challenge. It held that it was legitimate for the government to pursue a policy requiring registrars to conduct civil partnerships, as part of their strong commitment against discrimination on grounds of sexual orientation. Such action would not

Jurisdiction	Claim	Outcome
	case concerned a registrar who refused to perform civil partnerships based on her Orthodox Christian beliefs, but was not accommodated.	amount to either direct or indirect discrimination on grounds of religious belief. After her application for leave to appeal before the Supreme Court was dismissed, the registrar approached the European Court of Human Rights (see <i>Eweida</i>).
Canada	There have been no constitutional challenges at the federal level. At the provincial level, claims in Saskatchewan and Manitoba respectively challenged an exemption for state officials and the revocation of the marriage licence for a refusal.	Both cases have been resolved in favour of the same sex couple. In Saskatchewan, in <i>Reference re Marriage Commissioners</i> , the court did not definitively rule on whether the potential exemption violated the rights of same sex couples, but ruled that a less restrictive system was available. In <i>J (M) v Nicols</i> , the court held that a refusal to marry same sex couples violated the principle of non-discrimination. The Manitoba cases questioned whether the revocation of the officer's licence interfered with his religious rights at all, given that he was free to register as a religious marriage officer and benefit from an exemption.
USA	<i>Barber v Bryant</i> challenged the constitutionality of Mississippi's 'Protecting of Freedom of Conscience Act' <i>Ansley v Warren</i> three couples challenged the constitutionality of North Carolina's "Recusal of certain officials" legislation.	The Federal District Court ruled in favour of the same sex couple, as the legislation was found to be repugnant to the Establishment Clause's guarantee of state neutrality as to religious matters. It was also a violation of the equal protection clause. However, in the Fifth Circuit Court of Appeals the constitutional challenge was rejected due to a lack of standing, and the order of the District Court was quashed. Appeal to the Supreme Court has been refused, thus leaving the legislation in place. The challenge was rejected on standing grounds. The plaintiffs failed to demonstrate an injury in fact necessary to establish standing.
Argentina	No directly relevant litigation.	
Brazil	No directly relevant litigation.	
Colombia	No directly relevant litigation.	
Australia	No directly relevant litigation.	
New Zealand	No directly relevant litigation.	

Question 4: In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

Table 3: Any provision for recusing state officials in national jurisdictions where there are no exemptions:

Jurisdiction	Consequence, provision or accommodation
Belgium	No provision of accommodation: state officers are expected to take a neutral attitude. There is no fixed definition of neutrality, though it is unlikely that religious objections would be accommodated.
Germany	German state marriage officers are obliged to perform same sex marriages if statutory requirements are fulfilled. In the case of recusal of a marriage officer, the registrar office (<i>Standesbeamte</i>) can be directed by the court to perform the marriage. In case of refusal, the officer may be subject to proceedings under employment law, depending on the status of the individual state marriage officer. In the only case (not reported) found in the media, the relevant refusing officer faced disciplinary proceedings.
Ireland	In Ireland, a refusal to register a legal marriage is an offence carrying a penalty, on summary conviction, of €2,000 or imprisonment for a term not exceeding 6 months or both. This is imposed when the failure to register happens without reasonable cause. The term “reasonable cause” is yet undefined, though the context indicates religious objection would not be deemed reasonable.
The Netherlands	Since 2014 new state marriage officers can only be hired if they are willing to perform same sex marriages. Marriage officers who refuse to conduct same sex ceremonies can be dismissed, though the law does not compel a municipality to take these measures.
United Kingdom	In England and Wales, and Scotland, it is unclear whether employers (local authorities) are permitted to grant individuals an exemption from any part of their registrar duties. In Northern Ireland, it is clear that if all procedural requirements are fulfilled, the registrar is obligated to register the partnership.
Canada	Officers in Saskatchewan, Manitoba and Newfoundland & Labrador, are obligated to perform same sex marriages – they must either perform those marriages or resign.
USA	The Establishment Clause requires neutrality from the state and therefore from civil servants. Therefore, most states do not accommodate religious objectors for purposes of solemnising marriages. Kentucky and Texas have a form of accommodation, though in Texas’ conditional exemption a conflict would likely arise if everybody in the country clerk’s office refused to issue a marriage license.

Jurisdiction	Consequence, provision or accommodation
Argentina	No provision of accommodation.
Brazil	No provision of accommodation. Refusal to perform a same-sex union can lead to administrative sanctions.
Colombia	No binding provision of accommodation. Only a non-binding recommendation as <i>obiter dicta</i> in the concurring opinion of a single judge in the judgment that recognized same-sex marriage. Another non-binding consultative opinion from the administrative agency that regulates notary publics denied this exemption completely for notary publics.
Australia	If marriage celebrants wish to refuse to perform same sex unions on ground of their religious beliefs, they must register as religious marriage celebrants. There is a transition period available for already registered marriage celebrants to register themselves as religious marriage celebrants.
New Zealand	No provision of accommodation: State officials are obliged to issue a marriage license unless they have reasonable cause to believe that the marriage is prohibited by the Marriage Act 1955 (Schedule 2), or the statutory requirements have not been complied with.

EUROPE

I. EUROPEAN CONVENTION ON HUMAN RIGHTS (COUNCIL OF EUROPE)

16. The Council of Europe is an international organisation comprising 47 European states. Although it does not have a legislative arm, it promulgates international Conventions to uphold its aims of human rights, democracy and the rule of law. Its judicial arm, the European Court of Human Rights (ECtHR), provides the authoritative interpretation of the European Convention of Human Rights (ECHR). The ECHR is an international treaty premised on the promotion and protection of fundamental rights. Contracting states are required to ensure that domestic legislation is compatible with the ECHR. Unlike European Union law, however, the Convention does not have primacy over national laws or direct effect.⁴ The ECtHR also affords contracting states a margin of appreciation (i.e. element of discretion) in implementing Convention rights.⁵ The ECtHR has adopted a vertical model of human rights. This means that proceedings can only be brought against contracting states.⁶
17. The ECHR is distinct from EU law, although there is some degree of overlap. Indeed, the EU has undertaken to accede to the ECHR,⁷ although accession has not yet occurred.⁸

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

Same-sex unions fall within the scope of Article 8 ECHR which concerns the ‘right to respect for one’s private and family life’.⁹ Article 8 is a qualified right. This means it can be limited by a proportionate interference by a public authority on the basis of ‘national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

⁴ Please refer to the introductory sections in the country reports on Belgium, Germany, Ireland, Netherlands and the United Kingdom for more details.

⁵ *Handyside v UK* App no 5493/72 (ECtHR, 4 November 1976).

⁶ Art 34 ECHR.

⁷ Art 6(2), Treaty on the European Union

⁸ Case Opinion 2/13 of 18 December 2014 (ECJ, 18 December 2014).

⁹ *Vallianatos v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013) paras 70-74.

protection of health or morals, or for the protection of the rights and freedoms of others'.¹⁰ At present, Article 12 ECHR concerning the right to marry is limited to heterosexual couples.¹¹ Additionally, freedom of religion is protected by Article 9 ECHR and conscientious objection has been read into the provision.¹² When there is a clash of Article 8 and 9 rights in the case of a conscientious objection, the ECtHR is clear that the Convention affords the contracting states a broad margin of appreciation.¹³ In essence, contracting states are provided with a broad degree of discretion in regulating whether state marriage officers are (or are not) obliged to conduct same sex unions irrespective of conscientious objection concerns. For details, please see the answer to question 3 (below).

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

18. The ECtHR has not had an opportunity to examine exemptions (or lack thereof) to non-state, religious marriage officers by contracting states, to check for conformity with the ECHR. Freedom of religion is protected by Article 9 ECHR and conscientious objection has been read into the provision.¹⁴

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

19. The most relevant judicial determination on the refusal by a state official to register a same-sex union is *Orlandi and Others v Italy*.¹⁵ In these proceedings, officials employed by the municipalities refused to register same-sex marriage conducted abroad on public order grounds. A violation of Article 8 ECHR was found on the basis that no form of legal recognition was available to the applicants.¹⁶ This is in line with previous ECtHR

¹⁰ Art 8(2) ECHR.

¹¹ *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010); affirmed in *Chapin and Charpentier v France* App no 40183/07 (ECtHR, 9 June 2016).

¹² *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011).

¹³ *Evans v the United Kingdom* App no 6339/05 (ECtHR, 10 April 2007) affirmed in *Eweida*, *ibid*, para 106.

¹⁴ *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011).

¹⁵ *Orlandi and Others v Italy* App nos 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017).

¹⁶ *Ibid.*, paras 2017-211.

jurisprudence which stipulated that that a state must provide for recognition of same-sex partners by means of same-sex unions but this does not extend to a mandatory obligation to provide for same-sex marriage.¹⁷ Nonetheless, it was affirmed in *Orlandi* that contracting states have a wide margin of appreciation in relation to registration of marriages conducted abroad.¹⁸

20. Freedom of religion is protected by Article 9 ECHR and conscientious objection has been read into the provision.¹⁹ The most pertinent judgment in relation to conscientious objection in the context of performance of same-sex unions is *Eweida and others v the United Kingdom*, which required balancing Article 8 ECHR against Article 9 ECHR.²⁰ Article 14 ECHR was also considered but this provision cannot be invoked independently of other ECHR provisions - it is a 'parasitic' right which depends on the issue being brought within the "ambit" of another ECHR right to which it can attach.²¹ In *Eweida*, the third applicant was a public official whose duties included conducting civil union ceremonies. She refused to carry out this duty on the basis that it was contrary to her Christian beliefs and although her employer initially accommodated this, the applicant was subsequently ordered to conduct civil marriages. The ECtHR held that requiring registrars to conduct civil marriages would not amount to indirect discrimination provided that the policy had a legitimate aim and was proportionate.²² Further, when there is a clash of rights as in the case of a conscientious objection, the ECtHR is clear that the Convention affords the contracting states a broad margin of appreciation.²³ As the policy in question was strategic in ensuring the rights of others, it was deemed to be legitimate. The Court also held that the state has not exceeded the margin of appreciation by requiring state officials to perform civil unions regardless of religious belief.²⁴ No violation of Article 9 alone, or taken in conjunction with article 14 ECHR was found.

¹⁷ *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).

¹⁸ *Orlandi* (n 8) para 205.

¹⁹ *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011).

²⁰ *Eweida and Others v UK* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013).

²¹ *Belgian Linguistic Case* (1967) 1 EHRR 252.

²² *Ibid.*, para 104.

²³ *Evans v the United Kingdom* App no 6339/05 (ECtHR, 10 April 2007) affirmed in *Eweida*, *ibid.*, para 106.

²⁴ *Eweida* (n 13) para 106.

21. It is worth highlighting that the reasoning underpinning the *Eweida* decision may have been influenced by the fact that the third applicant was trying to rely upon employment rights which are not protected by the ECHR.²⁵
22. The same proceedings considered whether private employees could raise conscientious objections, as the fourth applicant refused to provide counselling services to same sex persons on the basis that it contravened his religious belief. As the private employer was endeavouring to provide a service without discrimination, the Court affirmed that the state had a wide margin of appreciation in determining the balance between the competing rights.²⁶ As with the third applicant, no violation of Article 9 alone, or in conjunction with Article 14 was found.

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

23. As noted above, the ECtHR asserted in *Evans* and affirmed in *Eweida* that where there is a conflict between two Convention rights, Articles 8 and 9 in this case, contracting states are afforded a wide margin of appreciation.²⁷ In essence, this indicates that contracting states are provided with a broad degree of discretion in regulating whether marriage officers are (or are not) obliged to conduct same sex union irrespective of conscientious objection concerns.

²⁵ Dolores Morondo Taramundi, 'To Discriminate in order to Fight Discrimination: Paradox or Abuse?' in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony* (OUP 2017).

²⁶ *Eweida* (n 13), paras 109-110.

²⁷ For recent writing on the margin of appreciation doctrine under the ECHR, see Oddný Mjöll Arnardóttir, 'Rethinking the Two Margins of Appreciation' [2016] 12 *European Constitutional Law Review* 27-53.

II. EUROPEAN UNION

24. The European Union is a political, social, and economic union of 28 member states. Within the areas of EU competence, EU law has primacy over the national laws of the Member States.²⁸ The principle requires that when there is conflict between European law and the law of Member States, European Union law prevails; and the norms of national law must be disapplied. It also requires that Member States do not enact legislation which contradicts EU law. However, EU competence is limited to areas in which Member States have conferred competence to it.²⁹ Family and marital status is one area in which there is a reluctance to confer competence to the EU.³⁰ Member States may raise issues of interpretation by making use of the preliminary reference procedure which entails a ruling by the Court of Justice of the European Union (CJEU).³¹ The findings of the Court are final and applicable across all Member States (*erga omnes*), whereas the opinion of the Advocate General, which accompanies CJEU judgments, is non-binding and merely persuasive in nature.³²

25. EU law is distinct from the ECHR although they are interrelated. Indeed, the Treaty on the Functioning of the European Union provides that the EU may accede to the ECHR³³ although accession has not occurred so far.³⁴ In the context of fundamental rights, in so far as provisions of the EU Charter on Fundamental Rights contain rights which correspond to ECHR rights, ‘the meaning and scope of those rights shall be the same as those laid down by the said Convention’.³⁵

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

26. Whilst no EU measure explicitly exempts state marriage officers from performing same-sex unions, employment-related discrimination claims would fall within the parameters of

²⁸ Case 6-64 *Costa v ENEL* [1964] ECR 585.

²⁹ Art 5 Treaty on the European Union (TEU).

³⁰ This is stated in documentation prepared in relation to the Horizontal Discrimination Directive: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008PC0426&from=en>> last accessed 1 February 2018.

³¹ Art 267 Treaty on the Functioning of the European Union (TFEU).

³² Art 19 Treaty on the European Union (TEU); Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (OUP 2014) 23-24, nr. 2.16.

³³ Art 59(2) Treaty on the Functioning of the European Union.

³⁴ Accession is unlikely following the opinion of the ECJ in: Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454.

³⁵ Art 52(3), EU Charter of Fundamental Rights.

Directive 2000/78.³⁶ As public body employers fall within the scope of the Directive,³⁷ state marriage officers would likely fall within its protection. This provides that an employee must not be treated less favourably on the basis of a protected ground, including religion.³⁸

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

27. There is no EU measure explicitly exempting non-state religious marriage officers from performing same-sex unions. Directive 2000/78 may be relevant as it protects against discrimination in employment. Private sector employees fall within the scope of this Directive and are thus required not to discriminate on the ground of religion.³⁹ Article 4(2), however, provides an exception for religious institutions.

28. This provision allows for domestic legislation which permits religious organisations to require their employees to act in accordance with the ethos of that organisation. It can be inferred that such organisations can prevent religious officers from carrying out same-sex unions if it is contrary to the religious beliefs underpinning the organisation. Further, hiring practices of these organisations can differentiate based on religion or belief, and requirements of loyalty to the organisation's ethos can constitute a 'genuine, legitimate and justified occupational requirement'. In a pending case concerning the scope of this provision, Advocate General Tanchev stated that 'the right of religious organisations to autonomy and self-determination is a fundamental right that is recognised and protected under EU law'.⁴⁰ He advised that any occupational requirements underpinned by religion should be subject to judicial review. This opinion is persuasive but non-binding in nature.

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

³⁶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303.

³⁷ Art 3(1), Directive 2000/78.

³⁸ Arts 1 & 2, Directive 2000/78.

³⁹ Art 3(1), Directive 2000/78.

⁴⁰ Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, Opinion of Advocate General Tanchev, delivered on 11 November 2017.

29. To date there has been no litigation challenging exemptions for state marriage officers. Nonetheless, both sexual orientation and religion are protected grounds in EU non-discrimination law.⁴¹ Moreover, the right to conscientious objection is given explicit recognition in Article 10 of the EU Charter which broadly protects freedom of religion.⁴² The EU Charter is a fundamental rights instrument which is a primary source of EU law and has the same legal standing as the EU treaties. However, in accordance with Article 51 thereof, the Charter is only applicable when states are “implementing” EU law.
30. Whilst the CJEU has adopted an expansive approach in respect of protection against discrimination on grounds of sexual orientation (see below), existing secondary legislative measures are restricted to employment and do not extend to the provision of services.⁴³ This suggests that claimants may have difficulty seeking redress in EU law for discrimination on grounds of sexual orientation in the context of performance of civil unions.
31. In a series of decisions concerning Directive 2000/78, the CJEU held that whilst there is no obligation to provide for same-sex marriage, it is direct discrimination to limit an employment benefit to married couples, excluding those in civil partnerships, where marriage is not available to same-sex couples.⁴⁴ This is indicative of a broad interpretative approach towards discrimination on grounds of sexual orientation. The recent opinion of Advocate General Wathelet, recommending that the term ‘spouse’ include same-sex spouses irrespective of whether same-sex marriage is provided for in individual Member States,⁴⁵ gives further weight to the likelihood that the CJEU would take a broad approach towards discrimination on sexual orientation grounds. That said, the Court is often reluctant to rule on issues pertaining to a given state’s perception of ‘morality’, and on those issues which are within the competence of individual Member States.⁴⁶ Whilst such an approach is evident in

⁴¹ Art 10 TFEU; Arts 20 and 21, EU Charter of Fundamental Rights (CFREU); Arts 1 & 2, Directive 2000/78.

⁴² Art 10(2), EU Charter of Fundamental Rights.

⁴³ See the proposed Horizontal Discrimination Directive (n 3), <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008PC0426&from=en>> last accessed 1 February 2018.

⁴⁴ Case C-267/06 *Maruko* [2008] ECR I-1757; Case C-147/08 *Römer* [2011] ECR I-3591; Case C-267/12 *Haj*, 12 December 2013.

⁴⁵ Case C-673/16 *Relu Adrian Coman*, Opinion of Advocate General Wathelet, delivered on 11 January 2018.

⁴⁶ Alina Tryfonidou, ‘Another failed opportunity for the effective protection of LGB rights under EU law: Dr David L Parris v Trinity College Dublin and Others’ (EU Law Analysis, 1 December 2016) <<http://eulawanalysis.blogspot.co.uk/2016/12/another-failed-opportunity-for.html>> accessed 3 February 2018.

relation to sexual orientation discrimination in the *Parris* decision,⁴⁷ this seems to be an outlier in this thread of jurisprudence and concerns the interpretation of a preamble clause as opposed to a substantive provision.⁴⁸ Furthermore, *Parris* was a chamber decision whereas *Maruko*, *Römer* and *Hay* were Grand Chamber decisions, indicating that the latter are more persuasive.

32. In relation to interpretation of the scope of freedom of religion, the EU Charter indicates that the meaning and scope of Article 10 thereof corresponds to Article 9 of the European Convention of Human Rights.⁴⁹ This section should therefore be read in conjunction with that on the ECHR. In addition, ‘the right to conscientious objection is recognised [in Article 10(2) of the EU Charter] in accordance with the national laws governing that right’,⁵⁰ although this has not been litigated in relation to the performance of civil unions.
33. Two recent decisions of the CJEU (concerning prohibitions of external symbols indicative of religious or other convictions of the employer) construed religion very narrowly. While the CJEU confirmed that religion has both an internal and an external dimension⁵¹, it accepted that the external dimension of religion can be limited in a proportionate way. Moreover, it accepted that a private employer’s interests in projecting an image of neutrality towards its clients can be justified, as long as the employer’s limitations are applied to all religions and beliefs equally.⁵² The Court did seem to imply a minimal duty of accommodation but this could not impose any additional burden on the employer.⁵³
34. Therefore, it seems likely that a state prohibiting any external manifestations of religion in its employers would be able to justify this in the interests of neutrality, if it imposed this prohibition for all religious and other beliefs equally.

⁴⁷ Case C-443/15 *Parris v Trinity College Dublin* (ECJ), 24 November 2016). In *Parris*, the Court held that the measure in question did not constitute indirect discrimination on sexual orientation grounds.

⁴⁸ *Parris* turned on recital 22 of the preamble which states: ‘[t]his Directive is without prejudice to national laws on marital status and the benefits dependent thereon’.

⁴⁹ Art 52(3) EU Charter of Fundamental Rights. Conscientious objection was deemed to fall within the parameters of Art 9 ECHR in *Bayatyan v Armenia* [2012] 54 EHRR 15.

⁵⁰ Case C-472/13 *Andre Lawrence Shepherd v Bundesrepublik Deutschland* (ECJ), 26 February 2015), para 8.

⁵¹ Case C-157/15 *Achbita* (ECJ), 14 March 2017), paras 26-28; Case C-188/15 *Bouagnaoui* (ECJ), 14 March 2017) paras 28-30.

⁵² *Achbita*, *ibid*, paras 34-43; *Bouagnaoui*, *ibid*, paras 32-33.

⁵³ *Achbita*, *ibid*, paras 42-43.

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

35. EU law does not appear to explicitly stipulate that marriage officers are obliged to conduct same-sex unions irrespective of their religious views. In the event of a conflict, it is likely that the considerations outlined above would be utilised. Finally, as the EU is a supranational organisation, there is some degree of deference to the practices of Member States. Therefore, in the absence of an express EU measure, individual practices may vary between Member States.

III. BELGIUM

36. Marriage in Belgium is primarily a civil institution. The Belgian Constitution provides, in article 21, an exception to the separation of Church and State concerning marriage: it states that ‘a civil wedding should always precede the blessing of the marriage.’ This means that a religious wedding ceremony, if not preceded by a civil marriage performed by a state officer, cannot, in itself, produce the legal effects of marriage.⁵⁴
37. Civil marriage is performed by the mayor or the competent ‘alderman’ of a municipality.⁵⁵ A civil marriage officer is responsible for the formal aspects of the ceremony (*e.g.* declaration of marriage, inspection of documents, marriage certificate).⁵⁶
38. Articles 10 and 11 of the Belgian Constitution provide for the equality of all Belgians before the law and the prohibition of discrimination. Articles 19 to 21 lay down the freedom of religion. The Constitutional Court has jurisdiction to review the constitutionality of laws enacted in relation to these provisions.⁵⁷ The Belgian equality law of 2007 prohibits discrimination on several protected grounds, including religion and sexual orientation.⁵⁸ It covers *inter alia* the provision of public services and employment relations.⁵⁹
39. Belgium is a member state of the EU. Thus, where EU Law applies, it has primacy over national law.⁶⁰ The same is true for the European Convention of Human Rights.⁶¹ To the extent that its provisions are clear, precise and unconditional EU Law and the European Convention have direct effect in the Belgian legal order.⁶² Individuals can thus rely on these

⁵⁴ André Alen and Koen Muylle, *Compendium van het Belgisch Staatsrecht* (part II, 3th edn, Kluwer 2012), 380, nr. 839.

⁵⁵ For more details on the procedure see ‘Huwelijksformaliteiten’, Belgian Government <<https://www.belgium.be/nl/familie/koppel/huwelijk/formaliteiten>> accessed 16 February 2018 or ‘Huwelijk’, Flemish Government <<https://www.vlaanderen.be/nl/gezin-welzijn-en-gezondheid/samenwonen-huwen-enscheiden/huwelijk>> accessed 16 February 2018.

⁵⁶ Belgian Government, ‘Huwelijksformaliteiten’, <<https://www.belgium.be/nl/familie/koppel/huwelijk/formaliteiten>> accessed 16 February 2018.

⁵⁷ Art 142, 2° Belgian Constitution; art 1, 2° Bijzondere wet Grondwettelijk Hof. For a translated version of the Belgian Constitution on Constitution <https://www.constituteproject.org/constitution/Belgium_2014.pdf?lang=en> accessed 16 February 2018. For the original Dutch, French or German version see: ‘De Belgische Grondwet’, Belgian Senate <https://www.senate.be/doc/const_nl.html> accessed 16 February 2018.

⁵⁸ Art 3 wet 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie, *BS* 30 mei 2007 (hereafter ‘Antidiscriminatiewet’).

⁵⁹ Art 5, §1, 1° and §2 Antidiscriminatiewet.

⁶⁰ ECJ Case C-6/64 *Costa v ENEL* [1964] ECR 587; Cass. 27 mei 1971, *Arr. Cass.* 1971, ‘smeerkaasarrest/Franco-Suisse Le Ski’, 959.

⁶¹ Cass. 27 mei 1971, *Arr. Cass.* 1971, ‘smeerkaasarrest/Franco-Suisse Le Ski’, 959.

⁶² André Alen and Koen Muylle, *Compendium van het Belgisch Staatsrecht* (part II, 3th edn, Kluwer 2012), 23, nr. 61.

provisions in Belgian courts.⁶³ Where a national law is not in conformity with either of these, it can no longer be applied.⁶⁴ Thus, both the sections on the EU and on the European Convention of this report are also relevant to the Belgian situation.

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

40. Belgium does not provide for any such exemption for state marriage officers. Moreover, there is no consideration of state marriage officers with religious objections in either the *travaux préparatoires* or the explanatory memorandum accompanying the law opening up marriage to same-sex couples.⁶⁵

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

41. The Belgian Constitution lays down the freedom of religion for all Belgian citizens in its articles 19 and 20. Article 21 of the Belgian Constitution establishes the separation between Church and state. It provides *inter alia* that:

‘The State does not have the right to intervene either in the appointment or in the installation of ministers of any religion whatsoever.’

As each religion is free in its own organisation, the Belgian state cannot provide an exemption nor impose that religious marriage officers perform same-sex unions. This is part of the internal organisation of each religion.⁶⁶ Thus depending on the religion, religious marriage officers do or do not perform same-sex unions.

⁶³ André Alen and Koen Muylle, *Compendium van het Belgisch Staatsrecht* (part II, 3th edn, Kluwer 2012), 23, nr. 61.

⁶⁴ Cass. 27 mei 1971, *Arr. Cass.* 1971, ‘smeerkaas arrest/Franco-Suisse Le Ski’, 959.

⁶⁵ MvT wet 13 februari 2003 tot openstelling van het huwelijk voor personen van hetzelfde geslacht en tot wijziging van een aantal bepalingen van het Burgerlijk Wetboek. All *travaux préparatoires* for this law can be found on Belgian Chamber,

<<https://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=N&legislat=50&dossierID=1692>> accessed 16 February 2018, Belgian Chamber

<<https://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=N&legislat=50&dossierID=2165>> accessed 16 February 2018 and Belgian Senate <https://www.senate.be/www/?MIval=/index_senate&MENUID=22150&LANG=nl> accessed 16 February 2018.

⁶⁶ André Alen and Koen Muylle, *Compendium van het Belgisch Staatsrecht* (part II, 3th edn, Kluwer, 2012), 380, nrs. 837-838.

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

42. There has been no litigation concerning the absence of such an exemption. In a case concerning the constitutionality of the law opening up marriage to same-sex couples, the Constitutional Court rejected a claim based on the freedom of religion.⁶⁷ Litigants claimed their freedom of religion was violated because the law changed the nature of civil marriage and citizens cannot marry religiously unless having married civilly first.⁶⁸ The Constitutional Court did not consider itself competent to rule on the distinction between civil and religious marriage as this is established by the Constitution itself.⁶⁹

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

43. State marriage officers can only refuse to perform a marriage where they suspect it to concern a marriage of convenience or more broadly, where one of the formal requirements for marriage (*e.g.* consenting adults) is not met.⁷⁰ It seems unlikely that state marriage officers can invoke religious objections. As civil servants, they are expected to take a neutral attitude.⁷¹ This implies amongst other things providing public services without discrimination on the basis of sexual orientation.⁷² However, this neutrality to date has not been defined and is given effect on a local level in a pragmatic way taking into account the local needs.⁷³ Nevertheless it seems unlikely that such religious objections could be accommodated as performing marriages is a core task of the state marriage officer.

⁶⁷ GwH 20 oktober 2004, nr. 159/2004, B.7.1-B.7.2.

⁶⁸ Ibid. B.7.1.

⁶⁹ Ibid. B.7.2.

⁷⁰ Art 63 & 167 Belgian Civil Code; Omz. 6 september 2013 inzake de wet van 2 juni 2013 tot wijziging van het Burgerlijk Wetboek, de wet van 31 december 1851 met betrekking tot de consulaten en de consulaire rechtsmacht, het Strafwetboek, het Gerechtelijk Wetboek en de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, met het oog op de strijd tegen de schijnhuwelijken en de schijnwettelijke samenwoningen, <http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2013090609&table_name=wet> accessed 16 February 2018.

⁷¹ See *inter alia* 'neutraliteit van de staat', UNIA <<http://www.ediv.be/site/nl/content/neutraliteit-van-de-staat>> accessed 16 February 2016; 'neutraliteit', Flemish Government <<https://overheid.vlaanderen.be/neutraliteit>> accessed 16 February 2016.

⁷² Ibid.

⁷³ Ibid.

As stated in reply to question II, the State cannot interfere with the marriages performed by religious marriage officers.

IV. GERMANY

44. From 2001 onwards, it was possible for same-sex couples to enter into a registered life partnerships (*eingetragene Lebenspartnerschaft*).⁷⁴ The German legislature has legalised same-sex marriage with effect from 1 October 2017.⁷⁵ Since that date, it is no longer possible to enter into registered life partnerships.⁷⁶

45. Germany is a member state of the EU. Thus, where EU Law applies, it has primacy.⁷⁷ In the German legal order, the European Convention on Human Rights has the status of a federal statute.⁷⁸ It is therefore subordinate to the German Constitution (*Grundgesetz*). The European Convention on Human Rights and the decisions by the European Court of Human Rights are, however, important criteria in the interpretation of the fundamental rights laid down in the Constitution.⁷⁹ Thus, both the sections on the EU and on the European Convention of this report are also relevant to the legal situation in Germany.

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

46. State marriage officers or ‘registrars’ (*Standesbeamte*) are obliged to perform same-sex marriages if the statutory requirements are fulfilled. Section 1310(1) sentence 2 of the German Civil Code (BGB)⁸⁰ reads:

‘The registrar may not refuse his cooperation in the entering into of the marriage if the requirements for the marriage are satisfied’

47. There is no discretion and there is no exemption for state marriage officers from performing same-sex marriages in legislation, regulation, policy or practice.⁸¹

⁷⁴ Act on Registered Life Partnerships of 16 February 2001 (Federal Law Gazette I p. 266), last amended by Article 2 of the Act of 20 July 2017 (Federal Law Gazette I p. 2787), available at <http://www.gesetze-im-internet.de/englisch_lpartg/englisch_lpartg.html#p0105> accessed 22 February 2018.

⁷⁵ BGBl. I 2017, 2787 (Federal Law Gazette).

⁷⁶ BGBl. I 2017, 2787, Article 3(3) (Federal Law Gazette).

⁷⁷ ECJ Case C-6/64 *Costa v ENEL* [1964] ECR 587; BVerfG NJW 2009, 2267 (2285) (German Constitutional Court).

⁷⁸ BVerfG NStZ 2011, 450 (German Constitutional Court).

⁷⁹ BVerfG NStZ 2011, 450 (German Constitutional Court).

⁸⁰ <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4752> accessed 22 February 2018.

⁸¹ Cf Section 1310(1) BGB and Section 49 Personenstandsgesetz.

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

48. The performance of same-sex marriages by religious marriage ‘officers’ has no legal effects in German law. For a marriage to be legally valid, it must be performed by a state marriage officer.⁸²

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

49. The absence of an exemption has not led to any litigation in Germany.

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

50. The rule under German law is that state marriage officers are obliged to perform same-sex marriages if the statutory requirements are fulfilled (Section 1310(1) sentence 2 BGB). In case of a refusal to perform the marriage, the local court (*Amtsgericht*) on application of the parties orders the registrar office (*Standesamt*) to perform the marriage (Section 49 Personenstandsgesetz⁸³).

51. A same-sex couple therefore has, thus, a right against the registrar office that the union is performed. This legal relationship is distinct from the legal relationship between the state marriage officer and the municipality to which the registrar office belongs. The consequences that a refusal to perform the marriage has for the officer will be determined by employment or civil service law.⁸⁴

⁸² Cf Marina Wellenhofer, in *Münchener Kommentar zum BGB* (7th edn, C.H. Beck 2017) § 1310 para 1.

⁸³ *Personenstandsgesetz*, German Federal Personal Statute Law, <<https://www.gesetze-im-internet.de/pstg/BJNR012210007.html>> accessed 22 February 2018.

⁸⁴ Some state marriage officers in Germany have the status of a civil servant (*Beamtenverhältnis*), while others are employed based on an employment contract (*Angestellte im öffentlichen Dienst*).

52. There is only one reported case where the issue has arisen.⁸⁵ In 2014, a case was reported in the media, where a state marriage officer refused to perform a same-sex registered life partnership for religious reasons.⁸⁶ The solution reached was that another officer came back from her holidays earlier to perform the union instead. The officer who had refused to perform the union subsequently faced disciplinary proceedings.⁸⁷ The outcome of these proceedings was not reported.
53. In the legal relationship between the marriage officer and the municipality, the officer might try to rely on Art. 4 of the German Constitution (*Grundgesetz*)⁸⁸ which guarantees the ‘freedom of faith and of conscience, and freedom to profess a religious or philosophical creed’. If there are multiple marriage officers in the municipality, one might take the view that Art. 4 of the German Constitution and the principle of ‘practical concordance’ (*praktische Konkordanz*)⁸⁹ requires the municipality to simply have another officer perform the union. It is however likely that a refusal of the state marriage officer will constitute a breach of duty⁹⁰ and that disciplinary measures will be imposed.
54. If there is only one state marriage officer in a municipality, there is no doubt that the interests of the officer would be outweighed by the principle of religious and ideological neutrality of the state⁹¹ and that the officer would be obliged to perform the union.

⁸⁵ Several German LGBT interest groups and organisations of state marriage officers (including the Bundesverband der Deutschen Standesbeamtinnen und Standesbeamten e.V. (BDS) and the Lesben- und Schwulenverband in Deutschland (LSVD)), have responded that they are not aware of any other cases where a registrar has refused to perform a same-sex union.

⁸⁶ <<http://www.taz.de/Radikales-aus-Ratzeburg/!5026382/>> accessed 22 February 2018; <<http://www.ln-online.de/Lokales/Lauenburg/Standesbeamter-will-lesbisches-Paar-nicht-trauen>> accessed 22 February 2018.

⁸⁷ <<https://jungfreiheit.de/politik/deutschland/2014/ratzeburg-geht-gegen-standesbeamten-vor/>> accessed 22 February 2018).

⁸⁸ <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0037> accessed 22 February 2018.

⁸⁹ The principle of ‘Praktische Konkordanz’ says that conflicts between different constitutional rights and principles should be resolved in the most ‘gentle’ way possible. The conflicting rights and principles should each be given effect as far as possible. Cf BVerfG NJW - Neue Juristische Wochenschrift (1995), 2477, 2479, (German Constitutional Court).

⁹⁰ Cf Michael Germann, in Volker Epping and Christian Hillgruber (eds), *BeckOK Grundgesetz* (35th edn, C.H. Beck 2017) Art. 4 paras 56.1, 56.5.

⁹¹ Cf Michael Germann, in Volker Epping and Christian Hillgruber (eds), *BeckOK Grundgesetz* (35th edn, C.H. Beck 2017) Art. 4 paras 56.1, 56.5.

V. IRELAND

55. In Ireland, the Civil Registration Act 2004, as amended by the Marriage Act 2015 (which allows same-sex couples to marry), states that a marriage may be solemnised only by a registered solemniser.⁹² A registered solemniser is an individual included in the Register of Solemnisers under section 53 of the Civil Registration Act 2004.⁹³ Registered solemnisers can be civil, religious or secular.⁹⁴

56. Ireland is a member state of the EU. Thus, where EU Law applies, it has primacy,⁹⁵ and therefore the section on the EU is relevant to the legal situation in Ireland.

57. The European Convention on Human Rights (ECHR) is incorporated into Irish law by the ECHR Act 2003. The sub-section of this report on the law under the ECHR is therefore relevant to the legal situation in Ireland. Section 2 of the ECHR Act 2003 obliges judges when ‘interpreting and applying any statutory provision or rule of law’ to do so in a manner that is consistent with the state’s obligations under the Convention ‘in so far as is possible’. Where Irish law cannot be interpreted in a manner that is consistent with the Convention, the remedy is a declaration of incompatibility. This does not mean that the legislation that is in conflict with the Convention is struck down. It means that the Taoiseach (the Irish Prime Minister) must cause a copy of the declaration of incompatibility to be laid before each House of Parliament ‘within the next 21 days on which that House has sat after the making of the order.’ The person whose Convention rights have been infringed can apply to the Attorney General for compensation for any injury, loss or damage suffered and it is at the Government’s discretion to decide whether any *ex gratia* payment will be made.

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

⁹² Civil Registration Act 2004, s 51.

⁹³ Civil Registration Act 2004, s 53.

⁹⁴ The Register of Solemnisers demonstrates that registered solemnisers can be civil, religious or secular, see ‘Register of Solemnisers’ <<https://www.welfare.ie/en/downloads/RegisterOfSolemnisers.pdf>> accessed 2 March 2018.

⁹⁵ ECJ Case C-6/64 *Costa v ENEL* [1964] ECR 587; HR 3 March 1919, NJ 1919, 371.

58. The Marriage Act 2015, which amends the Civil Registration Act 2004 to remove the impediment to same-sex marriage, does not contain an exemption for state marriage officers from performing same-sex unions.

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

59. Religious marriage officers are exempted from performing same-sex unions under section 7 of the Marriage Act 2015. Section 7(1) provides that nothing in the Marriage Act 2015 should be interpreted as ‘obliging a religious solemniser to solemnise a marriage in accordance with a form of marriage ceremony which is not recognised by the religious body of which the religious solemniser is a member’.⁹⁶

60. Section 7(2) clarifies that ‘form of marriage ceremony’ ‘includes that form in so far as it relates to the sex of the parties to the ceremony’.⁹⁷

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

61. Neither the lack of an exemption for state officers nor the existence of an exemption for religious solemnisers has led to any litigation or constitutional challenges.

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

62. Section 69(4) of the Civil Registration Act 2004 states that ‘A registrar who, without reasonable cause, fails or refuses to register a ...marriage ... is guilty of an offence.’⁹⁸

⁹⁶ Marriage Act 2015, s 7.

⁹⁷ Marriage Act 2015, s 7.

⁹⁸ Civil Registration Act 2004, s 69(4).

63. Section 70(2) provides that a person guilty of an offence under section 69(4) ‘shall be liable on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 6 months or both.’⁹⁹
64. The phrase ‘reasonable cause’ is not defined in the Act. However, the Civil Registration Act 2004 does not contain a conscientious objection clause. The Marriage Act 2015 provides for an exemption for religious solemnisers only. As well as this, the Equal Status Act 2000 prohibits discrimination in the provision of services on the grounds of sexual orientation.¹⁰⁰
65. Therefore, it can be argued that state marriage officers are obliged to perform same sex unions regardless of their religious views and are liable to a fine or imprisonment if they refuse to do so.

⁹⁹ Civil Registration Act 2004, s 70(2).

¹⁰⁰ Equal Status Act 2000, s 3(2)(d) prohibits discrimination on the grounds of sexual orientation. Equal Status Act 2000, s 5 provides that a person shall not discriminate when providing services to the public.

VI. THE NETHERLANDS

66. Article 1:68 of the Dutch Civil Code lays requires that a civil marriage must be performed prior to any religions marital ceremony. The civil marriage is performed by a civil marriage officer. This is either an ordinary civil servant or an “extraordinary” civil servant who has been appointed exclusively to perform marriages.¹⁰¹ Some municipalities allow couples to have their marriage officiated by an extraordinary civil servant of another municipality or even by a friend or acquaintance taking on the capacity of extraordinary civil servant for one day.¹⁰²
67. Article 1 of the Dutch Constitution prohibits discriminatory treatment on any ground.¹⁰³ It explicitly mentions religion as a prohibited ground. The Dutch General Equal Treatment Act explicitly prohibits discrimination on several protected grounds, including religion and sexual orientation.¹⁰⁴ The Dutch Constitution prohibits judges from performing a constitutional review of the law.¹⁰⁵ Should the law be unclear, judges can ask the Dutch Supreme Court (*Hoge Raad*) an interpretive question. Judges can review whether the law is in conformity with international treaties concluded by the Netherlands.
68. The Netherlands is a member state of the EU. Thus, where EU Law applies, it has primacy.¹⁰⁶ The same is true for the European Convention of Human Rights.¹⁰⁷ Both EU Law (from the moment it has been published) and the European Convention have force of law in the internal legal order.¹⁰⁸ Where a national law is not in conformity with either of these, it can no longer be applied.¹⁰⁹ Thus, both the sections on the EU and on the European Convention of this report are also relevant to the legal situation in the Netherlands.

¹⁰¹ Arts 1:16 and 1:63 Nederlands Burgerlijk Wetboek (Dutch Civil Code).

¹⁰² E.g. ‘Trouwambtenaar voor één dag’, <<https://www.amsterdam.nl/veelgevraagd/?productid=%7B7882C140-3BAA-4E7A-B711-398D513C45CD%7D>> accessed 17 February 2018; ‘Trouwambtenaar voor 1 dag’, <<https://www.utrecht.nl/wonen-en-leven/burgerzaken/trouwambtenaar-voor-1-dag/>> accessed 17 February 2018; ‘Trouwambtenaar voor 1 dag’, <<https://www.gemeentemaastricht.nl/product/trouwambtenaar-voor-1-dag/>> accessed 17 February 2018.

¹⁰³ For an English translation of the Dutch Constitution, see for example: ‘Netherlands 1815 (rev. 2008)’, *Constitute* (<https://www.constituteproject.org/constitution/Netherlands_2008?lang=en>) accessed 17 February 2018.

¹⁰⁴ §1 art 1 Algemene wet gelijke behandeling (General Equal Treatment Act).

¹⁰⁵ Art 120 Dutch Constitution.

¹⁰⁶ ECJ Case C-6/64 *Costa v ENEL* [1964] ECR 585; HR 3 March 1919, NJ 1919, 371.

¹⁰⁷ HR 3 March 1919, NJ 1919, 371.

¹⁰⁸ Art 93 Dutch Constitution.

¹⁰⁹ Art 94 Dutch Constitution.

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

69. The Netherlands has never had an explicit exemption for state marriage officers. At the time of the legal introduction of same-sex marriage, a proposal to exempt refusing marriage officers who invoked their religion was rejected.¹¹⁰ However, until 2014, the decision whether or not to allow religious objectors was part of municipal autonomy.¹¹¹ Notwithstanding this, every municipality also had to ensure that same-sex couples could marry there.¹¹² According to one 2007 study, this led to ‘refusing civil servants’ (‘weigerambtenaren’) in one out of every six municipalities in the country.¹¹³ As will be elaborated under question 3 below, this situation also led to some litigation.

70. In 2014 a law was passed prohibiting the hiring of state marriage officers who would not perform ceremonies in accordance with the Dutch General Equal Treatment Act.¹¹⁴ The General Equal Treatment Act *inter alia* protects sexual orientation.¹¹⁵ Thus, municipalities can now only hire state marriage officers willing to perform same-sex unions.¹¹⁶ The 2014 law also makes it possible for municipalities to fire or take measures against state marriage officers hired before the 2014 law who refuse to perform same-sex unions.¹¹⁷ The number of state marriage officers not performing same-sex unions should thus gradually decrease.

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

¹¹⁰ Kamerstukken II 2000/01, 26 672, nr. 12; Henk Vat, ‘8 Geschiedenis inzake de weigerambtenaren’, *Groene Serie Personen- en familierecht*, 8.2.

¹¹¹ Kamerstukken II 2000/01, 26 672, nr. 12; Henk Vat, ‘8 Geschiedenis inzake de weigerambtenaren’, *Groene Serie Personen- en familierecht*, 8.2; Commissie Gelijke Behandeling, oordeel 2002-25, 5.8, <<https://www.mensenrechten.nl/publicaties/oordelen/2002-25>>.

¹¹² Kamerstukken II 2000/01, 26 672, nr. 12; Henk Vat, ‘8 Geschiedenis inzake de weigerambtenaren’, *Groene Serie Personen- en familierecht*, 8.2.

¹¹³ ‘Eén op de 6 gemeenten heeft weigerambtenaren’, COC <<https://www.coc.nl/jouw-belangen/een-op-de-6-gemeenten-heeft-weigerambtenaren>> accessed 17 February 2018.

¹¹⁴ Wet van 4 juli 2014 tot wijziging van het Burgerlijk Wetboek en de Algemene wet gelijke behandeling met betrekking tot ambtenaren van de burgerlijke stand die onderscheid maken als bedoeld in de Algemene wet gelijke behandeling. (Hereafter ‘Wet van 4 juli 2014’.)

¹¹⁵ §1 Art 1.1 Algemene wet gelijke behandeling (General Equal Treatment Act).

¹¹⁶ Art 1.2 Wet van 4 juli 2014.

¹¹⁷ Centrale Raad van Beroep 29 February 2016, ECLI:NL:CRVB:2016:606, 4.5, <<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2016:606>> accessed 17 February 2018; Kamerstukken II 2012/13, 33344, 6, p.4.

71. Article 1 of the Dutch Constitution prohibits discrimination *inter alia* on religious grounds. Article 6 establishes the freedom of religion and religious expression both individually and in community with others.

72. The Dutch Civil Code grants religious organisations legal personality.¹¹⁸ Insofar as this does not conflict with the law, they are free to determine their internal organisation.¹¹⁹ Moreover, several laws contain specific exemptions for religious organisations. Article 3 of the General Equal Treatment Act contains such an exemption for the internal organisation of religious institutions.¹²⁰ This seems to indicate that religious organisations can require their marriage officers to not perform same-sex religious marriages.

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

73. The Dutch Constitution prohibits the judiciary from performing a constitutional review of the law.¹²¹ However, there has been other litigation. One case concerned a refusing civil servant in The Hague who was dismissed for this reason. The court in The Hague considered the case as one of conflicting fundamental rights. It considered whether firing the civil servant was proportionate. The court referred to the European Court of Human Rights' decision in *Eweida*¹²² and the wide margin of appreciation accorded to contracting States in this area. It considered that the protection of the rights of others (*viz.* of same-sex couples not to be discriminated against) constitutes a legitimate aim.¹²³ It held that the civil servant was an extraordinary civil servant whose core task was performing marriages.¹²⁴ Moreover, it noted that the civil servant was an external representative of the municipality, which wanted,

¹¹⁸ Art 2:20, s 1 Nederlands Burgerlijk Wetboek (Dutch Civil Code).

¹¹⁹ Art 2:20, s 2 Nederlands Burgerlijk Wetboek (Dutch Civil Code). Alfons Dölle, *Bezield Staatsrecht* (Wolters Kluwer, 2014), IV.23.8.2.

¹²⁰ For example applied in Commissie Gelijke Behandeling, oordeel 2003-43. For other applications see: Remco Nehmelman and C.W. Noorlander, *Horizontale werking van grondrechten* (Kluwer 2013), 8.2. See also §3 art 5.2 s 2a Algemene wet gelijke behandeling (General Equal Treatment Act).

¹²¹ Art 120 Dutch Constitution.

¹²² *Eweida and Others v UK* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013). See subsection in this report on 'European Convention of Human Rights (Council of Europe)', 12.

¹²³ Rb. Den Haag 23 October 2013, ECLI:NL:RBDHA:2013:14133, 4.3-4.15,

<<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2013:14133>> accessed 17 February 2018.

¹²⁴ *Ibid* 4.12.

as a policy choice, to stimulate social acceptance of homosexuality.¹²⁵ Given these two facts, it considered the dismissal of the civil servant to be proportionate.¹²⁶ This decision was confirmed by the Central Court of Appeals ('Centrale Raad van Beroep').¹²⁷

74. The Dutch Equality Body/DEB ('College voor de rechten van de mens', formerly 'Commissie Gelijke Behandeling') also gave decisions in three similar cases (two in 2002 and one in 2008). Applying the proportionality test, the DEB considered possible justifications for indirect discrimination based on religion. In the 2002 decisions it considered the refusal to hire a refusing civil servant not justified as the municipalities concerned had sufficient 'non-refusing' civil servants for an accommodation not to affect the services provided by the municipality.¹²⁸ In 2008, the DEB appeared to have changed its stance. It gave overriding importance to the requirement of equal treatment on the basis of sexual orientation.¹²⁹ There, the DEB considered that performing marriages was the officer's core task.¹³⁰ As the only way to prevent a differentiation between same-sex and different-sex couples would have been to exempt the officer from performing any marriages, accommodation was not an option.¹³¹ More generally, the DEB seems to differentiate between ordinary and extraordinary civil servants.¹³²

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

75. Since the 2014 law, new state marriage officers can only be hired if they are willing to perform same-sex marriages.¹³³ The law also allows municipalities to dismiss or take measures against refusing state marriage officers hired before 2014.¹³⁴ It does not force

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Centrale Raad van Beroep 29 February 2016, ECLI:NL:CRVB:2016:606, <<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2016:606>> accessed 17 February 2018

¹²⁸ Commissie Gelijke Behandeling, oordeel 2002-25, 5.8-5.9; oordeel 2002-26, 5.7-5.8.

¹²⁹ Commissie Gelijke Behandeling, oordeel 2008-40, 3.26-3.30.

¹³⁰ Commissie Gelijke Behandeling, oordeel 2008-40, 3.29.

¹³¹ Commissie Gelijke Behandeling, oordeel 2008-40, 3.29.

¹³² 'Gewone en buitengewoon ambtenaar van de burgerlijke stand' <<https://www.mensenrechten.nl/gewone-en-buitengewoon-ambtenaar-van-de-burgerlijke-stand>> accessed 17 February 2018.

¹³³ Art 1.2 Wet van 4 juli 2014.

¹³⁴ Centrale Raad van Beroep 29 February 2016, ECLI:NL:CRVB:2016:606, 4.5, <<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2016:606>> accessed 17 February 2018; Kamerstukken II 2012/13, 33344, 6, p.4.

municipalities to take any measures.¹³⁵ However, municipalities are obligated to ensure that same-sex couples can get married in their municipality.¹³⁶

76. As indicated under question 2 above, the internal organisation of religious institutions would determine whether religious officers can perform same-sex marriages.

¹³⁵ Centrale Raad van Beroep 29 February 2016, ECLI:NL:CRVB:2016:606, 4.5, <<http://deelink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2016:606>> accessed 17 February 2018.

¹³⁶Kamerstukken II 2000/01, 26 672, nr. 12 Henk Vat, '8 Geschiedenis inzake de weigerambtenaren', *Groene Serie Personen- en familierecht*, 8.2.

VII. UNITED KINGDOM

77. The UK is (currently) a member state of the EU. The UK is also a party to the European Convention on Human Rights, incorporated into domestic law through the Human Rights Act, 1998. Thus, both the sections on the EU and on the European Convention of this report are relevant to the legal situation in the UK. It should be noted, however, that in March 2019, the UK will exit from the European Union. It is unclear to what extent EU laws and directives will be binding upon the UK after this date.

78. In the United Kingdom marriage is a devolved issue. This means that the law in relation to same-sex marriages is different in England and Wales, Scotland and Northern Ireland.

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

England and Wales

79. There is no exemption in legislation for state marriage officers (referred to as registrars in the UK) who object to performing same-sex unions. Same sex marriage in England and Wales is governed by the *Marriage (Same Sex Couples) Act 2013*. The act does not expressly permit employers to grant individuals an exemption from any part of their duties as a registrar. During the passage of the Marriage (Same Sex Couples) bill amendments to allow registrars to conscientiously object to performing same-sex marriages was proposed. However, these amendments were defeated in both the House of Commons and the House of Lords.¹³⁷

80. It is unclear whether it is possible, as a matter of policy or practice, for local authorities to grant exemptions for registrars that object to performing same-sex marriages. The Equality and Human Rights Commission publication on the *Marriage (Same Sex Couples) Act 2013: The Equality and Human Rights Implication for Work Places and Service Delivery* states that, “A registrar whose religious or other belief prevents them undertaking all the responsibilities of their public office following the Act can explore the potential options with their employer.”¹³⁸

¹³⁷ HC Deb vol 563 cols 926-966 20 May 2013 (340 against and 150 in favour), HL Deb vol 747 cols 39-62 8 July 2013 (278 against and 103 in favour).

¹³⁸ Equality and Human Rights Commission, *The Marriage (Same Sex Couples) Act 2013: The Equality and Human Rights Implications for Work Places and Service Delivery*, 6, available at <www.equalityhumanrights.com> accessed 14.03.2018.

However, it goes on to note that as no exception is provided in the legislation, “it is therefore most likely that granting one is not a permissible option, although this has yet to be explicitly tested in the courts.” Research found no published policies setting out how local authorities would respond to a request from an employee to opt out of performing a same-sex marriage ceremony.

81. A local authority, as a public authority, is under a general duty under section 149 of the *Equality Act 2010* not to discriminate in the provision of the services it provides. This means that it cannot grant exemptions to registrars if this affects a same-sex couple’s ability to get married.

Scotland

82. The approach to exemptions in Scotland is very similar to the approach in England and Wales. There is no exception in the legislation. Same sex marriage in Scotland is governed by the *Marriage and Civil Partnership (Scotland) Act 2014*. The act does not expressly permit employers to grant individuals an exemption from any part of their duties as a registrar.

83. It is also unclear whether it is possible, as a matter of policy or practice, for local authorities to grant exemptions for registrars who object to performing same-sex marriages. The Equality and Human Rights Commission publication on the *Marriage and Civil Partnership (Scotland) Act 2014: The Equality and Human Rights Implication for Work Places and Service Delivery*, echoing its publication on the law in England and Wales, states, “Parliament did not provide an exemption for this purpose in the Act and it is therefore most likely that granting one is not a permissible option, although this has yet to be explicitly tested in the courts.”¹³⁹ However, it adds that “The Scottish Government has stated that it is for each local authority to decide how best to provide its services relating to the registration of marriage and that they expect that local authorities would handle registrars who raise such issues sensitively.”¹⁴⁰ Research found no published policies by local authorities setting out how they would respond to a request from an employee to opt out of performing same-sex marriage ceremonies.

¹³⁹ Equality and Human Rights Commission, *Marriage and Civil Partnership (Scotland) Act 2014: The Equality and Human Rights Implications for Work Places and Service Delivery*, 4, available at www.equalityhumanrights.com.

¹⁴⁰ Ibid 5.

Northern Ireland

84. There is no legislation to allow marriage of same sex couples in Northern Ireland and, in 2012, 2013 and 2014, the Northern Ireland Assembly voted against private members' motions to allow such marriages.¹⁴¹ However, same sex couples can enter into a civil partnership, which must be solemnised at a registrar's office or approved place.¹⁴² Civil partners are treated at par with married couples in a wide range of legal matters.¹⁴³
85. The *Civil Partnership Act, 2004* places a legal obligation upon the registrar to complete the civil partnership proceedings upon receiving a civil partnership notice from the proposed civil partners and being satisfied of no legal impediments to the formation of the same.¹⁴⁴ These impediments include free consent, age of majority, etc.¹⁴⁵ A reading of the Act makes it clear that registrars cannot be exempted from the same.

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

England and Wales

86. There is an exception for non-state, religious marriage officers in section 2 of the *Marriage (Same Sex Couples) Act 2013*. This section states that no person, if they are a non-state, religious marriage officer, can be compelled to perform same sex-marriages.

Scotland

¹⁴¹ Catherine Fairbairn, Heather Lyall, Jane Campbell, 'Marriage of same sex couples across the UK: What's the same and what's different?' (2014) Research Paper 54/14 <<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2014/general/5414.pdf>> assessed 15 February 2018.

¹⁴² NI Direct, Getting married in a civil ceremony <<https://www.nidirect.gov.uk/articles/getting-married-civil-ceremony>> assessed 13 February 2018.

¹⁴³ Ibid.

¹⁴⁴ Civil Partnership Act, 2004, S. 143.

¹⁴⁵ NI Direct, Registering a civil partnership <<https://www.nidirect.gov.uk/articles/registering-civil-partnership#toc-5>> accessed 13 February 2018.

87. There is an exception for non-state, religious marriage officers in S8(1D) *Marriage (Scotland) Act 1977*, as amended by the *Marriage and Civil Partnership (Scotland) Act 2014*. This section clarifies that these individuals are not under any duty to perform same sex-marriages.

Northern Ireland

88. Non-state religious marriage officers or religious organisations are not allowed to conduct a civil partnership.¹⁴⁶ This can only be performed by the registrar or deputy registrar of the council district in which it is to take place. This question therefore does not arise.

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

England and Wales

89. Research found no litigation in relation to the lack of exemptions in the *Marriage (Same Sex Couples) Act 2013*. There has been litigation in relation to the *Civil Partnership Act 2004*. In *Ladele v The London Borough of Islington*¹⁴⁷ a registrar refused to perform civil partnerships based on her Orthodox Christian belief, but the local government did not accommodate her needs. She challenged the action of the local government requiring her to perform civil partnerships, but the Court of Appeal dismissed her challenge. It held that it was legitimate for the government to pursue a policy requiring registrars to conduct civil partnerships as part of their strong commitment against discrimination on grounds of sexual orientation.¹⁴⁸ Such action would not amount to either direct or indirect discrimination on grounds of religious belief.¹⁴⁹ After her application for leave to appeal before the Supreme Court was dismissed, she approached the European Court of Human Rights. In *Eweida v United Kingdom*¹⁵⁰ the European Court of Human Rights held that requiring a state marriage officer

¹⁴⁶ Catherine Fairbairn, Heather Lyall, Jane Campbell, 'Marriage of same sex couples across the UK: What's same and what's different?' (2014) Research Paper 54/14 <<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2014/general/5414.pdf>> assessed 15 February 2018

¹⁴⁷ [2009] EWCA Civ 1357

¹⁴⁸ Ibid [46].

¹⁴⁹ Ibid [42], [53].

¹⁵⁰ (2013) 57 EHRR 8

to carry out civil partnership ceremonies was not a breach of Article 14 (prohibition of discrimination) taken together with article 9 (freedom of religion).¹⁵¹

Scotland

90. Research found no litigation in relation to the lack of exemptions in the *Marriage and Civil Partnership (Scotland) Act 2014*.

Northern Ireland

91. Research found no litigation in relation to the legal requirement of registrars to register civil partnerships for same-sex couples under the *Civil Partnership Act 2004*.

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

England and Wales

92. It is unclear from the *Marriage (Same Sex Couples) Act 2013* whether employers, namely local authorities, are permitted to grant individuals an exemption from any part of their duties as a registrar. This is explored in more detail under question I. If they are not then registrars are obligated to perform same-sex marriage ceremonies regardless of their religious belief. Research found local authorities do not have published policies on this issue. Some local authorities were contacted to find out what their policy would be. Oxfordshire County Council responded saying that the issue had not yet arisen.

Scotland

93. It is unclear from the *Marriage and Civil Partnership (Scotland) Act 2014* whether employers, namely local authorities, are allowed to grant individuals an exemption from any part of their duties as a registrar. The Scottish Government has said it is up to the local authority to

¹⁵¹ For more details, see subsection on the European Convention of Human Rights.

decide how it delivers its services. Research found local authorities do not have published policies on this issue.

Northern Ireland

94. From the *Civil Partnership Act, 2004*, it is evident that when the Registrar is satisfied that there is no legal impediment to the civil partnership registration, he or she must prepare a civil partnership schedule and register the partnership.¹⁵² If all procedural requirements are followed, the Registrar is obligated to register the partnership.¹⁵³

¹⁵² NI Direct, Registering a civil partnership <<https://www.nidirect.gov.uk/articles/registering-civil-partnership#toc-5>> assessed 13 February 2018

¹⁵³ Referral and Investigation of Proposed Marriages and Civil Partnerships (Northern Ireland and Miscellaneous Provisions) Order 2015; S. 143, Civil Partnership Act, 2004.

NORTH AMERICA

I. CANADA

96. The legal requirements for marriage in Canada are provided under both federal law and provincial law. Federal law determines who has the capacity to get married; while provincial law determines the validity conditions for marriages, including by whom any ceremony must be performed, and under what circumstances.¹⁵⁴

97. Marriages have legal effect only if performed by either a state marriage officer (“SMO”) or a registered member of the clergy. Religious marriages performed by a non-registered member of the clergy do not have legal effect as such. Except for Prince Edward Island, all the provincial Marriage Acts make allowance for a marriage to be treated as valid even if the person purporting to solemnise it was not authorised at the time of performing the ceremony.¹⁵⁵

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

98. Through the federal Civil Marriage Act 2005,¹⁵⁶ same-sex couples now have the legal right to marry. However, because the solemnisation requirements for marriages are determined by each province, SMOs in Canada enjoy no general exemption from performing same-sex unions. Any such exemption depends on provincial law.

99. Only Prince Edward Island provides an exemption from solemnising a marriage on grounds of religious belief in legislation.¹⁵⁷ The legislation does not specify conditions or limitations on such exemption.

100. Ontario,¹⁵⁸ Quebec,¹⁵⁹ Nova Scotia,¹⁶⁰ New Brunswick,¹⁶¹ Alberta¹⁶² and British Columbia¹⁶³ do not exempt SMOs from performing same sex unions on religious grounds in

¹⁵⁴ Constitution Act, 1867, section 91(26) and 92(12).

¹⁵⁵ Saskatchewan Marriage Act, s.3(a), 4, 8 and 21; Newfoundland and Labrador Marriage Act s.4 and s.32; Manitoba Marriage Act, s.2 and 6; Nova Scotia Marriage Act, s.4(1), 5 and 11; Ontario Marriage Act, s.4 and 30; Quebec Civil Code, s.366, 380 and 382; Alberta Marriage Act, s.3 and 23; Prince Edward Island Marriage Act, s.3(a) and 4; New Brunswick Marriage Act s.2(1) and s.27(1); British Columbia Marriage Act s.2 and 11.

¹⁵⁶ Civil Marriage Act, S.C. 2005, c. 33.

¹⁵⁷ Marriage Act, R.S.P.E.I. 1988, c. M-3, s. 11.1.

¹⁵⁸ Marriage Act, R.S.O. 1990, M.3.

¹⁵⁹ Civil Code of Québec, S.Q. 1991, c. 64, s. 365-377.

their Marriage Acts. Commentators have noted that in British Columbia a SMO may refuse only on the condition that they refer the same-sex couple to an alternative, willing marriage officer.¹⁶⁴ In each of the other provinces, SMOs reportedly also may refuse to perform SSUs, although commentators have suggested that these policies are not consistently applied by all municipal governments.¹⁶⁵ However, even if such policies are applied, they are not published.¹⁶⁶

101. None of Saskatchewan,¹⁶⁷ Manitoba,¹⁶⁸ or Newfoundland and Labrador¹⁶⁹ exempts state marriage officers from performing same-sex unions in legislation. However, these provinces go further by requiring any officer who refuses to perform a same sex union to resign.¹⁷⁰

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

102. Religious officers are exempt from performing same sex unions under the Canadian Charter of Rights and Freedoms.¹⁷¹ Because of the constitutional status of the Charter, it takes primacy over federal and provincial law. Although the Charter makes provision for either the federal legislature or any provincial legislature to derogate from the requirements of the Charter,¹⁷² none has done so. Moreover, the federal Civil Marriage Act 2005, s 3, expressly recognises the right of religious officers to refuse to perform same sex Unions.

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

¹⁶⁰ Solemnization of Marriage Act, R.S.N.S. 1989, c. 436.

¹⁶¹ Marriage Act, R.S.N.B. 2011, c. 188.

¹⁶² Marriage Act, R.S.A. 2000, c. M-5, s. 13.

¹⁶³ Marriage Act, R.S.B.C. 1996, C. 282.

¹⁶⁴ Lafferty (2006) 85(2) Can B Rev 287, 314.

¹⁶⁵ MacDougall (2012) 1:1 Can J Hum Rts 127, 139-40; Trotter (2007) 70 Sask. L. Rev. 365, 386-7.

¹⁶⁶ Research through each of the provinces' government websites and regulations did not turn up any information on the right of SMOs to refuse to solemnise a marriage on religious grounds.

¹⁶⁷ Marriage Act, S.S. 1995, c. M-4.1.

¹⁶⁸ Marriage Act, R.S.M. 1987, C. M50.

¹⁶⁹ Marriage Act, S.N. 2009, C. M-1.02.

¹⁷⁰ Lafferty 2006: 313.

¹⁷¹ Decided in *Reference Re Same-Sex Marriage*, 2004 SCC 79, [58]-[60].

¹⁷² Charter of Rights and Freedoms, s.33.

103. There have not yet been any challenges in the Canadian Supreme Court over the treatment of SMOs' refusals to perform same sex unions. However, there have been challenges at the provincial level in Saskatchewan and Manitoba to the policy of requiring officers to resign if they refuse.

Saskatchewan

104. The most senior court to consider the position of SMO refusals is the Saskatchewan Court of Appeal in *Reference re Marriage Commissioners*.¹⁷³ The question before the court was whether either of two proposed amendments¹⁷⁴ to Saskatchewan's Marriage Act, were compatible with the Charter of Rights and Freedoms. The amendments sought to exempt SMOs from performing same sex unions if doing so conflicted with their religious beliefs.

105. The court was unanimous in holding that the measures were disproportionate to the aim of balancing the religious freedom of SMOs against the right to equality before the law of same-sex couples. This was because a less restrictive alternative system was available: namely, a centralised system in which couples would apply for a SMO to marry them, indicating the gender of the persons to be married in their application, and be assigned an SMO willing to perform a same sex union.¹⁷⁵ This would avoid any couple being refused by a particular objecting SMO, and so avoid any rights-violation.¹⁷⁶

106. The court was divided on whether requiring SMOs to perform same sex unions would infringe their rights to religious freedom. The majority held that their rights would be infringed, but without reaching any firm conclusion on whether that infringement was justifiable.¹⁷⁷ The minority doubted that compelling state marriage officers to solemnise same sex unions would infringe their religious freedom, on the basis that civil unions were not religious ceremonies.¹⁷⁸

107. It is worth noting that the court was aware of, and did not overrule, the case of *J. (M.) v. Nichols*. In that case, a SMO was held to have violated the right to non-discrimination of

¹⁷³ 2011 SKCA 3.

¹⁷⁴ The amendments differed only in their temporal effects: one would have exempted only those who had become SMOs before November 2004 (the date of the ruling in *N.W. v. Canada* 2004 SKQB 434, which held that limiting civil marriage to heterosexual couples was contrary to the Charter); the other would have provided an exemption regardless of the start date of the SMO.

¹⁷⁵ 2011 SKCA 3, [76], [85]-[88].

¹⁷⁶ *Ibid* [86].

¹⁷⁷ *Ibid* [61]-[66].

¹⁷⁸ *Ibid* [129].

same-sex couples by refusing to marry them. The court upheld the decision of the Saskatchewan Human Rights Tribunal, which had held that SMOs, qua state officials, ‘act as government’ and therefore may not discriminate against anyone requesting their services.¹⁷⁹ Moreover, the interference with the SMO’s right to religious freedom was found to be proportionate, because ‘[a] prohibition on discrimination by public officials is necessary to ensure that government treats its citizens equally.’¹⁸⁰

108. Human rights complaints by marriage commissioners who chose to resign after refusing to perform same sex unions were all dismissed on similar grounds.¹⁸¹

Manitoba

109. The two Saskatchewan decisions were recently followed in *Kisilowsky v. Manitoba*, in which a SMO challenged the revocation of his licence to perform marriages for refusal to perform same sex unions. The court agreed with the *Nichols* decision, holding that SMOs were governmental actors and so required to perform their functions in ways that do not violate the Charter rights of others. It was also held that the violation of the SMO’s right to religious freedom was proportionate to the aim of protecting the rights of same-sex couples. Moreover, it was noted that it is unclear whether the SMO’s religious rights were infringed at all, given that they could either register as a religious marriage officer and benefit from the exemption, or apply for a temporary marriage commissioner’s appointment in order to perform specific marriages on particular occasions, without being advertised to other couples as a registered SMO.¹⁸²

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

110. SMOs in Saskatchewan, Manitoba and Newfoundland & Labrador are obligated to perform SSUs – they must either perform those marriages or resign. This appears to be a matter of unpublished internal government policy.

¹⁷⁹ 2009 SKQB 299, [24], [53], [55], [73]-[74].

¹⁸⁰ Ibid [71].

¹⁸¹ *Bjerland v Saskatchewan* (2006) CHRR 06-888; *Goertzen v Saskatchewan* (2006), CHRR 06-889.

¹⁸² 2016 MBQB 224, [21], [29], [34], [44].

II. UNITED STATES OF AMERICA

111. The U.S. is a federal country composed of 50 states. A Bill of Rights was added to the Constitution in 1791. Federal law is supreme over state law because of the Supremacy Clause of Article VI. The U.S. Constitution protects religious freedom through two clauses of the First Amendment: the ‘Establishment Clause’ and the ‘Free Exercise Clause’. While the former requires state neutrality towards religion, the latter prohibits laws that burden the free exercise of religion without sufficient justification. The First Amendment originally applied only to laws enacted by the federal government (Congress), but both the Free Exercise Clause¹⁸³ and the Establishment Clause¹⁸⁴ have been interpreted by the U.S. Supreme Court to apply to the states. The Court has held that where a neutral law of general applicability substantially burdens religious manifestation, the government is not required under the First Amendment to meet the strict scrutiny standard (discussed below) in justifying its refusal to grant religious exemptions.¹⁸⁵ In reaction, Congress passed the Religious Freedom Restoration Act (RFRA) of 1993 which sought to re-impose the strict scrutiny standard for neutral laws that substantially burden religion.¹⁸⁶ The Supreme Court subsequently found the part of the RFRA that applied to the states unconstitutional.¹⁸⁷ However, it continues to bind the federal government¹⁸⁸ and many states have since adopted legislation analogous to RFRA.

112. Same-sex marriages were legalised in the United States on the federal level by a Supreme Court decision.¹⁸⁹ The opinion affirms that the Constitution does not allow the states to bar same-sex couples from marriage on the same terms as opposite-sex couples.¹⁹⁰ Marriages are regulated by state laws.

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

¹⁸³ *Cantwell v Connecticut* 310 US 296 (1940).

¹⁸⁴ *Everson v Board of Education* 330 US 1 (1947).

¹⁸⁵ *Employment Division v Smith* 494 US 872 (1990).

¹⁸⁶ 107 Stat 1488 (16 November 1993); 42 USC 21B §§ 2000bb-2000bb-4.

¹⁸⁷ *City of Boerne v Flores* 521 US 507 (1997).

¹⁸⁸ *Gonzales v O Centro Spirit Beneficente União do Vegetal* 546 US 418 (2006) (US Supreme Court) 433.

¹⁸⁹ *Obergefell v Hodges* 135 S Ct 2584 (2015).

¹⁹⁰ *Ibid* 2607.

113. As local officers perform marriages, and same-sex marriage has been legalised nationwide, states can regulate same-sex marriage within the framework of federal law. The Establishment Clause limits the accommodation states can provide for civil marriage officers on religious grounds. At least three jurisdictions have introduced exemptions for civil marriage officers. Additionally, many states have passed RFRA on their own, often modelled on the federal legislation.

Mississippi

114. The State of Mississippi has passed the 'Protecting Freedom of Conscience from Government Discrimination Act' after the *Obergefell* decision.¹⁹¹ This law allows state employees and others tasked to authorise or licence and perform or solemnise marriages to recuse themselves in advance because of their sincerely held religious beliefs.¹⁹² The statute does not include any provisions to make sure that a government service to solemnise marriages will be available, but requires the individuals to ensure that 'legally valid marriage is not impeded or delayed as a result of any recusal', without further specification. The language of the statute also suggests that officials are entitled to recuse themselves from performing any lawful marriage, not just same-sex marriages.¹⁹³

Utah

115. Utah passed legislation to enact exemptions prior to *Obergefell*.¹⁹⁴ The Act gives much discretion to local government. The elected county clerks are responsible for setting up a policy for solemnising marriages.¹⁹⁵ Government officials under such a policy could recuse themselves for any reason from performing any kind of marriage, as long as another government official is available to solemnise the marriage. County clerks can also delegate solemnising of a marriage to other people in their office but have to make certain that someone in their office is available to solemnise marriages.¹⁹⁶ Any officials that recuse

¹⁹¹ Miss HB 1523 (2016).

¹⁹² Miss Code Ann § 11-62-5 (8) (West 2016).

¹⁹³ Ibid 8 (a) and (b).

¹⁹⁴ Utah SB 297 (2015).

¹⁹⁵ Utah Code Ann § 17-20-4 (West 1953).

¹⁹⁶ Nicolas J Schilling Jr, 'Analysis of Statutory Religious accommodations for State-Employed Religious Objectors to Same-Sex Marriage Solemnization' (2015) 31 Notre Dame Journal of Law, Ethics & Public Policy 431, 448-449.

themselves under this law are also protected from retaliatory measures by the government.¹⁹⁷ Utah also allows a wide range of officials to solemnise marriages.¹⁹⁸

North Carolina

116. North Carolina passed a statute governing religious exemptions for civil marriage officials shortly before the *Obergefell* decision.¹⁹⁹ Magistrates and assistant or deputy registers of deeds may recuse themselves from performing any lawful marriage because of ‘any sincerely held religious objection’ under the act. Until such a recusal is rescinded, they may not perform any, including opposite-sex, marriages.²⁰⁰ Furthermore, the law seeks to ensure the general availability of magistrates to perform marriages, by specifying that in each district the chief judge of the district court must ensure that ‘marriages before a magistrate are available to be performed at least a total of 10 hours per week, over at least three business days per week’.²⁰¹ The chief judge may notify the Administrative Office of the Courts if these criteria are not met and it should then make additional magistrates available.²⁰²

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

Federal constitutional law

117. The First Amendment of the U.S Constitution protects the ‘free exercise’ of religion as a fundamental right. Thus, any law explicitly targeting religiously motivated conduct, would, in order to pass constitutional muster, have to be necessary to achieve a ‘compelling’ governmental interest.²⁰³ This ‘strict scrutiny’ test is the most stringent in U.S. constitutional law, requiring the government to demonstrate that a law is ‘narrowly tailored’ or the ‘least restrictive means’ of furthering its objective.²⁰⁴ A law specifically requiring religious marriage

¹⁹⁷ Utah Code Ann § 63G-20-202 (West 1953).

¹⁹⁸ Utah Code Ann § 30-1-6 (West 1953).

¹⁹⁹ NC SB 2, Session Law 2015-75 (2015).

²⁰⁰ NC Gen Stat Ann § 51-5-5 (b) (West).

²⁰¹ NC Gen Stat Ann § 7A-292 (b) (West).

²⁰² NC Gen Stat Ann § 51-5-5 (c) (West).

²⁰³ *Church of the Lukumi Babalu Aye Inc v Hialeah* 508 US 520 (1993); see also, Erwin Chemerinsky, *Constitutional Law* (Wolters Kluwer 2013) 1700.

²⁰⁴ *Ibid* 713.

officers to solemnise marriages that they objected to on religious grounds would have to satisfy this test. Moreover, it appeared to be accepted by the petitioners during Supreme Court oral arguments for the *Obergefell* case that religious ministers are protected under the First Amendment from being forced to perform marriages they object to.²⁰⁵

State legislative exemptions for religious marriage officers

118. Prior to the *Obergefell* decision, many states (and Washington D.C.) had already authorised same-sex marriage through statute. These states²⁰⁶ exempted religious marriage officers from having to solemnise marriages which they objected to on religious grounds, within their existing legislative frameworks. The law in Washington D.C., for example, states that no ‘priest, minister, imam, or rabbi of any religious denomination and no official of any non-profit religious organization authorised to solemnize marriages ... shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the First Amendment.’²⁰⁷

119. Following *Obergefell*, other states,²⁰⁸ like Texas, responded by introducing similar exemption measures for non-state religious marriage officers: ‘...a clergy or minister may not be required to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage if the action would cause the organization or individual to violate a sincerely held religious belief.’²⁰⁹

120. In addition to affording exemptions, many of these state laws²¹⁰ reinforce protection for religious objectors by expressly guaranteeing immunity from any civil or criminal penalty for refusing to officiate a marriage to which they object to on religious grounds.²¹¹

²⁰⁵ Leslie Griffin, ‘Marriage Rights and Religious Exemptions in the United States’ (2017) Oxford Handbooks Online <www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-19?rskey=HpcaVW&result=1> accessed 09 February 2018; See also the transcript of oral arguments in *Obergefell*, <https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-556q1_15gm.pdf> accessed 26 March 2018, 25-27.

²⁰⁶ Connecticut, Delaware, Washington D.C., Hawaii, Illinois, Maryland, Maine, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington.

²⁰⁷ District of Columbia Official Code § 46-406 (9) (c).

²⁰⁸ Oklahoma, North Carolina, Texas, Utah, Florida and Mississippi.

²⁰⁹ Texas Family Code, Chapter 2, Sec 2.601.

²¹⁰ Each state’s legislative provisions dealing with exemptions for religious marriage officers may be found in full at <www.ncsl.org/research/human-services/same-sex-marriage-religious-exemptions-statutes.aspx>.

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

121. The religious exemption provisions for state marriage officers in North Carolina and Mississippi (discussed above) have both triggered constitutional challenges.

Mississippi litigation

122. In *Barber v Bryant*,²¹² plaintiffs (religious leaders opposed to the law and gay and transgender persons who were likely to be negatively affected by it) challenged the constitutionality of Mississippi's 'Protecting Freedom of Conscience' Act, arguing it violated the Establishment Clause and the Fourteenth Amendment's Equal Protection guarantee. The federal District Court ruled in their favour. The Court found the law to be repugnant to the Establishment Clause's promise of state neutrality toward religion because it accorded special protection to a particular set of religious beliefs by granting immunity from adverse state action to persons who acted in a manner 'consistent' with those beliefs.²¹³ Furthermore, the Court held that the law was a denial of equal protection because 'it creates a vehicle for state-sanctioned discrimination on the basis of sexual orientation.'²¹⁴

123. However, the Fifth Circuit Court of Appeals, without considering the merits of the case, rejected the constitutional challenge due to a lack of standing on the part of the plaintiffs and quashed the District Court order restraining enforcement of the legislation.²¹⁵ The Court reasoned that none of the plaintiffs had been 'personally confronted' by the law in the sense that none of them had actually been denied a marriage license. As such any 'stigmatic harm' they suffered from the existence of the law was not sufficiently concrete and particularised to constitute the 'injury in fact' required to establish standing.

²¹¹ Oklahoma Statutes, Title 43 Marriage and Family, § 43-7.1.

²¹² *Barber v Bryant* 197 F Supp 3d 905 (SD Miss 2016); *Barber v Bryant* 860 F 3d 345 (5th Cir 2017).

²¹³ Miss Code Ann § 11-62-5 (2) (West 2016).

²¹⁴ *Barber* (n 30).

²¹⁵ *Ibid*.

124. The Supreme Court of the United States has recently refused to hear an appeal of the Circuit Court decision, thus leaving the legislation in place.²¹⁶

North Carolina litigation

125. Similarly, in *Ansley v Warren*,²¹⁷ the plaintiffs (three couples) had their challenge to North Carolina's 'Recusal of certain officials' legislative provision rejected on standing grounds in both the District Court and Fourth Circuit Court of Appeals. None of the plaintiffs alleged that the state had impeded their right to marry. Instead, they asserted 'tax-payer standing' to claim a violation of the Establishment Clause arising from the money spent by the state to facilitate its recusal scheme for magistrates who refuse to perform same-sex marriages. They argued this money was impermissibly used to support a specific religious view of marriage.

126. Both courts dismissed this contention, holding that the expenditure was merely 'incidental' to the implementation of a 'denominationally neutral recusal scheme', as opposed, for example, to the financing of a 'private sectarian entity.'²¹⁸ Consequently, the plaintiffs failed to demonstrate an injury in fact necessary to establish standing. North Carolina's law remains in place.

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

127. The Establishment Clause of the First Amendment to the U.S. Constitution requires neutrality from the state and thus from civil servants. Most states do not accommodate religious objectors for purposes of solemnising marriages.

²¹⁶ The Supreme Court has not released its written reasons for refusing to hear an appeal <www.supremecourt.gov/search.aspx?filename=&filetype=2F&docketfiles%2Fhtml%2Fpublic%2F17-547.html> accessed 8 March 2018.

²¹⁷ *Ansley v Warren* 2016 WL 5213937; *Ansley v Warren* 861 F 3d 512, 517 (4th Cir 2017).

²¹⁸ *Ibid.*

Kentucky

128. The State of Kentucky has enacted a compromise solution after Rowan County Clerk Kim Davis was jailed because she had refused to sign marriage certificates for same-sex couples.²¹⁹ The new governor of Kentucky, Matthew G. Bevin issued an executive order that removed county clerk's names from state-issued marriage licences.²²⁰ Subsequently, legislation has been enacted to change the marriage licence and marriage certificate, removing the county clerk's name.²²¹

Texas

129. Texas has not yet enacted an exemption for civil marriage officers. The Attorney General, however, suggested after the *Obergefell* decision that county clerks, justices of the peace and judges in the state could refuse to solemnise marriages.²²² Under the prior existing law, a deputy clerk can perform any function that the elected county clerk could perform.²²³ The county clerk can thus delegate the issuing of marriage licenses for same-sex couples to his employees, but the employees would likewise enjoy a right to refuse under the state's RFRA. A conflict would most likely arise if everyone in the county clerk's office refused to issue a marriage license. Judges and justices of the peace are authorised to perform marriages but are not required to do so in any case.²²⁴

Alabama

130. Same-sex marriages were legalised in the State of Alabama by federal court decisions.²²⁵ The former Chief Justice of the Supreme Court of Alabama, Roy Moore, issued an order

²¹⁹ Alan Blinder and Tamar Lewin, 'Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage' *The New York Times* (New York, 3 September 2015) <www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html> accessed 13 February 2018.

²²⁰ Executive order 2015-048 (22 December 2015).

²²¹ Kentucky 16 RS SB 216, codified in KRS § 402.100 (West).

²²² Ken Paxton, 'Re: Rights of government officials involved with issuing same-sex marriage licenses and conducting same-sex wedding ceremonies' (Opinion no KP-0025, letter to Lt Governor Dan Patrick, 28 June 2015) <www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf> accessed 7 February 2018.

²²³ VTCA Texas Loc Gov't Code Ann § 82.005 (c) (West).

²²⁴ Paxton (n 40).

²²⁵ *Searcy v Strange* 81 F Supp 3d 1285 (SD Ala 2015); *Strawser v Strange* 44 F Supp 3d 1206 (SD Ala 2015).

prohibiting the states' probate judges to issue marriage licences to same-sex applicants.²²⁶ After the *Obergefell* decision, Moore issued an administrative order reiterating his view that the state's laws and Constitution prohibit the state's officials from solemnising same-sex marriage.²²⁷ Moore was thus suspended from office for disregarding a federal injunction, and later, after exhausting legal remedies,²²⁸ resigned as Chief Justice.²²⁹

²²⁶ Roy Moore, 'State of Alabama – Judicial System, Administrative Order of the Chief Justice of the Alabama Supreme Court' (8 February 2015) <www.scribd.com/doc/255139693/Roy-Moore-Order-to-Alabama-Probate-Judges> accessed 13 February 2018.

²²⁷ Roy Moore, 'Administrative Order of the Chief Justice of the Alabama Supreme Court' (6 January 2016) <www.splcenter.org/sites/default/files/roymoore-adminorder_jan6-2016.pdf> accessed 13 February 2018.

²²⁸ *Moore v Alabama Judicial Inquiry Commission* 2017 WL 1403696 (SC Ala).

²²⁹ Mike Cason, 'Roy Moore running for Senate, resigns from Supreme Court to challenge Luther Strange' AL.com (26 April 2017) <www.al.com/news/montgomery/index.ssf/2017/04/roy_moore_announces_alabama_ch.html> accessed 13 February 2018.

SOUTH AMERICA

I. ARGENTINA

131. The current Civil and Commercial Code (2014)²³⁰ regulates marriage and cohabitational unions (*unión convivencial*) defining them as the union between two people (thus including same-sex couples). All marriages are performed and solemnised by civil servants (religious marriages have no legal effect).

132. While a federal country, substantive laws (civil and commercial, criminal, labour laws, and others) are passed by Congress. Thus, the Civil and Commercial Code is a federal law with jurisdiction in all Provinces. However, procedural laws are local. This means that provinces can, in principle, regulate conscientious objection and that the officials in charge of applying these laws are provincial, as opposed to federal.

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

133. The current Civil and Commercial Code (2014)²³¹ does not include exemptions for conscientious objectors. Such exemption was also not included in the law that first introduced same-sex marriages in 2010 (Law 26618),²³² and the expression of motives of this law when introduced in Congress.²³³ When this law was passed, an alternative Bill that contemplated a provision on conscientious objectors was included in the Congressional debates on the Senate but was discarded.²³⁴

134. There are no other regulations or policies on the matter.

²³⁰ <<http://servicios.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235975/norma.htm#11>> accessed 12 February 2018.

²³¹ <<http://servicios.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235975/norma.htm#11>> accessed 12 February 2018.

²³² <<http://servicios.infoleg.gob.ar/infolegInternet/anexos/165000-169999/169608/norma.htm>> accessed 12 February 2018.

²³³ Bill 1737-D-2009, <<http://www.hcdn.gob.ar/proyectos/textoCompleto.jsp?exp=1737-D-2009&tipo=LEY>> accessed 12 February 2018.

²³⁴ See Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo (INADI) (2010), Informe técnico. Sobre dictamen Ley Unión Civil (Exp. CD-13/10) <<http://www.8300.com.ar/wp-content/uploads/2010/07/Dictamen-INADI-Uni%C3%B3n-civil-Completo1.pdf>> accessed 12 February 2018, p 16.

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

135. Given that religious marriages have no legal effect, there is nothing in the judicial text referring to religious marriage officers.

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

136. There has been no litigation on the matter.²³⁵ The cases that arose on the matter (see question below) were never brought to court.

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

137. Shortly after the original law on same-sex marriage was passed, there was some resistance to its implementation²³⁶ and some local Bills were introduced to regulate exemptions based on the right to conscientious objection.²³⁷

138. In any case, the few marriages where officials refused to act - which are known given their transcendence in the media - were still performed by other officials.²³⁸

²³⁵ Fernando Arlettaz, 'Matrimonio Homosexual, Oposición Religiosa Y Objeción De Conciencia En Argentina. A Cinco Años De La Ley De Matrimonio Igualitario', *Revista Latinoamericana De Derecho Y Religión* Núm. 1 (2015), p 58.

²³⁶ For example, two judges from different jurisdictions refused, on the basis of conscientious objection, to marry same-sex couples and so did the director of a civil registry where marriages are registered. See "Matrimonio gay: impulsan proyectos a favor de la objeción de conciencia en algunas provincias", in *Diario La Nación*, 03/08/2010, Available at <<https://www.lanacion.com.ar/1290869-matrimonio-gay-impulsan-proyectos-a-favor-de-la-objecion-de-conciencia-en-algunas-provincias>> accessed 12 February 2018, and "Matrimonio gay: otro funcionario se niega a casar homosexuales", in *ambito.com*, 18/07/2018, available at <<http://www.ambito.com/532724-matrimonio-gay-otro-funcionario-se-niega-a-casar-homosexuales>> accessed 12 February 2018, respectively. In all cases, the couples were married by other judges or officers.

²³⁷ F Arlettaz, p 53.

Furthermore, none of the local Bills introduced was passed.²³⁹ Since those early cases after the passing of the original law, there have not been others, including after the passing of the Civil and Commercial Code. There is a relative homogeneity in legal academia according to which, unlike other cases like abortion, conscientious objection should not be applicable in cases involving same-sex couples.²⁴⁰

²³⁸ Fernando Arlettaz, 'Matrimonio Homosexual, Oposición Religiosa Y Objeción De Conciencia En Argentina. A Cinco Años De La Ley De Matrimonio Igualitario', *Revista Latinoamericana De Derecho Y Religión* Núm. 1 (2015), p 58.

²³⁹ F Arlettaz, p 58.

²⁴⁰ See Marcelo Alegre 'Objeciones a un dictamen y un dictamen sobre la objeción', in N Solari and C Von Opiela (Dirs), *Matrimonio entre personas del mismo sexo. Ley 26.618. Antecedentes. Implicancias. Efectos* (Buenos Aires: La Ley, 2010), pp 89-92; and Graciela Medina, 'Matrimonio entre personas del mismo sexo en el derecho comparado. Filiación, objeción de conciencia, matrimonio entre extranjeros y constitucionalidad', *Revista de Derecho de Familia y de las Personas* November 2010, II 10, p 15.

II. BRAZIL

139. The Brazilian State is federal in nature. The right to get married is regulated at the federal level. States do not have the power to legislate on family law, including marriages or same-sex unions. The Brazilian federal legislation remains silent about the possibility of same-sex marriages or same-sex *uniões de fato*.²⁴¹
140. Brazil has adopted a Bill of Rights enshrined under the *Constituição Federal Brasileira de 1988* (Brazilian Federal Constitution of 1988). The fact that Brazil is a secular state can be inferred from Article 19, subsection I, of the Brazilian Bill of Rights. The Brazilian Federal Constitution of 1988 also establishes the freedom of religion and conscience²⁴² and the prohibition of discrimination.²⁴³
141. Brazil is signatory to the American Convention on Human Rights. The Convention guarantees the freedom of conscience and religion²⁴⁴ and prohibits discrimination.²⁴⁵
142. The Brazilian Federal Supreme Court (STF) ruled in 2011 that the interpretation that common-law marriage could only be celebrated between a man and a woman violated the content of the Article 3, subsection IV, of the Brazilian Federal Constitution of 1988, which prohibits any sorts of discrimination.²⁴⁶ Therefore, the STF recognized the legal possibility of same-sex *união estável*. This decision is legally binding throughout Brazil (*erga omnes*), including on the Brazilian Public Administration.
143. Two years after this judgement, the Brazilian National Council of Justice,²⁴⁷ an administrative body belonging to the Brazilian Judiciary, adopted Resolution n° 175/2013.²⁴⁸ The Resolution prohibits any competent public authority from excusing himself from

²⁴¹ The institute *união de fato* is very similar to the institute of common-law marriage.

²⁴² *Constituição Federal Brasileira de 1988* (Brazilian Federal Constitution of 1988), Article 5th, subsection VI. Available at <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm> accessed 1 March 2018.

²⁴³ Brazilian Federal Constitution of 1988, Article 3rd, subsection IV.

²⁴⁴ American Convention on Human Rights, Article 12.

<<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>> accessed 1 March 2018.

²⁴⁵ American Convention on Human Rights, Articles 1 and 24.

²⁴⁶ Brazil, Supreme Federal Court, *Arguição de Preceito Fundamental* n° 132/RJ and *Ação de Declaração de Inconstitucionalidade* n° 4277/DF, May 2011.

<<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633>> accessed 1 March 2018.

²⁴⁷ The Brazilian National Council of Justice is an administrative body linked to the Judiciary.

²⁴⁸ Brazilian National Council of Justice, Resolution n° 175/2013. Available at <<http://www.cnj.jus.br/busca-atos-adm?documento=2504>> accessed 13 March 2018.

solemnising same-sex marriages or same-sex *união estável* or performing the conversion of a same-sex *união estável* to a same-sex marriage. This is an administrative measure and is binding on the Judiciary and all employees of registries.²⁴⁹ Refusal can lead to the institution of administrative procedures²⁵⁰ and administrative sanctions.²⁵¹

144. The Civil Marriage procedure is divided in two stages.²⁵² Firstly, the couple need to be granted an authorisation to get married. The authorisation is granted by the competent registry after assessing if there are impediments to the union. The State-level Public Prosecution Service must be heard before the authorisation is granted. Secondly, the *juiz de paz* (equivalent to the figure of the Justice of the Peace)²⁵³ will perform the wedding in the competent public registry.

145. When it comes to the Religious Marriage with Civil Effects, the procedure is divided into three stages²⁵⁴. Firstly, the couple needs to be granted an authorisation to get married by the competent registry. Secondly, the marriage will be celebrated by a religious authority (this person can be from any religion). Thirdly, the married couple will have to communicate the marriage celebration to the competent registry and require the concession of legal effects to the marriage.²⁵⁵

²⁴⁹ The Resolution does not clarify who the competent authorities are but it can be inferred that it is referring to *juizes de paz* (people who have the competence to perform marriage), people that work in the registries and are responsible for dealing with the paperwork related to marriage requests and marriage recognition, and also members of the public prosecution service.

²⁵⁰ All registries are under the supervision of a judge. If the competent authority refuses to perform the same-sex union, this refusal will be communicated to the judge who will then decide if investigations should be commenced, if administrative procedures should be instituted and if any sanction should be applied.

²⁵¹ Employees of the registries can be subjected to the following sanctions: reprimand, fine, suspension, loss of the competence to perform public and private acts. Brazilian Act n° 8.935/1994, Article 32. Available at <http://www.planalto.gov.br/ccivil_03/leis/18935.htm> accessed 13 March 2018. *Juizes de paz* are subjected to the following sanctions: reprimand, censure, forced change of workplace, compulsory retirement, dismissal. Brazilian Act n° 35/1979, Article 42. < <http://www.cnj.jus.br/publicacoes/lei-organica-da-magistratura-nacional>> accessed 13 March 2018.

²⁵² Código Civil Brasileiro de 2002 (Brazilian Civil Code of 2002), Articles 1526 and 1533. Available at <http://www.planalto.gov.br/CCivil_03/leis/2002/L10406.htm> accessed 1 March 2018.

²⁵³ *Juiz de paz* is the competent authority to perform marriage in Brazil. They can have a legal qualification, but that is not a requirement. The Brazilian Constitution states that they should be elected, but in practice each State's Governor can appoint the *juizes de paz* of his State.

²⁵⁴ The procedure is regulated by the 1.110/1950 Act. Available at <http://www.planalto.gov.br/ccivil_03/leis/1950-1969/L1110.htm> accessed 1 March 2018.

²⁵⁵ A marriage to produce legal effects must have its validity recognized by the competent registry. If the marriage is considered valid by the registry, it will grant legal effects to it.

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

146. No exemption is granted to state marriage officers from performing same-sex unions.

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

147. Brazilian legal framework is silent regarding the possibility of non-state religious marriage officers refusing to perform same-sex unions. The researcher was unable to find case law or academic literature relevant to this question.

148. Provisions of the Brazilian Federal Constitution of 1988 are relevant to answering this question. The Brazilian State is a Secular State, and the Brazilian Federal Constitution of 1988, in its Article 5th, subsection VI, guarantees freedom of religion and conscience. A refusal by a non-state marriage officer to perform a marriage may be protected by this freedom. The Constitution also prohibits discrimination,²⁵⁶ including on the basis of religion or sexual orientation.²⁵⁷

149. Further, when it comes to marriage laws in Brazil, it is important to keep in mind that the current legal framework establishes a difference between religious and civil marriage. In principle, only civil marriages produce legal effects. Nonetheless, the Brazilian Civil Code envisages the possibility of granting legal effects to religious marriages if some requirements are met.²⁵⁸ Since civil marriages are enough to produce the legal effects desired, it is not necessary to undergo religious marriages.

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

²⁵⁶ Brazilian Federal Constitution of 1988, Article 3rd, subsection IV.

²⁵⁷ See, Brazil, Supreme Federal Court, Arguição de Preceito Fundamental n° 132/RJ and Ação de Declaração de Inconstitucionalidade n° 4277/DF, May 2011.

<<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633>> accessed 1 March 2018.

²⁵⁸ Brazilian Civil Code of 2002, Article 1516.

150.No.

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

151. Competent public authorities cannot deny performing same-sex unions based on personal or religious reasons because of Resolution n° 175/2013 adopted by the Brazilian National Council of Justice and the fact that Brazil is a Secular State. The resolution is an administrative measure and it is binding on the Judiciary and all employees of registries.

152. The refusal to perform the act can lead to the institution of an administrative procedure and administrative sanctions. The refusal can also be subjected to judicial review. Please see paragraph 143 above for more details.

III. COLOMBIA

153. Neither same-sex de facto unions²⁵⁹ nor same-sex marriages are statutorily regulated in Colombia, but are the product of four judicial decisions by the Colombian Constitutional Court. The first two, in 2007 and 2009, extended the rights of de facto marital unions to same-sex couples.²⁶⁰ The third one, in 2011, established the right of same-sex couples to form a family but decided to leave the establishment of same-sex marriage to Congress, giving it a period of two years to do so.²⁶¹ After the two years, the potential inaction of Congress would make the order fully operative and allow same-sex marriages to be registered. However, the decision was ambiguous as to whether they would be registered as marriages and left a legal vacuum until finally, in 2016, given the inaction of Congress, the Constitutional Court decided that article 42 of the Constitution, while mentioning “the free decision of a man and woman to contract matrimony”²⁶², does not exclude the possibility of same-sex marriage, therefore declaring the right of same-sex couples and an obligation by the State to guarantee it.²⁶³ This last judgment made same-sex couples’ right to marriage an operative right, requiring no further action by other branches of the State.
154. All marriages are performed by judges or notaries and solemnised by civil servants in a Civil Registry. Religious marriages have no legal effect, but they can be registered through a solemnisation process in the Civil Registry.

V. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

²⁵⁹ Referred to in other jurisdictions as domestic partnership or cohabitation (in Spanish, *unión marital de hecho*), is the recognition by the State of certain marriage-related rights to couples who have lived together for some years. In Colombia, this requires two years of cohabitation and establishment by a notary public on a public deed or by a judge.

²⁶⁰ Judgement C-075/2007, available at <<http://www.corteconstitucional.gov.co/relatoria/2007/c-075-07.htm>> accessed 1 February 2018, and Judgement C-029/09, available at <<http://www.corteconstitucional.gov.co/relatoria/2009/c-029-09.htm>> accessed 1 February 2018.

²⁶¹ Judgement C-577/11, available at <<http://www.corteconstitucional.gov.co/relatoria/2011/C-577-11.htm>> accessed 1 February 2018.

²⁶² Translation from retrieved from <https://www.constituteproject.org/constitution/Colombia_2015?lang=en> accessed 1 February 2018.

²⁶³ Judgement SU214/16, available at <<http://www.corteconstitucional.gov.co/relatoria/2016/su214-16.htm>> accessed 1 February 2018.

155. In its recent judgment, the Court did not mention the possibility of marriage officers exercising a right of conscientious objection, although it has dealt with this issue in other cases such as abortion.²⁶⁴ Furthermore, when discussing the duty of the State to grant this right, the Court included judges, state marriage officers, and notary publics who, although are not public officials *stricto sensu*, do perform a public service.²⁶⁵

156. There are no other regulations or policies on the matter.

VI. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

157. There is nothing in the judicial text referring to religious marriage officers.

VII. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

158. There has been no litigation in the matter.²⁶⁶

VIII. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

159. The Senate in 2015 passed a Bill regulating the right to conscientious objection; however, it neither dealt with same-sex marriage (since it was before the judgement of

²⁶⁴ Judgment T-388/09, available at <<http://www.corteconstitucional.gov.co/relatoria/2009/t-388-09.htm>> accessed 1 February 2018.

²⁶⁵ Judgement SU214/16, available at <<http://www.corteconstitucional.gov.co/relatoria/2016/su214-16.htm>> accessed 1 February 2018, at s 9.3.

²⁶⁶ Comunicado No. 17, 28/04/2016, available at <<http://www.corteconstitucional.gov.co/comunicados/No.%2017%20comunicado%2028%20de%20abril%20de%202016.pdf>> accessed 1 February 2018, p 10.

the court), nor with same-sex de facto unions. The Bill was archived in July 2017 after two years of not being debated in the House of Representatives.²⁶⁷

160. Soon after the 2016 decision, the Constitutional Court issued a Unification Decision (Sentencia de Unificación) addressing other issues.²⁶⁸ These decisions have the same status as regular decisions and are issued to clarify certain aspects of the judgment. In it, one of the judges, in a concurring vote, mentioned the necessity of establishing rules for conscientious objectors. According to him, a judge or notary public could claim exemption if and only if there are other legal actors capable of performing the legal act of union. Otherwise, the right of the same-sex marriage trumps that of the conscientious objector. However, this is only obiter dicta in a single-judge concurring opinion and has no binding effect. That is, it does not alter the silence in the Court's judgment on the matter of conscientious objection.

161. Finally, a non-binding consultative opinion was requested to the Superintendencia de Notariado y Registro (state entity dependent of the Ministry of Justice in charge of regulating notary publics and public registries) regarding conscientious objection in same-sex unions.²⁶⁹ The opinion clearly states that there is no right to conscientious objection by notary publics in these cases.

²⁶⁷ <<http://www.congresovisible.org/proyectos-de-ley/por-medio-de-la-cual/8075/#tab=2>> accessed 1 February 2018.

²⁶⁸ Comunicado No. 17, 28/04/2016, p 10-11.

²⁶⁹ Superintendencia de Notariado y Registro, 'Consulta sobre objeción de conciencia por parte de notarios ante matrimonio igualitario entre personas del mismo sexo. Radicado SNR2016ER047068', available at <<https://www.supernotariado.gov.co/PortalSNR/ShowProperty;jsessionid=ycQqV8xF5Uera-UFz5I-5wZzDkJTcpX74hGpP1mDA5k7CAyqBc7u!46740245?nodeId=%2F%2FSNRContent%2F%2FWLSWCCPORTAL01130055%2F%2FidcPrimaryFile&revision=latestreleased>> accessed 1 February 2018.

AUSTRALASIA

I. AUSTRALIA

162. The Marriage Amendment (Definition and Religious Freedom) Bill 2017 was introduced in the Senate for the first time on 15 November 2017. It was finally passed by both Houses (House of Representatives and the Senate) on 7th December 2017. Under paragraph 51(xxi) of the Constitution of Australia, the Commonwealth (federal Parliament) has the power to make laws relating to marriage. The High Court of Australia confirmed that this power includes the power to make laws relating to same-sex marriage in *The Commonwealth v Australian Capital Territory*.²⁷⁰ The amended definition of marriage in Section 5(1) of the Marriage Amendment (Definition and Religious Freedom) Act removed the restrictions that limited marriage in Australia to the union of a man and a woman and now, allows two people the freedom to marry in Australia, regardless of their sex or gender.

163. It should be noted that Australia has no Bill of Rights contained in one single document. Rights may be found in the Constitution, common law or legislation passed - Acts passed by the Commonwealth Parliament or State or Territory Parliament.²⁷¹

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

(a) Objects of the Act

164. The objective of the 2017 amendment²⁷² to the Marriage Act, 1961 has been to allow equal access to marriage by extending the freedom to marry to any two people, regardless of their sex or gender and to allow ministers of religion to solemnise marriage, respecting the doctrines, tenets and beliefs of their religion, the views of their religious community or their own religious beliefs. The amendment also sought to allow equal access to marriage while protecting religious freedom in relation to marriage.

²⁷⁰ [2013] HCA 55

²⁷¹ <https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law>.

²⁷² Marriage Amendment (Definition and Religious Freedom) Act 2017, s 2A

b) Redefining ‘authorised celebrant’

165. Under Australian law, only an authorised celebrant can legally solemnise marriages within Australia. In Australia, religious marriage celebrants, ministers of religion, chaplain, civil marriage celebrants, state and territory registry officers and military officers are considered as authorised celebrants.
166. Subsection 5(1) of the Marriage Act was amended and the current definition of authorised celebrants has three new limbs to the definition: (a) the inclusion of religious marriage celebrant, (b) to clarify that a chaplain in the Defence Force is an authorised celebrant, and (c) to enable the Chief of the Defence Force to authorise an officer (as defined by the *Defence Act 1903*) other than a chaplain to be an authorised celebrant. Apart from these three new limbs, the definition of ‘authorised’ celebrant also included minister of religion and marriage celebrant (civil celebrant).

c) No exemption to civil celebrants based on religious beliefs²⁷³

167. The Supplementary explanatory memorandum to the Marriage Amendment (Definition and Religious Freedom) Act 2017 states that subsection 5(1) of the Bill (now Act) clarifies that religious exemptions under new section 47A of the amended Marriage Act will not apply to a ‘civil’ marriage celebrant (referred to in the Marriage Act as marriage celebrant) registered under Subdivision C of Division 1 of Part IV.²⁷⁴
168. As a clarification on section 47A of the Bill (now Act), the Supplementary explanatory memorandum states that all marriage celebrants registered after the Act commences are required, as agents of the Commonwealth, to uphold the definition of marriage under the Marriage Act without discrimination. It further clarifies that State and territory officers and ‘civil’ marriage celebrants (who are not religious marriage celebrants) may not refuse to solemnise marriages on religious grounds, in accordance with the existing Code of Practice and anti-discrimination laws.²⁷⁵ The revised explanatory memorandum

²⁷³ The legislative amendments have recently become operational and there is no information regarding how these amendments are working out in practice.

²⁷⁴ Supplementary Memorandum to Marriage Amendment (Definition and Religious Freedom) Bill 2017(House of Representatives),
<https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1099>
accessed 12 February 2018.

²⁷⁵ Ibid.

to the Act states that it requires marriage celebrants who are not religious marriage celebrants or ministers of religion to perform marriages in accordance with civil law, regardless of their personal beliefs.²⁷⁶

169. Also, the revised explanatory memorandum states that the Bill (now Act) re-introduced the category of marriage officers within the Australian Defence Force who will be able to solemnise marriages of Australian Defence Force officers overseas to ensure that members of the Australian Defence Force will have a secular (non-religious) option to marry available to them. These marriage officers, unlike the chaplain in the Defence Forces, will not be able to refuse solemnise a marriage which is lawful under the Marriage Act.
170. Thus, state and territory registry officers, civil marriage celebrants and military officers are not exempt from performing same-sex marriages under the legislation.

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

171. Section 47 of the Marriage Amendment (Definition and Religious Freedom) Act 2017 provides that a minister of religion may refuse to solemnise a marriage if any of the following applies: (a) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation; (b) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion; (c) the minister's religious beliefs do not allow the minister to solemnise the marriage. Under Section 81(2) of the amended Act, a chaplain may refuse to solemnise marriage based on the same grounds as a minister of religion.
172. Section 47A of the amended Marriage Act 1961 provides that a religious marriage celebrant may refuse to solemnise a marriage if the celebrant's religious beliefs do not allow the celebrant to solemnise the marriage. Neither section 47 nor section 47A limits

²⁷⁶ Revised Explanatory Memorandum to Marriage Amendment (Definition and Religious Freedom) Bill 2017(House of Representatives), <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fs1099_ems_cd9d80d5-a58a-438f-86a4-5500c0990b00%22> accessed 12 February 2018.

the grounds on which a minister of religion or religious marriage celebrant may refuse to solemnise a marriage. The provisions of new section 47 are designed to ensure that a minister of religion/religious marriage celebrant whose religious belief is that marriage is only a relationship between a man and a woman, may decline to solemnise a same-sex marriage without penalty. According to the Supplementary Explanatory Memorandum, these provisions will also over-ride any State or Territory law on discrimination relating to sexual orientation which might have been argued to operate to the contrary.

173. Section 39DA to 39DD of the amended Marriage Act provides procedural clarification on how to register and get identified as a religious marriage celebrant. As per Section 39DA, persons are entitled to be registered as a religious marriage celebrants on the register of marriage celebrants if they have registered as a marriage celebrant²⁷⁷ on the register or they are a ministers of religion.²⁷⁸ A combined reading of section 39DB and Section 39DC shows that a person has to give notice in writing to the Registrar of Marriage Celebrants to be identified as a religious marriage celebrant. This inclusion of a new category of religious marriage celebrant is noteworthy as Section 39DD of the amended Marriage Act 1961 provides for transitional provisions for existing marriage celebrants. Thus, the amended Act provides a pathway for current civil celebrants to become religious marriage celebrants by giving a notice in writing in a form approved by the Registrar within 90 days from when the Act commences. Section 39DD(c) requires that this transition is provided for when the choice is based on the person's belief. Thereafter, all remaining and future civil celebrants would continue to provide non-discriminatory services.²⁷⁹

²⁷⁷ Section 39C of the Marriage Act 1961 lays down general substantive and procedural requirements to be registered as a marriage celebrant - to be 18 years of age, fit and proper, has required qualifications necessary to be a marriage celebrant. Section 39(C)(2) lays down what the Registrar must take into account while determining whether a person is fit and proper to be a marriage celebrant. There are no different substantive requirements for a religious marriage celebrant. As per Section 39 DE of the amended Marriage Act, if the Registrar decides not to identify the person as a religious marriage celebrant, then the person must be informed of this decision in writing, the reasons for the decision and the person has a right under Section 39(J) to ask for a review of the decision.

²⁷⁸ Section 29 of the Marriage Act 1961 states the qualifications required for being registered as a minister of religion - ordinarily resident of Australia, 21 years of age, person is minister of religion of a recognised denomination and has been nominated for registration by the denomination. As per Section 26, the Governor-General may, by Proclamation, declare a religious body or a religious organisation to be a recognised denomination for the purposes of this Act.

²⁷⁹ Senator's Introductory Speech, Second Reading of Marriage Amendment (Definition and Religious Freedom) Bill 2017, available at <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2Fc88411d8-89e6-4641-9141-3b3f92feb4e6%2F0165;query=Id%3A%22chamber%2Fhansards%2Fc88411d8-89e6-4641-9141-3b3f92feb4e6%2F0159%22>> accessed 12 February 2018.

174. Thus, according to the Revised Explanatory Memorandum (of the Bill, now Act) ministers of religion, chaplains and religious marriage celebrants may refuse to marry same-sex couples. However, state and territory registry officers, civil marriage celebrants and military officers authorised to perform marriages overseas will not be able to refuse to solemnise a marriage which is lawful under the Marriage Act because of a person's sex, gender, race, disability, age or other attribute protected under anti-discrimination law. According to the Memorandum, this limitation is reasonable, necessary and proportionate and accommodates the right to religion to the greatest extent possible while still achieving the objective; that is, adopts the least rights-restrictive means of achieving its objective.

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

175. The new provisions of the Marriage Act 1961 relating to exemptions for religious marriage celebrants, chaplains or ministers of religion has not been subject to any constitutional challenge.

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

176. In Australia, religious marriage celebrants, ministers of religion, chaplain, civil marriage celebrants, state and territory registry officers and military officers are considered as authorised celebrants. As stated under Question 2, according to the Revised Explanatory Memorandum (of the Bill, now Act) ministers of religion, chaplains and religious marriage celebrants may refuse to marry same-sex couples and are thus, provided with exemptions. However, state and territory registry officers, civil marriage celebrants and military officers authorised to perform marriages overseas will not be able to refuse to solemnise a marriage which is lawful under the Marriage Act because of a person's sex, gender, race, disability, age or other attribute protected under anti-discrimination law.

II. NEW ZEALAND

177. There are two ways to get married or have a civil union in New Zealand: by a registered marriage celebrant,²⁸⁰ or in a registry office.²⁸¹
178. Marriage celebrants are non-state marriage officers. They are registered on a list,²⁸² and are thereby authorised to solemnise marriages. They may be ministers of religion from statutorily specified religious bodies,²⁸³ nominated members of approved organisations,²⁸⁴ or independent applicants.²⁸⁵
179. Marriages in registry offices are performed by a Registrar of Marriages, and do not require marriage celebrants.

I. Does this jurisdiction exempt state marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

180. New Zealand law does not provide for state marriage officers to be exempted from performing same-sex unions in legislation.²⁸⁶ There have been no reported cases challenging this since the legalisation of same-sex marriage in New Zealand.

II. Does this jurisdiction exempt non-state, religious marriage officers from performing same-sex unions, whether in legislation, regulation, policy or practice?

181. Marriage celebrants are generally not obliged to solemnise marriages.²⁸⁷
182. A more specific exemption was added through the legislation legalising same-sex marriage,²⁸⁸ whereby some marriage celebrants are exempted from performing certain marriages.²⁸⁹

²⁸⁰ Marriage Act 1955, s 31.

²⁸¹ Ibid s 33.

²⁸² Ibid s 7.

²⁸³ Ibid s 8. List of religious bodies enumerated in Schedule 1 of the same Act.

²⁸⁴ Ibid s 10. Organisation approval process set out in s 9 of the same Act.

²⁸⁵ Ibid s 11.

²⁸⁶ Ibid s 28.

²⁸⁷ Ibid s 29(1).

183. This exemption only applies to marriage celebrants who are ministers of religion from the listed religious bodies,²⁹⁰ or members of approved organisations.²⁹¹ It does not apply to independent marriage celebrants.

184. This exemption only applies if solemnising the marriage contravenes the religious beliefs of the religious body, or the religious beliefs or philosophical or humanitarian convictions of the approved organisation. It does not apply on the basis of personal beliefs or convictions of individual members of the organisation.

185. Marriage celebrants are not necessary for a marriage to occur.

III. Have those provisions (or their absence) led to any litigation, particularly any constitutional challenges to the existence of an exemption for state marriage officers?

186. There have been no reported cases about the ability of same-sex couples to marry, nor about the exemption for some marriage celebrants, since the legalisation of same-sex marriage in New Zealand.

IV. In jurisdictions that do not provide for such exemptions, are marriage officers obligated to perform same sex unions regardless of their religious views? How is this regulated?

187. The specific exemption described in paragraph 166 above²⁹² is aimed at religious freedom. It is available for ministers of religion and celebrants nominated by approved organisations, most of which are churches. It reflects the Government Administration Committee's "intention that the passage of this bill should not impact negatively upon people's religious freedoms".²⁹³

²⁸⁸ Marriage (Definition of Marriage) Amendment Act 2013, s 6.

²⁸⁹ Marriage Act 1955, s 29(2).

²⁹⁰ Listed in Schedule 1 of the Marriage Act 1955.

²⁹¹ Through the approval process in Marriage Act 1955, s 10(4).

²⁹² Marriage Act 1955, s 29(2).

²⁹³ Marriage (Definition of Marriage) Amendment Bill 39-2.

188. The specific exemption was intended to clarify the position for the specified marriage celebrants²⁹⁴. It does not limit the generality of the prior principle that marriage celebrants are not obliged to solemnise marriages.²⁹⁵
189. The Government Administration Committee endorsed the view that marriage is a human right.²⁹⁶ In light of this, the lack of an exception for Registrars reflects the range of options available to religious and non-religious couples for the solemnising of their marriages: of approximately 22,000 marriages conducted in New Zealand each year, 23% are conducted in a registry office by a registrar, 32% are conducted by a church or organisational marriage celebrant, and 45% are conducted by an independent marriage celebrant.²⁹⁷

²⁹⁴ Ibid.

²⁹⁵ Marriage Act 1955, s 29.

²⁹⁶ Marriage (Definition of Marriage) Amendment Bill 39-2.

²⁹⁷ Ibid.