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Ms Sophie Dunstone  
Committee Secretary  
Legal and Constitutional Affairs Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By Email: [foreignmarriages.sen@aph.gov.au](mailto:foreignmarriages.sen@aph.gov.au)

31 July 2014

Dear Ms Dunstone

### **Submission on the *Recognition of Foreign Marriages Bill 2014 (Cth)***

The Human Rights Law Centre (**HRLC**) and National Association of Community Legal Centres (**NACLC**), together with support from the Inner City Legal Centre (a specialist LGBTIQ legal service in NSW), welcome the opportunity to make a submission to the inquiry into the *Recognition of Foreign Marriages Bill 2014 (Cth)* (the **Bill**).

The HRLC is an independent not-for-profit organisation that protects and promotes human rights in Australia and beyond through a strategic mix of legal action, advocacy, education and capacity building. NACLC is the peak national body of Australia's community legal centres. NACLC's members are the eight State and Territory Associations of Community Legal Centres. Community legal centres provide legal assistance to the most vulnerable and disadvantaged members of the community, including lesbian, gay, bisexual, transgender and intersex people

In its current form, the *Marriage Act 1961 (Cth)* (the **Marriage Act**) legalises and entrenches unacceptable discrimination against LGBTI people. The exclusion of LGBTI people from the Marriage Act denies them a right that is afforded to all other Australians and also contributes to higher levels of discrimination and stigma experienced by these communities.

While this Bill does not remedy the discrimination central to the definition of marriage in the Marriage Act, it is nevertheless an important step forward towards marriage equality in Australia. We strongly support the Bill with some amendments, which we have set out below.

#### *Previous support for marriage equality*

The HRLC and NACLC have consistently supported and advocated for marriage equality in Australia. The HRLC has recommended to previous inquiries that marriage should be available in Australia

without the discrimination mandated by the current definition of marriage in subsection 5(1) of the Marriage Act.<sup>1</sup>

#### *Public support for marriage equality*

The existing discrimination against LGBTI couples in the Marriage Act is out of step with the views of the Australian public. A recent poll conducted by Crosby Textor for Australian Marriage Equality found support for marriage equality at records levels in Australia. Overall, 72 per cent of those surveyed were supportive of marriage equality. A majority of respondents in each Australian state said they wanted to see marriage equality, as did a majority of Australians who identified with major religions, including Catholic, Anglican and non-Christian religions.<sup>2</sup>

#### *No legal barriers to achieving marriage equality*

The recent decision of the High Court of Australia in *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55 confirmed that the federal parliament has the power under the Constitution to recognise same sex marriage. In a unanimous judgment, the Court held that under the Australian Constitution and federal law, whether same sex marriage should be provided for by law is a matter for the federal parliament.<sup>3</sup>

#### *The Bill is supported by international law*

The HRLC and NACLAC submit that marriage equality is a basic human right that all Australians are entitled to enjoy. Denying same-sex couples the freedom to marry violates Australia's human rights and other commitments under international law. The HRLC and NACLAC consider that the current section 88EA of the Marriage Act, which does not recognise overseas marriages of same-sex couples, breaches Australia's obligations under Article 9 of the *Convention on Celebration and Recognition of the Validity of Marriages*<sup>4</sup> and under the *International Covenant on Civil and Political Rights*.<sup>5</sup> Further, we understand that failing to recognise overseas marriages is an affront to international comity in relation to the 19 nations<sup>6</sup> whose marriage laws do not discriminate against same-sex couples.

#### *Specific legal difficulties for same-sex couples under the current law*

In certain circumstances, the lack of recognition of foreign marriages in Australia can have the cruel effect of denying people access to divorce and separation if they are, or have become, Australian citizens. Clients of community legal centres have found themselves in what is, effectively, a legal void. This can have a profound impact on individuals. The result for some has been that they continue to

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<sup>1</sup> See HRLC submission to the Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Marriage Equality Amendment Bill 2012 and the Marriage Amendment Bill 2012*, 20 April 2012; and HRLC submission to the Inquiry into the Marriage Equality Amendment Bill 2009 entitled '*Marriage Equality – A Basic Human Right*'.

<sup>2</sup> Cox, Lisa, 'Poll shows growing support for same-sex marriage', *The Sydney Morning Herald*, 14 July 2014 retrieved from: <http://www.smh.com.au/federal-politics/political-news/poll-shows-growing-support-for-samesex-marriage-20140714-3bxaj.html>

<sup>3</sup> *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55 at [1] and [38].

<sup>4</sup> *Hague Convention on Celebration and Recognition of the Validity of Marriages*, opened for signature 14 March 1978, [1991] ATS 16, 16 ILM 18 (entered into force 14 May 1991).

<sup>5</sup> The jurisprudence of the HRC confirms that the reference to 'sex' in articles 2 and 26 of the ICCPR should be taken to include sexual orientation. This position was first suggested by the HRC in the 1994 case of *Toonen v Australia*<sup>5</sup>. Following this in the 2000 decision of *Young v Australia*,<sup>5</sup> the HRC more clearly confirmed that 'sexual orientation' was a prohibited ground of discrimination under article 26. Read together, these cases indicate that sexual-orientation rights are embedded in the text of the ICCPR. In light of the sexual orientation rights embedded in the ICCPR, there are compelling reasons in favour of interpreting the marriage provision (article 23(2)) broadly so as to include same-sex couples. For further detail see HRLC Submission '*Marriage Equality – A Basic Human Right*' (2009).

<sup>6</sup> Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Luxembourg (with effect 1 Jan 2015), Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, United Kingdom, Uruguay; and Mexico and United States in part.

have legal obligations to a former spouse who continues to reside in their former country. This has included continuity of claims to the (now Australian) spouse's estate in that former country.

*Amendments to the Bill*

While the HRLC and NACLC support the Bill, we recommend some amendments, particularly so as to recognise and respect the rights of transgender, intersex and gender diverse people and their unions.

We recommend the following two amendments:

1. Proposed new s 88EA makes express references to unions between “a man and another man” and “a woman and another woman”. This language is unnecessarily narrow and may fail to capture unions recognised in a foreign country involving an intersex or transgender person. This difficulty could be addressed by using the wording “two people”; and
2. The Bill retains s 88B(4), which provides that the meaning of marriage in s 88E is given by subsection 5(1), that is, that marriage is between a man and a woman. This provision should be repealed.

We note that the Bill might have implications for certain legislation in states and territories, such as the *Relationships Act 2008* (Vic). We would strongly encourage the Committee to recommend that state governments take any necessary steps to integrate the recognition of foreign same-sex marriages into state law and policy, regardless of whether the Bill achieves passage.

We note that if the passage of this Bill is achieved, marriage would become available only to those same-sex couples with the means to travel and/or otherwise access marriage in a foreign jurisdiction. Regardless of this issue, the HRLC and NACLC strongly support the Bill as a step towards achieving marriage equality in Australia.

Yours sincerely

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