

SUBMISSION OF LAWYERS FOR THE PRESERVATION OF THE DEFINITION OF MARRIAGE (LPDM) IN RELATION TO THE *RECOGNITION OF FOREIGN MARRIAGES BILL 2014* (BILL)

INTRODUCTION

1. LPDM is a group of practising and academic lawyers who advocate for the retention of the definition of “marriage” as it currently is in the *Marriage Act 1961* (MA). LPDM initially came together because of a common concern that constitutional restraints were being ignored in the debate in relation to proposed Same Sex Marriage (SSM) Bills.
2. LPDM has made submissions and appeared, by invitation, before the House of Representatives Standing Committee on Social and Legal Affairs, the Senate Legal and Constitutional Affairs Committee, the Legislative Council in Tasmania, in committee, and the Legislative Council Committee on Social Issues in New South Wales in their respective inquiries in relation to the issue of SSM.
3. As a result LPDM has gained considerable expertise in relation to the issue of SSM, both constitutionally and a matter of policy. LPDM has kept abreast of developments overseas and has monitored the litigation which has been spawned by this issue.
4. LPDM respectfully submits that the Committee should find that there are good legal and policy grounds to recommend to the Senate that the Bill should be rejected.

EXECUTIVE SUMMARY

5. The essence of this submission is that this Committee should advise the Senate that the Bill should be rejected for several reasons. Among the principal reasons for rejecting the Bill are the following:
 - 5.1. The definition of marriage in the MA and the conflict the Bill introduces with this fundamental aspect of the MA;
 - 5.2. The dangers of following overseas trends without careful analysis of municipal needs;
 - 5.3. Australia’s independent stance on many policy issues against overseas trending;
 - 5.4. the large body of evidence of the benefit to the community of marriage as defined in the MA, including that children do best with their biological parents and the economic cost for the community in children not “doing best;”
 - 5.5. the weaknesses of and flaws in the research into the alleged positive effects of same-sex parenting;
 - 5.6. the settled jurisprudence in relation to the two fundamental human rights charters, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR);
 - 5.7. the growing jurisprudence in relation to curtailment of fundamental and express freedoms by reason of the push for SSM and the litigation which it spawns;

THE MA AND THE BILL

6. The MA was amended in 2004 by a substantial bi-partisan majority to define marriage in terms of what had always been understood in Australian society and to exclude marriages that did not fall within that definition. It is now a fundamental provision of the MA that “marriage means the union between a man and a woman to the exclusion of all others, voluntarily entered into for life”.¹ The MA expressly disallows foreign SSMs being recognised in Australia. Section 88B (4) which is part of Part VA, adopts the MA definition of marriage in relation to the question of the recognition of foreign marriages. It says:

¹ Section 5(1).

“To avoid doubt, in this Part (including section 88E) marriage has the meaning given by subsection 5(1).”

Section 88EA, which is also in Part VA, provides:

“A union solemnised in a foreign country between a:

(a) a man and another man; or

(b) a woman and another woman:

must not be recognised as a marriage in Australia.” (Emphasis added by LPDM)

7. The Bill seeks to repeal section 88EA² and to provide that:
“Despite the definition of marriage in subsection 5(1), a union between:
(a) a man and another man; or
(b) a woman and another woman;
solemnised in a foreign country under local law as a marriage *is* recognised as a marriage in Australia.”³ (Emphasis added by LPDM)
8. It will immediately be seen that the Bill introduces a fundamental inconsistency into the MA by creating a new tier of marriage when its policy has been for there to be only one legally recognised form of marriage in all of the states and territories of the country. If this Bill were ever to become law, a new confusion of the kind that the MA has been drafted to remove would be re-introduced.
9. While on the one hand the MA currently says that marriage in Australia is a union between a man and a woman, on the other hand, if the Bill were enacted, the MA would provide that a foreign marriage which is between a man and a man or a woman and a woman would be treated as a marriage under Commonwealth law.
10. Such fundamental inconsistency in legislation creates a tension in policy that should not be countenanced.
11. There would also be, in the case of certain jurisdictions, confusion as to precisely what is to be recognised under the Bill if it ever became law.
12. It has all the hallmarks of an ill-considered legislative measure that will give rise to complicated and expensive litigation.
13. It would be an indictment on those members of Parliament who supported such a measure if, unwittingly, Australians were to use this vehicle as some form of back door to have domestic arrangements recognised as marriage contrary to the intent of the MA at section 5 and found themselves involved in litigation that raised any of these types of question raised in the examples set out below.
14. Circumstances that are not clearly addressed by the proposed amendment include:
 - 14.1. In Norway and Sweden, as just two European examples, civil partnerships registered with the state are *de facto* treated as marriages though, *de jure*, they are not;
 - 14.2. In Canada, marriages contracted under laws in that country, by a legislative oversight, do not have associated provisions for the divorce of SSMs - would, therefore, the Canadian same-sex couple, or one of such a couple, gain an advantage under Australian law not enjoyed in Canada? And what of the status of an Australian divorce?;
 - 14.3. Only 19 of the over 50 United States jurisdictions (that is over fifty if one includes territories) permit some form of same-sex union or marriage – could it be said that they are “*solemnised in a foreign country under local law as a marriage*” within the meaning of the provisions of the Bill when they are recognised in only certain parts of the country of origin and expressly prohibited by many of the other 30 jurisdictions of that country?;
 - 14.4. If civil unions and partnerships, *de facto* though not *de jure* recognised as marriages in other countries, are to be included among those legal relationships falling for recognition, does the Bill overreach the federal marriage power?
 - 14.5. If so, what if some state or territory jurisdictions treat them as marriages and others do not?

² Clause 1.

³ *Ibid.*

14.6. And, in the recognition of such “marriages”, apart from the question of the lacuna in Canadian divorce law, what of private international laws relating to inheritance, local and international taxation regimes and related private international law matters that may arise?

THE DANGERS OF FOLLWING OVERSEAS TRENDS

15. The Bill is misleadingly named. It is not a bill for the recognition of foreign marriages, rather a bill for the recognition of foreign same sex marriages. It is, in fact, part of the push for the recognition of SSM in Australia which, only recently has been rejected by the Senate.
16. However, the misleading title highlights one of the significant problems that the Bill will create if it becomes law. SSM is not the only type of foreign marriage which is not recognised in Australia. Some jurisdictions also recognise child marriages.⁴ This is not a theoretical issue as such marriages are alleged to have happened here, and are well known to happen in the United Kingdom.⁵ Other jurisdictions recognise polygamy.⁶ If overseas same-sex marriages are to be recognised, why should not foreign child marriages or polygamous marriages? This question asked rhetorically, is, unavoidably, created by the Bill.
17. That question exposes the truths, firstly, that that the choice of some US States and some nations to legislate for SSM, creates no logical or moral imperative for Australia to recognise those unions and, secondly, that to so do will lead to pressure for further and other recognitions which will diminish the value of the institution of marriage in this country.

AUSTRALIA’S INDEPENDENT STANCE

18. Australia has been prepared to go its own way on several critical social issues. These include rejecting a bill of rights, enactment of strong gun laws and retaining its own form of constitutional government that retains a representative of the monarchy.
19. Australians have seen the difficulties which the United Kingdom and Canada have subjected themselves to with broad Charters of Rights and independently decided to adopt a different course.
20. Whereas the United States of America has had much wringing of hands over its liberal gun laws under the Second Amendment of its *Bill of Rights*, but has never acted in any way to reduce the more than 10,000 annual gun-related deaths, Australia has acted decisively and differently to the United States, in relation to gun control.
21. Likewise, Australia was among the earliest of Western jurisdictions to abolish the death penalty, while a democracy like the United States still practices this form of punishment.
22. Despite many who argued that a republic is inevitable, the Australian public, when asked in a properly funded referendum, rejected the idea.

⁴⁴ Yemen has no minimum age for marriage; [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(13\)62653-7/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(13)62653-7/fulltext) accessed 7 February 2014; it is practised in India; <http://health.india.com/diseases-conditions/why-is-india-refusing-to-sign-the-un-resolution-against-child-marriage/> accessed 7 February 2014; it is a known practise now in the United Kingdom; <http://www.gatestoneinstitute.org/4017/uk-muslim-underage-marriage>

⁵ See articles “Lebanese student kept in custody over allegations he married 13-year-old girl” Read more: <http://www.smh.com.au/nsw/lebanese-student-kept-in-custody-over-allegations-he-married-13-year-old-girl-20140207-326kn.html#ixzz2scHiI6IU> accessed 7 February 2014; and “Forced underage marriage ‘common’” <http://www.theaustralian.com.au/national-affairs/state-politics/forced-underage-marriage-common/story-e6frgczx-1226821064701#> accessed 8 February 2014.
<http://www.gatestoneinstitute.org/4017/uk-muslim-underage-marriage> accessed 7 February 2014.

⁶ Polygamy is legal in about 50 countries.

23. Australia should preserve the institution of marriage that has worked to the benefit of our society from its inception and should reject the argument that we, as a nation, should simply follow what other nations have done. Many of those who would seek to preach to this nation have no moral justification for doing so.
24. Those Australians who have entered into SSMs overseas have no grounds for complaint as they entered into those arrangements in the full knowledge that they were not able to be recognised as marriages here.
25. Nothing has changed in this country that would warrant a following of overseas trends that have not been demonstrated to be of any social benefit.

THE BENEFITS OF MARRIAGE⁷

Statistical advantages of a stable marriage between the biological parents of the children of the marriage

26. Some of the evident benefits of marriage are outlined below:⁸
27. Waite and Lehrer concluded upon their study that married people are more productive, have higher incomes, and enjoy more family time than the unmarried. This is due to the division of specialisation of labour as spouses each take responsibility for specified tasks.⁹
28. Popenoe and Whitehead concluded that married men earn 10% to 40% more than similar unmarried men.¹⁰
29. Married mothers are less likely to live in poverty.¹¹
30. Children are less likely, statistically, to live in poverty if they are raised by biological parents whose marriage endures.
31. Professor Linda Waite observed:
*In a variety of ways along a number of dimensions, married men and women lead healthier lives than the unmarried. This includes more drinking, substance abuse, drinking and driving and generally living dangerously among single men. Married women more often have access to health insurance. Divorced and widowed men and women are more likely to get into arguments and fights, do dangerous things, take chances that could cause accidents. The married lead more ordered lives, with healthier eating and sleeping habits. Marriage improves both men's and women's psychological well-being. Perhaps as a result, married men and women generally live longer than single men and women.*¹²
32. The research does seem unanimous to the effect that marrying and remaining married bring better health outcomes than any other form of lifestyle. The research also seems to be unanimous across jurisdictional boundaries, whether in the United States, Britain, Canada or Australia.¹³

The benefits of stable marriage between biological parents for children

33. The evidence does not only indicate that marriage favours the wellbeing of adults, but, even more importantly, enhances in marked ways the happiness, health and adjustment of children. Children who are raised by their two biological parents within a stable marriage enjoy significant advantages.

⁷ Marriage here refers to the union between a man and a woman as defined in the MA.

⁸ See generally <http://www.foryourmarriage.org/economic-impact/> at which each of the works cited are referenced.

⁹ *The Benefits From Marriage in the US: A Comparative Analysis Population and Development Review*, Vol 29, No. 2, June 2003, page 264.

¹⁰ *The State of our Unions, 2005*, page 16

¹¹ *Marriage and the Public Good: 10 Principles*, Witherspoon Institute, 2006, page 20.

¹² Cited in Kevin Andrews, *Maybe "I Do"* at 30

¹³ Andrews, 31-32.

Whether it be in terms of better health,¹⁴ enjoyment of subsequent adult relationships,¹⁵ educational outcomes, children from stable marriages are significantly better off.

34. An American academic, Professor Susan Brown recently reviewed the evidence and said:

“Over the past decade, evidence on the benefits of marriage for the well-being of children has continued to mount. Children residing in two-biological-parent married families tend to enjoy better outcomes than do their counterparts raised in other family forms. The differential is modest but consistent and persists across several domains of well-being. Children living with two biological married parents experience better educational, social, cognitive, and behavioral outcomes than do other children, on average. Variation in well-being among children living outside of two-biological-parent married families (e.g., married step, cohabiting, and single-parent families) is comparatively low and often negligible. The benefits associated with marriage not only are evident in the short-term but also endure through adulthood.”¹⁶

Statistical disadvantages of parenting outside of marriage

35. It is clear, on the above examples, which reflect only a small fraction of the research that has been done, that stable marriage between biological parents is the best predictor of good outcomes for adults and children and a net contributor to social stability.

36. Any other form of relationship does not produce the same benefits of children.

The Economic Cost of Children not doing their Best

37. It has been observed, by Professor Paul Amato, that

“Increasing the share of adolescents living with two biological parents to the 1970 level ...would mean 643, 262 fewer children would repeat a grade. Increasing the share of adolescents in two-parent families to the 1960 level suggests that nearly three-quarters of a million fewer children would repeat a grade. Similarly increasing marital stability to its 1980 level would result in nearly half a million fewer children suspended from school, about 200,000 fewer children engaging in delinquency or violence, a quarter of a million fewer children receiving therapy, about a quarter of a million fewer smokers, about 80,000 fewer children thinking about suicide, and about 28,000 fewer children attempting suicide.”¹⁷

38. While Professor Amato’s figures are in the context of the United States, there is no reason to think that they are not true in principle here. They dictate that there should be a move to strengthen marriage and not alter it.

Relevance of the Benefits of Marriage

39. The relevance of this issue to the SSM debate is that in jurisdictions where SSM has been legalised there is evidence that suggests a fall in the rate of marriages between men and women.¹⁸ This will inevitably lead to the detriment of the entire Australian community.

40. The detriments of a weakening in marriage are already being felt in the areas of aged care, health and youth affairs. They should not be increased.

41. The detriments in aged care are reported in the Australian Institute of Family Studies paper entitled “*The Consequences of Divorce for Financial Living Standards in Later Life.*”¹⁹ :

¹⁴ Andrews, 55 and following; ‘*Married Live Longer-new Australian data*’ (2008) Threshold 94: 3, citing Australian Bureau of Statistics, Causes of death, 2006, SH Lee et al (1987) *Health differences among working age Australians* [Canberra: Australian Institute of Health].

¹⁵ Andrews, 66-67.

¹⁶ S.Brown, Marriage and Child Well-Being: Research and Policy Perspectives 72 *J. Marriage and Family* 1059, 1062 (2010) (references omitted).

¹⁷ Paul R Amato (2005) “The impact of family change on the social, cognitive and emotional well-being of the next generation” *The Future of children* 15:88-89.

¹⁸ David Blenkhorn “*The Future of Marriage*” Encounter Books New York 2007.

¹⁹ David de Vaus, Matthew Gray, Lixia Qu and David Stanton RESEARCH PAPER NO. 38, FEBRUARY 2007 at (ix).

42. Australian research has found that there are large health differences between married men and women and men and women who are separated or divorced or widowed. The latter have greater mortality rates, more acute symptoms and mental health problems than the former.²⁰
43. We have already referred, at [37] above, to the effect of the lack of biological parents on the welfare of children.
44. Now is *not* the time for legislative experiments with variants of marriage.

WEAKNESS OF THE EVIDENCE IN RELATION TO SAME-SEX PARENTING

45. The matters addressed above inevitably lead to the necessity to confront the studies which suggest the benefits of same-sex parenting. We do so now.
46. First, we note that one of the latest and most thorough studies finds significant disadvantages reported by young adults with a parent who had same-sex relationships prior to the child's turning 18.²¹
47. The most recent Australian study done on this question is "The Australian Study of Child Health in Same-Sex Families" or ACHESS.
48. ACHESS had "*a convenience sample of 390 parents from Australia who self-identified as same-sex attracted and had children aged 0-17 years. Parent-reported, multidimensional measures of child health and wellbeing and the relationship to perceived stigma were measured.*" The self-identified volunteers for the study — some 315 parents — represented 500 children, 80 percent of them with female index parent and 18 percent with a male index parent.
49. The study's methodology points to its weaknesses. The first weakness is that of self-registration rather than random sampling.²² Regnerus cites the following in the methodology section: "The convenient sample was recruited using online and traditional recruitment techniques, accessing same-sex attracted parents through news media, community events and community groups. 390 eligible parents contacted the researchers..."
50. Regnerus then points to the sampling distortion and bias as to conclusion that was inherent in the methodology by referring to the sampling approach announced two years before the study was completed: "Initial recruitment will... include advertisements and media releases to the gay and lesbian press, flyers at gay and lesbian social and support groups, an investigator attendance at gay and lesbian community events... Primarily recruitment will be through emails posted on gay and lesbian community email lists aimed at same-sex parenting. This will include but not be limited to Gay Dads Australia and the Rainbow Families Council in Victoria."
51. The criticism that Regnerus levels at this methodology is that it does not produce a study of average same-sex households with children. He says that to compare the results of this study with that of any population-based sample of everyone else is "suspect science". All of the participants in the study were well-aware of the political import of the study topic and an unknown number of the participants signed up for that very reason.
52. It would therefore be unwise, Regnerus argues, to trust such self-reports. This is so given the high risk of "social desirability bias" or the tendency to portray oneself (or hear one's children) as better than they actually are. The temptation to report positive assessments is just unavoidable in this self-selected sample on a sensitive and politically charged topic.
53. Crouse, the author of *Children at Risk*, executive director and senior fellow at Concerned Women for America's Beverly La Haye Institute, in a special report in the *American Spectator* "What About That

²⁰ 'Married Live Longer-new Australian data' (2008) *Threshold* 94: 3, citing Australian Bureau of Statistics, *Causes of death*, 2006, SH Lee et al (1987) *Health differences among working age Australians* [Canberra: Australian Institute of Health]-referred to in Andrews note 11 above at notes 127 and 128.

²¹ Mark Regnerus, "How different are adult children of parents who have same-sex relationships? Findings from the New Family Structures", *Social Science Researcher*, Volume 41 [2012], 752-770

²² *Is same-sex parenting better for kids? The new Australian study can't tell us*, at <http://www.thepublicdiscourse.com/2014/07/13451/> - Accessed on 9 July 2014

Australian Study About Same-Sex Parenting?” comments that ACHES’s credibility is impaired by the fact that it is the gay parents who are giving themselves good ratings.

54. Crouse then poses the questions regarding the study’s methodology including contradictions that are not explained in the work of Crouch namely that the authors advertised in homosexual publications and on websites to get participants; it was not a random sample:

“The study participants knew before going into the study that its purpose was to make homosexual parenting look successful. All of these factors made it difficult, if not impossible, to accurately assess the study’s findings.”

55. The short point is simple. The benefits of marriage between a man and a woman, to the children of that union, are clear. Those that favour SSM have yet to discharge the very heavy burden to demonstrate that there is no risk of harm to the children that will be raised in any such relationship if it were to become law in Australia, it being impossible for such children to be raised by their biological parents. LPDM respectfully submits that the evidence dictates that the burden will never be discharged.

OTHER POLICY REASONS FOR REJECTING THE BILL

The MA is not discriminatory

56. The question may be posed whether the MA is discriminatory?
57. Australia’s position in relation to overseas same-sex marriage has been express since 2004. Section 88EA was inserted on a bi-partisan basis into the MA to deal with the issue of overseas same-sex marriages. This includes marriages of any kind other than that defined to be marriage in this country. It is not in any sense discriminatory, therefore, for Australian law to say that what is accepted in another nation is not accepted here.
58. There is therefore no ground to say that discrimination is a basis for the Bill.
59. The assertion that the MA is itself discriminatory in relation to Australians was argued and rejected in *Morgan v President, Australian Human Rights Commission*, the Court finding that the MA did not discriminate in any proscribed way.²³ That is the position at law in Australia.
60. It is also the position under the *Universal Declaration of Human Rights (UDHR)* and the *International Covenant on Civil and Political Rights (ICCPR)*. In *Schalk v Kopf*²⁴ and *Gas and Dubois v France*²⁵ the European Court of Human Rights, considering the European Charter of Human Rights, which is substantially the same as the UDHR and the ICCPR, held that for a state to only permit marriage between a man and a woman, was not discriminatory.
61. Those decisions have been recently affirmed this year by the European Court of Human Rights Grand Chamber in *Hämäläinen v. Finland*.²⁶
62. There is no discrimination for same-sex relationships to be accorded legal recognition other than by marriage (as if between a man and a woman), as Australia has progressively done since the 1970s up to recent times.

SSM will lead to an Erosion of other established Rights and Freedoms

63. The jurisprudence surrounding SSM in other jurisdictions shows that amending the law in relation to marriage inevitably leads to the limiting of other well established freedoms, which are expressed in

²³ [2013] FCS 109.

²⁴ Application No 30141/04 Judgment 24 June 2010.

²⁵ Application No 2591/07) Judgment 15 March 2012.

²⁶ Application no. 37359/09, 16 July 2014.

the international charters, such as the freedom of thought, conscience and religion,²⁷ and the freedom of opinion and expression.²⁸

64. Some recent examples are:

64.1. *Elane Photography v Vanessa Willcock*,²⁹ where a commercial wedding photographer that declined to photograph what was essentially a same-sex wedding was found to have unlawfully discriminated against the prospective customer, though no monetary relief was granted;

64.2. *Craig and Mullins v Masterpiece Cakeshop Inc and Anor*,³⁰ where a cake maker that declined to bake a cake celebrating an SSM was held to have acted unlawfully;

64.3. Challenge by a UK same sex couple to the Anglican Church's ban on SSM;³¹

64.4. A case that has not yet resulted in a prosecution but has gained notoriety concerns the demands of a gay rights activist in Northern Ireland who ordered a cake from a Christian-run bakery in Northern Ireland that carried a picture of the Sesame Street characters Bert and Ernie with the slogan "support gay marriage". The proprietors insisted that producing the cake with the slogan and the picture of the puppets arm-in-arm printed on the icing would amount to endorsing a campaign for the introduction of gay marriage in the province, where it is currently illegal, and go against their religious convictions. The Equality Commission for Northern Ireland has now written to the bakers insisting that they are in breach of the law. It claims that refusing to decorate the cake amounted to discrimination on grounds of sexual orientation against the man who placed the order.³²

64.5. Litigation in Washington State as a result of a florist refusing to prepare flowers for an SSM;³³

65. Thus it is clear that legislating for recognition of SSM (or the recognition of foreign SSM as the Bill aims to do) will inevitably lead to restrictions on other liberties which are uncontroversially fundamental, and are expressed in the international charters. One right will trump another, without any rational justification.

66. Further, if the overseas experience is followed, many small business people will become involved in expensive and distracting litigation. The advancement by litigation may also spread to religious organisations. As Paul Kelly, the Editor at large of the Australian said in an article on 22 September 2012:

"Once the state authorises SSM then religions will come under intense pressure to allow SSM and another campaign based on a further application of marriage equality will begin. Looking at the passions of the SS movement can this be seriously doubted? At that point the ideology of marriage equality runs into direct conflict with the idea of religious freedom, something will have to give."

CONCLUSION

67. The Bill is part of the campaign for SSM, which itself is based on bad policy and poor evidence. It should be rejected.

²⁷ UDHR Article 18 "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

²⁸ UDHR Article 19 "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

²⁹ Supreme Court of New Mexico Docket No 33,687 22 August 2013.

³⁰ State of Colorado Administrative Court CR 2013-0008 6 December 2013.

³¹ http://www.chelmsfordweeklynews.co.uk/news/10617202.Gay_dads_campaign_for_church_wedding/ accessed 8 February 2014.

³² <http://www.independent.co.uk/news/uk/home-news/northern-ireland-bakery-refuses-to-make-gay-bert-and-ernie-wedding-cake-9590745.html>.

³³ <http://www.reuters.com/article/2013/04/19/us-usa-gaymarriage-washington-idUSBRE93I08820130419> accessed 10 February 2014.

68. LPDM is grateful for the opportunity to make a submission in relation to this important area of legal and public life. We are ready to appear before the Committee to give oral evidence, if required.

Dated 30 July 2014

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