



THE LAW SOCIETY  
OF NEW SOUTH WALES

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22 July 2014

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary,

**Inquiry into the Recognition of Foreign Marriages Bill 2014**

I write to you on behalf of the Human Rights Committee ("HRC") and the Family Issues Committee ("FIC") of the Law Society of NSW (referred to together as "the Committees").

The HRC is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly. The FIC represents the Law Society on family law as it relates to the legal needs of people in NSW. The Committees include experts drawn from the ranks of the Law Society's membership.

The Committees support the Recognition of Foreign Marriages Bill 2014 ("the Bill") on the basis that it will move Australia closer to a position of marriage equality. Same-sex marriages performed lawfully in other jurisdictions should be recognised in Australia in the same way as opposite-sex marriages (subject to s 88D of the *Marriage Act*). For the reasons set out in more detail in this letter, the Committees also continue to support marriage equality in Australia, and submit that the *Marriage Act 1961* (Cth) ("*Marriage Act*") should be amended to remove the existing discrimination against same-sex couples, by recognising marriages otherwise validly performed between same-sex couples.

In the HRC's view, when considering the issue of recognition of same-sex marriages, the relevant principle to apply is the key human rights principle of equality. This approach is one that is consistent with Australia's international human rights obligations as a signatory to the International Covenant on Civil and Political Rights ("ICCPR"). Article 26 of the ICCPR sets out that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.



In *Toonen v Australia*<sup>[1]</sup>, the UN Human Rights Committee expressed its view that the reference to “sex” in Article 26 is to be taken to include sexual orientation. In *Young v Australia*, the UN Human Rights Committee found that Australia violated Article 26 by denying Mr Young “a pension on the basis of his sex or sexual orientation.”<sup>[2]</sup> The HRC’s view is that if civil marriage is recognised only between opposite-sex couples, it is strongly arguable that this amounts to discrimination against same-sex couples on the basis of sexual orientation and therefore a violation of Article 26 of the ICCPR.

The HRC takes this opportunity to reiterate its view that the *Marriage Act* should be amended to allow same-sex couples to marry in order for Australia to properly uphold its international obligations. Further, the discriminatory references to “man”, “woman”, “husband” and “wife” should be removed and replaced with non-gender specific terms.

The HRC echoes the point made by the Australian Human Rights Commission that recognising the right to enter into civil marriage for all Australians does not restrict any other human right. The Committee’s view is that allowing civil marriage does not interfere with the right of religious individuals or organisations to refuse to perform ceremonies inconsistent with their religious beliefs.<sup>[3]</sup>

Finally, the HRC notes that Australia would not be by any means the first jurisdiction to remove discrimination against same-sex couples by allowing same-sex marriage. Jurisdictions such as Canada, South Africa, Spain, Sweden, Netherlands, Iceland, Norway, several states in the United States, Argentina and Portugal allow same-sex marriage.

The FIC agrees with the HRC’s views in support of the Bill, and in support of marriage equality. The FIC expresses this support on the basis of a perceived shift towards greater acceptance of the diversity of family structures within the Australian community, and the likely benefits that recognition of same-sex marriages will have for children born to same-sex couples. Additionally, the FIC notes the desirability of congruence in permitting same-sex marriages within Australia, where the Australian Government currently issues a “Certificate of No Impediment to Marriage” to Australians who wish to enter into a same-sex marriage in an overseas jurisdiction.

Thank you for the opportunity to comment.

Yours sincerely,

Ros Everett  
**President**

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[1] (488/1992) UN Doc. CCPR/C/50/D/488/92, [8.7]

[2] *Young v Australia*, (941/2000) UN Doc. CCPR/C/78/D/941/2000, [10.4]

[3] Australian Human Rights Commission, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Marriage Equality Amendment Bill 2009, 10 September 2009 at p 8. Available online:

[http://www.aph.gov.au/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2008\\_10/marriage\\_equality/submissions/sublist1/Sub\\_m89\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2008_10/marriage_equality/submissions/sublist1/Sub_m89_pdf.ashx) (Accessed 22 July 2014).