**Attachment 1 - Approaches taken to exceptions in some comparable jurisdictions**

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Jurisdiction  *(date marriage equality legalised / method)* | Can ministers of religion refuse to solemnise a same-sex marriage?  *Equivalent to the proposed s47 of the Exposure Draft.* | Can marriage celebrants refuse to solemnise a same-sex marriage?  *Equivalent to the proposed s47A of the Exposure Draft.* | Can religious organisations refuse to provide same-sex couples with goods and services related to the marriage of same-sex couples?  *Equivalent to the proposed s47B of the Exposure Draft.* | Can anyone refuse to provide same-sex couples with goods and services related to marriage on the basis of religious belief or conscience? | Is it unlawful to discriminate against a person on the ground of sexual orientation?  *Equivalent to s5A of the Sex Discrimination Act 1984 (Cth).* | Is it generally unlawful for a person to discriminate on the basis of sexual orientation in providing goods or services?  *Equivalent to s22 of the Sex Discrimination Act 1984 (Cth).* | Are there specific marriage law related exceptions within the anti-discrimination law?  *Equivalent to s40(2A) of the Sex Discrimination Act 1984 (Cth).* | Is there a broad exception allowing religious bodies to discriminate on the basis of sexual orientation?  *Equivalent to s37(1)(d) of the Sex Discrimination Act 1984 (Cth).* |
| Australia  *(current law)* | N/A[[1]](#endnote-1) | N/A[[2]](#endnote-2) | N/A[[3]](#endnote-3) | Rarely re: religious belief; no re conscience[[4]](#endnote-4) | Yes[[5]](#endnote-5) | Yes[[6]](#endnote-6) | Yes[[7]](#endnote-7) | Yes[[8]](#endnote-8) |
| Australia  *(incorporating Exposure Draft amendments)* | Yes[[9]](#endnote-9) | Yes[[10]](#endnote-10) | Yes[[11]](#endnote-11) | Rarely re: religious belief; No re: conscience[[12]](#endnote-12) | Yes[[13]](#endnote-13) | Yes[[14]](#endnote-14) | Yes[[15]](#endnote-15) | Yes[[16]](#endnote-16) |
| Australia  *(Australian Human Rights Commission proposed amendments)* | Yes[[17]](#endnote-17) | No[[18]](#endnote-18) | In limited circumstances[[19]](#endnote-19) | Rarely re: religious belief; No re: conscience[[20]](#endnote-20) | Yes[[21]](#endnote-21) | Yes[[22]](#endnote-22) | Yes[[23]](#endnote-23) | Yes[[24]](#endnote-24) |
|  | | | | | | | | |
| New York  *(24 July 2011 / legislation)* | Yes[[25]](#endnote-25) | No[[26]](#endnote-26) | Yes[[27]](#endnote-27) | Unlikely[[28]](#endnote-28) | Yes[[29]](#endnote-29) | Yes[[30]](#endnote-30) | No exception found[[31]](#endnote-31) | Yes[[32]](#endnote-32) |
| Spain  *(3 July 2005 / legislation)* | Unlikely[[33]](#endnote-33) | Unlikely[[34]](#endnote-34) | Unlikely[[35]](#endnote-35) | Unlikely[[36]](#endnote-36) | Yes[[37]](#endnote-37) | Yes[[38]](#endnote-38) | Unknown[[39]](#endnote-39) | Possibly[[40]](#endnote-40) |
| Brazil  *(14 May 2013 / legislation)* | Unknown[[41]](#endnote-41) | Unknown[[42]](#endnote-42) | Unknown[[43]](#endnote-43) | Unknown[[44]](#endnote-44) | Yes[[45]](#endnote-45) | Likely[[46]](#endnote-46) | Unknown[[47]](#endnote-47) | Unknown[[48]](#endnote-48) |
| England and Wales  *(12 March 2014 / legislation)* | Yes[[49]](#endnote-49) | No[[50]](#endnote-50) | Sometimes[[51]](#endnote-51) | No[[52]](#endnote-52) | Yes[[53]](#endnote-53) | Yes[[54]](#endnote-54) | Yes[[55]](#endnote-55) | Yes[[56]](#endnote-56) |
| Northern Ireland  *(22 May 2015 / popular referendum)* | Yes[[57]](#endnote-57) | No[[58]](#endnote-58) | Yes[[59]](#endnote-59) | No[[60]](#endnote-60) | Yes[[61]](#endnote-61) | Yes[[62]](#endnote-62) | Yes[[63]](#endnote-63) | Yes[[64]](#endnote-64) |
| Scotland  *(February 2014 / legislation)* | Yes[[65]](#endnote-65) | Yes[[66]](#endnote-66) | Yes[[67]](#endnote-67) | No[[68]](#endnote-68) | Yes[[69]](#endnote-69) | Yes[[70]](#endnote-70) | No exception found[[71]](#endnote-71) | Yes[[72]](#endnote-72) |
| New Zealand  *(17 April 2013 / legislation)* | Yes[[73]](#endnote-73) | Yes[[74]](#endnote-74) | No[[75]](#endnote-75) | No[[76]](#endnote-76) | Yes[[77]](#endnote-77) | Yes[[78]](#endnote-78) | No exception found[[79]](#endnote-79) | No exception found[[80]](#endnote-80) |

1. Same-sex marriage has not been legalised in Australia. [↑](#endnote-ref-1)
2. Same-sex marriage has not been legalised in Australia. [↑](#endnote-ref-2)
3. Same-sex marriage has not been legalised in Australia. [↑](#endnote-ref-3)
4. Same-sex marriage has not been legalised in Australia, therefore direct legislation governing marriage will not apply. However, the protections under the *Sex Discrimination Act 1984* (Cth) are likely to prevent service providers from discriminating on the ground of sexual orientation. [↑](#endnote-ref-4)
5. *Sex Discrimination Act 1984* (Cth), s 5A. [↑](#endnote-ref-5)
6. *Sex Discrimination Act 1984* (Cth), s 22. [↑](#endnote-ref-6)
7. *Sex Discrimination Act 1984* (Cth), s 40(2A). [↑](#endnote-ref-7)
8. *Sex Discrimination Act 1984* (Cth), s 37(1)(d). [↑](#endnote-ref-8)
9. *Marriage Amendment (Same-Sex Marriage) Bill 201X* (Cth)*,* s 47. [↑](#endnote-ref-9)
10. *Marriage Amendment (Same-Sex Marriage) Bill 201X* (Cth), s 47A. [↑](#endnote-ref-10)
11. *Marriage Amendments (Same-Sex Marriage) Bill 201X* (Cth), s 47B. [↑](#endnote-ref-11)
12. This has not been explicitly addressed in the *Marriage Amendment (Same-Sex Marriage) Bill 201X* (Cth), however, protections within the *Sex Discrimination Act 1984* (Cth) are likely to apply. [↑](#endnote-ref-12)
13. *Sex Discrimination Act 1984* (Cth), s 5A. [↑](#endnote-ref-13)
14. *Sex Discrimination Act 1984* (Cth), s 22. [↑](#endnote-ref-14)
15. *Sex Discrimination Act 1984* (Cth), s 40(2A). [↑](#endnote-ref-15)
16. *Sex Discrimination Act 1984* (Cth), s 37(1)(d). [↑](#endnote-ref-16)
17. See submission. [↑](#endnote-ref-17)
18. See submission. [↑](#endnote-ref-18)
19. This will only apply to religious organisations as per s 37(1)(d) of the *Sex Discrimination Act 1984* (Cth). [↑](#endnote-ref-19)
20. This has not been explicitly addressed in the *Marriage Amendment (Same-Sex Marriage) Bill 201X* (Cth), however, protections within the *Sex Discrimination Act 1984* (Cth) are likely to apply. [↑](#endnote-ref-20)
21. *Sex Discrimination Act 1984* (Cth), s 5A. [↑](#endnote-ref-21)
22. *Sex Discrimination Act 1984* (Cth), s 22. [↑](#endnote-ref-22)
23. *Sex Discrimination Act 1984* (Cth), s 40(2A). [↑](#endnote-ref-23)
24. *Sex Discrimination Act 1984* (Cth), s 37(1)(d). [↑](#endnote-ref-24)
25. *Marriage Equality Act 2011* (New York), s 5(1)(a). [↑](#endnote-ref-25)
26. The exception under s5(1)(a) of the *Marriage Equality Act 2011* (New York) only applies to a minister or clergyman, meaning a minister or clergyman of a religious faith. The exception then only applies to those with a direct connection to a religious body, and therefore is unlikely to extend to include celebrants who are not affiliated or registered with a religious body. [↑](#endnote-ref-26)
27. Religious corporations can refuse ‘accommodations, advantages, facilities or privilege’ related to the solemnization or celebration of same-sex marriage under s10(b)(1) of the *Marriage Equality Act 2011* (New York). This only applies to ‘religious corporations’, with the requirement of being incorporated under the education law or the religious corporations law. Section 10(b)(2) of the *Marriage Equality Act 2011* (New York) prevents a civil claim or cause of action being brought against a religious corporation on the basis of sexual orientation in the context of services for marriage. [↑](#endnote-ref-27)
28. Section 10(a)(2) of the *Marriage Equality Act 2011* (New York) ensures that same-sex marriages receive the same government treatment afforded to heterosexual marriages. In relation to other service providers (being non-religious), it was held in the case of *Gifford v McCarthy* 23 N.Y.S.3d 422 (2016) that a business could not discriminate against customers “on the basis of sexual orientation or any other sexual characteristic”. The *Gifford* case illustrates an emerging intolerance of discrimination towards same-sex couples in providing services, where those services are not provided by a religious organisation. [↑](#endnote-ref-28)
29. The *Sexual Orientation Non-Discrimination Act 2003* (New York) prohibits discrimination on the basis of actual or perceived sexual orientation. [↑](#endnote-ref-29)
30. The *Sexual Orientation Non-Discrimination Act 2003* (New York) prohibits discrimination on the basis of actual or perceived sexual orientation. This includes services, amongst other things, for housing, public accommodations, education and credit. An exception for religious or denominational institutions will apply where an organisation for charitable or educational purposes is controlled by or in connection with that religious institution to the extent that the institution may limit, give preference or take action to promote religious principles and choose those of the same religion in providing the services. [↑](#endnote-ref-30)
31. There appears to be no direct reference to marriage legislation, with respect to an exception under the relevant discrimination law. [↑](#endnote-ref-31)
32. See endnote 30. [↑](#endnote-ref-32)
33. It is unlikely that discrimination, even by Ministers, would be tolerated under Spanish law with reference to the *Constitución Española,* Art14; *Código Civil* (Spain), Title IV. Unable to source equivalent reference in marriage legislation due to language limitations. [↑](#endnote-ref-33)
34. It is unlikely that discrimination by celebrants would be tolerated under Spanish law with reference to the *Constitución Española,* Art 14; *Código Civil* (Spain), Title IV. Unable to source equivalent reference in marriage legislation due to language limitations. [↑](#endnote-ref-34)
35. Under *Código Civil* (Spain), Title IV, Art 44, a religious organisation is unlikely to be able to discriminate in providing services related to marriage. Unable to source equivalent reference in marriage legislation due to language limitations. [↑](#endnote-ref-35)
36. Under *Código Civil* (Spain), Title IV, Art 44, an organisation is unlikely to be able to discriminate in providing services related to marriage. Unable to source equivalent reference in marriage legislation due to language limitations. [↑](#endnote-ref-36)
37. *Constitución Española,* Arts 14 and 18. A specific reference to discrimination legislation could not be found due to language limitations. [↑](#endnote-ref-37)
38. *Constitución Española,* Arts 14 and 18. A specific reference to discrimination legislation could not be found due to language limitations. [↑](#endnote-ref-38)
39. A specific reference to discrimination legislation could not be found due to language limitations. [↑](#endnote-ref-39)
40. Art 16 of the *Constitución Española* addresses religious freedom. A specific reference to discrimination legislation or case law could not be found due to language limitations. [↑](#endnote-ref-40)
41. A specific reference to marriage legislation could not be found due to language limitations. [↑](#endnote-ref-41)
42. A specific reference to marriage legislation could not be found due to language limitations. [↑](#endnote-ref-42)
43. A specific reference to marriage legislation could not be found due to language limitations. [↑](#endnote-ref-43)
44. A specific reference to marriage legislation could not be found due to language limitations. [↑](#endnote-ref-44)
45. *Constitution of the Federal Republic of Brazil,* Art 3. This prohibition of discrimination is also echoed throughout the states of Brazil in their municipal statutes. A specific reference to discrimination legislation could not be found due to language limitations. [↑](#endnote-ref-45)
46. Art 3 of the *Constitution of the Federal Republic of Brazil* provides a broad prohibition towards discrimination. A specific reference to discrimination legislation could not be found due to language limitations. [↑](#endnote-ref-46)
47. A specific reference to discrimination legislation could not be found due to language limitations. [↑](#endnote-ref-47)
48. A specific reference to discrimination legislation could not be found due to language limitations. [↑](#endnote-ref-48)
49. *Marriage (Same Sex Couples) Act 2013* (UK)*,* Pt 1. The legislation provides a ‘quadruple lock’ which protects religious organisations and officials with respect to solemnising same-sex marriages. The Church of England carries a separate set of rules under the *Marriage (Same Sex Couples) Act 2013* (UK). [↑](#endnote-ref-49)
50. A celebrant isn’t directly referred to in the *Marriage (Same Sex Couples) Act 2013* (UK)*,* however, the exception afforded to religious organisations in solemnising a same-sex marriage will not extend to a ‘registrar, superintendent registrar or the Registrar General’ (section 2(4) of the *Marriage (Same Sex Couples) Act 2013* (UK)). These positions are analogous to the role of a celebrant in the Australian context. Therefore, it is unlikely that celebrants (or their equivalent) are permitted to refuse to solemnise a same-sex marriage on the basis of religious belief, conscience or any other grounds. [↑](#endnote-ref-50)
51. Section 2(6) of the *Marriage (Same Sex Couples) Act 2013* (UK) explicitly states that an exception is to be drafted into the *Equality Act 2010* (UK)*,* Sch 3, Pt 6A, s 25A(1). This exception is narrowed to services provided in order to conduct a marriage for a religious organisation. [↑](#endnote-ref-51)
52. The scope of the exception as stated in endnote 51 does not extend to all persons, explicitly, it will not include a ‘registrar, a superintendent registrar or the Registrar General’. Therefore, it is unlikely that the exception will extend to all service providers, meaning that not all service providers will be permitted to refuse services to same-sex couples on the basis of religious belief or conscience. [↑](#endnote-ref-52)
53. *Equality Act 2010* (UK), Pt 2, s 12. [↑](#endnote-ref-53)
54. *Equality Act 2010* (UK), Pt 3, s 29(1). [↑](#endnote-ref-54)
55. *Equality Act 2010* (UK), Sch 3, Pt 6A, s 2(6). [↑](#endnote-ref-55)
56. There is a broad exemption for religious organisations with reference to religion or belief or sexual orientation with respect to particular acts of the organisation. This will include participation, membership and provision of services by that organisation to others. This is outlined in Sch 23, s 2 of the *Equality Act 2010* (UK). [↑](#endnote-ref-56)
57. *Marriage Act 2015* (Ireland), s 7. The exemption will only apply where the Minister is part of a religious body that does not recognise same-sex marriage (s 7(1)(b) *Marriage Act 2015* (Ireland). [↑](#endnote-ref-57)
58. There is no explicit exemption afforded to celebrants in the *Marriage Act 2015* (Ireland) or the *Civil Partnership Act 2004* (Ireland). [↑](#endnote-ref-58)
59. The *Marriage Act 2015* (Northern Ireland) is silent on ‘goods and services’. s 16 of the *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006* provides an exception to religious organisations to restrict membership, participation, provision of goods and restrict use of premises on the basis of sexual orientation. [↑](#endnote-ref-59)
60. The exemptions listed in endnote 59 are restricted to religious organisations and do not extend to any person. [↑](#endnote-ref-60)
61. *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006,* s 3. [↑](#endnote-ref-61)
62. *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006,* s 5. [↑](#endnote-ref-62)
63. *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006,* s 16. [↑](#endnote-ref-63)
64. *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006,* s 7(1). [↑](#endnote-ref-64)
65. *Marriage and Civil Partnership (Scotland) Act 2014*, s 16; *Equality Act 2010* (UK), Sch 3, Pt 6B, s 25B. [↑](#endnote-ref-65)
66. *Marriage and Civil Partnership (Scotland) Act 2014*, s 16; *Equality Act 2010* (UK), Sch 3, Pt 6B, s 25B. [↑](#endnote-ref-66)
67. *Marriage and Civil Partnership (Scotland) Act 2014*, s 16; *Equality Act 2010* (UK), Sch 3, Pt 6B, s 25B; *The Equality Act (Sexual Orientation) Regulations 2007*, s 14(3). [↑](#endnote-ref-67)
68. The scope in endnote 67 does not extend beyond religious organisations. [↑](#endnote-ref-68)
69. *Equality Act 2010* (UK), s 12; *The Equality Act (Sexual Orientation) Regulations 2007*, s 3. [↑](#endnote-ref-69)
70. *Equality Act 2010* (UK), s 12; *The Equality Act (Sexual Orientation) Regulations 2007*, s 4. [↑](#endnote-ref-70)
71. No equivalent explicit exception appears in the *Marriage and Civil Partnership (Scotland) Act 2014.* [↑](#endnote-ref-71)
72. *Marriage and Civil Partnership (Scotland) Act 2014*, s 16(1)(a). This is a broad exception, as it states that the solemnisation of a same-sex couple will not affect the exercise of the ‘Convention right to freedom of thought, conscience and religion’. [↑](#endnote-ref-72)
73. *Marriage Act 1955* (New Zealand), s29(2). [↑](#endnote-ref-73)
74. *Marriage Act 1955* (New Zealand), s29. The celebrant must be from an ‘approved organisation’ as under s 10 of the *Marriage Act 1955* (New Zealand) to fall under the exception. [↑](#endnote-ref-74)
75. *Human Rights Act 1993* (New Zealand), ss 44 and 53 (note exceptions in ss 54 and 55). There is no explicit right to refuse in the *Marriage Act 1955* (New Zealand). [↑](#endnote-ref-75)
76. *Human Rights Act 1993* (New Zealand), ss 44 and 53 (note exceptions in ss 54 and 55). There is no explicit right to refuse in the *Marriage Act 1955* (New Zealand). [↑](#endnote-ref-76)
77. *Human Rights Act 1993* (New Zealand), s 21(1)(m). [↑](#endnote-ref-77)
78. *Human Rights Act 1993* (New Zealand), ss 44 and 53 (note exceptions in ss 54 and 55). [↑](#endnote-ref-78)
79. No direct reference to marriage found. [↑](#endnote-ref-79)
80. No direct reference to marriage found. [↑](#endnote-ref-80)