



SUBMISSION

TO THE

**SENATE LEGAL AND CONSTITUTIONAL
AFFAIRS LEGISLATION COMMITTEE
INQUIRY**

INTO THE

**RECOGNITION OF FOREIGN MARRIAGES
BILL 2014**

FROM

AUSTRALIAN MARRIAGE EQUALITY

Contents

Executive summary
Background to Australian Marriage Equality
Our support marriage equality
What is marriage equality and why do we support it?
A note on terminology
Background to the Foreign Marriages Recognition Bill 2014
~ The origin section 88EA
~ Other examples of non-recognition of foreign marriages
~ Extent of marriage equality overseas
Reasons for the recognition of foreign marriages between same-sex partners
~ The human impact
~ International obligations
~ Inconsistencies and anomalies
Objections to the recognition of foreign marriages between same-sex partners
~ Suggestions for improving the Bill
~ Recommendation

Executive summary

- Australian Marriage equality supports the intention of the Recognition of Foreign Marriages Bill 2014.
- An increasing number of Australian same-sex couples are marrying overseas. The recognition of these marriages as marriages will benefit same-sex couples married overseas, their families, the community and the institution of marriage
- There are numerous inconsistencies and anomalies that arise because foreign marriages of same-sex couples are not recognised. These include the federal government's removal of barriers to same-sex couples marrying under foreign marriage laws, and the indirect recognition of foreign same-sex marriages in federal law through their recognition in state laws.
- There are a number of objections to the recognition of the foreign marriages of same-sex couples. These include inconsistency with the principle definition of marriage in the Marriage Act and the disadvantageous treatment of same-sex couples unable to travel overseas to marry. We reject these objections as unfounded.
- We recommend the Foreign Marriage Recognition Bill be passed with amendment.

Background to Australian Marriage Equality

Australian Marriage Equality (AME) is a community-based organisation dedicated to removing those discriminatory provisions of the Australian *Marriage Act 1961* (Cth) (hereafter, "the *Marriage Act*") which prevent same-sex partners entering legal marriages and which also prohibit the recognition of foreign same-sex marriages. AME's work includes lobbying of decision-makers, public advocacy and community education. AME is governed by a nationally-representative, membership-elected board. Our funding comes from community fund raising. For more on AME visit www.australianmarriageequality.com

What is marriage equality and why do we support it?

In a legal sense, marriage equality refers to the removal of legislative provisions which prevent same-sex partners from entering into marriages in Australia or from having their foreign marriages legally recognised in Australia. More broadly, marriage equality is about treating marriage-like relationships with equal respect and dignity, regardless of the gender of the partners involved.

Australian Marriage Equality supports marriage equality for a variety of reasons. They include equality for all Australians, the right of individuals to live their private and family life free of state intervention, the removal of stigma and discrimination against same-sex attracted people, and the value and benefits of marriage to couples, families and the community. These are developed in submissions we have previously made to federal parliamentary inquiries on the issue. We can provide these submissions if required.

A note on terminology

In this submission we use the term "marriage equality" to describe the legislative reform necessary to ensure that same-sex couples have the right to marry under the *Marriage Act 1961*. We do not use the term "gay marriage" because this may suggest that the reform we seek is something special, lesser or different than marriage for different-sex couples. The term "marriage equality" makes it clear that once reform has occurred the rights, responsibilities and status of marriage will be exactly the same for different and same-sex couples.

When it is necessary for us to distinguish between same-sex and different-sex couples or marriages, we use the term "same-sex" rather than "gay" because some same-sex partners may identify as bisexual or transgender. We acknowledge that some people may not within the categories of "male" and "female" because they are transgender, intersex or of indeterminate sex. AME believes all adult Australians should have the right to marry regardless of sex, gender or sexual orientation. Where we use the term "same-sex" it should be read to include all those couples who cannot currently marry because of sex, gender or sexual orientation.

Consistent with this terminology, we use the term "same-sex attracted people" to designate the broader group of people who may enter same-sex relationships.

At some points in the submission we use "solemnise" to describe entering into a marriage. We use this term because it is used in the *Marriage Act*, because it is suggestive of the seriousness and gravity of entering a marriage. We understand that for some people the word may have religious connotations. But clearly, like the word "marriage" itself, "solemnise" also has a legal meaning.

When we use the term "civil union" we refer to all schemes for the formal recognition of same-sex and other personal relationships, other than marriage. In common usage in Australia the term has come to mean a union formalised under a marriage-like scheme. But given our belief that no civil union scheme is an adequate substitute for marriage equality no matter what its marriage-like qualities (see section 6.b for more), we conform with international usage that designates all formalising schemes "civil unions" including relationship and domestic partner registers, and civil partnership schemes.

Background to the Foreign Marriages Recognition Bill 2014

~ The origin section 88EA

At the end of 2003 two Australian same-sex couples legally married under Canadian provincial laws which allowed such marriages. They were Jason and Adrian Tuazon-McCheyne, and Jacqui Tomlins and Sarah Nichols¹. When these couples returned to Australia they sought recognition of their foreign marriages from an Australian court. In part, this prompted the then Federal Government to amend the *Marriage Act* to make it clear marriages performed in Australia can only be between a man and a woman, to prohibit the recognition of foreign same-sex marriages, and to terminate the claims of the couples already cited and prevent such further claims. According to the second reading speech of then Attorney-General, Philip Ruddock,

"A related concern held by many people is that there are now some countries that permit

¹ <http://www.theage.com.au/articles/2004/02/03/1075776059590.html>

same-sex couples to marry. The amendments to the Marriage Act contained in this bill will make it absolutely clear that Australia will not recognise same-sex marriages entered into under the laws of another country, whatever that country may be. As a result of the amendments contained in this bill, same-sex couples will understand that, if they go overseas to marry, their marriage, even if valid in the country in which it was solemnised, will not be recognised as valid within Australia."²

As a result a new section was added to the Marriage Act, 88EA, to explicitly prevent the recognition of foreign marriages between same-sex partners as marriages.

~ Other examples of non-recognition of foreign marriages

Section 88EA is not without precedent. Of the occupying powers in post-war Japan only two, the United States and Australia, refused to sanction or recognise the marriages of their troops to Japanese civilians. Some Australian soldiers with Japanese fiancés married in the Canadian Embassy, and denied any recognition of their marriage or the right to return to Australia with their new spouse, ended their tour of duty in the same country. Not until 1964, with the first unravellings of the White Australia Policy, would the law of their home nation recognise their spouse³.

~ Extent of marriage equality overseas

The number of jurisdictions allowing same-sex couples to marry is growing rapidly. It includes many countries with which Australia has close historical, cultural, familial and economic ties such as New Zealand, Britain, Canada, the Netherlands and nineteen US states.

The nations that allow same-sex couples to marry are listed here, with the dates these marriages began, or will begin the case of Scotland and Luxemburg:

The Netherlands (2001), Belgium (2003), Spain (2005), Canada (2005), South Africa (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), Uruguay (2013), New Zealand (2013), France (2013), England and Wales (2014), Luxembourg (2014), Scotland (2014)

The nineteen US states and territories that allow same-sex couples to marry are California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and the District of Columbia. Marriage licenses have been issued to same-sex couples in Arkansas, Colorado, Indiana, Michigan, Utah and Wisconsin following court orders. Same-sex marriages are also permitted in some states in Mexico and Brazil.

Reasons for the recognition of foreign marriages between same-sex partners

~ The human impact

In the most recent Australian census 1338 same-sex couples indicated they have married in another country⁴. The Bureau of Statistics has indicated that the overall number of same-sex couples is under-reported, so we can expect the actual number of such couples married overseas to be higher. According to information supplied to AME from the New Zealand Registrar of Births, Deaths and Marriages, 234 Australian same-sex couples married in New Zealand between 19.8.13, when such marriages became possible, and 23.7.14. The total number of same-sex couples married in New Zealand in that period was 898. Clearly, many Australian same-sex couples who wish to marry, but are unable to fulfill that aspiration in

² House of Representatives: *Hansard* 24 June 2004 at p. 31459.

³ Owen, J., *Mixed Matches: interracial marriage in Australia*, University of NSW Press, 1991, p34ff

⁴ <http://www.theaustralian.com.au/national-affairs/overseas-weddings-show-need-to-allow-same-sex-marriage-here/story-fn59niix-1226404832244>

Australia, are travelling overseas and marrying in jurisdictions that have marriage equality. They do this, often at great expense, because they value marriage very highly. Often, they are accompanied by friends and family members who wish to witness their marriage.

The Census figure does not include the many Australians who live overseas and are in legal same-sex marriages. It is impossible to know how many couples are involved but it has been estimated that the Australian diaspora is at least 1,000,000. This diaspora is mainly in English-speaking countries like the UK, the US, Canada and New Zealand that already have marriage equality. Like same-sex couples who travel overseas to marry, couples who already live overseas will have family and friends who travel to their marriage ceremony.

It is an affront to all these couples that their legal marriage is not recognised as a marriage when they return to Australia. It is an affront to their loved ones who have travelled overseas to attend their marriage ceremony. It is an affront to the country in which they have married that Australia does not respect the laws of that country in a way we would expect our laws to be respected. No less, it is an affront to the institution of marriage that the solemn vows of lifelong commitment made by same-sex couples who marry overseas are not respected by Australian law when these couples return to Australia. Those who believe marriage vows are good for couples, families and society should oppose any law which devalues these vows and legally sunders the couples who make them.

AME understands some Australian same-sex couples have decided to move to, or remain longer in, those countries that have given them the kind of legal equality their home country is unwilling to provide. This situation parallels the situation faced by Australian servicemen and their wives mentioned above. It is unacceptable that our laws force some Australian citizens to decide between their nationality and their marriage. When an Australian couple chooses to live where they are married it is a loss to them, their families, their communities and the Australian economy.

The other negative impact of not recognising foreign same-sex marriages is that it can mean Australia misses out on skilled immigrants, most of whom come from developed English-speaking countries which already have marriage equality. When considering where to make their home, skilled migrants who are in same-sex marriages are more likely to migrate to a country which recognises that marriage. Such recognition not only means their spousal entitlements are guaranteed. It is also indicative of how well-respected their relationship will be. As more developed nations adopt marriage equality Australia will become an ever less favoured destination for skilled migrants.

~ International obligations

Australia has an obligation under the Hague Convention on the Recognition and Celebration of Marriages to recognise marriages lawfully entered into in another country. This includes the other two signatories of the Convention, the Netherlands and Luxemburg, both of which allow same-sex couples to marry. While it is true that article 14 of that Convention allows signatories not to recognise certain foreign marriages it would be embarrassing for Australia to justify its discriminatory policy should an appeal be made under the Hague Convention.

While Australia fails to recognise foreign marriages of same-sex partners it is also potentially in breach of a) the rights to privacy and equality enshrined in the International Covenant on Civil and Political Rights, b) its obligation to protect children under the Convention on the Rights of the Child and c) its obligation to protect children and families under the International Covenant on Economic, Social and Cultural Rights. More and more children are being raised by Australian same-sex couples. The wellbeing and human rights of these children are directly impacted by laws failing to recognise their parents' marriages.

~ Inconsistencies and anomalies

Australian governments already recognise foreign same-sex marriages, albeit not always as marriages. As noted above the Bureau of Statistics counts same-sex marriages as marriages

in the Census. State governments, including those in Tasmania and Queensland, automatically recognise foreign same-sex marriages as local civil unions (Deeds of Relationship in Tasmania and registered relationships in Qld). This means same-sex partners in foreign marriages have virtually the same rights as married, civil union or de facto heterosexual couples in state law. It also means that, by virtue of being state civil unions, foreign same-sex marriages are recognised as de facto partnerships in federal law, again giving the partners concerned virtually the same rights as married partners. It seems absurd that foreign same-sex marriages are recognised in state and federal law as civil unions and/or de facto partnerships, and are afforded all the same rights and responsibilities as married partners, but cannot legally be called "marriages".

Since 2011 the Federal Government has issued Certificates of No Impediment to Marriage to same-sex partners seeking to marry in those foreign countries that require such certificates⁵. Prior to that time CNIs were not available to same-sex partners intending to marry. In 2014 the Federal Government permitted the UK authorities to marry same-sex couples who qualify to marry under UK law⁶. Prior to this, same-sex couples were not permitted to marry in consulates that solemnised such marriages under foreign laws, namely those belonging to Portugal. It seems absurd that the Federal Government has actively removed barriers to Australian same-sex couples marrying under the laws of other countries, yet still refuses to recognise these marriages. It is no less absurd that a couple married in a foreign consulate in Australia ceases to be married the moment they step back on to Australian soil.

Polygamous marriages are recognised under the Family Law Act to ensure parties to these marriages have access to the Family Court for purposes of divorce, property settlement and matters related to children. Section 6 of the *Family Law Act 1975* says,

"For the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage."

This section provides greater recognition and respect to polygamous marriages than is found anywhere in federal law for marriage between partners of the same sex. This seems deeply unfair. Arguably, there are as many or more Australians in same-sex marriages than polygamous marriages. Popular support for allowing same-sex couples to marry is far higher than for polygamous marriages. Same-sex marriages are consistent with the general understanding of marriage as being an exclusive relationship between two people, while polygamous marriages are not consistent with this understanding. While AME does not support the solemnisation of polygamous marriages in Australia we support existing legal recognition of, and protections for, parties to polygamous marriages, and for their children. We believe it is inconsistent to deny same-sex married partners at least the same recognition and protection as polygamous married partners.

We note that another submission made to this inquiry, from Chris Puplick AM and Larry Galbraith, notes a potential legal problem that arises because Australia doesn't recognise foreign same-sex marriages. The problem is that same-sex partners married under a foreign law may open themselves to prosecution if they declare themselves to be married on any number of different official legal documents. We share Mr Puplick and Mr Galbraith's concern.

Objections to the recognition of foreign marriages between same-sex partners

Many of the objections to the recognition of foreign same-sex marriages are also objections to the principle of marriage equality. These include religious concerns, concerns about the

⁵ <http://www.theaustralian.com.au/archive/national-affairs/alp-opens-way-to-gay-australians-marrying-overseas/story-fnba0rxe-1226214013632>

⁶ Harrison, Dan "Same-sex couples can marry in UK consulates from June" *Sydney Morning Herald*, 28 March 2014.

slippery slope to non-conventional marriages and concerns about the wellbeing of children. We will not canvass these concerns here because they are comprehensively dealt with in previous Senate Legal and Constitutional Committee inquiries into marriage equality. Instead, we will deal with specific objections to the recognition of foreign same-sex marriages, some of which emerged in debate on a former foreign same-sex marriage recognition bill.

One objection to the recognition of foreign same-sex marriages is that it would be inconsistent with the legal definition of marriage in the Marriage Act as the union between a man and a woman and that this definition must be amended before foreign same-sex marriages are recognised. AME obviously supports reform of the Marriage Act to allow marriages between same-sex couples to be performed in Australia. But we do not believe that, in the absence of such a reform, foreign same-sex marriages can't or shouldn't be recognised. There is no legal principle that binds the current parliament to the decision of a former parliament. In its decision overturning the ACT's former Marriage Equality Act, the High Court made it clear that the Federal Parliament has the constitutional power to legislate for same-sex marriages if it wishes. As noted above, some foreign marriages are already recognised as marriages in Australian law despite not fitting the accepted definition of marriage. In some other countries foreign same-sex marriages are recognised as marriages even though such marriages are not performed under domestic law. This includes Japan and Israel. We can see no legal or constitutional obstacle to the Federal Parliament recognising foreign same-sex marriages before it allows such marriages to be performed in Australia.

Another objection is that recognising foreign same-sex marriages is a sly, back door route to marriage equality. This was said of the decriminalisation of homosexuality, the enactment of anti-discrimination laws, the recognition of same-sex de facto relationships, allowing same-sex adoption and surrogacy and any number of other reforms. Yet, none of them have yet lead to marriage equality. We believe we have provided sufficient reasons for foreign marriage recognition for this reform to be seen as valuable and necessary in its own right.

Another objection, cited by some supporters of the principle of marriage equality, is that the recognition of foreign same-sex marriages would create a new form of inequality by restricting marriage to those same-sex partners who have the capacity to travel overseas, leaving poorer same-sex partners without access the benefits and protections of marriage by virtue of their income. This objection fails to understand the reasons many same-sex couples marry overseas. Some value marriage as an institution very highly. Some have a sense of urgency; one partner may be ill or the partner's parents may be ageing. In these situations couples are willing to make the sacrifices necessary to marry overseas. It is a necessity for them, not a luxury. Whether or not a couple marries overseas is their decision, not the decision of those parliamentarians who arrogantly declare they are acting in the best interests of the couple concerned.

Suggestions for improving the Bill

AME supports the intention of the Recognition of Foreign Marriages Bill 2014. However, we have some suggestions for how it may be improved.

The Bill uses the term "same-sex marriages". As stated above, when AME uses this term we intend it to be inclusive of partners who are transgender, intersex, of indeterminate sex or not otherwise legally male or female. It is not clear the Bill does the same. A literal definition of "same-sex" may be exclusive of these partners. We support terminology that is inclusive. This could be a definition of "same-sex" which makes it clear that it includes all currently unable to marry because they are not male and female, or a new term that is equally inclusive. The former may be simpler. The new section 88EA should also make clear that the marriages being recognised include those between partners who are other than legally male and female.

The Bill uses the term "solemnised in a foreign country" and "solemnised in a foreign country under a local law". This could suggest that the laws in question are national laws. Because internal jurisdictions are responsible for marriage laws, particular in some other federal

nations such as the US, it should be clear the Bill deals with these laws. Two possibilities are "solemnised under foreign laws" and "solemnised outside Australia".

Recommendation

We recommend the Recognition of Foreign Marriage Bill 2014 be passed with amendment.