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## SUBMISSION

### Senate Legal and Constitutional Affairs Committee Inquiry into the *Recognition of Foreign Marriages Bill 2014*

30 July 2014

#### Introduction

The meaning of marriage continues to endure as the union of a man and a woman, entered into for life and open to the possibility of children. The mutual love of a man and woman, and their physical complementarity, provides the natural and vital community for procreation. The reason the state has recognised marriage and distinguishes it from other types of relationships is because of this unique capacity to generate children and to meet children's deepest needs for the love, attachment and nurturing of both their father and their mother.

The *Recognition of Foreign Marriages Bill 2014* purports to uphold the existing definition of marriage in section 5(1) of the *Marriage Act 1961* (Cth), whilst at the same time recognising as "marriages" same-sex unions contracted according to foreign marriage laws which directly conflict with section 5(1) of the *Marriage Act*. The Bill's incoherent and contradictory nature reflects its focus on securing an end result, at the cost of legal principle and the democratic process. The Bill reflects a failure to appreciate the social dimension of marriage and to understand why the law must reflect and apply a single definition of marriage, given the enormity of the importance of marriage to children, culture and society.<sup>1</sup>

#### Vast majority of world nations share our understanding of marriage

Far from being apart from the mainstream on this question, Australia's definition of marriage as a union of a man and a woman is consistent with that of the vast majority of world nations, who represent over 94 per cent of the global population.<sup>2</sup> To date, only 16 of the 193 member states of the United Nations have changed their legal definition of marriage to incorporate same-sex unions.<sup>3</sup> This is hardly surprising, as the enduring meaning of marriage as the mutual, exclusive love of a man and a woman open to children is embedded deeply across diverse communities, faiths and cultures around the world.

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<sup>1</sup> See Robert P. George, "Contrasting views of marriage: the need for a defining principle", *The Public Discourse*, July 22, 2014, <http://www.thepublicdiscourse.com/2014/07/13526>.

<sup>2</sup> <http://www.worldpopulationreview.com>.

<sup>3</sup> "At a glance: same-sex marriage around the world", SBS News, October 22, 2013, <http://www.sbs.com.au/news/article/2013/10/22/glance-same-sex-marriage-around-world>.

## **Not unjust discrimination to uphold the law on marriage**

The Bill would be socially divisive and would contravene the principle of equality under the law. The law of the Commonwealth of Australia with regard to marriage reflects the values and beliefs of its citizens expressed through the democratic process and should not be altered by an attempt to “import” the laws of foreign countries which are inconsistent with our own laws. It is not unjust discrimination to uphold Australian law on marriage.

Australians believe strongly in justice and “a fair go” for all. Same-sex couples who enter into a same-sex marriage ceremony in a foreign jurisdiction should not be subjected to any unjust discrimination or ill-treatment. The rights and welfare of such couples have properly been provided for by Commonwealth and State legislation addressing such areas as partner visas, medical decision-making, guardianship of children and the sharing of property. These rights and entitlements are now uniform with male-female couples in every substantive way.

Even persons who strongly support same-sex marriage have taken issue with the Bill’s purported claim to advance ‘marriage equality’. Pointing out that the Bill would favour those couples with financial means to take advantage of foreign marriage laws, blogger and same-sex marriage advocate Alastair Lawrie has commented:

*“In effect, if the Recognition of Foreign Marriages Bill were to succeed, Australia would have a system which, far from recognising genuine ‘marriage equality’, would actually create new types of marriage inequality, only this time based on distinctions around class and nationality rather than sexual orientation.”<sup>4</sup>*

The *Recognition of Foreign Marriages Bill 2014* is not an attempt to deal with a genuine injustice, but a vehicle for changing the definition of marriage legally, socially and culturally, and for severing the traditional nexus between marriage and children.

## **Bill an attempt to circumvent the democratic process**

We are deeply concerned that the Bill attempts to circumvent the democratic process and impose ‘same-sex marriage’ on the Australian community. The law of the Commonwealth recognises that marriage is “*a union of a man and a woman, to the exclusion of all others, voluntarily entered into for life*”<sup>5</sup>. The enduring meaning of marriage was reaffirmed by Federal Parliament less than two years ago<sup>6</sup>, following inquiries in the Senate and the House of Representatives to which over 293,000 Australians responded. A Bill almost identical to the present Bill was also rejected by the Australian Senate last year by a vote of 44 to 28.<sup>7</sup>

It is unjust and underhand that the Bill attempts to change the meaning of marriage for all Australians whilst purporting to do so only for a small number of same-sex couples.

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<sup>4</sup> <http://alastairlawrie.net/2014/06/26/why-i-dont-support-the-recognition-of-foreign-marriages-bill-2014/>

<sup>5</sup> *Marriage Act 1961* (Cth), section 5(1).

<sup>6</sup> The *Marriage Amendment Bill 2012* was rejected by the Federal House of Representatives on 19 September 2012 by a vote of 98 to 42. The *Marriage Amendment Bill (No 2) 2012* was rejected by the Australian Senate on 20 September 2012 by a vote of 41 to 26.

<sup>7</sup> “Senate ‘no’ to recognising same-sex unions celebrated overseas”, *The Conversation*, June 20, 2013. <http://theconversation.com/senate-no-to-recognising-same-sex-unions-celebrated-overseas-15368>

Changing the definition of marriage will affect all Australians. If we recognise a foreign definition of marriage in direct conflict with our own *Marriage Act*, we undermine respect for the law as an expression of shared values and we change the meaning of marriage for everyone. To take such a step is socially divisive and is not the proper role of government.

### **Bill will lead to further demands for recognition of alternative unions as marriages**

If the Commonwealth were to legislate for the recognition of foreign same-sex marriages, it will abandon the only principled basis on which it can justify rejecting further demands for the redefinition of marriage or the recognition of foreign marriage provisions, such as multi-partner marriage. If marriage is not the unique physical and emotional union of a man and a woman that is open to the possibility of children, it is simply a self-defining union which, logically, cannot be denied to others who desire the ‘right’ to marry and the ‘right’ to have their relationship recognised as a marriage.<sup>8</sup> In the United States where same-sex marriage is now legal in 19 of 50 States and the District of Columbia, the recent case of *Brown v Buhman* illustrates the inevitable pressure to legalise polygamous marriage.<sup>9</sup> As US writer and editor Jonathan Tobin has explained:

*“Once you blow up a societal consensus it cannot be easily reconstructed to protect only those practices or beliefs you like while still banning those you think ought to be kept beyond the pale.”*<sup>10</sup>

### **Bill incompatible with human rights law regarding marriage**

The “Statement of Compatibility with Human Rights” within the Bill’s Explanatory Memorandum claims that the Bill “*positively engages with*” applicable rights and freedoms in the international human rights instruments, including Article 23 of the International Covenant on Civil and Political Rights.<sup>11</sup> It is difficult to understand how such a claim can be made in ignorance of the history of this covenant and the fact that international law has always recognised the truth that marriage is a union of a man and a woman oriented to the begetting and nurturing of children. As the United Nations Human Rights Committee has affirmed, the “*right to marry and found a family*”, expressed in Article 23 and elsewhere, “*implies, in principle, the possibility to procreate*”.<sup>12</sup> As recently as 14 July 2014, in the case of *Hämäläinen v Finland*, the European Court of Human Rights reaffirmed that the right

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<sup>8</sup> In a 2006 statement titled *Beyond Same-Sex Marriage* a group of more than 300 signatories, including feminist leaders Gloria Steinem and Barbara Ehrenreich, sociologist Judith Stacey (a leading academic in the field of research into same-sex parenting) and Yale and Princeton University professors Kenji Yoshino and Cornel West, declared that under the principle “*love makes a family*”, what applies to “*committed, loving same-sex couples*” must also apply to “*committed, loving households in which there is more than one conjugal partner*” ([www.beyondmarriage.org](http://www.beyondmarriage.org)).

<sup>9</sup> In *Brown v Buhman* (currently on appeal), a Federal District Court ruled that Utah’s law criminalizing polygamous cohabitation was an unconstitutional violation of the plaintiffs’ right to privacy (“A Utah Law Prohibiting Polygamy is Weakened”, *New York Times*, December 14, 2013). As the editorial page of the *Los Angeles Times* explained in commenting upon the case when it was first brought to court, “[A] ruling sympathetic to unconventional sexual behavior could plant the seeds of a future campaign for full marriage equality. In that case, governments would have to prove that it’s rational to limit marriage to two individuals, homosexual or heterosexual. That might seem obvious, but so, at one time, did the argument that marriage should be confined to opposite-sex couples.” (“A Gay Wedding-Crasher”, *Los Angeles Times*, July 31, 2011, <http://articles.latimes.com/2011/jul/31/opinion/la-ed-polygamy-20110731>).

<sup>10</sup> J. Tobin, “‘Big Love’ Vindicated: Polygamy and Privacy”, *Commentary*, December 15, 2013, <http://www.commentarymagazine.com/topic/brown-v-buhman/>

<sup>11</sup> Statement of Compatibility with Human Rights, Explanatory Memorandum, *Recognition of Foreign Marriages Bill 2014*.

<sup>12</sup> UN Human Rights Committee General Comment No 19.

to marry, expressed in the international human rights covenants, "*enshrines the traditional concept of marriage as being between a man and a woman.*"<sup>13</sup>

The *Recognition of Foreign Marriages Bill 2014* is devoid of a sound basis in international law. The Bill is clearly incompatible with the concept and definition of marriage recognised continuously by the international human rights covenants and by the juridical bodies which apply and uphold these covenants. The Bill fails to recognise that the right to marry is a unique kind of right that by nature a man and a woman can only fulfil through each other.<sup>14</sup>

### **Bill fails to serve the common good and the interests of children**

The primary reason why nation states have been interested in marriage and why it has attracted public support is because of its procreative aspect. For the sake of children and to encourage men and women to commit to one another and to their offspring, marriage between a man and a woman has always been given the special recognition and support of the state. This Bill undermines that shared understanding of marriage and places the wishes of adults above the interests of children. It fails to acknowledge the truth that children constitute the very basis for the state's recognition and regulation of marriage.

Although sadly marriages and families sometimes break down, a stable, loving marriage provides the best conditions for raising children. Marriage between a man and a woman normally gives children the greatest chance of being loved and raised by their biological mother and father, the family structure most consistent with children's dignity as persons and with their rights to receive mothering and fathering, and to know who they are and where they have come from. It is the family structure associated most strongly with positive child outcomes.<sup>15</sup>

In attempting to introduce a new and fundamentally different definition of marriage, this Bill would displace children from the heart of marriage as a social institution. It would send confusing messages to the community about marriage, which will be damaging and socially and culturally disruptive. At a time when marriage is already under significant strains and pressures, the common good demands that the Commonwealth do what it can to support marriage, not undermine its meaning and the significance of mothering and fathering as distinctively beneficial experiences for children.<sup>16</sup> Children as a group are most vulnerable; yet they are the ones with the greatest investment in marriage continuing to be understood as the union of a man and a woman, and will be the most greatly affected if marriage is redefined so as to remove its link to children.

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<sup>13</sup> *Hämäläinen v Finland*, Grand Chamber, European Court of Human Rights, Strasbourg, 16 July 2014. Judgment available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145768#{"itemid":\["001-145768"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145768#{)

<sup>14</sup> The unique nature of the right to marry was previously affirmed by the European Court of Human Rights in the 2012 case of *Gas and Dubois v France*, where the Court found that the European Convention on Human Rights provided no basis on which states are required "to grant same-sex couples access to marriage" (Full judgment available at <http://www.coe.int/t/dghl/standardsetting/media/Article%208/Gas%20and%20Dubois%20v.France.pdf>).

<sup>15</sup> See, e.g., M. Regnerus, "How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study," *Social Science Research*, Vol. 41, No. 4 (June 2012), pp. 752–770.

<sup>16</sup> For a recent comprehensive review of studies demonstrating the distinctive benefits for children of mothering and fathering see K. Kline and W. Wilcox, *Mother Bodies, Father Bodies: How Parenthood Changes Us from the Inside Out*, Institute for American Values, New York, 2014.

We urge the Committee to uphold the law of the Commonwealth regarding marriage as the union of a man and a woman. We recommend that this Bill be rejected as an unacceptable undermining of the *Marriage Act* and of the meaning of marriage for the whole community.

Yours sincerely,

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