



2 July 2014

Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100, Parliament House
CANBERRA ACT 2600

By email: foreignmarriages.sen@aph.gov.au

Dear Ms Dunstone

INQUIRY INTO THE *RECOGNITION OF FOREIGN MARRIAGES BILL 2014*

The Law Council thanks the Senate Legal and Constitutional Affairs Legislation Committee (Committee) for the opportunity to respond to the Committee's Inquiry into the *Recognition of Foreign Marriages Bill 2014* (the Bill).

This Bill seeks to amend the *Marriages Act 1961* (Cth) (the Marriage Act) to ensure that same-sex marriages that are validly entered to in foreign countries can be recognised under the laws of Australia. In particular, it proposes to repeal section 88EA of the Marriage Act, which currently provides that same-sex unions solemnised in a foreign country must not be recognised as a marriage in Australia.

The Law Council's view is that the Marriage Act is discriminatory insofar as it restricts marriage to the union of a man and a woman and therefore excludes same-sex couples.

The Law Council's settled policy is that the Marriage Act should enable same-sex marriages to occur and to be recognised in Australia.

This Bill's intention is to amend the Marriage Act so that foreign marriages are considered equal under Australian law but does nothing in relation to the recognition of domestic relationships.

The dichotomy that the Bill would create if passed in its current form is likely to be problematic and result in confusion.

Furthermore, it would create a situation in which same sex couples who are able to travel overseas and marry can have their marriages recognised in Australia, while others may not be able to do so, due to the expense involved or other factors such as disability or age. The Law Council considers this to be a seriously discriminatory effect.

The Law Council accordingly opposes the current proposal.

The Law Council considers that marriage should be made available to all people, regardless of the country in which their marriage has taken place.

The Bill is not sufficient to achieve the desired end.

In this context, the Law Council notes the recent High Court of Australia decision in *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55. In finding that the *Marriage Equality Bill 2013* (ACT) was invalid, the High Court also held that the federal Parliament has the power under the Constitution to legislate with respect to same sex marriage, and that whether same sex marriage should be provided for by law is a matter for the federal Parliament.

The Law Council had previously expressed concerns about section 88EA of the Marriage Act and the fact that this section may contravene Australia's obligations under Article 9 of the *Convention on Celebration and Recognition of the Validity of Marriages*¹ (Hague Convention);

The Law Council will continue to press for the recognition of same sex marriages and assumes that legislation to effect this will at the same time make appropriate provision for the recognition of same sex marriages solemnised under foreign law.

Yours sincerely

Michael Colbran QC
President

¹ *Hague Convention on Celebration and Recognition of the Validity of Marriages*, opened for signature 14 March 1978, 16 ILM 18 (entered into force 14 May 1991). Art 9 provides that: 'A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter. A marriage celebrated by a diplomatic agent or consular official in accordance with this law shall similarly be considered valid in all Contracting States, provided that the celebration is not prohibited by the State of celebration'.
