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Victorian Council for Civil Liberties Inc  
Reg No : A0026497L

GPO Box 3161  
Melbourne, VIC 3001  
t 03 9670 6422  
[info@libertyvictoria.org.au](mailto:info@libertyvictoria.org.au)

**PRESIDENT**  
Jane Dixon QC

**SENIOR VICE-PRESIDENT**  
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**PATRON**  
The Hon. Michael Kirby AC CMG

Committee Secretary  
Senate Legal and Constitutional Affairs Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

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

31 July 2014

Dear Committee Secretary

### ***Inquiry into the Recognition of Foreign Marriages Bill 2014***

#### ***Introduction***

1. Liberty Victoria thanks the Committee for the opportunity to comment on this Bill. This is a public submission. It is not confidential.
2. The Victorian Council for Civil Liberties Inc – Liberty Victoria – is an independent non-government organization which traces its history back to Australia's first civil liberties body, the ACCL, established in Melbourne in 1936.
3. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the human rights and freedoms recognised by international law and with the human rights obligations freely undertaken by Australia in ratifying the international human rights treaties. Liberty's contribution is well known to Senate and House committees, and we have campaigned extensively in the past on issues concerning human rights and freedoms, equality, democratic processes, government accountability, transparency in decision-making and open government.

### **Liberty's support for equality**

4. As Liberty submitted to the Senate on 2 April 2012,<sup>1</sup> the goal of removing discrimination against same-sex couples from the *Marriage Act* 1961 is one we wholeheartedly endorse. Indeed we have consistently taken this principled view in submissions to the Senate since 2009<sup>2</sup>. We continue to hold this view, and therefore consider that the present Bill does not go far enough, as it does not attempt to reverse the discrimination against couples other than “a man and a woman” that the *Marriage Amendment Act* 2004 introduced into domestic law.

### **International law is the issue**

5. The present Bill, however, seeks only to deal with international law, effectively to reinstate Australia's compliance with the ordinary rules of private international law, and restoring Australia's compliance with its international obligations under the *Hague Marriage Convention*,<sup>3</sup> which it breached by the 2004 amendments. Because the present Bill deals only with respecting international law and honouring treaty obligations it should indeed be less contentious than previous bills which have tried to do everything at once. Liberty Victoria therefore considers it should (subject to some matters raised below) be supported.
6. While this Bill can be justly criticised also for its potential to create a new economic discrimination between couples who can travel overseas to marry and those, no doubt the majority, who cannot, it does have two major merits.
7. The first is that it ends the breach of international comity and the affront to friendly nations caused by Australia's refusal to recognize the validity of the laws of a growing number of nations – nineteen<sup>4</sup> at time of writing – whose marriage laws do not discriminate against same sex couples. In some cases this refusal breaches express treaty obligations<sup>5</sup>.
8. Although not strictly relevant, it would be underhand not to acknowledge the second, namely that it will highlight the absurdity of the other part of the 2004 changes, namely the discriminatory definition of marriage for domestic purposes inserted thereby. It is clear from numerous opinion polls that a substantial majority of Australians support marriage equality already (a distinctly higher proportion than voted for the current government, what's more), and the present Bill, if

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<sup>1</sup> Liberty Victoria submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Marriage Equality Amendment Bill* 2010

<sup>2</sup> Submission m43 to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Marriage Equality Amendment Bill* 2009.

<sup>3</sup> *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 1 May 1991).

<sup>4</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.

<sup>5</sup> The Netherlands and Luxembourg are, with Australia, parties, and Portugal is a signatory, to the *Hague Convention*.

passed, will serve to increase the pressure on the members of Parliament to do the right thing in our domestic law as well.

9. Denying same sex couples the right to marry is an unjustifiable restraint on individual freedom, in violation of Australia's human rights and other international legal commitments.<sup>6</sup> The Senate should note too that the recent decision of the High Court of Australia in *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55 confirms that the Parliament has the power under section 51 of the Constitution to recognise same sex marriage, putting to rest any prior uncertainty. The Court stated unanimously: 'When used in s 51(xxi), "marriage" is a term which includes a marriage between persons of the same sex' [38].

### **Overseas recognition compatible with local ban: High Court**

10. The High Court also observed<sup>7</sup> that there is nothing unusual or improper in Australia recognising marriages validly conducted in other jurisdictions which cannot be celebrated under Australian law, in particular polygamous marriages, as it does. The latter are also recognised in statute<sup>8</sup>, as the Court pointed out<sup>9</sup>; clearly the present Bill is no trailblazer in this respect. Australia will not even be the first country to recognise other countries' non-discriminatory marriage laws<sup>10</sup> while maintaining discriminatory domestic laws.

### **Drafting issues**

11. There are two respects in which we submit that the present Bill can be improved to more completely achieve its aims.
12. First, proposed new section 88EA may lead to an anomalous situation where unions recognised in a foreign country involving intersex or transgender persons might not be captured by the operation of this provision. This could be dealt with by removing the express references to "a man and another man" and "a woman and another woman" (as also used in the current section 88EA) and replacing these with "two people."
13. Second, the 2004 amendment changed s.88B to prevent its being used, as cases then under way in the Family Court no doubt would have done, to ensure that valid foreign marriages of same-sex couples were recognised under s.88E. This could be dealt with by repeal of s.88B(4).

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<sup>6</sup> See ICCPR Article 23 (the right to marry and establish a family) and Article 26 (non-discrimination) and the decision in *Young v Australia* CCPR/C/78/D/941/2000 (18 September 2003) available at <http://www1.umn.edu/humanrts/undocs/941-2000.html>.

<sup>7</sup> [2013] HCA 55 at [32]

<sup>8</sup> *Family Law Act 1975*, s.6.

<sup>9</sup> [2013] HCA 55 [32] footnote 46.

<sup>10</sup> Paula Gerber, 24 July 2014, *Online Opinion*, <http://www.onlineopinion.com.au/view.asp?article=16527>: "Australia would not be the first country to legally recognise overseas same-sex marriages while not allowing such marriages to take place at home. The following countries have all gone down this path: Aruba, Curaçao and Sint Maarten (collectively the Netherlands Antilles or the Dutch Caribbean); Israel; Japan; Italy; and Malta."

**Consulting affected countries**

14. As this Bill deals only with the recognition of valid laws of other jurisdictions, we urge the Committee, if it has not already heard from them, to contact the representatives of each of the 19 countries whose laws are disrespected by the current text of the Marriage Act 1961 to seek their views.

**Conclusion**

15. Subject to the above remarks, therefore, Liberty Victoria urges the Committee to recommend that the Bill (as amended to deal with the drafting issues noted above) be passed, and calls on the Senate to act on that recommendation.
16. Liberty Victoria would welcome the opportunity to address the Committee if it wishes to take further evidence in the pursuit of its inquiries.

Yours faithfully,



Jamie Gardiner  
Vice-President