

INQUIRY INTO SAME SEX MARRIAGE LAW IN NSW

Organisation: NSW Gay & Lesbian Rights Lobby
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‘ALL LOVE IS EQUAL’: TOWARDS SUBSTANTIVE RELATIONSHIP RECOGNITION
FOR SAME SEX COUPLES IN NSW

SUBMISSION TO THE NEW SOUTH WALES LEGISLATIVE COUNCIL INQUIRY INTO
SAME-SEX MARRIAGE LAW IN NEW SOUTH WALES

MARCH 2013

ABOUT THE GAY & LESBIAN RIGHTS LOBBY

Established in 1988, the NSW Gay & Lesbian Rights Lobby (GLRL) is the leading organisation for lesbian and gay rights in NSW. Our mission is to achieve legal equality and social justice for lesbians, gay men and their families. The GLRL has a strong history in legislative reform.

In NSW, we led the process for the recognition of same-sex de facto relationships, which resulted in the passage of the *Property (Relationships) Legislation Amendment Act 1999* (NSW) and subsequent amendments. The GLRL was also successful in campaigning for an equal age of consent in NSW for gay men in 2003 and the equal recognition of same-sex partners in federal law in 2008.

The rights and recognition of children raised by lesbians and gay men have also 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 reform recommendations outlined in our 2003 report, *And Then ... The Bride 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).

INTRODUCTION

The New South Wales Gay and Lesbian Rights Lobby (GLRL) welcomes the opportunity to provide comment to this inquiry by the New South Wales Legislative Council into same-sex marriage equality law in NSW.

In this brief submission, we intend to focus on most of the terms of reference for the inquiry, providing detailed commentary in our area(s) of expertise. We comment primarily on developments in other jurisdictions in relation to same-sex marriage equality, alternative models of relationship recognition and changes in social attitudes to marriage, and particularly same-sex marriage, in Australia.

In accordance with the terms of reference for this inquiry, and as an organisation that advocates on behalf of gay men, lesbians and their families, our submission focuses on same-sex couples. However, we recognise that reform to existing marriage law has significance to intersex, transgender, and other sex and/or gender diverse people and call for the use of inclusive terminology in relation to marriage equality legislation. In particular, we believe it would be worthwhile to inquire whether the terminology used in the Federal Marriage Equality Amendment Bill 2012 and Marriage Amendment Bill 2012, which would have allowed for the marriage of two adults regardless of sex, gender or sexual orientation, could be adopted, rather than the terminology 'same-sex marriage'.

1. LEGAL ISSUES SURROUNDING THE PASSING OF MARRIAGE LAWS AT A STATE LEVEL

(a) the impact of interaction of such law with the Commonwealth Marriage Act 1961

The power to make laws concerning marriage is shared by federal and state governments in Australia. As Constitutional law expert Professor George Williams has asserted,

“The constitution grants the Federal Parliament a concurrent, rather than exclusive, power to make marriage laws. As with other areas such as taxation, this means that the states also retain power in the area¹.”

Indeed, until 1961, when the federal *Marriage Act* was passed, marriage was primarily a concern of states, and not the Commonwealth. In 2004, the Howard Government amended the *Marriage Act 1961* (Cth), effectively precluding the recognition of same-sex marriages in federal law. Whilst this has had the effect of defining marriage as between a man and woman of marriageable age, in our view it leaves open the possibility that states can legislate for marriage equality in their own jurisdictions in a way that distinguishes such marriages from ‘marriage’ as defined under the *Marriage Act 1961* (Cth). The use of the term ‘same-sex marriage’ is one such example.

The GLRL holds the view that where the Federal government has failed to legislate in the interests of all Australians to uphold substantive equality before the law, as it did through the 2004 amendment to the *Marriage Act 1961*, States, including New South Wales, have a legitimate role, and indeed obligation, to legislate to remedy that gap in recognition and protection. In our view, this is not only legally possible, but would also give effect to the provisions of the *International Covenant on Civil and Political Rights* (ICCPR), which Australia has ratified, and which expressly requires State parties to ensure equality before the law. Indeed, historically, it is states such as New South Wales that have played an instrumental role in the push for recognition of de-facto rights for same-sex couples in Australia and, in other international jurisdictions where marriage equality is now a reality at law, specific states have adopted marriage equality legislation at a local level prior to the adoption of such measures at a national level, (an example is Canada, where provincial recognition in 2003 was followed by national recognition in 2005). There is, therefore, significant local and international precedent for State-based legislative measures aimed at ensuring equality before the law, including in respect of marriage.

Moreover, the existence of same-sex marriage equality legislation in NSW would not affect the intention or administration of the *Marriage Act 1961* (Cth), but would rather provide the option of formal relationship recognition to people ordinarily resident in New South Wales who are in committed same-sex relationships. By allowing such relationships to be designated marriages, same-sex marriage equality legislation would significantly enhance the recognition and respect currently afforded to same-sex relationships under the *Property (Relationships) Legislation Amendment Act 1999* and the *Relationships Register Bill 2010* (NSW). Australian Bureau of Statistics (ABS) data from

¹ Williams, G. (2012). States leave Canberra behind in rush to same-sex marriage. Sydney Morning Herald, accessed 27/02/2013 from: <http://www.smh.com.au/opinion/politics/states-leave-canberra-behind-in-rush-to-samesex-marriage-20120919-266wa.html#ixzz2CcpWZJMZ>

the 2011 census indicates that in NSW there are a sizeable number of same-sex couples that are in de-facto relationships (12, 259) and, further, would already describe themselves as married (468)². These couples should have the choice to have their relationship recognised as a marriage under NSW state law.

(b) the rights of any party married under such a law in each State's and Federal jurisdiction

The NSW GLRL is not in a position to provide detailed legal commentary on the implications of the rights of parties married under same-sex marriage legislation in other State, or in the Federal, jurisdictions. We are mindful that the Inquiry will receive submissions from legal experts who are suitably experienced to provide informed commentary on this particular matter.

(c) the rights of the parties married under such a law upon dissolution of the marriage

The primary concern of the NSW GLRL is that parties to a marriage who wish to seek dissolution are able to do so with as few legal impediments as possible, including requirements on the basis of citizenship status. If residency requirements for the dissolution of state-based same-sex marriages are adopted, in our view these should be on the basis of being 'ordinarily resident' in the State of New South Wales, and not with reference to, or in addition to, other attributes, such as being an 'Australian citizen'. The adoption of such a requirement would deny recourse to dissolution proceedings for thousands of people who are currently legally resident in New South Wales, but who are neither 'Australian citizens' nor, in some cases, 'permanent residents'³. Moreover, such provisions would, in our opinion, be inconsistent with the provisions of the *Racial Discrimination Act 1979* (Cth), by enabling only one party (for instance, an 'Australian citizen'), to seek dissolution of the marriage.

The NSW GLRL maintains that, should same-sex marriage legislation be enacted, it is critical that once a dissolution order has taken effect, a party to a same-sex marriage be able to enter into another marriage at that time, should they wish. This, we argue, would be consistent with the legal provisions, and prevailing social understandings concerning marriage, including as it is framed within the *Marriage Act 1961* (Cth).

Recommendation 1: That the Inquiry recognises the right of the state of NSW to legislate for same-sex marriage equality.

Recommendation 2: That the Inquiry calls for dissolution of marriage provisions that apply equally to all those legally resident in NSW, without reference to citizenship or permanent residency, and which enable individuals to re-marry following the issuing of a valid dissolution order.

² Australian Bureau of Statistics (2012). *Counts of same-sex couples in the 2011 census*. Accessed 27/02/2013 from: <http://www.abs.gov.au/websitedbs/censushome.nsf/home/factsheetssc?opendocument&navpos=450> It is important to note, however, that this may also represent an undercount of the total number of people currently in same-sex relationships.

³ This would include legally resident New Zealand nationals who are largely holders of sub-class 444 visas and are designated as Australian 'residents', but not 'permanent residents', under the *Migration Act 1958* (Cth) and associated regulations.

2. THE RESPONSE OF OTHER JURISDICTIONS IN AUSTRALIA AND OVERSEAS TO DEMANDS FOR MARRIAGE EQUALITY

Internationally, there has been a growing trend towards the adoption of same-sex marriage equality legislation in countries as diverse as Canada, Iceland, Argentina, Belgium, Denmark, Portugal, Spain, Norway, Sweden, the Netherlands, South Africa and certain states of the United States of America. Further, marriage equality legislation is imminent in countries including New Zealand, the United Kingdom, and France. The path to marriage equality in each of these jurisdictions has varied, with the existence of constitutional rights, including the right to non-discrimination on the basis of sexual orientation, as well as social attitudes, playing a role⁴.

Overseas jurisdictions that have adopted civil unions, including New Zealand and the United Kingdom, appear to have adopted these as provisional measures reflecting the changing nature of relationships in society, as well as calls for greater equality at specific points in time, but appear to be moving towards marriage equality. This, we argue, recognises the growing public support for full and substantive equality for people in same-sex relationships in other jurisdictions. As an example, a majority of submissions to the New Zealand Parliament's recent Government Administration Select Committee inquiry into the Marriage (Definition of Marriage) Amendment Bill expressed support for the passage of legislation granting same-sex couples the right to enter into marriage⁵. The majority committee report on the Bill asserted,

The majority of us consider that marriage is a human right, and that it is unacceptable for the state to deny this right to same-sex couples⁶.

Recognising that marriage is a civil, and not a religious, institution, the majority report further asserted:

The Marriage Act enables people to become legally married; it does not ascribe moral or religious values to marriage⁷

The GLRL is of the view that these developments, including the passage of marriage equality legislation and moves to introduce marriage equality legislation in other jurisdictions, reflect a recognition of the notion that marriage is a civil institution and the accordant importance of equal access to the institution of marriage as a human rights issue, with the right to non-discrimination, as enshrined in the *International Covenant on Civil and Political Rights* (ICCPR), constituting a central consideration in contemporary political debate(s) on the issue.

⁴ MacDougall B., Bonthuys, E., McK. Norrie, K. & van den Brink, M. (2012). Conscientious Objection to Creating Same-Sex Unions: An International Analysis, *Canadian Journal of Human Rights* 1(1): 127-164, p.163.

⁵ Marriage (Definition of Marriage) Amendment Bill: Report of the Government Administration Select Committee. Wellington: Parliament of New Zealand, p.2

⁶ Ibid, p.3

⁷ Ibid.

3. ANY ALTERNATIVES OF MODELS INCLUDING CIVIL UNIONS

"I'm worried that civil unions are the second rate alternative – I've already got second rate for lots of stuff [as a lesbian]"⁸

Although the GLRL recognises the diversity of relationships that exist and the different ways in which people may seek to mark their commitment to one another, the GLRL considers that other forms of relationship recognition, including civil unions, are not a substitute for marriage equality. Same-sex marriage equality legislation at a State level would introduce substantive relationship rights before the law for those in committed same-sex relationships, in a way that civil unions and relationship registers would and do not.

Forms of relationship recognition, such as the State relationships register⁹ or a civil union scheme, whilst having a place for those who do not wish to enter into marriage, create a tiered system of relationship recognition in the absence of access to the institution of marriage for same-sex couples, which currently serves to prevent access to the significant symbolic benefits that the institution of marriage confers on those who enter into it.

Such forms of relationship recognition, including relationship registries, which exist in isolation as the only choice of formal relationship recognition for those in same-sex relationships in many Australian States, perpetuate the notion that certain classes of people, including those in committed same-sex relationships, are somehow inferior to people in other relationships. Moreover, relationship registries and civil unions are also not universally transferable, or portable, in the same way that marriage is, which creates legal and material inequality for those in committed same-sex relationships. For instance, Australian relationship registries are not formally recognised outside of the country, with the exception of those registered under the Tasmanian scheme, which is currently recognised by the United Kingdom alone. This results in a number of practical difficulties, and inhibits the ability of same-sex couples to enjoy full and equal rights when travelling and working abroad or, indeed, interstate for periods of time. It effectively reinscribes and entrenches both *de jure* and *de facto* discrimination through the law, which translates into a situation of social and material inequality for people in same-sex relationships.

The GLRL is strongly of the view that should the NSW Parliament wish to explore legislation to provide recognition for people in committed same-sex relationships, including through alternative schemes such as civil unions, cognisance be taken of the likely negative ramifications of these measures, especially where they purport to provide greater recognition, but ultimately result in materially fewer rights and benefits than would normally accrue to someone who is married.

Recommendation 3: *That the Inquiry acknowledge the legal impediments to full relationship recognition, including for NSW residents, posed by civil unions and other forms of relationship recognition passed as substitutes for marriage but that do not constitute marriage.*

⁸ Gay and Lesbian Rights Lobby (2007). *All Love is Equal...Isn't It?*, Sydney: NSW Gay & Lesbian Rights Lobby, p. 16.

⁹ *Relationships Register Act 2010* (NSW)

4. CHANGES IN SOCIAL ATTITUDES (IF ANY) TO MARRIAGE IN AUSTRALIA

Social attitudes towards the institution of marriage have shifted significantly in the broader community over the past few decades. There is strong and growing support for marriage equality in Australia, as evidenced through representative opinion polls and social commentary, both within the LGBTI and broader community. Indeed, so strong is this sentiment, that a May 2011 Galaxy Poll found that over 75 percent of Australians believe that marriage equality is ultimately inevitable¹⁰.

An October 2010 Galaxy Poll, commissioned by Parents and Friends of Lesbians and Gays found that 62 percent of people supported same-sex couples being allowed to enter into marriage¹¹. In 2011, a Nielsen Poll revealed similar findings, concluding that 57 percent of Australians supported same-sex marriage¹². In August 2011, another poll indicated that 68 percent of respondents supported marriage equality¹³. These findings indicate that there is broad support for marriage equality in Australia.

Within the LGBTI community, support for marriage equality is also, unsurprisingly, strong. In 2006¹⁴ and 2009¹⁵, the GLRL consulted with the gay and lesbian community concerning people's attitudes towards marriage and other relationship recognition models. Respondents overwhelmingly supported same-sex relationship recognition, ultimately including access to the institution of marriage, primarily on the basis of the notion of equality.

The results of the NSW GLRL's 2006 statewide consultation in the *All Love is Equal... Isn't It?* Report illustrate that 86.3 percent of respondents favoured same-sex marriage¹⁶.

Critically, some respondents believed that State-based measures to achieve marriage equality represented not only a way to afford those resident in New South Wales formal recognition of their relationship, through access to the institution of marriage, but could also act as a catalyst for broader social and legal change. One respondent, for instance, commented:

"State-based [recognition] chips away. It's a stepping stone"¹⁷.

In 2009, the GLRL conducted a survey at Mardi Gras Fair Day. In response to the question "what are the most important aspects of formal relationship recognition to you?", of a total of 669 respondents, 82 percent nominated proof of my relationship and 58 percent said a formal ceremony¹⁸.

There is demonstrable support for same-sex marriage equality, both from those who will be most

¹⁰ Galaxy, 'Same-Sex Marriage Inevitability', May 2011

¹¹ Galaxy, 'Same-Sex Marriage Study', October 2010.

¹² Nielson, 'National Report – Carbon Price and Same-Sex Marriage', 13 March 2011.

¹³ Roy Morgan, 'Poll Results: Should gay people have the right to marry?', August 2011

¹⁴ Gay and Lesbian Rights Lobby (2007). *All Love is Equal...Isn't It?* Sydney: NSW Gay & Lesbian Rights Lobby.

¹⁵ Gay and Lesbian Rights Lobby (2009). *'Fair Day Survey 2009-Results'*. Sydney: NSW Gay & Lesbian Rights Lobby.

¹⁶ Gay and Lesbian Rights Lobby (2007). *All Love is Equal...Isn't It?* Sydney: NSW Gay & Lesbian Rights Lobby, p.18.

¹⁷ *ibid*, p. 19

¹⁸ Gay and Lesbian Rights Lobby (2009). *'Fair Day Survey 2009 – Results'*. Sydney: NSW Gay & Lesbian Rights Lobby.

affected by a decision to legislate for marriage equality in NSW, as well as the broader Australian community.

Recommendation 4: *That the Inquiry note the significant support for same-sex marriage equality legislation in New South Wales and from the broader Australian community.*

5. CONCLUSION

There is growing momentum for same-sex marriage equality internationally, as evidenced by the enactment of legislation for this purpose in other jurisdictions, and increasing calls for such measures in Australia, as well as New South Wales. Polling has consistently shown that the Australian community, and the people of New South Wales, overwhelmingly support proposals for same-sex marriage equality, and, in our submission, there is no demonstrable legal basis to preclude states from enacting such legislation. With the appropriate degree of consideration of issues concerning dissolution of marriage and residency requirements, there is no reason why the NSW Parliament should not pass state-based same-sex marriage legislation, in order to give effect to formal relationship recognition for all of the people of New South Wales, ending decades of discriminatory treatment of gay and lesbian people under the law.