

‘A failed experiment’: Why civil unions are no substitute for marriage equality

Civil unions do not provide same-sex couples with the same legal rights and social acceptance as equality in marriage. They consistently fail legal tests of equal treatment. They have been found to create many problems in daily life, lead to forced outing, and reinforce stigma and discrimination.

Same-sex couples in other countries who have the choice of civil unions or marriage prefer marriage. Australian same-sex couples say if they had the choice they would also prefer the right to marry than the right to enter a civil union.

More and more countries are moving on from what has been labelled the ‘failed experiment’ of

civil unions by enacting equality in marriage. Australia must learn from the mistakes others have made rather than repeat them.

Definitions and distinctions

The term ‘civil union’ generally encompasses all schemes for the formal recognition of personal relationships that are not marriage. This includes schemes for the official recognition and registration of civil unions, civil partnerships, personal partnerships and significant relationships.

However, our particular focus is on those civil union schemes which seek to replicate marriage

as closely as possible for same-sex couples without using the term ‘marriage’ and do so within jurisdictions which allow marriage for opposite-sex couples.

The New Zealand civil union scheme is an example of this. Such a scheme at a national level in Australia would be another example. In our view schemes of this kind are established as substitutes for equality in marriage, but do not fill this goal.

Australian Marriage Equality generally supports civil union schemes which do not purport to replicate marriage, and which, in the Australian context, exist at a state and local level where marriage is not already offered to opposite-sex partners.

11 arguments for marriage equality rather than civil unions

1. Civil unions do not offer the kind of **legal equity** that comes with marriage
2. Civil unions do not offer the same **practical benefits** as equality in marriage
3. Civil unions lead to many **day-to-day problems**, including outing
4. Civil unions do not offer the same **social acceptance** or status as equality in marriage, and actually reinforce **stigma** and entrench **discrimination**
5. Recent civil union inquiries have reached damning conclusions
6. Political support for civil unions overseas is shifting to the right
7. Same-sex partners overseas **prefer marriage** to civil unions
8. Civil unions overseas have not, in themselves, led to marriage equality
9. In Australia civil unions are not significantly more acceptable to the general community than equality in marriage
10. In Australia same-sex partners **prefer marriage** to civil unions
11. In Australia the LGBT community is **united on marriage** but divided on civil unions

1.

Civil unions don't offer the kind of legal equity that comes with marriage

Courts across the western world are of the opinion that civil union schemes do not meet the test of equal treatment of all citizens. For example, in *Barbeau v British Columbia* the **British Columbia Court of Appeal** found that redefining marriage to include same-sex couples is 'the only road to true equality for same-sex couples'.

Further, the Court stated that the granting of marital rights through an institution that is not marriage is not a remedy for this breach of the right to equality:

Any other form of recognition of [their] relationships, including the parallel institution of [civil union or civil partnership], falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal', or leave it to governments to choose among less-than-equal solutions.

Like Canadian courts before it, the **California Supreme Court** found that the fundamental right of equal treatment is not only not satisfied by civil union schemes, but is breached by them:

One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of 'marriage' exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.

Most recently, the **Iowa Supreme Court** also rejected civil unions for the simple reason that they do not satisfy the requirement of equal treatment. After declaring the state ban on same-sex marriage unconstitutional, the Iowa court went on to state:

A new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution.

Thanks to decisions such as these, civil unions have acquired a reputation as separate and unequal, in direct reference to those US laws which enforced racial segregation up until the 1960s.

2.

Civil unions don't offer the same practical benefits as equality in marriage

Studies of civil union schemes currently operating overseas have shown that these schemes do not provide civil union partners with the same rights as married partners, even when the law says they should. In federations like the United States, this is partly because of a lack of inter-jurisdictional recognition. But there is also the problem that civil unions are not widely recognised or understood as equivalent to marriage in the non-government sector.

For example, in the United Kingdom leading **insurers charge higher premiums** for same-sex civil union partners than for opposite-sex heterosexual partners because civil union partners are regarded as 'singles'. Similar problems regarding the failure of hospitals, employers, schools, insurers and even state government agencies to recognise civil unions have been found by inquiries into the operation of the civil union schemes in the US states of Vermont and New Jersey. According to the **Report of the Vermont Commission on Family Recognition and Protection** issued in April last year:

Many witnesses who have civil union licenses described situations, in Vermont and elsewhere, when seeking the benefit of the civil union law, in which they were forced to explain their civil union status, what a civil union is, and how a civil union by law secures a legal status and consequences equal to marriage. The consequences of these conversations include: (i) 'outing' oneself as gay or lesbian in situations where this is unnecessary, irrelevant, or a breach of privacy; (ii) the frustration of the additional time it often takes to explain successfully what a civil union is; and (iii) the difficulties encountered when using government, business, employer, and health care forms and documents that do not contemplate or appropriately deal with the status of being in a civil union.

The same problems are described in a report by the **New Jersey Civil Union Review Commission** issued in December last year:

A common theme in the testimony gathered by the Commission was that while marriage is universally recognized by the public, civil union status must be explained repeatedly to employers, doctors, nurses, insurers, teachers, soccer coaches, emergency room personnel and the children of civil union partners. The testimony suggests that the need to explain the legal significance of civil union status to decision makers and individuals who provide vital services is more than a mere inconvenience ... comments (were) provided by many witnesses regarding medical personnel, school officials and government workers who denied access and decision-making authority to civil union partners, either initially or completely, because of a lack of understanding of the rights that flow from civil unions.

Both reports also stressed that civil unions are not as widely recognised in other jurisdictions as marriage and are therefore not as 'portable'.

3.

Civil unions lead to many day-to-day problems, including outing

A report by the UK **Citizens Advice Bureau**, released at the end of 2007, found several more day-to-day problems with that country's civil partnership scheme. These included a lack of knowledge and information about the rights and responsibilities associated with civil partnerships because such partnerships were 'new and unfamiliar'. There were also significant problems with the language associated with civil partnerships and with their non-recognition on official forms:

Inevitably the terminology associated with any newly constructed social entity will feel unfamiliar for a while. However, it was not merely a lack of familiarity that created difficulties for individuals in this study. Some people found the use of the word 'civil' created a cold and uninviting impression, whilst others expressed concerns over the lack of obvious grammatical equivalents to traditional marriage terms.

Other participants expressed a preference for using the more familiar term 'marriage' or 'wedding' to describe a civil partnership, but pointed out that this creates further questions about the extent to which the traditional marriage discourse is applicable.

According to the Citizens Advice Bureau, there is more to the language problem than just confusion or lack of familiarity:

Social discomfort with homosexuality is brought into sharp focus as individuals struggle to communicate. Some individuals still find it difficult to discuss their same-sex relationship with friends and family, so confusion in communication compounds what is already for some quite a delicate situation. Furthermore, the lack of a shared language continues to reinforce the privilege and legitimacy of heterosexual relationships over and above homosexual relationships.

Ultimately, the inability to communicate effectively locates civil partnerships outside of mainstream society.

Similarly, the failure of official forms to recognise civil partnerships is more than a mere inconvenience, and can create potential legal problems:

With respect to the obligations to declare marital/partnership status in various circumstance, participants pointed out that some organisations have not updated their paperwork to include the option of 'civil partnership'. It is possible that such organisations are intending to but have not yet done so, but it is also possible that some organisations are ignorant of the need for this relatively minor bureaucratic change.

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The implication of having forms that are not updated is that gay people do not know how to respond when the options given do not match their circumstances. Although individuals have a responsibility to provide correct information, organisations have a responsibility to facilitate this. There is a distinct lack of clarity regarding the legal position of individuals and organisations with respect to situations where the organisation has failed to enable the individual to be truthful.

Perhaps the most serious problem of all is outing. The **Citizens Advice Bureau** notes:

Since the introduction of the Civil Partnerships Act, gay individuals may be put in a situation where the fact that they have formed a civil partnership may pressurise them

into revealing their sexual orientation where they might not have chosen to do so otherwise. Any circumstances which require disclosure of marital/partnership status would inevitably lead to a personal revelation unless information is explicitly withheld or false information is given.

This potential for forced outing has been termed a 'socio-legal' issue on the basis that the individual has a legal duty to provide correct information in certain circumstances and yet may not want to do so due to the potential for social embarrassment. For a minority of the participants, the concern about revealing their sexual orientation would be sufficient to respond with an incorrect answer, in order to avoid outing themselves.

The problem highlighted here is particularly acute in the UK because its civil partnership scheme is only open to same-sex couples. However, civil union schemes that are open to both same-sex and opposite-sex couples are not immune to the problem. Where marriage is not open to same-sex partners and the only choice is a civil union, same-sex partners are over-represented among civil union partners.

For example, in New Zealand and Tasmania 80 per cent of recognised partners are in same-sex relationships, creating a situation where many people would assume that a recognised relationship is a gay relationship. Obviously, the situation would be reversed and the problem eliminated if same-sex couples were permitted to marry.

4.

Civil unions don't offer the same social acceptance or status as equality in marriage, and actually reinforce stigma and entrench discrimination

The above-cited US reports describe at length how civil unions fail to provide the same level of social acceptance as marriage. The **Vermont report** states:

According to many witnesses, denying same-sex couples access to the widely recognized institution of marriage while conferring the legal benefits under a parallel system with different terminology sends the message that same-sex couples are different from or inferior to opposite-sex couples and unworthy of inclusion in the marriage laws. In an attempt to create a separate but equal status, many who testified stressed that the very existence of a separate track for same-sex couples is unfair and creates an inferior status for same-sex couples and their families.

Indeed, the reports go further, outlining how civil union schemes actually encourage discrimination and stigmatisation. The **New Jersey report** states:

According to many witnesses, denying same-sex couples access to the widely recognized civil institution of marriage while conferring the legal benefits under a parallel system using different nomenclature, imposes a second-class status on same-sex couples and sends the message that it is permissible to discriminate against them.

Many witnesses said they would not have encountered the same level of resistance (to the recognition of their relationships), or no resistance at all, had they been able to identify themselves as married. Witnesses called the two-tier system created by the Civil Union Act 'an invitation to discriminate' and a 'justification to employers and others' to treat same-sex couples as 'less than' married couples. According to the testimony, the Civil Union Act amounts to a tacit endorsement of discriminatory treatment.

The impact of this discrimination and stigmatisation is felt most keenly by the families and children of same-sex civil union partners:

Many witnesses noted that the labeling of civil union couples, not as married but in a civil union, has a detrimental effect on their families, showing children that their parents are different or somehow less than others, which can lead to teasing and bullying. Many witnesses observed that when the government treats people differently, it emboldens private citizens of any age to follow suit.

The Commission has heard testimony from mental health experts. They described the deep psychological harm that civil union laws can inflict on lesbian, gay, bisexual and transgender youth, as well as on straight youth being raised in same-sex families. The Commission also heard from affected youth themselves.

5.

Recent civil union inquiries have reached damning conclusions

The final conclusions of the **Vermont** and **New Jersey** inquiries are damning:

Vermonters with civil union licenses testified that they are being denied the full promise of Act 91. They have encountered a multitude and variety of instances where they find the promise of equality to be unfulfilled. They find many of these instances to be significant, if not substantial, deficits in the civil union law, with clear and negative financial, economic, and social impacts on their lives and the lives of their children and families. In addressing the Commission's charge, these witnesses find 'legal and practical challenges (with civil union) ... as compared to heterosexual marriage couples'.

The provisioning (in New Jersey) of the rights of marriage through the separate status of civil unions perpetuates the unequal treatment of committed same-sex couples. Even if, given enough time, civil unions are

understood to provide rights and responsibilities equivalent to those provided in marriage, they send a message to the public: same-sex couples are not equal to opposite-sex married couples in the eyes of the law, that they are 'not good enough' to warrant true equality.

But the last word on the matter must go to two experts who appeared before the **New Jersey** commission. Dr Marshall Forstein, an associate professor of psychiatry at Harvard Medical School, told the Commission:

Based on research and my years of working with gay people who have experienced stigma or discrimination on the basis of sexual orientation, I believe that second-class citizenship, now institutionalized in some states in the form of civil unions, contributes to increased rates of anxiety, depression and substance-use disorders in marginalized populations.

Meanwhile, Lynn Fontaine Newsome, president of the New Jersey State Bar Association, said that the New Jersey Civil Union Act is 'a failed experiment':

We believe the civil union law created a burdensome and flawed statutory scheme that fails to afford same-sex couples the same rights and remedies provided to heterosexual married couples as required ... by the New Jersey Supreme Court and its landmark Lewis v Harris decision. From the Bar's perspective, civil unions are a failed experiment. They have been shown to perpetuate unacceptable second-class legal status. Members of the Bar Association tell me more stories of the countless additional hours of work that must go into representing gays, lesbians, bisexual clients and their families.

6.

Political support for civil unions overseas is shifting to the right

Given evidence of the failure of civil unions, it should be no surprise that in the United States civil unions have shifted in less than a decade from being an expedient response to marriage equality amongst social progressives to being an expedient response among conservatives.

An example of social progressives who have shifted ground is the former Governor of Vermont, Howard Dean, who was a global pioneer of civil unions in the early years of this century, steering his state to the United States' first civil union scheme in 2000.

However, during the **recent Vermont debate** on marriage equality, Governor Dean urged Vermont legislators to support equality in marriage instead, declaring: 'Stand up

for doing the right thing; for being a human being. Put human rights above politics.' In response some former civil union supporters said they regretted not supporting marriage equality a decade ago.

The same shift can be seen in legislators who have not previously been responsible for civil union schemes. For example, the **Governor of Maine, John Baldacci**, after declaring his support for marriage equality in that state, wrote:

In the past, I opposed gay marriage while supporting the idea of civil unions. I have come to believe that this is a question of fairness and of equal protection under the law, and that a civil union is not equal to civil marriage.

At the other end of the political spectrum, civil unions were recently endorsed by **Republican Governor of Utah Jon Huntsman**, a Mormon, in response to growing support for same-sex marriage across the United States. The **Mormon Church** has said it will not oppose his initiative.

7.

Same-sex partners overseas prefer marriage to civil unions

Given all the problems with civil unions outlined here, it should come as no surprise that wherever the option of a civil union or marriage is available to same-sex partners they prefer to marry. For example, every year from the inception of same-sex marriage in the Netherlands in 2001 the number of same-sex marriages has exceeded the number of same-sex registered partnerships.

This means that the percentage of married same-sex partners now exceeds that of registered same-sex partners even though registered partnerships were introduced nationally in 1998 and provincially in 1995. The same is true of Canadian provinces such as Quebec and Nova Scotia where same-sex marriage and some form of civil union is available.

Same-sex marriage is not available in New Zealand so we cannot say whether same-sex partners in that country would opt for marriage in greater numbers if they could. However, if we compare New Zealand to culturally comparable jurisdictions and adjust for population we find that (a) the number of civil unions in New Zealand and Tasmania is exactly the same and (b) the number of civil unions in these jurisdictions is half that of same-sex marriages in Canada.

Even in places where neither same-sex marriage nor civil unions are available, the lesbian, gay, bisexual and transgender (LGBT) community overwhelmingly prefers the former. For example, a recent LGBT community survey in the [Republic of Ireland](#) found equality in marriage to be

the highest priority of a majority of respondents, despite a government proposal to enact a civil partnership scheme. Few, if any, LGBT community voices have been raised in [support of that scheme](#).

8.

Civil unions overseas have not, in themselves, led to marriage equality

One lesson often sought from the international situation is whether, regardless of their intrinsic merits, civil union schemes are a step towards equality in marriage or a step away from it. This question is difficult to answer because there are counter-examples to both propositions. For example, the Netherlands appears to have moved steadily from the recognition of same-sex civil unions at a provincial level, to their recognition nationally, to equality in marriage. On the other hand, in Sweden debate on equality in marriage appears to have been stymied by the existence of a civil union scheme for almost a generation.

The one generalisation we can make with confidence is that civil unions do not lead to marriage equality in the absence of a sustained debate about, and significant organised support for, the latter.

For example, quite a few US states with civil union schemes that were established several years ago have moved, or are moving, towards marriage equality (Vermont, Connecticut, Maine, California, New Hampshire). However, there has been no significant progress towards marriage equality in the UK and New Zealand, and the prospects for such movements are very low, even though the civil union schemes in these countries were established at about the same time as their US counterparts. The one factor that distinguishes the US from Britain and New Zealand is that the former has a sustained, multi-source marriage equality debate.

The implications are clear. The prospects for marriage equality are increased if the momentum for this reform is maintained during and after the enactment of a national civil union scheme. However, if the enactment of a

civil union scheme spends the political capital required for marriage equality, as appears to have been the case in Britain and New Zealand, further progress will be indefinitely delayed. Given that the Australian marriage equality debate has so far been conducted at a level far more like the UK and New Zealand than the US, it seems reasonable to predict that a national civil union scheme will not advance us any further towards marriage equality.

9.

In Australia civil unions are not significantly more acceptable to the general community than equality in marriage

Support for same-sex marriage has increased dramatically in Australia in the past few years, from **38 per cent** in 2004 to **57 per cent** in 2007. Notably, this latter figure is higher than the percentage of Canadians who supported same-sex marriage when it was allowed across that country in 2005 (**42 per cent**) and only slightly lower than the percentage who supported same-sex marriage a year after it was allowed (**59 per cent**).

But despite the high level of support for equal marriage in Australia, it is often assumed that there is significantly wider support in the general community

for civil unions. A recent opinion poll conducted by **Galaxy polling in Queensland** found this is not the case: 54 per cent of respondents to that poll supported equality in marriage while only an extra 6 per cent supported civil unions. This would suggest that those members of the community who oppose same-sex marriage and support civil unions as an acceptable substitute are more vocal than numerous.

LGBT community views on marriage

Do you favour or not favour same-sex marriage?

Of 1,281 respondents, 86.3% favoured same-sex marriage and 13.7% did not favour same-sex marriage.

Achieving the right to same-sex marriage means achieving full equality. Do you agree, disagree, feel neutral?

Of 1,266 respondents, 57.5% agreed, 31.4% disagreed and 11.1% nominated neutral.

Marriage is outdated. Do you agree, disagree or feel neutral?

Of 1,256 respondents, 44.2% disagreed with this statement, 27.9% agreed and a further 27.9% felt neutral.

Source: **Victorian Gay and Lesbian Rights Lobby survey 2005**

10.

In Australia same-sex partners prefer marriage to civil unions

If they had the choice, Australian same-sex couples would prefer to marry rather than enter a civil union. This has been shown by surveys of the LGBT community in New South Wales and Victoria. In 2007 the **NSW Gay and Lesbian Rights Lobby** surveyed the views of over 1000 people on relationship recognition. The results showed that same-sex partners: overwhelmingly want the right to marry, would be more likely to marry than enter a civil union, only favour civil unions because they may be more achievable and not because they perceive marriage to be outdated, and perceive marriage equality as the only alternative which offers full legal and social acceptance.

This is corroborated by a **Victorian Gay and Lesbian Rights Lobby survey** in 2005 which found that marriage is the most favoured form of relationship recognition, far in excess of registered partnerships (which the Lobby considered synonymous with civil unions). The Victorian survey also found that support for marriage had increased dramatically since 2000.

LGBT community views on marriage v civil unions

Marriage and civil unions always carry the same rights. Do you agree, disagree or feel neutral?

Of 1,264 respondents, 36.5% agreed, 45.6% disagreed and 18.0% nominated neutral.

Assume that all of these forms of relationship recognition were available. If you are, or were to be, in a committed relationship, which one model would you choose for your relationship to be legally recognised? Respondents were able to select only one choice. Of the 1,260 respondents:

- 42% would choose marriage
- 33% would choose civil union
- 17% would choose de facto

- 5% indicated that they didn't care
- 2% selected 'none of the above'
- 2% nominated 'other'

Overall what forms of relationship recognition should be available for Australian same-sex couples? Of the 1,297 respondents:

- 74% thought that marriage should be available
- 70% thought that civil unions should be available
- 60% thought that de facto status should be available
- 8% nominated 'other'

Source: **NSW Gay and Lesbian Rights Lobby survey 2007**

11.

In Australia the LGBT community is united on marriage but divided on civil unions

The other crucial point about the above Australian surveys is that they show the LGBT community is united behind the right of same-sex partners to marry. Purported community division over this issue was a rationale used by the Australian Labor Party in 2004 to support the Howard Government's ban on same-sex marriage.

If anything, the above studies show that the LGBT community is divided on whether they should pursue a national civil union scheme instead of equality in marriage. This confirms our experience which shows that some LGBT people believe a civil union scheme is a step towards marriage while others believe it is a step away. Some believe it offers greater recognition while others believe it reinforces discrimination. Some believe it is too much like marriage, while others believe it is not enough like marriage.

If 'the community is divided' is a valid reason not to pursue change, then it applies far more to civil unions than to marriage equality.

Our conclusion

For all the reasons outlined above, Australian Marriage Equality opposes a national civil union scheme instead of equality in marriage. The evidence shows that, unlike marriage equality, civil unions do not fulfil the aspiration of same-sex partners for equal entitlements and equal acceptance.

A few years ago when civil union schemes were adopted in places like Vermont, the United Kingdom and New Zealand, such schemes may have been the only real hope same-sex partners had of legal and social recognition. But those times have gone. Marriage equality is now a much more widely embraced aspiration in the LGBT and wider

communities, while civil unions have been shown to have irreparable flaws. In short, civil unions are not a stage through which Australia must pass, but a mistake from which we must learn

Australia must not embark on the civil union experiment at just that moment when it has been dubbed a failure elsewhere. Instead we must seize the opportunity we now have to embark on a fully-fledged debate about marriage equality, a debate that addresses the celebration and solemnisation of same-sex love directly and honestly, rather than through the distorted prism of a proposal that is 'separate and unequal'.