Gay & Lesbian Rights Lobby

# ALL LOVE IS EQUAL

# MARRIAGE EQUALITY IN AUSTRALIA:

## INVITED SUBMISSION TO THE STANDING COMMITTEE ON SOCIAL POLICY AND LEGAL AFFAIRS ON THE MARRIAGE AMENDMENT BILL 2012 AND THE MARRIAGE EQUALITY AMENDMENT BILL 2012

**MARCH 2012**

### ABOUT THE GAY & LESBIAN RIGHTS LOBBY

Established in 1988, the Gay & Lesbian Rights Lobby (GLRL) is the peak representative organisation for lesbian and gay rights in New South Wales (NSW). Our mission is to achieve legal equality and social justice for lesbians and gay men.

The GLRL has a strong history in legislative reform. In NSW, we led the fight for recognition of same-sex de facto relationships, which led to the passage of the *Property (Relationships) Legislation Amendment Act 1999* and subsequent amendments. The GLRL was also successful in lobbying for the equalisation of the age of consent in NSW for gay men in 2003.

In NSW, the rights and recognition of children raised by lesbians and gay men have been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the law reform recommendations outlined in our 2003 report, *And Then… The Brides Changed Nappies*. The major recommendations from our report were endorsed by the NSW Law Reform Commission's report, *Relationships* (No. 113), and enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW).

In 2010, we successfully lobbied for amendments to remove discrimination against same-sex couples in the *Adoption Act 2000* (NSW), non-discriminatory surrogacy legislation, and the introduction of Relationship Registers.

## EXECUTIVE SUMMARY

> Shanya, NSW said:
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> *I am an Australian citizen, I pay my taxes and I vote. I want to be treated with the same respect and consideration as the wider community. I do not want the government to discriminate against me because of my sexuality, and I do not want the government to dictate my level of commitment to my partner. Marriage is a civil right which should be made available to every Australian citizen!*

The GLRL endorses marriage equality and supports both the Marriage Equality Amendment Bill 2012 (Cth) and the Marriage Amendment Bill 2012 (Cth). The GLRL uses the term 'marriage equality' to recognise the many non-heterosexual and gender diverse couples will be affected by proposed amendments. As an organisation that advocates on behalf of gay men, lesbians and their families, our submission focuses on same-sex couples. We recognise that marriage reform has significant importance sex and/or gender diverse people and encourage the Standing Committee on Social Policy and Legal Affairs (the **Committee**) to have specific consultation with these communities.

Marriage is a civil institution, governed by secular laws, of which all people are entitled equitable access. We note the proposed legislation reiterates that:

- **Marriage is not an immutable religious institution.** The GLRL recognises that marriage takes many forms in different cultures and has various religious histories attached to it. However, marriage in Australia is a civil institution which is regulated by the Federal Government, and only sometimes takes place in a religious setting. Marriages performed by the state are civil, not religious, in nature. Federal legislation should reflect the separation of Church and State and not seek to privilege particular religious interests over treating all its citizens equally. Marriage equality should be made available to all couples regardless of sex.

- **Marriage equality is an issue of human rights.** Marriage reforms are essential to uphold the human rights of sexual and gender minorities. Australia has ratified the *International Covenant on Civil and Political Rights* that expressly provides for equality before the law and right to non-discrimination. In recent history marriage reform, through the lens of non-discrimination, has secured the legitimacy of interracial unions and furthered the agency of women in marital relationships. In the context of evolving norms then, the *Marriage Act 1961* should be amended to define marriage as the 'union of two people' irrespective of sex.

- **Australia is falling behind comparable jurisdictions and should recognise foreign marriages.** Same-sex couples can legally be married in many foreign nations: Canada, the Netherlands, Argentina and South Africa permit equal marriage. Despite not recognising these marriages in Australia, the Federal Government now issues eligible same-sex couples Certificates of No Impediment to marry in these jurisdictions. Couples that are legally married in overseas jurisdictions should have their marriages recognised in Australia.

- **Marriage equality has broad community support.** Consistent polling indicates that over 60 percent of Australians support marriage equality.

- **Civil unions are not substitutes to full marriage equality.** The GLRL recognises that relationship recognition can take multiple forms, and we support a range of options being available for all couples. Permitting civil unions or relationship register schemes while denying same-sex couples access to marriage produces a tiered relationship structure that privileges heterosexual relationships, while undermining same-sex relationship recognition.

**The Marriage Amendment Bill 2012 and the Marriage Equality Amendment Bill 2012 should be consolidated and passed by the Commonwealth Parliament to allow individuals the eligibility to marry regardless of the sex or gender of their partner.**

## INTRODUCTION

> Reverend Dorothy McRae McMahon, NSW said:
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> *I waited a long time to find my true self and the love of my life. I will be with her until death do us part and I am already traveling with her in ways that are tough and challenging because of threats to her and my health. In my view, the whole community should recognise and celebrate when two people make their faithful commitment to each other and try to model creative and loving relationship together. Surely this adds to the world, whatever the sexuality of those concerned.*

In 2004, the *Marriage Act 1961* (Cth) was amended to expressly define marriage as a 'union between a man and a woman, to the exclusion of others voluntarily entered into for life.'[1] The change in definition explicitly excluded same-sex couples from marrying.

In 2008, the Federal Government made a commitment to ending same-sex relationship discrimination and amended 85 federal laws to recognise same-sex de facto couples. The *Marriage Act*, however, was exempt from these changes, and remains a problematic gap in the Government's largely positive approach to same-sex relationship recognition.

In December 2011, the Australian Labor Party amended its platform to support marriage equality, while allowing MPs a "conscience" vote on the issue. The Federal Government also committed to issuing Certificates of No Impediment to eligible same-sex couples that wished to legally marry overseas.

In addition to the Marriage Equality Amendment Bill 2010 before the Senate, Stephen Jones MP has introduced the Marriage Amendment Bill 2012, and Adam Bandt MP and Andrew Wilkie MP have co-sponsored the Marriage Equality Amendment Bill 2012 that has been tabled in the House of Representatives.

Regardless of which legislative proposal is ultimately adopted, The *Marriage Act* must be amended to ensure full marriage equality for couples regardless of sex, sexual orientation or gender identity.

[1] *Marriage Act 1961* (Cth), s5(1).

## MARRIAGE AMENDMENT BILL 2012

> *Howard, NSW said:*
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> *I feel that, even if I am never married to a member of the same-sex, it is an important step for maintaining and promoting rights. This extends to EQUAL marriage; not gay marriage, which may leave out other gender diverse peoples.*

The Marriage Amendment Bill 2012 was introduced by Labor MP Stephen Jones to eliminate current discrimination on the basis of sex in the *Marriage Act*. It offers three significant changes to same-sex relationship recognition:

- **Neutralise the gendered definition of marriage.** Replaces the term 'man and woman' with 'two people' and maintains the rest of the current definition which indicates it is 'to the exclusion of all others, voluntarily entered into for life.'[2] The Bill also subsequently amends the gender specific references of 'husband and wife' to 'two people.'[3]
- **Recognising foreign same-sex marriages solemnised in other countries.** Repeals s88EA in order to recognise valid same-sex civil marriages from other jurisdictions.[4]
- **Ensures religious ministers are not obliged to perform same-sex marriages.** The Bill adds a provision to allow ministers of religion discretion to solemnise marriages according to their faith, and does not impose a civil obligation for ministers of religion to solemnise same-sex marriages.[5]

## MARRIAGE EQUALITY AMENDMENT BILL 2012

The Marriage Equality Amendment Bill 2012 was co-sponsored by Greens MP Adam Bandt and Independent MP Andrew Wilkie to also eliminate discrimination in the *Marriage Act.* While reiterating the provisions in the Marriage Amendment Bill 2012, it includes specific reference to 'sexual orientation and gender identity' to acknowledge the broad impact reform will have on same-sex, intersex and gender diverse couples.[6] The bill seeks to promote the acceptance and celebration of diversity.[7]

In addition to the provisions articulated in the Marriage Amendment Bill 2012, this bill adds a few further amendments:

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[2] Marriage Amendment Bill 2012 (Cth), s 5(1).
[3] Marriage Amendment Bill 2012 (Cth), s 46(1) and Part III of the Schedule.
[4] Marriage Amendment Bill 2012 (Cth), s 88EA.
[5] Marriage Amendment Bill 2012 (Cth), s 47(aa).
[6] Marriage Equality Amendment Bill 2012 (Cth), s 3(a) and (b).
[7] Marriage Equality Amendment Bill 2012 (Cth), s 3(c).

- **Remove the requirements of civil celebrants to refer to marriage as a gendered union.** The Bill proposes that civil celebrants refer to marriage as the union of 'two people' rather than a 'man and a woman.'[8]

- **Ceremonies and forms should use gender-neutral language when referring to spouses.** In order to acknowledge that marriages need not be gendered in a particular way, the terms 'husband' and 'wife' should be replaced with 'partner.'[9]

- **Consequential amendments.** The Bill enables the Governor-General to make regulations amending other consequential Acts to reflect the enactment of the amendments to the *Marriage Act*.[10]

## HISTORICAL EVOLUTION OF MARRIAGE

> Michael Carden, Queensland said:
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> *The reality is that marriage is not a religious institution, let alone a Christian one, and neither is there a universal marriage model even within Christian history.*

Marriage is a historically dynamic institution that has shifted with social change. Over time, we have seen the regulation of marriage adapt to different cultural and historical circumstances. Less than a century ago women were seen as chattels or property for transaction through a marriage contract, no provisions were made for no-fault divorce, and marital rape exemptions existed until the mid 1980s.[11] Mixed race marriages were prohibited on the basis that having 'mixed blood' children was seen as a threat to the preservation of distinct racial lineages.[12] These historical examples serve to remind us that the legal regulation of marriage in Anglophone countries has never been static and continues to evolve.

### SAME-SEX RELATIONSHIP RECOGNITION IN AUSTRALIA

Australia has had a very distinctive path towards same-sex relationship recognition. Until the late 1970s, 'homosexuality' was not simply peripheral; it was pathologised and proscribed as a criminal offence. Many gay and lesbian people have struggled against a history of stigma, harassment, discrimination and violence. While much has changed through decriminalisation and greater legal and social recognition, homophobia remains a systemic problem in our communities.

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[8] Marriage Equality Amendment Bill 2012 (Cth), s 46(1).
[9] Marriage Equality Amendment Bill 2012 (Cth), s 72(2).
[10] Marriage Equality Amendment Bill 2012 (Cth), Part 9.
[11] Melanie Heenan (2004), 'Just "keeping the peace": A reluctance to respond to male partner sexual violence', *Australian Institute of Family Studies* 1.
[12] *Loving v Virginia* (1967) US 338.

In an Australian legal context, de facto couples and married couples have the same rights at a federal level, and virtually all state and territory laws. However, symbolic recognition of these relationships has been undermined by the failure of the Commonwealth to legislate for marriage equality.

At a state and territory level, in the space of seven years (1999-2006), de facto recognition has expanded comprehensively to guarantee the rights of same-sex couples in state laws.[13] At the end of 2008, the Federal Government passed a series of reforms to largely mirror the recognition offered by states and territories. Same-sex couples were recognised in taxation, parenting, superannuation, veteran's affairs, social security and immigration laws.[14] The effect of the reforms was to give same-sex couples the same rights, entitlements and responsibilities as heterosexual de facto couples.

Some states and territories have schemes to formalise a same-sex relationship. NSW, Victoria, Queensland, ACT and Tasmania have relationship registers open to both heterosexual and same-sex couples.[15] Recently, the ACT amended its *Civil Partnership Act 2008* to allow for civil unions (solemnising a legal relationship with a formal ceremony).[16] In 2010, NSW also introduced a Relationships Register to offer some formal recognition to same-sex couples.[17] In 2011, Queensland legislated for civil unions for same-sex couples.[18] While the GLRL notes that relationship registers and civil unions are an important choice of recognition for same-sex couples, it is only one step towards full relationship recognition and falls considerably short of full marriage equality. Legal academic Morris Kaplan asserts it is problematic because 'full equality for lesbian and gay citizens requires access to the legal and social recognition of our intimate associations.'[19] Effectively this means ensuring same-sex couples have the same forms of legislative relationship recognition as heterosexual couples.

Until same-sex couples have formal and substantive equality before the law, homophobia will remain a troubling reality in our country.

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[13] Reg Graycar and Jenni Millbank (2007) 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition', *Journal of Law and Policy* 24 121 at 122.

[14] See *Same-Sex Relationships (Equal Treatment in Commonwealth Laws- General Law Reform) Act 2008*.

[15] *Relationships Register Bill 2010 (NSW); Relationships Act 2003* (Tas); and Births, Deaths and Marriages Victoria, 'Why register a domestic relationship?'', available at http://online.justice.vic.gov.au/CA256902000FE154/Lookup/BDMApplication_Forms/$file/DOJFactSheet1_WhyRegisterRelationship.pdf.

[16] *Civil Partnerships Act 2008* (ACT) Part 2, Division 2.3, s 6A(b).

[17] *Relationships Register Act 2010* (NSW).

[18] *Civil Partnerships Act 2011* (Qld).

[19] Morris Kaplan, 'Intimacy and Equality: The Question of Lesbian and Gay Marriage', in Phelan, S (ed), *Playing with Fire: Queer Politics, Queer Theories*, London and New York: Routledge, 1997, p. 201.

## PRINCIPLES OF MARRIAGE EQUALITY REFORM

> James, NSW said:
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> *As Marriage is a legal union, no one religion has the right to prevent same-sex couples from marriage. Being in a monogamous relationship for eleven years, we are looking forward to the day we can stand before our friends and family and have our union legally recognised. We trust that one day we will able to enjoy the same rights as every other Australian.*

Marriage in Australia is a civil institution. Civil marriages (those performed by the state) are a secular option for couples to formalise their relationship and secure their rights and responsibilities. The Australian Bureau of Statistics notes that in 2009, approximately 67 percent of marriages were solemnised by a civil celebrant not a religious minister.[20]

In Australia, marriage is accessed through legal and secular avenues and religious opinion should not dictate the meaning of marriage. Federal legislation should mirror the civil character of marriage by allowing couples to marry regardless of sex, gender or sexual orientation.

## HUMAN RIGHTS AND EQUALITY BEFORE THE LAW

International human rights principles support marriage equality. The Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012 addresses discrimination on the basis of sexuality and gender identity and recognises the fundamental human rights of sexual and gender minorities.[21] Under international law, Article 23 of the International Covenant on Civil and Political Rights (ICCPR) grants a right to marriage. Supplementing this provision in the ICCPR, Article 2(1)[22] provides that individuals should not be subject to discrimination and Article 26[23] emphasises that individuals should be treated equally before the law. The *Marriage Act* breaches these international human rights principles by discriminating against couples on the basis of their sexual orientation.[24]

Article 23 of the *International Covenant on Civil and Political Rights* provides that 'the right of men and women of marriageable age to marry and to found a family shall be recognised'. In *Joslin v New Zealand* the UN Human Rights Committee held that the right to marry under article 23 does not include same-sex marriage, noting that article 23 was intentionally gender specific.[25]

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[20] Australian Bureau of Statistics, 'Marriages and Divorces, Australia 2009', available at http://www.abs.gov.au/ausstats/abs@.nsf/0/094C7CFFDA274E61CA2577ED0014617C?opendocument.
[21] See above n8, at 2.
[22] Article 2(1), International Covenant on Civil and Political Rights, G.A res. 2200A (XXI), 22 U.N. GAOR Supp. (No. 16) at 52.
[23] *Id*, Article 26.
[24] See *Toonen v Australia*, Communication No. 488/92, 31 March 1994 and *Young v Australia*, Communication 941/2000, 6 August 2003.
[25] *Joslin et al v New Zealand* (2002) UN Doc A/57/40, 214, [8.2].

However, the reasoning of the Human Rights Committee in *Joslin* contradicts the Committee's previous comments on non-discrimination which emphasise that the principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.[26]

A number of overseas jurisdictions have distinguished the ratio in *Joslin*, and have found that same-sex couples do have the right to marry as a matter of fundamental human rights, and that this right is supported by other rights recognised under international law, such as the right to equality, the right to equal protection of the law without discrimination and the right to privacy.[27]

Alternatively, in *Minister for Home Affairs v Fourie*, the Constitutional Court of South Africa distinguished the obiter in *Joslin* to find that denying same-sex couples the right to marry breaches human rights protected by the South African Constitution. Justice Sachs noted that it would be 'strange' to use international human rights law to 'take away a guaranteed right ... openly, expressly and consciously adopted' by the Constitution.[28] Justice Sachs rejected that a reference to 'men and women' is 'prescriptive of a normative structure for all time'. Sachs J placed the human right to marry and found a family in its historical context as a right that was aimed at forbidding child marriages and removing racist impediments to marriage. Sachs J also argued that because 'family' is not defined in international law, it did not need to be always restricted to heterosexual families.[29]

In *Barbeau v British Columbia*, the British Columbia Court of Appeal held that recognition of the right for same-sex couples to get married 'is the only road to true equality' for same-sex couples.'[30] Further, the Massachusetts Supreme Court in *Goodridge v Massachusetts Department of Public Health* found that barring access to the protections, benefits and obligations of civil marriage means that 'a person who enters into an intimate, exclusive union with another of the same-sex is arbitrarily deprived of membership of one of our community's most rewarding and cherished institutions'. The Court found that this exclusion is incompatible with constitutional principles of respect for individual autonomy and equality under the law.[31]

In *Halpern v Canada*, the Ontario Court of Appeal found that the prohibition on marriage equality discriminated against same-sex couples and therefore breached the right to equality and the right to equal protection and benefit of the law without discrimination, in the Canadian Charter of Rights and Freedoms. The case also considered the intersection of marriage equality and freedom of religion. In the Court of Appeal's view, marriage is a legal institution, as well as a religious and social institution. The Court concluded that marriage equality did not in any way interfere with the religious institution of marriage or result in 'a corresponding deprivation to opposite-sex couples.'[32]

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[26] Human Rights Committee, General Comment 18 (1989), [10].
[27] See *Goodridge v Massachusetts Department of Public Health* (2003) 798 NE2nd 941; *Minister of Home Affairs v Fourie* (2005) CCT 60/04; CCT 10/05, 1 December 2005; *Barbeau v British Columbia* (2003) CA029048, 7 August 2003; *Halpern v Canada* [2003] OJ No 2268; In *Re Marriage Cases* , 43 Cal.4th 757 (2008) (15May 2008, Supreme Court of California).
[28] *Minister of Home Affairs v Fourie* (2005) CCT 60/04; CCT 10/05, 1 December 2005.
[29] *Ibid*.
[30] *Barbeau v British Columbia* (2003) CA029017; CA029048, 7 August 2003.
[31] *Goodridge v Massachusetts Department of Public Health* (2003) 798 NE2d 941.
[32] *Halpern v Canada* (2003) OJ No 2268.

In the recent Californian jurisprudence in *Perry v Schwarzenegger*, the District Court of Northern California reasoned that 'tradition' or religious morality alone is an insufficient basis for a secular state to insist upon marriage as pertaining strictly to a man and a woman.[33] Such a claim could not be a rational basis for a law. Indeed, the court considered evidence led by opponents of marriage reform that underscored the role of children in the debate. While recognising that marriage laws had no impact on the capacity of couples to legally have children, the court opined it was disingenuous to deny an institution to a child raised by a same-sex couples that could afford them the same social and symbolic legitimacy afforded to children raised by heterosexual couples.[34]

## INTERNATIONAL TRENDS

Australia should be consistent with other comparable jurisdictions. On an international level, Canada, Iceland, Argentina, Spain, the Netherlands, Belgium, Norway, Sweden, South Africa and an increasing number of US states grant the right to marry for same-sex couples.

In the past year, Denmark, Nepal and the UK have also indicated their intention to legislate for marriage equality.[35]

Internationally, Australia is falling behind many other comparable countries when it comes to relationship recognition. Even where couples are legally married overseas, 88EA of the *Marriage Act* does not recognise that relationship as a marriage. This remains a disgraceful demonstration of Australia's discriminatory position on civil marriage equality.

During the Universal Period Review of Australia in 2011, the UN Human Rights Council made recommendations that Australia remove marriage discrimination against same-sex couples by legislating for marriage equality.[36]

The significant shift in international norms surrounding marriage equality has been reflected in public opinion, with over 75 percent of Australians now believing that a change in the law to allow same-sex couples to marry is inevitable.[37]

## BROAD COMMUNITY SUPPORT

Marriage changes with social and cultural circumstances, and community support for change should demonstrate the desirability of marriage equality.

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[33] *Perry v Schwarzenegger* (2010) 3: 09 CV 02292.
[34] *Ibid.*
[35] AFP, 'Denmark submits gay marriage bill', *News.com.au*, 15th March 2012; BBC, 'Gay marriage: Government consultation begins', *BBC News*, 15th March 2012; and Utpal Parashar, 'Nepal charter to grant gay rights', *Hindustan Times,* 19th January 2010.
[36] Recommendations 88.69 and 88.70, UN Human Rights Council, 'Draft report of the Working Group on the Universal Periodic Review Australia', WG.6/10/L.8, 3 February 2011.
[37] Galaxy, 'Same-Sex Marriage Inevitability', May 2011.

In 2006 and 2009 the NSW Gay and Lesbian Rights Lobby (GLRL) consulted the gay and lesbian community on people's attitudes towards marriage and other relationship recognition models. Results of these consultations showed that the lesbian and gay community overwhelmingly believes that with the evolution of same-sex relationship recognition, same-sex couples should ultimately have access to the institution of marriage for reasons, primarily, of equality.[38]

The GLRL published the results of the 2006 statewide consultation in the 2007 *All Love is Equal… Isn't It?* Consultation Report. The report documented that:

- 86.3 percent of respondents favoured same-sex marriage[39];
- 51 percent of respondents said that gaining legal rights was the most important thing to them about relationship recognition[40]; and following that
- 46 percent of respondents said that 'equality – same-sex couples should be able to choose whether they want to marry or not.'[41]

With the significant advancements in obtaining legal rights as de facto couples, same-sex couples seek inclusion in marriage as a matter of securing formal equality. In 2009, the GLRL conducted a survey that was distributed at Mardi Gras Fair Day. When asked, "What are the most important aspects of formal relationship recognition to you?" of 669 respondents, 82 percent said proof of my relationship; 88 percent said transferability and consistency of recognition; 58 percent said a formal ceremony; and 45 percent noted the name of the scheme.[42]

The majority of Australians, including those of varying religious faiths, support marriage equality. Numerous polls conducted by Galaxy and Newspoll over 2011 and 2012 confirmed that a majority of Australians, generally over 60 percent of people, were in support of marriage equality.[43]

In October 2010, a Galaxy Poll commissioned by Parents and Friends of Lesbians and Gays identified that 62 percent of people supported same-sex couples being allowed to marry.[44] A Nielsen Poll in March 2011 confirmed similar findings, noting that 57 percent of Australians support same-sex marriage.[45] In August 2011, another poll confirmed that 68 percent of respondents supported marriage equality.[46] Despite the slight variations in polling data, there is an undeniable trend that a growing majority of Australians support marriage equality.

Support for marriage equality is particularly strong with young people, with approximately 80 percent of people in the 18-24 age cohort believing that Australia should allow for marriage equality.[47]

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[38] Gay and Lesbian Rights Lobby, *All Love is Equal…Isn't It?* (February 2007), p. 18.
[39] *Ibid.*
[40] *Id,* p. 5.
[41] *Ibid.*
[42] Gay and Lesbian Rights Lobby, 'Fair Day Survey 2009 – Results', June 2009).
[43] Australian Marriage Equality, 'A majority of Australians support marriage equality', http://www.australianmarriageequality.com/wp/who-supports-equality/a-majority-of-australians-support-marriage-equality/.
[44] Galaxy, 'Same-Sex Marriage Study', October 2010.
[45] Nielson, 'National Report – Carbon Price and Same-Sex Marriage', 13 March 2011.
[46] Roy Morgan, 'Poll Results: Should gay people have the right to marry?', August 2011.
[47] Galaxy, 'Same-Sex Marriage Study', October 2010.

Even amongst those of Christian faith, there is strong support for marriage equality. A Galaxy Poll commissioned by Australian Marriage Equality in August 2011 reported that 53 percent of Australians who identified as Christians support marriage equality.[48]

In May 2011 a Galaxy Poll identified that 75 percent of Australians believed that marriage equality was inevitable.[49]

The majority of Australians (78 percent) have also indicated that any proposed marriage equality legislation should be subject to a conscience vote.[50]

The GLRL believes that the 2008 de facto reforms in federal law, and the introduction of formal partnership schemes in the different states, has contributed to the growing public support for marriage equality in Australia.

## SYMBOLIC AND TRANSFERABLE RECOGNITION

> Peter Tatchell, UK said:
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> *Marriage is the internationally recognised system of relationship recognition. It is the global language of love. When we were young, most of us dreamed of one day getting married.*

Marriage offers symbolic as well as legal recognition. Relationship 'apartheid', where couples are granted equal rights but different status promotes a cultural hierarchy of relationships. Whilst legal entitlements between de facto and married couples are virtually the same, the absence of marriage places same-sex relationships as 'inferior' or 'lesser than' heterosexual married couples.

Marriage is an internationally recognised status of relationship. Australia has limited options of formal recognition, with only some states and territories having registry schemes, transferability and portability of relationship status is unclear. Marriage is recognised in other state and territory jurisdictions, as well as overseas. Whilst same-sex couples may be considered de facto, there is no marital option (a universally recognised status) to formalise or prove the existence of a relationship. This effectively limits the portability of same-sex relationship and the material rights and responsibilities associated with it.

Australian relationship registries are not recognised outside Australia, with the exception of the United Kingdom that recognises couples registered under the Tasmanian scheme. Transferability and consistency of recognition was considered the most important aspect of formal relationship recognition by 88 percent of our 2009 Fair Day survey respondents.[51] Marriage is a portable system of relationship recognition across different jurisdictions; relationship registries or civil unions are not.

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[48] Galaxy, 'Same-sex marriage and religion', August 2011.
[49] Galaxy, 'Same-Sex Marriage Inevitability', May 2011.
[50] Galaxy, 'Same-Sex Marriage Study', October 2010.
[51] See above, n31.

## CIVIL UNIONS AND OTHER FORMS OF RELATIONSHIP RECOGNITION

The GLRL values diverse forms of relationship recognition for all couples and families, however, it does not support the establishment of a Commonwealth registry for same-sex couples as a substitute for marriage, primarily because a tiered relationship recognition scheme continues to promote inequality for same-sex couples.

In the case of *Perry*, the Northern Californian District Court granting of domestic partnerships and legal rights to same-sex couples, while refusing the grant of civil marriage, explicitly signaled that same-sex couples were inferior to heterosexual ones. Thus, Proposition 8 offended the equal protection clause of the US Constitution.[52] While this case was decided in a different legislative context, the underlying principle reflects that hierarchical forms of relationship recognition serve to entrench discrimination.

Moreover, there is legal uncertainty about whether the Commonwealth Parliament has the power under the Australian Constitution to establish a federal relationship registry scheme.[53] Relationship registries also have very limited recognition outside Australia and a federal registry would not provide the same symbolic significance that marriage would.

## RECOMMENDATION

**The Marriage Amendment Bill 2012 and the Marriage Equality Amendment Bill 2012 should be consolidated and passed by the Commonwealth Parliament to allow individuals the eligibility to marry regardless of the sex or gender of their partner.**

## CONTACT INFORMATION

We welcome the opportunity to participate in any public hearings on this issue.

For further information, contact Senthorun Raj, Senior Policy Advisor, at [redacted] or [redacted]

[52] See above, n26.
[53] See *Commonwealth of Australia Constitution,* s 51(xxi).