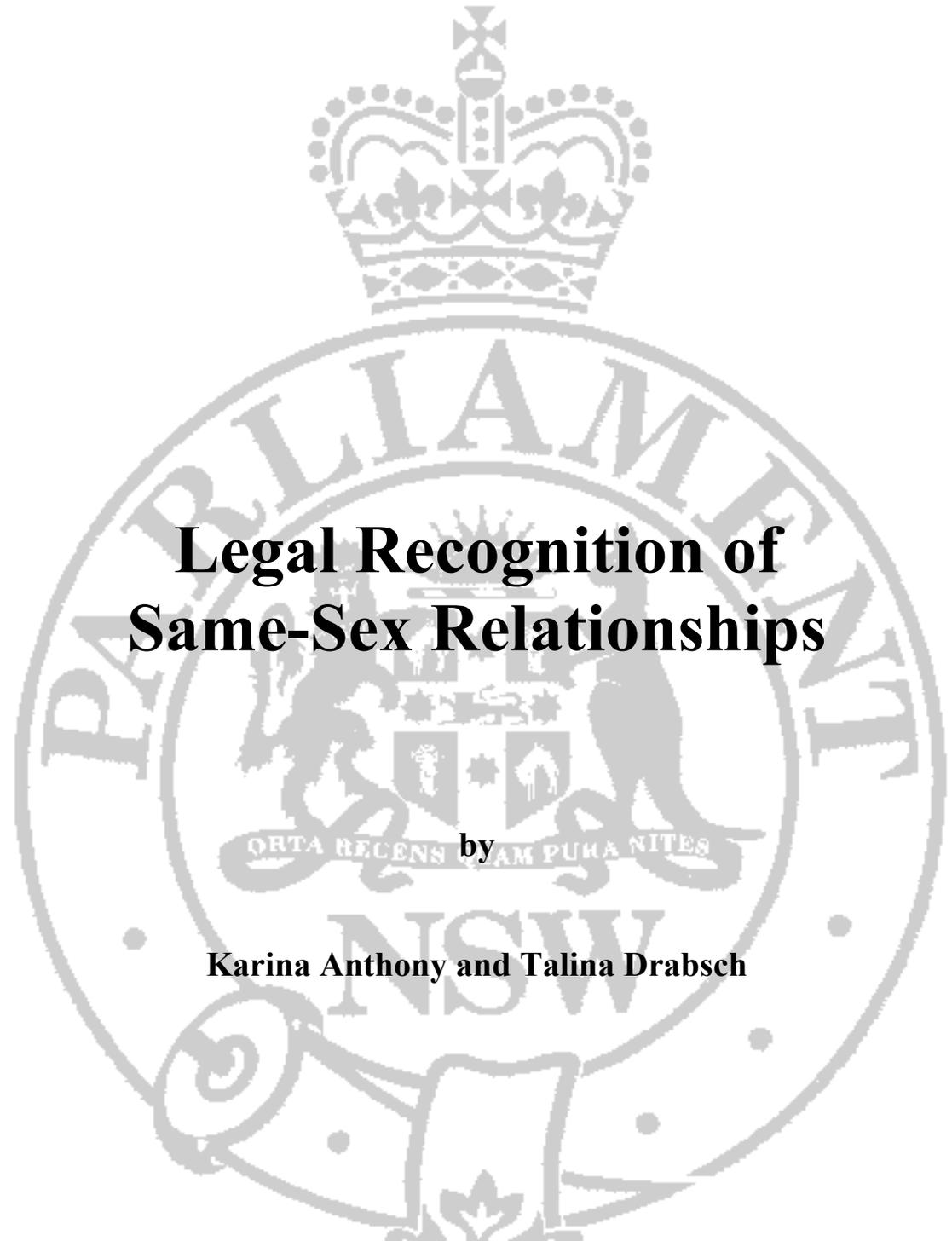


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**Legal Recognition of
Same-Sex Relationships**

by
Karina Anthony and Talina Drabsch

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Legal Recognition of Same-Sex Relationships

by

Karina Anthony and Talina Drabsch

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EXECUTIVE SUMMARY

The legal recognition of same-sex relationships in NSW and elsewhere in Australia has increased dramatically in the last 20 years to a point where most jurisdictions generally provide same-sex couples with the same rights and obligations as heterosexual de facto couples. However, the extent to which same-sex relationships are or should be recognised continues to elicit much debate.

Section two of this paper (pp 3-6) outlines the various relationship recognition models – those that operate on a presumptive basis as well as those that require couples to ‘opt-in’.

The development of same-sex relationship recognition in NSW is described in section three (pp 7-16). Particular attention is paid to the widespread changes that occurred as a result of the *Property (Relationships) Legislation Amendment Act 1999* which amended the definition of a de facto relationship so as to remove the requirement of partners being of the opposite sex. This section also considers various parenting issues such as who is considered to be a child’s parent, as well as matters relating to artificial donor insemination and adoption.

The *Marriage Amendment Act 2004* (Cth) inserted a definition of marriage into the *Marriage Act 1961* (Cth) so that marriage is ‘the union of a man and a woman to the exclusion of all others voluntarily entered into for life’. Section four (pp 17-29) discusses the development of the law on marriage in Australia, and provides the context in which the 2004 amendments occurred. This section also examines issues relating to children, including the availability of parenting orders and child support. Some of the relevant provisions of international treaties are also noted.

Section five (pp 30-40) outlines the various ways same-sex relationships are recognised in the Australian states and territories. Particular attention is paid to the recent developments in Tasmania and the ACT, in terms of the introduction of relationship registration and civil unions respectively. It also notes the different approaches to the law on adoption and assisted reproductive technology – with regard to access to such services and the status of children born as a result.

The Netherlands was the first country to introduce same-sex marriage, having done so in 2001. As well as the Netherlands, same-sex marriage is available in Belgium, Spain and Canada. Section six (pp 41-53) highlights the various ways same-sex relationships are recognised in Canada, Europe, New Zealand, the United Kingdom and the United States of America.

There are many areas of law in Australia in which same-sex relationships continue to be treated in a different manner to relationships involving a heterosexual couple. Some of the key issues that remain are noted in section seven (pp 54-56). Some of these areas are currently the subject of an inquiry by the Human Rights and Equal Opportunity Commission.

Some of the arguments for and against same-sex marriage are presented in section eight (pp 57-61). Similarly, the arguments for and against same-sex parenting and access to assisted reproductive technologies are highlighted.

1 INTRODUCTION

Legal recognition of same-sex relationships is an issue characterised by strong opinions, and a lack of consensus, not only within society in general, but also within the gay and lesbian community itself. Questions regarding the most appropriate avenue for recognition focus on the four main systems commonly in use: de facto recognition, registration, civil unions, and marriage. These questions are further complicated by the challenge posed by recognition of same-sex relationships to the traditional concepts of ‘spouse’, ‘marriage’, ‘parent’ and ‘family’.

The debate surrounding the legal recognition of same-sex relationships recently came to the fore with the passage of the *Civil Unions Act 2006* through the ACT Legislative Assembly on 11 May 2006. The Act enables same-sex couples to participate in a civil union ceremony sanctioned by the State. The Federal Government expressed its objection to the Bill, claiming it was de facto marriage.¹ The Federal Government made it clear that it would not allow marriage celebrants licensed under the *Marriage Act 1961* (Cth) to be available for the conduct of civil union ceremonies. Although states and territories have the power to legislate with regard to same-sex couples, the Constitution provides that only the Federal Government can legislate with regard to marriage.² The *Marriage Act 1961* (Cth) defines marriage as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’³. A number of amendments were made to the Bill as a result of the issues raised by the Federal Government. Nonetheless, the Federal Government announced on 6 June 2006 that it intends to override the *Civil Unions Act*. The objections raised by the Federal Government to the Act are based upon the equating of civil unions with marriage,⁴ and illustrate the wider conflict over the meaning of such terms as ‘marriage’ and ‘family’. Are procreation and the raising of children definitive of marriage? How can such a definition be reconciled to the social reality of lesbians and gay men raising children, and the increase in heterosexual couples choosing not to marry? Is Nicholson right to point to ‘the commitment and the financial and emotional interdependence of family members’⁵ as the essential indicators of a family relationship?

These questions are posited against the background of rapid social change in the developed world – with increasing divorce rates, declining numbers of marriages, greater acceptance of de facto and same-sex relationships, and advancements in reproductive and gender assignment technology. The result is ‘an increasingly diverse range of family forms

¹ Transcript of the Joint Press Conference with Prime Minister Hon. John Howard MP, Hon. Kevin Andrews MP, and Mr Nicholas Wilson, Executive Director of the Office of Workplace Services, Parliament House, Canberra, 30 March 2006.

² Section 51(xxi) of the *Commonwealth of Australia Constitution Act 1900* (Cth).

³ Section 5(1).

⁴ Ruddock P, ‘Commonwealth to defend marriage against territory laws’, *Media Release*, 6/6/06.

⁵ Nicholson A, ‘The Changing Concept of Family: The Significance of Recognition and Protection’, *Australasian Gay and Lesbian Law Journal*, 6(13) 1997, pp 24-25.

existing outside the traditional nuclear family model'.⁶ Governments around the world are faced with the challenge of legislating to acknowledge these emerging family groups. A balance often has to be found between conflicting societal attitudes. As a matter of law marriage is a secular institution. However, 'it is rarely treated as such by the public or by legislators'.⁷ The historical / traditional association of marriage with religion is juxtaposed with the anti-discrimination requirements of international law. Nor is freedom to marry necessarily a consensual goal among the gay and lesbian community.⁸ Sarantakos says that cohabiting gays and lesbians experience problems in their relationships not because they cannot marry but rather because their relationships are not legally recognised.⁹ Thus, in 1999, the NSW Gay and Lesbian Rights Lobby recommended that same-sex relationships be placed on equal footing with relationships involving heterosexual couples.¹⁰

Although the passage of the *Civil Unions Act 2006* made the ACT the first jurisdiction in Australia to allow for civil unions for same-sex couples, Tasmania has had a registration scheme in place since 2003. All the other states (except South Australia) and the Northern Territory have recognised same-sex relationships through de facto, or domestic, partner categories. Yet there remain areas within the law where no provision has been made to recognise same-sex relationships – from Federal laws relating to immigration and social security, to State and Territory laws concerning adoption and access to assisted reproductive technology. This paper seeks to provide a comprehensive review of Federal, State and Territory approaches to same-sex relationships, including an account of current debates surrounding the recognition of same-sex relationships, developments in overseas jurisdictions, and obligations arising from international law.

⁶ Caruana C, 'Relationship diversity and the law', *Family Matters*, 63, 2002, p 60.

⁷ Nicholson, above n 5, p 21.

⁸ See Dick T, 'Gay Lobby groups go separate ways over same-sex marriage', *The Sydney Morning Herald*, 13/08/05, p 11.

⁹ Sarantakos S, 'Same-Sex Marriage: which way to go?', *Alternative Law Journal*, 24(2) 1999, p 80.

¹⁰ Gay and Lesbian Rights Lobby, *The NSW Anti-Discrimination Act*, Submission to the Attorney General's Department in response to Law Reform Commission Report 92 (1999), GLRL, Sydney, 2000, p 9.

2 RELATIONSHIP RECOGNITION MODELS

2.1 Recognition of de facto relationships: a presumptive model

The traditional definition of a de facto relationship is: a relationship between a man and a woman who are not legally married but live together on a genuine domestic basis as husband and wife. Formal registration of the relationship is not required. However, most jurisdictions require a period of cohabitation and evidence of financial or non-financial contributions by the parties to the relationship. Where a child is born to a de facto couple this is viewed as sufficient evidence of permanency to attach a legal status to the couple's relationship.

A broader definition of de facto relationships – that of a relationship between two people irrespective of gender – has been adopted by New South Wales¹¹, Victoria¹², Queensland¹³, Tasmania¹⁴, the Australian Capital Territory¹⁵, the Northern Territory¹⁶ and Western Australia¹⁷.

Legal recognition of de facto relationships is an example of a presumptive system: it operates automatically after the parties have satisfied certain criteria. Millbank notes that Australia has extensive recognition of de facto relationships through presumptive laws 'for the very reason that declining numbers of heterosexual people were "registering" their relationships through marriage – yet in times of crisis and dispute they still required access to the law'¹⁸. The Table below briefly outlines some of the advantages and disadvantages of this model for same-sex couples.

¹¹ *Property (Relationships) Act 1984* (NSW), section 4 (de facto relationship) and section 5 (domestic relationship).

¹² *Property Law Act 1958* (Vic), section 275 (domestic partner & domestic relationship).

¹³ *Acts Interpretation Act 1954* (Qld), section 32DA (de facto partner).

¹⁴ *Relationships Act 2003* (Tas), section 4 (significant relationships) and section 5 (caring relationships).

¹⁵ *Domestic Relationships Act 1994* (ACT), section 3 (domestic relationship).

¹⁶ *De Facto Relationships Act 1991* (NT), section 3A (de facto relationship).

¹⁷ *Interpretation Act 1984* (WA), section 13A (de facto relationship and de facto partner).

¹⁸ Millbank J, 'De Facto Relationships Amendment Bill 1998 (NSW): The Rationale for Law Reform', *Australasian Gay and Lesbian Law Journal*, 8, 1998, p 16.

| De Facto Relationship Recognition | |
|---|--|
| Advantages | Disadvantages |
| Financial benefits during the relationship. | Separation and cohabitation agreements cost money and the court may interfere if the agreement is unjust. |
| Financial responsibilities on ending the relationship. However maintenance and property obligations may be more limited than marriage and there is no ongoing maintenance obligation. | Some in the judiciary may not understand that some couples do not have a 'public' relationship because of negative public opinion among some parts of the community. |
| Cheaper mechanism for resolving disputes - an action in the Supreme Court of NSW would be less expensive than the Equity Division. | Costly and invasive evidentiary requirements: the couples' relationship will be brought under scrutiny. |
| Relationships would be recognised and the parties can sign cohabitation agreements to avoid interference by the court. | Covers some couples who may not wish to be recognised. |
| Access to the Family Court (for counselling, conferences and other assistance to resolve disputes about the relationship and the child). | |

Source: Lesbian and Gay Legal Rights Service, *The Bride Wore Pink*, Second edition, Gay and Lesbian Rights Lobby, February 1994.

2.2 Registered partnership / civil union: the opt-in models

Registration systems require partners to take some official steps to have their relationship recognised, such as signing a declaration that is lodged at a local court or city register. Some models cover heterosexual as well as same-sex couples. These systems grant most – but not usually all – of the same rights as marriage. Also, unlike marriage, the status granted by such registration does not generally apply if a couple travels or moves anywhere else.

One of the main differences between registered partnerships and civil unions is that civil unions permit a greater level of formal ceremonial and symbolic recognition. This creates a greater social profile for same-sex couples than those that are simply registered. Also, in most places that allow civil unions, the law states as a general principle that parties to a civil union will have all the same benefits, protections and responsibilities under law as a husband and wife in a marriage.

Both registered partnerships and civil unions are examples of 'opt-in' systems. Parties to a relationship are required to take some action in order to receive the benefits of these systems. As with any other opt-in system, many people may not use it, or it may be disproportionately used by those who are economically and socially advantaged compared to those who are not. Overseas experience of registered partnerships show extremely low rates of coverage, with a much lower rate of take up by women, and a high urban

concentration. In Denmark, for example, only 1,793 partnerships were registered in total in the seven years from 1990 to 1996. This was equal to only 0.8% of the number of marriages which took place during that period in Denmark.¹⁹ As Millbank notes:

If lesbians and gays comprise 5-10% of the Danish population, and form relationships at approximately the same rate as heterosexual couples do, then these figures show that an overwhelmingly majority of gay and lesbian couples – as many as 9 out of 10 – are *not registering* their partnerships.²⁰

The Table below outlines some of the advantages and disadvantages for same-sex couples of opt-in models.

| Registered Partnership / Civil Union | |
|--|--|
| Advantages | Disadvantages |
| Requirement to register allows for choice: status is not imposed. | Financial responsibilities on ending a relationship |
| Automatic status upon registering / civil union. | Limited coverage: only those who register are granted legal rights. |
| Financial benefits during the relationship. | Cost involved in registering. |
| Financial responsibilities at the end of the relationship. | Creates a separate category for same-sex relationships with a lesser status than marriage. |
| Certainty: when parties opt in to the scheme, they can find out what their rights and responsibilities are. | |
| Social recognition and reduction in discrimination: registration affirms and sanctions relationships, and equalises the position of lesbians and gay men with heterosexuals. | |
| No requirement of gender. | |
| Access to the Family Court if there is a child. | |
| Provides an alternative to marriage for the formal recognition of relationships for people who are in, or wish to enter into, a permanent interdependent relationship. | |

¹⁹ Ibid.

²⁰ Ibid.

| | |
|--|--|
| Removes the problem of same-sex couples having to prove a domestic partnership in order to exercise a legal right by simply showing a certificate of registration. | |
|--|--|

Source: Lesbian and Gay Legal Rights Service, *The Bride Wore Pink*, Second edition, Gay and Lesbian Rights Lobby, February 1994.

3 SAME-SEX RELATIONSHIPS IN NSW

The following timeline outlines the major steps toward recognition of same-sex relationships in New South Wales.

| | |
|-------------|--|
| 1982 | Part 4C was inserted into the <i>Anti-Discrimination Act 1977</i> (NSW) to prohibit discrimination on the ground of homosexuality. |
| 1983 | The NSW Law Reform Commission published Report 36 – <i>De Facto Relationships</i> . The scope of the report was limited to heterosexual de facto relationships. The Commission recommended that the law be amended to remove any inconsistencies between married people and those in a de facto relationship, with the courts to be given the power to adjust the property interests of de facto couples. |
| 1984 | The <i>De Facto Relationships Act 1984</i> (NSW) was passed. It essentially followed the recommendations of the 1983 NSW Law Reform Commission report. |
| 1993 | The Gay and Lesbian Rights Lobby published <i>The Bride Wore Pink</i> . It recommended that the definition of de facto relationships be extended to include lesbian and gay relationships. |
| 1997 | Clover Moore MP introduced the Significant Persons Relationships Bill 1997 into the NSW Parliament in September. The Bill was not read a second time. |
| 1998 | The Hon Elisabeth Kirkby MLC introduced the De Facto Relationships Amendment Bill in June. The Bill was not read a second time. The NSW Government referred the issues raised in the De Facto Relationships Amendment Bill to the Legislative Council Standing Committee on Social Issues. |
| 1999 | <p>The Social Issues Committee inquiry lapsed when Parliament was prorogued prior to the March election.</p> <p>The Hon Jeff Shaw MLC announced in May that the Carr Government intended to introduce a Bill to amend the <i>De Facto Relationships Act 1984</i> that would extend the rights and obligations of de facto relationships to other domestic relationships between adults.</p> <p>The Social Issues Committee was reconstituted in May.</p> <p>The <i>Property (Relationships) Legislation Amendment Act 1999</i> (NSW) was passed and received assent on 7 June. Same-sex couples were included within the definition of de facto relationships. NSW was the first Australian state to comprehensively reform a wide range of existing laws regarding same-sex couples.²¹ Laws affected included property division, family provision, intestacy, accident compensation, stamp duty, and decision-making in illness and after death. <i>The Bride Wore Pink</i> served as a blueprint for the new law. Millbank and Sant concluded:</p> <p style="text-align: center;">Despite its uninspiring name, the <i>Property (Relationships) Legislation Amendment Act 1999</i> is a major human rights reform, introducing sweeping</p> |

²¹ Millbank J and Sant K, 'A bride in her every-day clothes: same sex relationship recognition in NSW', *Sydney Law Review*, 22(181) 2000, p 188.

| | |
|-------------|---|
| | <p>changes to the status and rights of cohabiting same-sex couples in NSW. These changes have the potential to affect gay men and lesbians in every aspect of their lives.²²</p> <p>In September, the NSW Law Reform Commission was requested to inquire into and report on the operation of the <i>Property (Relationships) Act 1984</i>.</p> <p>The Social Issues Committee released a report in December. It recommended that the NSW Law Reform Commission investigate: issues surrounding the introduction of a relationship recognition system; definitional issues raised by the 1999 amendments; jurisdictional issues in relation to the District Court; alternatives to litigation; the issue of the legal recognition of non-biological parents to ensure that children in non-traditional domestic relationships are not disadvantaged; and the adequacy of the maintenance provision in relation to children.</p> |
| 2002 | The <i>Miscellaneous Acts Amendment (Relationships) Act 2002</i> amended 20 laws in NSW to include same-sex couples in the definition of de facto relationships. The amendments were in such areas as the exception from giving evidence against a spouse in court and employment benefits. ²³ |
| 2005 | On 4 May, Ms Lee Rhiannon MLC sought a notice of motion seeking leave to introduce the Same-Sex Marriage Bill to provide for marriage between adults of the same-sex. Notice was also given regarding two cognate bills: Same-Sex Marriage (Dissolution and Annulment) Bill 2005 and Same-Sex Marriage (Celebrant and Registration) Bill 2005. The Bills lapsed on the prorogation of parliament on 19 May 2006. |
| 2006 | The Same-Sex Marriage Bill 2006, Same-Sex Marriage (Dissolution and Annulment) Bill 2006 and Same-Sex Marriage (Celebrant and Registration) Bill 2006 were reintroduced by Ms Rhiannon MLC on 24 May. |

Source: NSW Law Reform Commission, *Review of the Property (Relationships) Act 1984 (NSW)*, Discussion Paper 44, April 2002, pp 2-6.

3.1 Anti-Discrimination Act 1977

Part 4C of the *Anti-Discrimination Act 1977* (NSW) is concerned with discrimination on the ground of homosexuality. It was inserted into the Act in 1982 by the *Anti-Discrimination (Amendment) Act 1982* (NSW). A person discriminates on the ground of homosexuality if he or she treats a person less favourably than he or she would a person whom he or she did not think was a homosexual person.²⁴ Alternatively, discrimination on the ground of homosexuality may occur if a person requires someone to comply with an unreasonable requirement or condition that a substantially higher proportion of persons who are either not homosexual persons, or not related to/associated with someone who is, could comply. The Act prohibits such discrimination in the areas of work, education, the

²² Ibid, p 218.

²³ Millbank J, *Same-sex Families*, Hot Topics 53, Legal Information Access Centre, 2005, p 5.

²⁴ Section 49ZG *Anti-Discrimination Act 1977* (NSW).

provision of goods and services, accommodation and registered clubs. Sections 49ZS to 49ZTA make homosexual vilification unlawful. That is, it is generally unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

3.2 Property (Relationships) Act 1984

The *Property (Relationships) Legislation Amendment Act 1999* (NSW) amended more than 20 statutes to confer new rights and responsibilities on those in same-sex relationships. This included areas such as property, inheritance, illness and incapacity, and compensation. The title of the *De Facto Relationships Act 1984* was altered to the *Property (Relationships) Act 1984* to reflect the changes made by the amending Act. Whilst the breadth of the changes made by the Act was great, it did not completely remove discrimination between heterosexual and same-sex relationships.²⁵

Same-sex relationships in NSW are presumption based, that is, no formal steps need to be taken for the relationship to be recognised. Since 1999, same-sex relationships have fallen within the category of de facto relationships which are no longer seen as being between members of the opposite sex. Section 4 defines a de facto relationship as ‘a relationship between two adult persons: who live together as a couple, and who are not married to one another or related by family’. Millbank and Sant have highlighted the distinctiveness of such a definition (particularly when compared to the previous definition of a de facto relationship), as it does not rely on a comparison with marriage.²⁶ Section 3 of the *De Facto Relationships Act 1984* had previously defined a de facto relationship as ‘the relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other’.

The following factors may be used to determine whether two persons are in a de facto relationship.²⁷

- (a) the duration of the relationship.
- (b) the nature and extent of common residence.
- (c) whether or not a sexual relationship exists.
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties.
- (e) the ownership, use and acquisition of property.

²⁵ NSW Law Reform Commission, *Review of the Property (Relationships) Act 1984 (NSW)*, Discussion Paper 44, April 2002, p 6.

²⁶ Millbank and Sant, above n 21, p 190.

²⁷ Section 4(2).

- (f) the degree of mutual commitment to a shared life.
- (g) the care and support of children.
- (h) the performance of household duties.
- (i) the reputation and public aspects of the relationship.

Millbank and Sant note some of the difficulties that arise as a result of the inclusion of such a list as it is ‘fundamentally influenced by the origins and history of de facto law, which had as its starting point a comparison with marriage’.²⁸ However, these factors are to serve as a guide only.

3.3 City of Sydney Relationships Declaration Program

The City of Sydney Relationships Register²⁹ allows same-sex and mixed-sex couples to make a written declaration that they are mutually committed to sharing their lives together. The declaration is subsequently recorded in the City of Sydney Relationships Register. The declaration does not confer legal rights as a marriage ceremony would but it can be used to demonstrate the existence of a de facto relationship as defined in the *Property (Relationships) Act 1984* (NSW). In particular, it may demonstrate the degree of mutual commitment to a shared life. Applicants must be at least 16 years old. However, those under the age of 18 require the consent of their parent or legal guardian.

There is an option of a ceremony for the celebration of the declaration. Couples may make relationship declarations: by private interview at any Council location; in the Lady Mayoress’ Room, Sydney Town Hall, with a person appointed by the Lord Mayor officiating; or at a venue of the couple’s choice, with their choice of officiator.

3.4 Same-Sex Marriage Bill

On 4 May 2005, Ms Lee Rhiannon MLC of The Greens gave notice of motion of the Same-Sex Marriage Bill to provide for marriage between adults of the same-sex. Notice was also given regarding two cognate bills: Same-Sex Marriage (Dissolution and Annulment) Bill 2005 and Same-Sex Marriage (Celebrant and Registration) Bill 2005. The Gay and Lesbian Rights Lobby responded to the announcement that such bills were to be introduced with a number of concerns. According to David Scamell of the Gay and Lesbian Rights Lobby:

State-based marriage laws may give the right to marry, but they will not give our relationships full equality in the eyes of the law. It will make our relationships separate and unequal. Separate in that straight couples will be able to be married

²⁸ Millbank and Sant, above n 21, p 191.

²⁹ For information on the City of Sydney Relationships Declaration Program see: *City of Sydney Relationships Declaration Information Pack*, City of Sydney, September 2005. Available from www.cityofsydney.nsw.gov.au

under federal law, while our marriages may only be recognised under NSW law. Unequal in that we will still face discrimination in many areas on a day-to-day basis.³⁰

Other concerns voiced were that the bills would not end discrimination faced in such other areas as taxation, social security, superannuation and immigration. Julie McConnell of the Gay and Lesbian Rights Lobby warned of the dangers of introducing same-sex marriage bills in terms of conservative politicians being able to ignore other aspects of law reform:

Introducing same-sex marriage bills into the state parliament while we are trying to fight for the rights of same-sex parents and their children offers conservatives on all sides of politics yet another opportunity to side-swipe important gay and lesbian law reform.³¹

The bills lapsed on the prorogation of parliament on 19 May 2006 but were re-introduced by Ms Rhiannon MLC on 24 May 2006.

3.5 Commonwealth Powers (De Facto Relationships) Act 2003 (NSW)

The *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) referred certain financial matters arising out of the breakdown of de facto relationships to the Commonwealth Parliament for the purposes of section 51(xxxvii) of the Commonwealth Constitution. The Minister's Second Reading Speech on the Bill noted:

The Commonwealth considers that it is preferable for issues concerning the division of superannuation to be dealt with at the Commonwealth level. This will provide uniformity between married and de facto couples in the division of superannuation interests and will ensure that the treatment of de facto couples does not vary between individual States and Territories.³²

The referral of this power enables disputes over property and children to be resolved by the one court. However, same-sex couples seem likely to be excluded from these changes:

Ideally the advantages of superannuation splitting upon the breakdown of a de facto relationship should be provided to same-sex de facto couples. The Commonwealth is not prepared to allow this to happen. This intransigence on the part of the Commonwealth in refusing to legislate in respect of same-sex couples is to be deplored and is clearly discriminatory. In the face of the discriminatory behaviour of the Commonwealth, the majority of States consider that it is desirable to extend the benefit of the family law property divisions to the very many heterosexual de facto couples in their jurisdictions, particularly as de factos will otherwise be

³⁰ Gay and Lesbian Rights Lobby, "Separate and unequal": State-based marriage', *Media Release*, 2/5/05.

³¹ Ibid.

³² Newell N, *NSWPD*, 5/9/03, p 3236.

denied access to the superannuation splitting arrangements that took effect at the end of December 2002. It is therefore thought preferable that a reference be made even if the Commonwealth refuses to legislate with respect to same-sex de facto couples.³³

According to the Gay and Lesbian Rights Lobby, the Federal Government intends to introduce legislation this year that accepts the referral of power but only in relation to heterosexual de facto relationships. Therefore, same-sex couples with children will still need to use two separate court processes should their relationship end.³⁴ Millbank has suggested that the continued use of the state courts for the division of property upon the breakdown of a same-sex relationship, whilst heterosexual couples have their disputes heard in the Family Court, may lead to the state courts developing a specialist expertise in this area.³⁵

3.6 Parenting issues

This section examines: who is considered to be a parent; matters concerning adoption; and parentage as a result of artificial reproduction. For a discussion of the arguments for and against same-sex parenting see section 8.2 of this paper.

3.6.1 Who is considered a child of the parties to a relationship?

Section 5(3) of the *Property (Relationships) Act 1999* (NSW) defines a child of the parties to a domestic relationship as any of the following:

- a) a child born as a result of sexual relations between the parties;
- b) a child adopted by both parties;
- c) where the domestic relationship is a de facto relationship between a man and a woman, a child of the woman: of whom the man is the father, or of whom the man is presumed, by virtue of the *Status of Children Act 1996*, to be the father, except where such a presumption is rebutted; or
- d) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*).

‘Parental responsibility’ is defined in section 3 of the *Children and Young Persons (Care and Protection) Act 1998* as ‘all the duties, powers, responsibilities and authority which, by

³³ Ibid, p 3237.

³⁴ Gay and Lesbian Rights Lobby, *Key Issues in Federal Gay and Lesbian Law Reform*, February 2006, p 4.

³⁵ Millbank J, ‘Cutting a different cake: Trends and developments in same-sex couple property disputes’, *Law Society Journal*, 43(10) November 2005, p 57.

law, parents have in relation to their children'. In NSW, section 5(3)(d) of the *Property (Relationships) Act 1999* is the most relevant to same-sex couples. Section 5(3)(d) has been carried through to the *Bail Act 1978*, *Family Provision Act 1982*, *Coroner's Act 1980* and the *Trustee Act 1925*.³⁶ To avoid confusion, the NSW Law Reform Commission has proposed that section 5(3)(d) should be altered to read:

a child for whose long-term welfare both parties exercise parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*) without necessarily having a parenting order in their favour.³⁷

See section 4.3.1 of this paper for an overview of parenting orders.

3.6.2 Artificial donor insemination

Currently, a child who is conceived through artificial donor insemination to a mother who is not in a heterosexual relationship at the time is considered to only have one legal parent. However, some statutes do provide for non-biological parents including the *Workers Compensation Act 1987* (NSW) and the *Compensation to Relatives Act 1897* (NSW).³⁸

Section 14 of the *Status of Children Act 1996* (NSW) is concerned with presumptions of parentage arising out of the use of fertilisation procedures. Section 14(1) to (3) states three rebuttable presumptions:

- (1) When a married woman has undergone a fertilisation procedure as a result of which she becomes pregnant:
 - (a) her husband is presumed to be the father of any child born as a result of the pregnancy even if he did not provide any or all of the sperm used in the procedure, but only if he consented to the procedure, and
 - (b) the woman is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.
- (2) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.
- (3) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using an ovum obtained from another woman, that other woman is presumed not to be the mother of any child born as a result of the pregnancy.

³⁶ Millbank and Sant, above n 21, p 209.

³⁷ NSW Law Reform Commission, above n 25, p 63.

³⁸ Millbank and Sant, above n 21, p 209.

Therefore, a child born as the result of a fertilisation procedure is presumed to not have a father if the mother was not in a relationship with a man at the time. A sperm donor is presumed to not have a relationship with any child born as a result of his donation.

3.6.3 Adoption

Adoption remains one of the areas of law in NSW where same-sex couples are treated differently to people in a heterosexual relationship. Whilst individuals or couples in NSW may lodge an application for an adoption order,³⁹ a couple is defined by the *Adoption Act 2000* (NSW) as a man and a woman who are either married or in a de facto relationship. Therefore same-sex couples cannot lodge a joint application. In addition, it is not thought likely that either a single person or a same-sex couple would be selected for placement as birth parents are involved in the selection of adoptive parents and usually request placement with a mother and a father.⁴⁰ In the case of a single applicant, the Court must also be satisfied that the particular circumstances of the case make the adoption order desirable.

The NSW Law Reform Commission published its report *Review of the Adoption of Children Act 1965 (NSW)* in 1997. Amongst other things, the Commission concluded that suitable same-sex couples should be allowed:

to adopt a child jointly or for the step-parent to adopt the child of his or her partner. A joint or step-parent adoption reflects the reality of the dual parenting commitment and responsibility to the child. As such, it benefits the child's emotional and financial security. In the event of a separation, to resolve the issues of custody, access and maintenance, same-sex couples would have access to the Family Court.⁴¹

The Commission argued that there was no established connection between a person's sexual orientation and whether or not he or she would be suitable as an adoptive parent. It suggested that the assessment should focus on the ability of the applicants to promote the best interests of the child. Therefore, recommendation 58 stated:

The legislation should permit an adoption order to be made in favour of either a couple whether married or living in a de facto heterosexual or homosexual relationship) or a single person.

However, the NSW Government has not implemented this recommendation.⁴²

³⁹ Section 26 *Adoption Act 2000* (NSW).

⁴⁰ Department of Community Services, 'Adopting locally', www.community.nsw.gov.au Accessed 24/5/06.

⁴¹ NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report 81, March 1997, p 229.

⁴² NSW Law Reform Commission, above n 25, p 88.

Section 30 of the *Adoption Act* does not allow an adoption order to be made in favour of a step-parent unless the child is at least five years old and has lived with the step-parent and the child's parent for a continuous period of at least three years prior to the application. Specific consent from the appropriate persons must have been obtained and the Court must be satisfied that the adoption order is clearly preferable in the best interests of the child to other actions such as the making of a care order or a parenting order. Whilst the Commission considered in its 2002 report *Review of the Property (Relationships) Act 1984 (NSW)* that an order for step-parent adoption should generally be discouraged (as it is often inappropriate in terms of the promotion of the best interests of the child), it accepted that there are some circumstances in which such an order will be appropriate. As children with a lesbian or gay step-parent are currently denied the opportunity to be adopted, the Commission proposed that 'the current and pending step-parent adoption provisions should be amended to include lesbian and gay step-parents'.⁴³

The following table summarises the relevant provisions of the *Adoption Act*.

| Section | Content |
|---------|---|
| 26 | An application for an adoption order may be made solely by or on behalf of one person or jointly by or on behalf of a couple (defined as a man and woman who are married or have a de facto relationship). |
| 27 | One person is permitted to adopt a child. However, the website for the Department of Community Services notes that 'single applicants may apply and be assessed for adoption however, if a child is placed with a single person the Court must be satisfied that the particular circumstances of the child make an Adoption Order desirable'. |
| 28 | A couple may adopt a child if they have been living together for at least three years. |
| 29 | The Court may not make an adoption order in favour of a relative of the child unless specific consent has been given by the appropriate person, the child has established a relationship of at least five years with the relative, and the Court is satisfied that the adoption order is clearly preferable in the best interests of the child as opposed to the making of a care order or a parenting order. |
| 30 | The Court may not make an adoption order in favour of a step-parent unless the child is at least five years old and has lived with the step-parent and the child's parent for a continuous period of at least three years prior to the application. Specific consent from the appropriate persons must have been obtained and the Court must be satisfied that the adoption order is clearly preferable in the best interests of the child to other action such as the making of a care order or a parenting order. |
| 42 | People interested in adopting a child may submit an expression of interest to the Director-General or the principal officer of a suitable adoption service provider. |
| 87 | The Court may only make an adoption order on application by: the prospective adoptive parent or parents with the consent of the Director-General; or the Director-General or by a principal officer on behalf of the prospective adoptive parent or parents; or a step parent or relative of the child; or a child who is 18 or more years of age for his or her adoption. |

The Minister for Community Services is currently undertaking a review of the *Adoption Act 2000* to consider, amongst other things, whether the policy objectives of the Act remain valid. Submissions closed on 31 May 2006.

⁴³ Ibid, p 92.

3.7 Succession

A de facto relationship for the purposes of the *Wills, Probate and Administration Act 1898* (NSW) has the same meaning as in the *Property (Relationships) Act 1984*. The *Wills Act* also uses the term ‘de facto spouse’ to mean a person who was the sole partner in a de facto relationship with the person and was not a partner in any other de facto relationship.⁴⁴ Section 61B of the *Wills, Probate and Administration Act 1898* sets out what happens to property when a person dies intestate (without a will). It enables a same-sex partner to inherit the assets of his or her partner in the same manner as would apply to someone in a heterosexual de facto relationship.

The *Family Provision Act 1982* (NSW) empowers the Court to alter the provision made by a will or by the law of intestacy to provide for a person who is eligible under the Act. Section 7 of the *Family Provision Act* permits the Court to make an order that provision be made for the maintenance, education or advancement in life of an eligible person out of the estate of the deceased if the Court believes inadequate provisions has been made. Section 6 of the *Family Provision Act 1982* (NSW) includes in its definition of an eligible person, a person with whom the deceased person lived in a domestic relationship (as defined in the *Property (Relationships) Act 1984*) at the time of the death of the deceased person.

⁴⁴

Section 32G.

4 FEDERAL RECOGNITION OF SAME-SEX RELATIONSHIPS

In 1996 and 2001, Australians were invited to record if they were living in a same-sex relationship for the Australian Census. The number of same-sex couples recording their relationship in the Census doubled between 1996 and 2001: from 10,000 to 20,000 couples.⁴⁵ The increase is thought to be due to a greater willingness of individuals to identify as being in a same-sex relationship. Cooper notes:

to put these figures in perspective, in terms of their proportion of the Australian couple population, the Australian Bureau of Statistics has reported that this reflects only 0.5 per cent of the entire couple population.⁴⁶

At present – under federal law – same-sex couples are unable to marry. This section considers the definition of marriage in Australian legal history, current areas of federal recognition of same-sex relationships, and the constitutional / jurisdictional context. A brief survey of international law principles follows.

4.1 Marriage⁴⁷

4.1.1 Legal Development

There are many aspects to marriage including social, religious, emotional and financial. The legal consequences include a range of benefits and obligations under federal, state and territory law. Governments ‘legislate legal consequences for marriage to protect a vulnerable partner and any children – mostly to ensure that they are adequately cared for on the death of one partner or if the relationship breaks down’.⁴⁸ Section 51(xxi) of the Constitution⁴⁹ grants power exclusively to the Commonwealth to make laws with regard to ‘marriage’. Other relevant sections of the Constitution are set out in the table below:

⁴⁵ Millbank, above n 23, p 3.

⁴⁶ Cooper D, ‘For richer for poorer, in sickness and in health: Should Australia embrace same-sex marriage?’, *Australian Journal of Family Law*, 19, 2005, p 156.

⁴⁷ For an account of the history of marriage from pre-Christian times, see Finlay H, *To Have But Not To Hold*, The Federation Press, Sydney, 2005, Ch 1.

⁴⁸ Canada, Department of Justice, *Marriage and Legal Recognition of Same-sex Unions*, Discussion Paper, Department of Justice, November 2002, p 3.

⁴⁹ Which reads: ‘The Parliament shall...have power to makes laws for the peace, order, and good government of the Commonwealth with respect to: - marriage’.

| Commonwealth of Australia Constitution Act 1900 | |
|---|---|
| Section | |
| 51(xxii) | Power to make laws with respect to 'marriage'. |
| 51(xxii) | Power to make laws with respect to 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants'. |
| 51(xxxix) | Power to makes laws in respect of '[m]atters incidental to the execution of any power vested by this Constitution in the Parliament'. |
| 51(xxix) | Power to make laws in respect of 'external affairs'. |
| 109 | Laws enacted by state parliaments are invalid to the extent that they contradict laws validly enacted by the Commonwealth Parliament. |
| 51(xxxvii) | States can refer specific matters to the Commonwealth so that these matters can be made the subject of federal legislation. |

As previously mentioned, the *Marriage Act 1961* (Cth) defines 'marriage' as 'the union of a man and a woman to the exclusion of all others voluntarily entered into for life'⁵⁰, a definition repeated in the *Family Law Act 1975* (Cth).⁵¹

Until 1961, marriage in Australia was governed by State and Territory law. The Marriage Bill was first introduced into Federal Parliament in 1960.⁵² The Bill was not dealt with, but was re-introduced in 1961 with some amendments. While the Bill was being debated in the Senate, a Country Party Senator unsuccessfully proposed that the term 'marriage' should be defined.⁵³ Thus, prior to 2004, the *Marriage Act* contained no formal definition of marriage. Section 46(1), however, provided:

(1) Subject to subsection (2), before a marriage is solemnized by or in the presence of an authorized celebrant, not being a minister of religion of a recognized denomination, the authorized celebrant shall say to the parties, in the presence of the witnesses, the words:
'...Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'...

Section 46(1) and the current definition of marriage are based on a definition given by Lord Penzance in the 1866 English case of *Hyde v Hyde and Woodmansee*.⁵⁴ Former Chief Justice of the Family Court, Alastair Nicholson has also noted:

⁵⁰ Section 5(1).

⁵¹ Section 43(a).

⁵² By Commonwealth Attorney-General Barwick.

⁵³ *CPD (Senate)*, 18/4/61, p 549.

⁵⁴ (1866) LR 1 P & D 130 at 133.

The law of marriage itself is directly descended from concepts developed originally within the Eastern and Western branches of the ancient Catholic Church and latterly, so far as this country is concerned, by the Ecclesiastical Courts in England, applying the dogma of the Church of England.⁵⁵

From a legal perspective, the concept of marriage as a religious institution has diminished. Religious celebrants are no longer required, and the 2001 Australian Census results on marriage revealed that in each State and Territory, marriages performed by non-religious civil celebrants out-numbered those performed by ministers of religion.⁵⁶ Over the past decade, at least at common law,⁵⁷ the courts in some instances have also shown themselves to be open to the concept of same-sex couples creating ‘non-traditional families’. The following paragraphs taken from recent judgments illustrates this openness:

▪ *Re Wakim; Ex parte McNally*⁵⁸

[45] In 1901 ‘marriage’ was seen as meaning the voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same-sex marriages, although arguably ‘marriage’ now means, or in the near future may mean, a voluntary union for life between two *people* to the exclusion of others.

▪ *Re Patrick: an application concerning contact*⁵⁹

This case concerned the breakdown of a lesbian relationship and issues of access by the donor-father. The paragraph deals with whether a lesbian couple could be considered the ‘family’ of the child, Patrick.

[325] The term ‘family’ has a flexible and wide meaning. It is not one fixed in time and is not a term of art. It necessarily and broadly encompasses a description of a unit which has ‘familial characteristics’. Not all families function in the same way. Never the less, they enjoy common characteristics such as those demonstrated by the applicants. Theirs is not of a casual or transitory nature but one that has embraced exclusivity and permanency. They are emotionally and financially inter-dependant and I have no doubt, share common interests, activities and companionship. Their biological and psychological relationship to and mutual care of Patrick makes it so much more obvious. In my view it would stultify the

⁵⁵ Nicholson, above n 5, p 17.

⁵⁶ Gahan L, ‘Australian Marriage Equality’, Address to the NSW Gay and Lesbian Rights Lobby Relationship Forum, Newtown RSL, 18 June 2005.

⁵⁷ Cooper, above n 46, p 159.

⁵⁸ (1999) 198 CLR 511 per McHugh J.

⁵⁹ (2002) 28 Fam LR 579 per Guest J.

necessary progress of family law in this country, if society were not to recognise the applicants as a ‘family’ when they offer that which is consistent and parallel with heterosexual families, save for the obviousness of being a same-sex couple. The issue of their homosexuality is, in my view, irrelevant.

▪ ***Re Kevin: Validity of marriage of transsexual***⁶⁰

[151] However, we think it strongly arguable that marriage is now a secularised institution in our society. There are no longer any requirements for a religious ceremony associated with marriage, and its occurrence, formalities and registration are purely secular. It is apparent that many non-Christians enter into marriage in our community pursuant to the provisions of the Marriage Act. In such circumstances, we agree with the trial judge that its historical Christian origins are not relevant or helpful in the determination of the present issue.

In *Re Kevin* the court rejected the proposition that the essential purpose of marriage in modern Australia is procreation as, the court reasoned, many couples have children outside marriage and some are unable to have children.⁶¹

4.1.2 The amendments of 2004

The Marriage Amendment Bill 2004 was introduced into the Parliament of Australia in June 2004. In his Second Reading speech on the Bill, the Attorney General, the Hon P Ruddock MP emphasised the fundamental importance of marriage in Australian society and argued that the Bill was necessary as a result of ‘significant community concern about the possible erosion of the institution of marriage’.⁶² He also stressed that marriage ‘is vital to the stability of our society and provides the best environment for the raising of children’.

The Marriage Legislation Amendment Bill 2004 had been previously introduced on 27 May 2004. The Marriage Legislation Amendment Bill proposed to amend the *Marriage Act 1961* (Cth) by:

- (i) defining ‘marriage’, and confirming that unions solemnised overseas between same-sex couples would not be recognised as marriages in Australia (Schedule 1); and
- (ii) preventing inter-country adoptions by same-sex couples under multilateral or bilateral agreements or arrangements (Schedule 2).

It was thus broader in subject as it considered the issue of inter-country adoption by same-sex couples in addition to same-sex marriage. The Marriage Legislation Amendment Bill 2004 passed the House of Representatives on 17 June 2004 and was introduced into the

⁶⁰ (2003) 30 Fam LR 1.

⁶¹ Cooper, above n 46, p 158.

⁶² Ruddock P, *CPD(HR)*, 24/6/04, p 31459.

Senate the following day. It was subsequently referred to the Senate Legal and Constitutional Legislation Committee on 23 June 2004. The Committee was to release a report by 7 October 2004.⁶³

However, the Attorney General introduced the Marriage Amendment Bill 2004 in June as some parties had already sought recognition of offshore arrangements. The Marriage Amendment Bill 2004 contained Schedule 1 of the Marriage Legislation Amendment Bill 2004 but separated the issue of adoption. The Attorney General argued that passage of the Bill should not be delayed and should not be the subject of Senate referral.⁶⁴ The Marriage Amendment Bill 2004 had the support of the Opposition. However, the Greens characterised the Bill as blatant discrimination and proposed that the definition of marriage be amended to include a woman and a woman, a man and a man, in addition to the present definition of a woman and a man. The Greens also argued that a union solemnised in a foreign country, including same-sex unions, should be recognised as a marriage in Australia. Nonetheless, the Marriage Amendment Bill 2004 passed through the Senate on 13 August 2004.

Schedule 1 of the *Marriage Amendment Act 2004* (Cth) accordingly inserted the common law definition of marriage into the *Marriage Act 1961* (Cth). Marriage is therefore defined in the legislation as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’. The Amendment Act also inserted section 88EA into the *Marriage Act* for the purpose of prohibiting the recognition of a same-sex marriage solemnised outside Australia.

4.2 Recognition of same-sex relationships

The *Family Law Act 1975* (Cth) is the main law in Australia on matters involving divorce, property settlement after marriage, spousal maintenance (between married couples), and issues relating to children's arrangements after separation. The Act emphasises the obligations of parents and the best interests of the children. The *Family Law Act* covers all children, regardless of whether their parents were married or not. However, the Act in its current form does not cover property disputes between de facto couples.

The original jurisdiction of the Family Court of Australia is defined by section 31 of the *Family Law Act 1975* (Cth). The principles to be applied by the courts when exercising

⁶³ ‘The effect of the Senate passing the Second Bill was that the Senate indicated that it no longer required the Committee’s advice on that part of the original Bill. In the absence of any further direction from the Senate, the Committee was only obliged to report on the remaining part of the Bill, that is, the schedule in relation to adoption by same-sex couples’: Letter from Senator Marise Payne, Chair of the Senate Legal and Constitutional Committee to Senator Hon Paul Calvert, President of the Senate, dated 6 September 2004. The Committee inquiry was advertised in the press and submissions invited by 30 July 2004. Over 16,000 submissions were received. On 31 August 2004, the Governor-General prorogued the 40th Parliament and dissolved the House of Representatives. Accordingly the Committee resolved not to continue its inquiry into the remaining part of the Bill (the adoption aspect).

⁶⁴ Ruddock P, *CPD(HR)*, 24/6/04, p 31460.

jurisdiction under the *Family Law Act* are set out in section 43. The Court is to have regard to:

- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
- (c) the need to protect the rights of children and to promote their welfare;
- (ca) the need to ensure safety from family violence; and
- (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.

The Family Court initially could only deal with disputes about property and children that had arisen in the marriage context. De facto relationships were accordingly outside its jurisdiction.

With respect to certain matters, the States may 'refer' their power to make laws to the Federal Parliament. Section 3(1) of the *Commonwealth Powers (Family Law – Children) Act 1986* (NSW) referred the following matters to the Commonwealth: the maintenance of children and the payment of expenses in relation to children or child bearing; the custody and guardianship of, and access to, children; the determination of a child's parentage for the purposes of the law of the Commonwealth, whether or not the determination of the child's parentage is incidental to the determination of any other matter within the legislative powers of the Commonwealth. The provisions of the *Family Law Act 1975* (Cth) did not initially extend to ex-nuptial children because the Federal Parliament's power in this area was limited to marriage and divorce, and matrimonial causes arising from divorce. Only children of a marriage came within the Act. However, NSW referred its powers in this area in 1987. So, whilst the *Family Law Act* is largely concerned with marriage, it also deals with disputes involving children where the parents were not married.

The necessary legislation to refer power to the Commonwealth over the division of property of those in de facto relationships was enacted in 2003 by NSW, together with Queensland, Victoria and the Northern Territory. However, the Commonwealth government has refused to accept a referral of power over same-sex couples: 'This means that once the referral of powers is complete, the simplicity and wider jurisdiction to divide property of the Family Court will cover only heterosexual couples, while same-sex couples will need to continue using two separate courts for their disputes'.⁶⁵

⁶⁵

Millbank, above n 23, p 12.

4.3 Children

In the 2001 census, 503 male same-sex couples had children (out of a total of 10,802 male same-sex couples) and 1,684 female same-sex couples had children (out of a total of 8,792 female same-sex couples).⁶⁶ In other words, 4.7% of male same-sex couples had children, as did 19.2% of female same-sex couples. Federal statutes concerned with the regulation of issues associated with children include the *Family Law Act 1975* (Cth), the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth).

Part VII of the *Family Law Act 1975* (Cth) is concerned with children. Section 60B sets out the objects and principles of Part VII. The object is ‘to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children’ based on the following principles (unless contrary to the best interests of a child):

- Children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together.
- Children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development.
- Parents share duties and responsibilities concerning the care, welfare and development of their children.
- Parents should agree about the future parenting of their children.

4.3.1 Parenting orders

Section 61B of the *Family Law Act* defines parental responsibility as ‘all the duties, powers, responsibilities and authority which, by law, parents have in relation to children’. Each parent is to have parental responsibility for his or her child. In most situations where a marriage or de facto relationship breaks down, parents themselves are able to reach an agreement about the ongoing parenting arrangements for their children. When parents are unable to agree on matters concerning their child, the Family Court will encourage resolution of the issue through mediation; otherwise it is able to make a parenting order. A parenting order confers parental responsibility on a person to the extent of the order.⁶⁷ Parenting orders may deal with: the person/s with whom a child is to live (residence order); contact between a child and another person/s (contact order); maintenance of a child (child maintenance order); and/or any other aspect of parental responsibility for a child (specific

⁶⁶ Australian Bureau of Statistics, ‘Same-sex couple families’, *Year Book Australia 2005*, 1301.0.

⁶⁷ Section 61D.

issues order).⁶⁸ However, the paramount consideration is what is in the best interests of the child.

A parenting order may be applied for by: either or both of the child's parents; the child; a grandparent of the child; or any other person concerned with the care, welfare or development of the child.⁶⁹ Therefore a non-biological parent, including the same-sex partner of the biological parent, could apply to the Family Court for a parenting order on the basis that he or she is a person concerned with the care, welfare and development of the child. However, the NSW Law Reform Commission has highlighted some of the limitations on using parenting orders:⁷⁰

1. A Court will not necessarily make the order desired.
2. A parenting order ceases to have effect once the child turns 18, marries or enters into a de facto relationship – it therefore does not create an enduring parent-child relationship.
3. Parenting orders do not affect significant areas of the law and therefore do not equate to legal parentage status.

The following two cases, *Re Patrick* and *Re Mark* were concerned with whether the donor of semen for a child conceived by assisted reproduction should be regarded as a parent under the *Family Law Act*.

Re Patrick

Re Patrick (2002) 168 FLR 6 was the first reported occasion on which the Family Court was confronted with a contact dispute between a donor of semen and the child's parents.⁷¹ The case concerned a lesbian couple (the mother and co-mother) who were parents of Patrick. The mother had conceived and given birth to Patrick as the result of insemination with the sperm of the donor. Disagreement had arisen over the role the donor was to play in Patrick's life. The case was concerned with two questions:

1. Was it in the best interests of Patrick to have contact with the donor?
2. Is the donor regarded as the parent of Patrick at law?

Guest J held that for the purpose of orders pursuant to the *Family Law Act*, the donor of semen is not a parent of a child as there are no prescribed laws of any State or Territory that expressly confer the status of parent on a sperm donor for the purposes of the *Family Law*

⁶⁸ Section 64B.

⁶⁹ Section 65C.

⁷⁰ NSW Law Reform Commission, above n 25, p 73.

⁷¹ Sifris A, 'Known semen donors: To be or not to be a parent', *Journal of Law and Medicine*, 13(2) November 2005, p 235.

Act. However, a parenting order could still be granted in favour of the donor in this case, as he was considered a person concerned with the care, welfare and development of the child.

Re Mark

Another case that considered the meaning of a parent was *Re Mark* (2003) 179 FLR 248. Mark was born in the US in 2002 but lived with Mr X and Mr Y in Melbourne. Both Mr X and Mr Y shared the care for Mark and considered him to be their son. They applied for parenting orders in 2002. Ms S, who lived in the US, had given birth to Mark pursuant to a surrogate agreement that was legal in California, after carrying an embryo created from an anonymously donated egg and the sperm of Mr X. The main issue in the case was who should have responsibility for the care, welfare and development of Mark. The court held that it was in Mark's best interests for a parental order to be made in favour of both Mr X and Mr Y, as they were responsible for his long-term and day-to-day care, welfare and development. Brown J disagreed with the finding of Guest J in *Re Patrick* that the donor of semen may not be regarded as the parent of the child for the purposes of the *Family Law Act*. Brown J did not believe that section 60H, if it does define 'parent' for the purposes of the *Family Law Act*, is an exhaustive definition. However, a determination of whether Mr X was a parent for the purposes of the *Family Law Act* was not considered necessary as section 65G was complied with in any event.

Sifris has highlighted how a different conclusion was reached in the above cases.⁷² The status under the *Family Law Act* of a person who donates sperm to a single woman remains unclear in terms of whether or not he will be considered a parent. Sifris has argued that the status of the known donor needs to be clarified at the State and Federal level. She proposes that uniform presumptions be enacted at both the State and Federal level so that:

- Donors of semen (whether known or unknown) should be presumed to not be the parent of a child born through assisted reproductive procedures.
- A donor should be presumed to be the father of the child, with the rights and obligations that entails, when a child is born as a result of sexual intercourse.

Sifris suggests that the relevant legislation should provide a mechanism, such as a valid written agreement, for opting out of these presumptions. This agreement should be finalised prior to the conception of the child.

4.3.2 Child support

According to section 5 of the *Child Support (Assessment) Act 1989* (Cth) the definition of a parent includes:

when used in relation to a child born because of the carrying out of an artificial conception procedure – a person who is a parent of a child under section 60H of the *Family Law Act 1975*.

⁷² *Ibid*, p 234.

Section 60H provides that a child born to a woman as a result of artificial conception is considered her child. If the woman is married at the time of the procedure, and it is carried out with the consent of both members of the couple, then the child is considered to be the child of both parents. This also applies if they lived together as husband and wife on a genuine domestic basis although not legally married. However, the situation differs for same-sex couples.

The co-parent of a child is not liable for child support through the Child Support Agency. Nonetheless, should the child reside with the co-parent, child support may be sought from the biological parent.⁷³

In NSW, section 27 of the *Property (Relationships) Act 1984* (NSW) allows an order for maintenance to be made where the applicant is unable to adequately support him/herself as a result of caring for a child of the parties to the relationship or of the respondent. The child must be under the age of 12. A claim could also be made on the basis of promissory estoppel.⁷⁴ However, this is likely to be both complex and expensive.

4.4 International law

Australia is a party to a number of treaties with terms that impact, both directly and indirectly, on those in same-sex relationships. Many human rights treaties are concerned with protecting individuals and groups from discrimination. For example, article 2(1) of the *International Covenant on Civil and Political Rights* (ICCPR) states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against

⁷³ Acts of Passion, 'Parenting', www.actsofpassion.nsw.gov.au Accessed 11/5/06.

⁷⁴ *W v G* (1996) 20 Fam LR 49. This case concerned a lesbian couple who had separated after having children by means of artificial insemination. The biological mother claimed for child maintenance, arguing that the non-biological mother had undertaken to provide financially as well as to participate in the upbringing of the children. Hodgson J granted the application for lump sum maintenance for the children. He found the non-biological mother liable on the basis of equitable estoppel, as the biological mother had acted to her detriment in reliance on a promise created or encouraged by the non-biological mother. Hodgson J deemed it unconscionable for the non-biological mother to make no contribution to the raising of the children. It should be noted that this case was decided prior to the passage of the *Property (Relationships) Legislation Amendment Act 1999* (NSW).

discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

These articles have been interpreted so as to include non-discrimination on the basis of sexual orientation.⁷⁵

Some argue that continuing to draw a distinction between heterosexual and same-sex parents has the potential to negatively impact the various rights of children. Article 2 of the *Convention on the Rights of the Child* provides:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The various arguments for and against same-sex parenting, including issues of adoption and access to assisted reproductive technologies, are outlined in section 8.2 of this paper.

4.4.1 Hague Convention on Celebration and Recognition of the Validity of Marriage

Australia is a party to the *Hague Convention on Celebration and Recognition of the Validity of Marriage*. The Convention entered into force for Australia on 1 May 1991. Article 9 states 'A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter'. According to article 14, 'A Contracting State may refuse to recognise the validity of a marriage where such recognition is manifestly incompatible with its public policy (ordre public)'. Nygh believes that an objection on public policy grounds would be difficult to justify in Australia given the decriminalisation of same-sex intercourse and the conferral of rights on same-sex couples.⁷⁶

Nygh, writing prior to the passage of the *Marriage Amendment Act 2004*, analysed the potential consequences for Australia of the introduction of same-sex marriage in the Netherlands.⁷⁷ Nygh considered whether Australia would be obliged to recognise same-sex marriages solemnised in the Netherlands as a result of the *Convention on Celebration and*

⁷⁵ Berns S and Berman A, 'Homophobia perpetuated: The demise of the Inquiry into the Marriage Amendment Bill 2004 (Cth)', *Alternative Law Journal*, 30(3) June 2005, p 107.

⁷⁶ Nygh P, 'The consequences for Australia of the new Netherlands law permitting same gender marriages', *Australian Journal of Family Law*, 16(2) August 2002, p 143.

⁷⁷ *Ibid*, pp 139-145.

Recognition of the Validity of Marriages. He noted in relation to article 9 of the Convention that same-sex marriages had not been excluded under article 8 and were not included in the circumstances in which a State can refuse to recognise a marriage under article 11. Nygh narrowed the issues down to whether same-sex marriage is a marriage within the meaning of the Convention. He concluded that same-sex relationships had yet to reach the point of 'acceptance transcending a particular national system that a particular relationship constitutes a marriage. ... It is therefore unlikely that an Australian court or authority in the near future would regard a same gender marriage validly celebrated in the Netherlands as coming within the scope of the Convention'.⁷⁸ Nonetheless, Australia subsequently made it clear with the enactment of the *Marriage Amendment Act* that same-sex marriages solemnised in a foreign country will not be recognised in Australia.

4.4.2 *Young v Australia*

*Young v Australia*⁷⁹ concerned the application of Mr Edward Young for a pension as the dependent of a war veteran. Mr Young had been the same-sex partner of a World War Two veteran (Mr C) for 38 years, prior to the death of Mr C on 20 December 1998. The Repatriation Commission refused Mr Young's application. He was deemed to not be a dependant, as he was not considered a member of a couple as defined by the *Veterans Entitlements Act 1986* (Cth). Young, after appealing to the Veterans Review Board and attempting to lodge a complaint with the Human Rights and Equal Opportunity Commission, complained to the United Nations Human Rights Committee. The *First Optional Protocol to the International Covenant on Civil and Political Rights* enables individuals whose rights have been violated to submit a written communication to the Human Rights Committee.

Mr Young argued that his right to equal treatment before the law had been violated and that the refusal of his application was contrary to Article 26 of the *International Covenant on Civil and Political Rights*. Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Amongst other things, Australia argued that no partner of Mr C, whether homosexual or heterosexual, would have been entitled to a pension under the *Veterans Entitlement Act*, as it was not clear that Mr C's death was war-caused. Australia also argued that Mr Young had failed to provide sufficient evidence that established him as the partner of Mr C.

The Human Rights Committee noted that the only reason given by the domestic authorities when refusing Mr Young's application was that Mr C and Mr Young were not living with a

⁷⁸ Ibid, p 142.

⁷⁹ 941/2000 (18 September 2003).

person of the opposite sex. Therefore the Committee concluded that this was the only aspect of the *Veterans Entitlements Act* at issue. The Committee found that article 26 had been violated as Mr Young had been denied a pension on the basis of his sex or sexual orientation. The Australian Government had not shown that the distinction between same-sex partners (excluded from pension benefits) and unmarried heterosexual partners (entitled to such benefits) was reasonable and objective.

Whilst the Australian Government indicated that it would consider the views of the Committee, it has stressed that the views of the Committee are not binding on Australia nor is there any requirement for Australia to respond.⁸⁰

⁸⁰ Commonwealth Attorney-General's Department, '12th NGO Human Rights Forum – Responses to questions on notice', www.ag.gov.au Accessed 1/6/06.

5 AUSTRALIAN JURISDICTIONS

This section provides a comparison of the recognition of same-sex relationships afforded by each state and territory in Australia. The legislative approach to adoption and assisted reproductive technology is also discussed.

5.1 Recognition of same-sex relationships

Most state laws, with the exception of South Australia, recognise same-sex couples as de facto couples in such areas as inheritance, guardianship, property division and accident compensation. However, one of the key differences between Tasmania and the other states is that couples in Tasmania are not required to live together for their relationship to be recognised.

5.1.1 Tasmania

Relationships Act 2003 (Tas)

There are two types of personal relationships under the *Relationships Act 2003* (Tas): significant relationships and caring relationships. A significant relationship is defined in section 4 of the *Relationships Act 2003* as ‘a relationship between two adult persons who have a relationship as a couple; and who are not married to one another or related by family’. A significant relationship may be registered under Part 2 of the Act. A caring relationship is defined in section 5 as ‘a relationship other than a marriage or significant relationship between two adult persons whether or not related by family, one or each of whom provides the other with domestic support and personal care’.

Two adults who live in Tasmania, who are not married or not already party to a deed of relationship, and are in a significant or caring relationship may apply to the Registrar of Births, Deaths and Marriages to register their relationship.⁸¹ The deed of relationship is revoked by the death or marriage of either party.⁸² It can also be revoked by an order of a court, or on application to the Registrar by either or both parties. Section 36 allows a partner to apply to a court for an order for the adjustment of interests with respect to the property of either or both of the partners, and/or for the granting of maintenance. However, an order can generally only be made if the partners have been in a personal relationship for a continuous period of at least two years.⁸³ The circumstances in which property adjustment and maintenance may be ordered are set out in the Act.

⁸¹ Section 11.

⁸² Section 15.

⁸³ Section 37.

Same-Sex Marriage Bill 2005

The Same-Sex Marriage Bill was first read in the House of Assembly in the Parliament of Tasmania on 12 April 2005. It was introduced by Mr Nicholas McKim of the Tasmanian Greens, together with the Same-Sex Marriage (Celebrant and Registration) Bill and the Same-Sex Marriage (Dissolution and Annulment) Bill. The Same-Sex Marriage Bill seeks to provide for marriage between adults of the same sex. Same-sex marriage is defined as ‘the lawful union of two people of the same sex to the exclusion of all others, voluntarily entered into for life’. The partners to a same-sex marriage must not be: married to another person, within a prohibited relationship, or younger than 18. A same-sex marriage is to be solemnised by an authorised celebrant. Ministers of religion are not obliged to solemnise a same-sex marriage. The Bill has yet to progress past the first reading.

According to Donna Cooper, passage of the various State bills that seek to legalise same-sex marriage would have little impact on marriage laws ‘as such legislation must be passed by the Commonwealth Parliament’.⁸⁴ However, Professor George Williams has argued that the Federal Government has ‘vacated the field’ following the *Marriage Amendment Act* so that a gap has opened for the States and Territories to set up their own regime of marriage for same-sex couples.⁸⁵

5.1.2 Australian Capital Territory

A statutory bill of rights operates in the Australian Capital Territory. Section 8 of the *Human Rights Act 2004* (ACT) provides for recognition and equality before the law:

1. Everyone has the right to recognition as a person before the law.
2. Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
3. Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Some examples of discrimination are then provided:

Discrimination because of race, colour, sex, *sexual orientation*, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

[emphasis added]

⁸⁴ Cooper, above n 46, p 153.

⁸⁵ ‘ACT, Commonwealth battle over same-sex marriage laws’, *The World Today*, ABC Radio, 30/3/06.

Whilst the *Human Rights Act* is an ordinary statute and does not constitutionally entrench the rights set out in it, the effect of the Act is such that other statutes are to be interpreted in a manner that is consistent with the *Human Rights Act*. If the ACT Supreme Court deems the statutes to be incompatible, a declaration of incompatibility must be presented to the Legislative Assembly within six sitting days. A written response must be prepared by the Attorney General within six months and presented to the Legislative Assembly. The *Human Rights Act* also provides for the pre-legislative scrutiny of bills, with a compatibility statement to be presented with the bill stating whether or not the bill is consistent with human rights. Any inconsistency is to be explained.⁸⁶

Civil Unions Act

Same-sex couples in the ACT will be able to participate in a civil union ceremony sanctioned and approved by the State as a result of the *Civil Unions Act 2006* (ACT) which was passed by the Legislative Assembly on 11 May 2006. Jon Stanhope, Chief Minister of the ACT, when presenting the Civil Unions Bill, described it as ‘a very significant piece of legislation and a major step forward for equality for the gay, lesbian, bisexual, transgender and intersex members of the ACT community’.⁸⁷

The introduction of the Bill followed the release of a discussion paper in 2005 by the ACT Department of Justice and Community Safety that outlined three potential avenues for reform: registration; civil unions; and marriage.⁸⁸ The paper highlighted that the main difference between the options of registration and civil unions is that civil unions allow a greater level of formal recognition, especially regarding the ceremonial and symbolic aspects. One of the major concerns in relation to the introduction of same-sex marriage in the ACT was that it would be more open to legal challenge than either of the other options.

The purpose of the *Civil Unions Act* is to ‘provide a scheme for two people, regardless of their sex, to enter into a formally recognised union (a civil union) that attracts the same rights and obligations as would attach to married spouses under Territory law’.⁸⁹ The scheme is to provide functional equality for those who cannot or choose not to marry. A civil union is defined as ‘a legally recognised relationship that... may be entered into by any 2 people, regardless of their sex’.⁹⁰ A person may enter into a civil union if he or she is at least 16 years old (consent is required for those under the age of 18) and is not currently

⁸⁶ For further discussion of the *Human Rights Act* see: *A NSW Charter of Rights? The Continuing Debate* by Gareth Griffith, NSW Parliamentary Library Briefing Paper No 5/06, pp 59-63.

⁸⁷ *ACTPD*, 28/3/06, p 656.

⁸⁸ ACT Department of Justice and Community Safety, *The Recognition of Same Sex Relationships in the ACT: Discussion Paper*, 2005.

⁸⁹ Legislative Assembly for the Australian Capital Territory, *Civil Unions Bill 2006: Explanatory Statement*, 2006.

⁹⁰ Section 5(1).

married or in a civil union.⁹¹ The Act sets out the process for entering a civil union and specifies how a civil union may be terminated by the parties or by court order. It also provides for the registration of civil union celebrants. Those involved do not need to reside in the ACT – formal recognition of the relationship will occur simply if the relationship is registered in the ACT.

According to Jon Stanhope, Chief Minister of the ACT:

A civil union is not a marriage but will, so far as the law of the ACT is concerned, be treated in the same way. The government is of the view that this is preferable to providing an alternative form of marriage that would not have equal recognition to Commonwealth marriage. The civil union is a new concept that can be used by anybody, regardless of gender. It will give couples functional equality under ACT law with married couples but does not replace or duplicate marriage.⁹²

The Federal Government had indicated its concern with the Bill and threatened to override it:

The Government will strongly oppose any action which would attempt to equate other relationships with marriage, or which would create confusion over the distinction between marriage and same sex relationships.⁹³

Section 5(2) of the Bill originally stated that ‘A civil union is to be treated for all purposes under territory law in the same way as a marriage’. However, this was subsequently amended so that section 5(2) now states ‘A civil union *is different to a marriage but* is to be treated for all purposes under territory law in the same way as a marriage’ (emphasis added). The Federal Government also did not want marriage celebrants authorised under Commonwealth legislation to conduct civil unions. Amendments were accordingly made to the Bill with a separate registration scheme to be established for civil union celebrants in the ACT.

Nonetheless, on 6 June 2006, the Federal Attorney General, the Hon Philip Ruddock announced that the Federal Government would act to invalidate the *Civil Unions Act*.⁹⁴

this legislation has always been a cynical attempt by the Chief Minister to undermine the institution of marriage and circumvent the Commonwealth Marriage Act.... Amendments to the initial draft have not altered the substance of the ACT

⁹¹ Sections 6 and 7.

⁹² *ACTPD*, 28/3/06, p 657.

⁹³ Ruddock P, ‘Stanhope bill equates civil unions with marriage’, *Media Release*, 30/3/06.

⁹⁴ Section 35 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides that the Governor-General may by written instrument disallow an enactment within six months after it is made.

laws which make it clear that same sex civil unions are just marriage by another name.⁹⁵

5.2 Adoption

Adoption remains one of the areas in which same-sex couples are frequently treated differently to those in a heterosexual relationship. Same-sex couples may adopt in Western Australia and the Australian Capital Territory. Same-sex couples may also adopt in Tasmania. However, their relationship must be registered and the application may only be in relation to children who are related to one member of the couple.

Many jurisdictions also permit adoption by a single applicant. However, Millbank has argued that the availability of adoption to individual applicants in Australia is:

fairly token in nature, as single people are clearly not preferred applicants. For example many Acts specify that there must be ‘exceptional’ or ‘special’ circumstances, or that the child is a ‘special needs child’ or that explicit permission be given by the birth parents before a child can be adopted by a single applicant.⁹⁶

Statistics on adoptions in Australia reveal that the overwhelming majority of adoptions involve married couples. Regarding local and intercountry adoptions in 2004-2005, 95% of adopted children were adopted by married couples, 4% by single people and 1% by de facto couples.⁹⁷

The following table summaries some of the relevant provisions of the adoption laws in Australia.

Adoption laws in Australia

| Jurisdiction | Statute | Section | Content |
|--------------|-------------------------------|---------|---|
| Qld | Adoption of Children Act 1964 | 7 | The Chief Executive may make an order for the adoption of a child. |
| | | 12 | An adoption order is generally only to be made in favour of a husband and wife jointly. It does not matter if one of them is the natural or adoptive parent of the child. However, an adoption order may be made in favour of one person if: that person is the spouse of the natural or adoptive parent of the child concerned; or, if the child is a special needs child, the Chief Executive believes that the order would be for the welfare and in the interests of the child; or there are exceptional circumstances. An adoption order will not be |

⁹⁵ Ruddock P, ‘Commonwealth to defend marriage against territory laws’, *Media Release*, 6/6/06.

⁹⁶ Millbank, above n 23, p 21.

⁹⁷ Australian Institute of Health and Welfare, *Adoptions Australia 2004-2005*, AIHW, Canberra, 2005, p 18.

| | | | |
|-----|-------------------|----|--|
| | | | made in favour of a relative of the child unless the Chief Executive believes that the welfare and interests of the child are better served by such an order as opposed to an order for guardianship or custody. |
| SA | Adoption Act 1988 | 10 | The Court will not make an adoption order in favour of a person who is cohabiting with a birth or adoptive parent of the child in a marriage relationship or a relative of the child unless it is satisfied that adoption is clearly preferable in the interests of the child to any alternative order that may be made under the laws of the State or the Commonwealth. |
| | | 12 | An adoption order will only be made in favour of two persons who have been cohabiting in a marriage relationship (defined as the relationship between two persons cohabiting as husband and wife or de facto husband and wife) for a continuous period of at least five years. A period of less than five years will only suffice if the Court is satisfied that there are special circumstances. An adoption order may be made in favour of one person where that person has cohabited with a birth or adoptive parent of the child in a marriage relationship for a continuous period of at least five years or the Court is satisfied that there are special circumstances justifying the making of the order. |
| | | 22 | Prior to making an adoption order, the Court will consider any report prepared by or on behalf of the Chief Executive regarding, inter alia, the suitability of the prospective adoptive parents and their capacity to care adequately for the child. |
| TAS | Adoption Act 1988 | 9 | Adoptions may be arranged by Secretary or by approved agency. |
| | | 18 | An adoption order is to be made on application by the Secretary or the principal officer of an approved agency on behalf of the prospective adoptive parents. |
| | | 20 | An adoption order may be made in favour of two persons who for at least three years have been married to each other or have been the parties to a significant relationship which is the subject of a registered deed. The three years may include a period during which the persons lived together in a stable continuous relationship immediately prior to their marriage or the registration of their relationship. The court may not make an adoption order in favour of a person who is in a significant relationship unless the other party to the relationship is the natural or adoptive parent of the child proposed to be adopted or either party to the relationship is a relative of the child proposed to be adopted. The court may make an adoption order in favour of one person where the court is satisfied that exceptional circumstances exist in relation to the welfare and interests of the child. An adoption order in favour of the spouse (including the other party to a significant relationship which has been registered) of a parent will only be made if a custody or guardianship order would not adequately provide for the welfare and interests of the child and there are special circumstances that warrant the making of the order. |

| | | | |
|-----|-------------------|----|--|
| | | 21 | Orders will only be made in favour of relatives if there are special circumstances and a guardianship or custody order would not adequately provide for the welfare and interests of the child. |
| | | 24 | The court will only make an adoption order after considering, inter alia, a written report by the Secretary or the principal officer of an approved agency concerning the proposed adoption. |
| VIC | Adoption Act 1984 | 11 | An adoption order may be made in favour of a man and a woman: who have been married for at least two years; whose relationship has been recognised as a traditional marriage for at least two years by an Aboriginal community; or who have lived in a de facto relationship for at least two years. The Court may make an adoption order in favour of one person where special circumstances exist. |
| | | 15 | The Court may not make an order for the adoption of a child unless it has received a written report on behalf of the Secretary or the principal officer of an approved agency concerning the proposed adoption and is satisfied on a number of matters. |
| | | 20 | Arrangement of adoptions may be made by or on behalf of the Secretary or an approved agency. |
| WA | Adoption Act 1994 | 6 | Adoption services are to be conducted by or on behalf of the CEO. |
| | | 7 | Adoption services may be conducted by the birth parent of a child who has the responsibility for the long term and daily care, welfare and development of the child or a person acting on behalf of that birth parent, with a view to the child's adoption by a step-parent of the child. |
| | | 9 | The Minister may grant a licence to private adoption agencies to conduct adoption services. |
| | | 20 | A person may only be specified as a child's prospective adoptive parent if the person is a step-parent or carer of the child and wishes to adopt the child. |
| | | 38 | A person who wishes to adopt a child must apply to the CEO to be assessed for suitability for adoptive parenthood. However, this does not apply to a step-parent or carer of a child who wishes to adopt the child. |
| | | 39 | Applicants in a marriage or de facto relationship must apply as a joint applicant with that person, and must have been in the relationship for at least three years. |
| | | 67 | A person may adopt a child if he or she: is a step-parent of the child and has been married to, or in a de facto relationship with, a parent of the child for at least three years; is a carer of the child; or has had the child placed in his or her care with a view to the child's adoption by him or her. |
| | | 68 | Before a step-parent may adopt a child, the court must determine that the adoption is preferable to: a parenting order; an order in respect of the welfare of the child; or a guardianship order. |

| | | | |
|-----|-------------------------------|----|---|
| ACT | Adoption Act 1993 | 18 | Adoption orders are generally only to be made in favour of two people jointly, being a couple: neither of whom is a parent of the child; and who have lived together in a domestic partnership for at least three years; and have demonstrated the stability of, and a commitment to, that relationship to the court. Where a person has a relationship with the parent of the child, an adoption order is not be made unless: the instrument of consent discloses consent to adoption by that particular person; and the court considers that it would not be preferable to make an order relating to guardianship or custody of the child. Nonetheless, the court may make an adoption order in favour of one person after having regard to the wishes of the birth parents. An adoption order will not be made in favour of a relative unless there is consent to adoption by that particular relative and the court believes that the circumstances warrant the redefining of relationships within the family and it is not preferable to make a guardianship or custody order. |
| | | 19 | One of the necessary steps before a court can make an adoption order, is for the chief executive or the principal officer of a private adoption agency to provide a written report to the court concerning the circumstances of the child and the proposed adoption. |
| NT | Adoption of Children Act 1994 | 9 | The Minister is responsible for: the assessment of the suitability of a person or persons to adopt a child (including a non-citizen child); the arrangements for and in relation to the allocation of a citizen-child to a person or persons wishing to adopt such a child; the transfer of the care and custody of a child (including a non-citizen child) to the person or persons who will adopt him or her; and the giving of his or her consent to the adoption of a child (including a non-citizen child) of whom he or she has guardianship. |
| | | 13 | The Court is to only make an adoption order in favour of a couple (a man and a woman) who have been married for at least two years, including a traditional Aboriginal marriage. The Court will not make a joint adoption order for a couple where one of them is a parent of the child. |
| | | 14 | The Court is not to make an adoption order in favour of one person unless the child is under the guardianship of the Minister and the opinion of the Minister is that there are exceptional circumstances which make it desirable to make the order. |
| | | 15 | The Court may make an adoption order in favour of: the spouse of a parent of the child; a relative of the child; the spouse of a relative of the child; or a relative of the child and his or her spouse jointly. However, the order should only be made if certain other actions would not adequately provide for the welfare and interests of the child and there are exceptional circumstances which make the order desirable. |
| | | 17 | A person or couple who wishes to adopt a child is to apply to the Minister. They may apply to the Court for an adoption order where the Minister is satisfied that they are suitable (section 38). |

5.3 Assisted reproductive technology

5.3.1 Access

Dempsey notes that the regulation of access to donor insemination and IVF in Australia ranges from permissive to restrictive, with lesbians and single heterosexual women experiencing relative ease of access in New South Wales, Western Australia, Tasmania and the Australian Capital Territory.⁹⁸ Access to artificial insemination services is open to anyone in Western Australia, with the exception of invasive assisted reproductive technology services such as IVF. The more invasive services are restricted to women who are clinically infertile for reasons other than age.

Access by lesbians and single heterosexual women is more limited in South Australia, Queensland, and the Northern Territory, and is particularly difficult in Victoria. The *Infertility Treatment Act 1995* (Vic) allows a woman to undergo a treatment procedure if she is married and living with her husband on a genuine domestic basis or is living with a man in a de facto relationship.⁹⁹ A doctor must be satisfied that a woman is otherwise unlikely to become pregnant by her husband, or, that if she did, a genetic abnormality or a disease might be transmitted to the child. A ‘treatment procedure’ is defined as ‘artificial insemination of a woman with sperm from a man who is not the husband of the woman; or a fertilisation procedure’.¹⁰⁰

The Federal Court of Australia considered the provisions of the *Infertility Treatment Act 1995* (Vic) in *McBain v Victoria* (2000) 99 FCR 116. Sundberg J found those provisions that restrict fertility treatment to married woman or those in a de facto relationship are inconsistent with the *Sex Discrimination Act 1984* (Cth) and are therefore invalid. As a result of *McBain v Victoria*, a woman’s relationship status cannot be used to block access to assisted reproductive technology. However, the practice in Victoria appears to be that a female without a male partner must be clinically infertile to access treatment.¹⁰¹

The Victorian Attorney-General, the Hon Rob Hulls MP, requested on 11 October 2002 that the Victorian Law Reform Commission undertake a reference on assisted reproduction and adoption. The Commission has published three position papers to date considering such issues as: eligibility for assisted reproductive technology; parentage and adoption; and surrogacy.¹⁰²

⁹⁸ Dempsey D, ‘Active fathers, natural families and children’s origins: dominant themes in the Australian political debate over eligibility for assisted reproductive technology’, *Australian Journal of Emerging Technologies and Society*, 4(1) 2006, pp 28-44.

⁹⁹ Section 8.

¹⁰⁰ Section 3.

¹⁰¹ Magri S et al, *Access to assisted reproductive technology, donation of gametes and embryos, and posthumous use of gametes*, Position Paper One, Victorian Law Reform Commission, April 2005, p 5.

¹⁰² For the progress of the reference and for access to its publications visit the website for the Victorian Law Reform Commission ‘Assisted reproduction and adoption’

5.3.2 Parentage

Sifris has described the Australian laws that govern the parentage of children born as a result of assisted reproduction and the status of sperm donors as ‘an unsatisfactory patchwork of legislation’.¹⁰³ She highlights the complexity of the relationship between Federal and State legislation. Whilst States have powers in relation to adoption, child protection, assisted reproduction and the parentage of children conceived in this way, Federal jurisdiction is concerned with parental responsibility, maintenance, child support, residence and contact of children.

In most jurisdictions in Australia, a child born as a result of assisted reproductive technologies is presumed to only have one parent if the mother is not married or cohabiting with a man at the time of conception.¹⁰⁴ The semen donor generally does not have any rights or obligations with respect to the child in such a situation. On the other hand, the female co-mother of a child born as the result of assisted conception is assumed to be a legal parent for the purposes of State law in Western Australia, the Northern Territory and the Australian Capital Territory. However, she must have consented to the conception. Both mothers of babies born in those jurisdictions can register as parents on the birth register. The relevant presumptions applying in Western Australia, the Northern Territory and the Australian Capital Territory are set out in detail below.

Western Australia

As a result of the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA), the non-biological mother in a lesbian couple who have children through assisted reproduction is recognised. Both mothers may be listed on the birth certificate. Section 6A(1) of the *Artificial Conception Act 1985* (WA) sets out the rule relating to parentage with regard to same-sex de facto relationships. It provides that:

Where a woman who is in a de facto relationship with another woman undergoes, with the consent of her de facto partner, an artificial fertilisation procedure in consequence of which she becomes pregnant, then for the purposes of the law of the State, the de facto partner of the pregnant woman –

- (a) shall be conclusively presumed to be a parent of the unborn child; and
- (b) is a parent of any child born as a result of the pregnancy.

www.lawreform.vic.gov.au

¹⁰³ Sifris, above n 71, p 231.

¹⁰⁴ For example, see section 18 *Status of Children Act 1978* (Qld) and section 10C *Status of Children Act 1974* (Tas).

Australian Capital Territory

Section 8 of the *Parentage Act 2004* (ACT) sets out the presumption about parentage arising from a domestic partnership. A domestic partnership is the relationship between two people, whether of different or the same sex, living together as a couple on a genuine domestic basis.¹⁰⁵ Section 9 provides that a person is presumed to be a parent of a child if the person was in a domestic partnership with the woman who gave birth to the child at any time between 44 weeks and 20 weeks before the birth of the child. Section 11 sets out the presumptions regarding parentage that apply when a woman gives birth as a result of artificial insemination or other assisted reproductive technologies. The domestic partner of the woman is presumed to be the parent of any child born if the woman underwent the procedure with the consent of the partner.

Northern Territory

Section 5DA of the *Status of Children Act* (NT) sets out the rule relating to parentage of female de facto partners in the Northern Territory. It states:

Where a woman who is the de facto partner of another woman undergoes, with the consent of the other woman, a fertilization procedure as a result of which she becomes pregnant, the other woman is, for all purposes of the law of the Northern Territory, to be presumed to be a parent of –

- (a) the unborn child; and
- (b) a child born as a result of the pregnancy.

¹⁰⁵Section 169 *Legislation Act 2001* (ACT).

6 WHAT IS HAPPENING OVERSEAS?

In 2001, the Netherlands became the first country to legalise gay marriages by giving final approval to laws that allowed same-sex couples to marry and adopt children. The legislation was the result of reforms that had occurred over a long period as part of a wider change towards equality and recognition for lesbians and gay men. Dutch law has recognised registered partnerships since 1998, but registered same-sex couples did not have the same rights as heterosexual couples to adopt children.

Since 2001, other jurisdictions have established same-sex marriages. By July 2005, four countries permitted same-sex marriage: the Netherlands (2001), Belgium (2003), Spain (2005), and Canada (2005). However, in December 2005, the Constitutional Court in South Africa ordered that the definition of marriage be amended by parliament to allow for a union between two persons as opposed to a union between a man and a woman – the current definition of marriage was deemed by the Court to be inconsistent with the constitution.¹⁰⁶

Whilst most reforms in Europe have occurred through legislative means, the role of the courts in North America has been significant. In Canada, constitutional rights guarantees have been integral to reform as ‘in several important cases courts have held that legislation denying recognition to same-sex couples is unlawfully discriminatory or unconstitutional’.¹⁰⁷ Like the Netherlands, this recognition has not occurred in a vacuum. As Millbank says:

No country anywhere in the world has passed laws going from absolutely no form of same-sex relationship recognition directly to same-sex marriage. Rather, over a period of many years, a series of changes have built incrementally on one another. Generally progress has gone along the following sequence: decriminalisation of gay sex, implementation of anti-discrimination protections, some limited recognition of relationships either through de facto relationship recognition or limited registration systems, and then through one or more stages a move to broader relationship recognition, then (usually) some parenting recognition, then a status similar to marriage but called something else such as ‘civil union’ or ‘registered partnership’, and then, some years later, marriage.¹⁰⁸

¹⁰⁶ ‘South Africa to have gay weddings’, *BBC News*, 1/15/05 <http://news.bbc.co.uk>

¹⁰⁷ Millbank, above n 23, p 17.

¹⁰⁸ *Ibid.*

6.1 Canada¹⁰⁹

In 2005, federal laws were amended in Canada so as to expand the definition of marriage to include the union of two persons, regardless of sex. This section traces the legal development of same-sex marriage in Canada, particularly noting some of the major decisions of the Supreme Court of Canada in this regard. For further information on the *Canadian Charter of Rights and Freedoms*, including discussion of same-sex marriage, see *A NSW Charter of rights? The Continuing Debate* by Gareth Griffith, NSW Parliamentary Library Briefing Paper No 5/06, pp 18-32.

Section 15(1) of the *Canadian Charter of Rights and Freedoms* came into effect in 1985. It states:

Every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Sexual orientation has subsequently been deemed an analogous ground for the purposes of section 15 and could therefore form the basis of discrimination: *Egan v Canada* [1995] 2 SCR 513. *Egan v Canada* concerned a challenge to spousal allowance provisions in the *Old Age Security Act* which were not available to those in same-sex relationships. A majority of 5:4 found that the spousal allowance provisions discriminated on grounds of sexual orientation. However, a different majority found the discrimination to be justified under section 1 of the Charter. Section 1 guarantees the rights and freedoms set out in the Charter 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The decision of the Supreme Court of Canada in this case has significantly influenced other same-sex spousal benefit cases in Canada, and is important in terms of its confirmation that sexual orientation is a prohibited ground of discrimination under the Charter.

In 1992, the Ontario Court of Appeal in *Haig v Canada* (1992) 94 DLR(4th) 1 held that the absence of sexual orientation from the list of proscribed grounds of discrimination in the *Canadian Human Rights Act* was a violation of section 15 of the Charter. Bill C-33 *An Act to amend the Canadian Human Rights Act* was subsequently enacted in 1996 to include sexual orientation as a prohibited ground for discrimination. This codified the law as stated in *Haig*.

In *M v H* [1999] 2 SCR 3 the majority of the Supreme Court of Canada held that the opposite-sex definition of spouse in the *Family Law Act* in Ontario, as related to spousal support, violated section 15 of the Charter and was not justified under section 1. This case seems to have served as a catalyst for change, as from 1999 onwards, legal challenges in

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The main source for the information on Canada is Hurley M, *Sexual Orientation and Legal Rights*, Current Issue Review, Parliamentary Information and Research Service, Parliament of Canada, Revised July 2005.

many jurisdictions led to marriage being redefined in gender neutral terms. By June 2005, New Brunswick was the eighth province and ninth jurisdiction to legalise same-sex marriage. These changes also occurred at the federal level – the enactment of Bill C-23 *The Modernization of Benefits and Obligations Act* in 2000 amended 68 federal statutes to ensure they applied equally to unmarried heterosexual and same-sex couples.

On 17 July 2003 the federal government referred draft legislation to the Supreme Court of Canada in a constitutional reference: *Reference re Same-Sex Marriage* 2004 SCC 79. The major sections of the proposed Act referred to the Court stated:

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

A couple was therefore no longer required to consist of two persons of the opposite sex for the purpose of marriage.

The Court was asked to consider the following four questions:

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

The Court answered yes with respect to section 1 and no with respect to section 2. Section 2 was deemed to be *ultra vires* for Parliament as it was considered a matter for the provinces.

2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same-sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

The Court held that it was consistent with the Charter as it embodies the government's policy stance in relation to the section 15(1) equality concerns of same-sex couples and flows from the Charter rather than violating it.

3. Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same-sex that is contrary to their religious beliefs?

The Court held that the guarantee of religious freedom is broad enough to protect religious officials in this regard.

4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law-Civil Law*

Harmonization Act, No 1, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

The Court declined to answer this question. This was due to: the stated intention of the federal government to address the issue of same-sex marriage legislatively regardless of the Court's opinion; the fact that people had relied upon decisions in previous litigation and had acquired rights which the Court believed were entitled to protection; and that an answer to this question had the potential to undermine the goal of achieving uniformity regarding civil marriage in Canada. The court noted that uniformity would be achieved if its answer was no. However, if it responded positively, the decisions of the lower courts would be cast into doubt by a contrary advisory opinion which could not actually overturn them.

Bill C-38 *An Act respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* (the Civil Marriage Act) was subsequently enacted, coming into effect on July 2005. It expanded the definition of marriage to include 'the lawful union of two persons to the exclusion of all others'. Accordingly, marriage in Canada is open to same-sex couples. The Act acknowledges that religious officials are entitled to refuse to perform marriages where it conflicts with their religious beliefs.

There have thus been a number of significant developments in Canadian law in relation to the legal recognition of same-sex relationships. Hurley concludes that:

Judicial and legislative reforms over the past decade, particularly since the *M v H* decision in 1999, have effected a significant shift in Canadian society with respect to recognition of the legal status and claims of same-sex conjugal couples. The watershed nature of this shift is illustrated, most notably, by federal legislation sanctioning same-sex marriage.¹¹⁰

6.2 Europe

According to the International Lesbian and Gay Association (ILGA),¹¹¹ the following legal recognition is given to same-sex relationships in Europe.

¹¹⁰ Ibid, p 22.

¹¹¹ ILGA is a non-governmental umbrella organisation that represents lesbian, gay, bisexual and transgender persons at the European level. It has participative status at the Council of Europe.

| Country | Year | Legal Recognition | Details |
|------------------------|------|---------------------------|--|
| Albania | | None | |
| Andorra | 2005 | Registered cohabitation | Legislation provides for the registration of 'stable couples' regardless of the sex of the partners. Couples have to register in a registry of stable unions and must prove a stable relationship. Registered couples will enjoy most rights of marriage. |
| Armenia | | None | |
| Austria | | Unregistered cohabitation | Cohabiting same-sex partners are entitled to the same rights as unmarried cohabiting opposite sex partners. |
| Azerbaijan | | None | |
| Belgium | 2003 | Marriage | Same rights and responsibilities as opposite-sex married partners. However, Belgian law does not provide for presumed paternity for the female spouse of a married woman who gives birth during their marriage. There is no provision for joint parental responsibility nor adoption by a same-sex partner or a same-sex couple. |
| | 2000 | Registered cohabitation | Same rights and responsibilities as opposite-sex married partners. |
| Bosnia and Herzegovina | | None | |
| Bulgaria | | None | |
| Croatia | 2003 | Unregistered cohabitation | The law on same-sex civil unions grants same-sex partners of at least three years the same rights as enjoyed by unmarried cohabiting opposite sex partners (inheritance, financial support). |
| Cyprus | | None | |
| Czech Republic | 2006 | Registered partnership | Registered Partnership Law was approved on 15 March 2006. |
| Denmark | 1989 | Registered partnership | Registered partnership is open to same-sex partners only. Grants full range of protections, responsibilities and benefits as marriage. States that all legislation referring to 'marriage' or 'spouse' be read to include registered same-sex partners. Registered partner can adopt the other partner's child, but a registered couple cannot adopt other children. |
| Estonia | | None | |
| Finland | 2001 | Registered partnership | Grants similar rights and responsibilities as married partners. Registration and dissolution are undertaken in a similar manner to marriage. Joint custody is allowed. Grants immigration rights to foreign partner. Registration available only to same-sex couples. |
| France | | Unregistered cohabitation | Very limited rights in such areas as tenancy, immigration, health insurance for same-sex cohabiting partners. |
| | 1999 | Registered partnership | Partners commit to mutual and material help and are jointly responsible for household debts by signing a Pact of Civil Solidarity at the district court. Dissolution of partnership is by death or marriage or, after three months' delay, at the request of either partner. Available to any two domestic partners of the same or opposite sex. Joint taxation and welfare benefits are available after three years of partnership. Available to non-French nationals. No joint custody; cannot adopt partner's children or jointly adopt unrelated children. |

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| Georgia | | None | |
| Germany | 2000 | Life partnership | Registered partners are able to change their last names and qualify for same inheritance tax exemptions as married couples. Allows joint custody over child for whom one partner already has custody and allows adopt each other's children. Grants recognition of next of kin rights; joint eligibility for some social security benefits; survivor's pension right; similar rights in the field of tenancy; immigration concessions for foreign partner. When ending partnership by a court declaration, provides for continuing maintenance payment obligations. Registration available only to same-sex couples. |
| Greece | | None | |
| Hungary | 1996 | Unregistered cohabitation | Applies to couples living together in an economic and sexual relationship (common-law marriage) including same-sex couples. No official registration required. The law gives some specified rights and benefits to two persons living together. These rights and benefits are not automatically given – they must be applied for to the social department of the local government in each case. |
| Iceland | 1996 | Registered partnership | Grants full range of protections, responsibilities and benefits as marriage. Joint custody of children is permitted, where one partner already has custody of the child. Only available to same-sex couples. Registered partner can adopt the other partner's child, unless the child is adopted from a foreign country. No joint adoption for registered same-sex partners. |
| Ireland | | | A Civil Partnership Bill was presented on 9 December 2004. |
| Italy | | None | |
| Latvia | | None | |
| Liechtenstein | | None | |
| Lithuania | | None | |
| Luxembourg | 2004 | Registered partnership | Applies to same-sex and opposite sex couple. Official declaration before the register of civil status. Same rights as married couples in relation to access to welfare benefits. Same fiscal status as married couple. |
| Malta | | None | |
| Moldova | | None | |
| Monaco | | None | |
| Netherlands | 1979 | Unregistered cohabitation | Since 1979, same-sex cohabiting partners were increasingly granted legal rights in such areas as rent law, social security, income tax, immigration rules, state pension, death duties etc. |
| | 1998 | Registered partnership | Registered partnerships are for same-sex and opposite sex partners. All the same rights and responsibilities as married partners. However, the registered (female or male) partner of a woman who gives birth is not deemed to be the second parent of the child. |
| | 2001 | Marriage | Same rights and responsibilities as opposite-sex married partners. However, cannot adopt a child from abroad. |
| Norway | 1993 | Registered partnership | Grants full range of protections, responsibilities and benefits as marriage, including arrangements for the breakdown of the relationship. Only available to same- |

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| | | | sex couples. |
| Poland | | None | |
| Portugal | 2001 | Unregistered cohabitation | Legislation extends to same-sex couples the same rights as heterosexual couples living in a de facto union for more than two years ('common economy'); housing arrangements, same property regime as married partners, civil servants and work benefits, fiscal status, welfare benefits. Very limited rights, do not cover most of the rights and benefits associated with marriage. |
| Romania | | None | |
| Russia | | None | |
| San Marino | | None | |
| Serbia and Montenegro | | None | |
| Slovakia | | None | |
| Slovenia | 2005 | Registered partnership | The Law on Registered Same-Sex Partnership covers only the property relations, the right/obligation to support socially weaker partner and only partly the inheritance rights. It does not bring any rights in the area of social security (social and health insurance, pension rights), and it does not give the status of a next-kin to the partners. |
| Spain | 2005 | Marriage | Same-sex married partners will now enjoy all the rights and responsibilities of marriage, including entitlement for joint adoption. |
| Sweden | 1988 | Unregistered cohabitation | Limited tenancy and property rights. In 2003, a gender neutral act on cohabitation gave same-sex cohabiting partners all the same rights and responsibilities as opposite sex cohabiting partners. |
| | 1994 | Registered partnership | Grants full range of protections, responsibilities and benefits as marriage, including arrangements for the breakdown of the relationship. Only available to same-sex couples. Same-sex registered partners can adopt jointly. |
| Switzerland | 2004 | Registered partnership | Legislation adopted on 10 June 2004. Same-sex couples can register their partnerships. They get the same rights as heterosexual couples in terms of pension, insurance and taxation. The law does not confer rights to marry, take the same name, adopt or undergo fertility treatments. |
| FYR Macedonia | | None | |
| Turkey | | None | |
| Ukraine | | None | |
| UK | 2004 | Registered partnership | Registrations start in December 2005, open to same-sex partners only, all the same rights and responsibilities as marriage. |
| | | Unregistered cohabitation | Cohabiting same-sex partners are recognised and enjoy a variety of rights in such areas as accidents and compensations, tenancy, immigration and mental health. |

Source: International Lesbian and Gay Association, 'Marriage and partnership' www.ilga-europe.org
 Accessed 5/5/06.

6.3 New Zealand

The option of civil unions was recently introduced in New Zealand. The *Civil Union Act 2004* (NZ) came into force in April 2005. Section 4 of the Act provides that two people, whether of different or the same-sex, may enter into a civil union if both are at least 16 years old (16 and 17 year olds must obtain consent). The civil union may be solemnised by a Registrar or a civil union celebrant. It is then registered as a civil union under the *Births, Deaths, and Marriages Registration Act 1995* (NZ). The couples involved are provided with the same legal rights and responsibilities as those who are married. The *Relationships (Statutory References) Act 2005* (NZ) was also passed to remove discriminatory provisions on the basis of relationship status from a range of statutes.

6.4 United Kingdom

The *Civil Partnership Act 2004* (UK) entered into force in the UK on 5 December 2005. Section 1 of the Act provides that a civil partnership is a relationship between two people of the same-sex formed when they register as civil partners. The partners must be at least 16 years old, with consent required for 16 and 17 year olds. The Act sets out the rights and responsibilities of civil partners, which include: a duty to provide reasonable maintenance of the civil partner and any children of the family; civil partners to be assessed in the same way as spouses for child support; equitable treatment for the purposes of life assurance; employment and pension benefits; recognition under intestacy rules; access to fatal accidents compensation; protection from domestic violence; and recognition for immigration and nationality purposes.¹¹²

6.5 United States of America

In the United States of America, marriage licences may be issued to same-sex couples in Massachusetts. There is currently no explicit prohibition of same-sex marriage in New Jersey, New Mexico, New York, Rhode Island and the District of Columbia. However, a total of 45 states either have a state constitution amendment or a law that restricts marriage to between a man and a woman.¹¹³

The following table is based on information collated by the Human Rights Campaign, the largest civil rights organisation in the US that works for gay, lesbian, bisexual and transgender equality. It outlines the position adopted by each state regarding same-sex marriage.

¹¹² Women and Equality Unit, 'Civil Partnership', www.womenandequalityunit.gov.uk Accessed 10/5/06.

¹¹³ Human Rights Campaign 'Statewide Marriage Laws' and 'State Prohibitions on Marriage for Same-Sex Couple' www.hrc.org Accessed 9/5/06.

Marriage laws in the US (as at April 2006)

| State (including DC) | Date | Laws |
|-----------------------------|-------------|--|
| Alabama | 1998 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Alaska | 1998/1996 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Arizona | 1996 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Arkansas | 2004/1997 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| California | 1997/2000 | Has a marriage law pre-dating 1996 that defines marriage as only between a man and woman and passed a law purporting to not honour marriages of same-sex couples from other jurisdictions. |
| Colorado | 2000 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Connecticut | 2005 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Delaware | 1996 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| District of Columbia | | No explicit provision prohibiting marriage between individuals of the same-sex. |
| Florida | 1997 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Georgia | 2004/1996 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as |

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| | | between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Hawaii | 1998 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Idaho | 1996 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Illinois | 1996 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Indiana | 1997 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Iowa | 1998 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Kansas | 2005/1996 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Kentucky | 2004/1998 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Louisiana | 2004/1999 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Maine | 1997/1996 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Maryland | | Has a law that defines marriage as only between a man and woman or a husband and wife. |
| Massachusetts | | Issues marriage licenses to same-sex couples. |
| Michigan | 2004/1996 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as |

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| | | between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Minnesota | 1997 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Mississippi | 2004/1997 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Missouri | 2004/2001 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Montana | 2004/1997 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Nebraska | 2000 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid. |
| Nevada | 2002 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid. |
| New Hampshire | 2004 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| New Jersey | | No explicit provision prohibiting marriage between individuals of the same-sex. |
| New Mexico | | No explicit provision prohibiting marriage between individuals of the same-sex. |
| New York | | No explicit provision prohibiting marriage between individuals of the same-sex. |
| North Carolina | 1996 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| North Dakota | 2004/1997 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Ohio | 2004/2004 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |

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| Oklahoma | 2004/1996 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Oregon | 2004 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid. |
| Pennsylvania | 1996 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Rhode Island | | No explicit provision prohibiting marriage between individuals of the same-sex. |
| South Carolina | 1996 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| South Dakota | 1996 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Tennessee | 1996 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Texas | 2005/2003 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Utah | 2004/1995 | Has amended its state constitution to purport to declare marriages between same-sex couples void or invalid and has passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Vermont | 1999 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Virginia | 1997 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Washington | 1998 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |

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| West Virginia | 2000 | Passed a law in response to marriage litigation in the mid 1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honour marriages between same-sex couples from other jurisdictions. |
| Wisconsin | | Has a law that defines marriage as only between a man and woman or a husband and wife. |
| Wyoming | | Has a law that defines marriage as only between a man and woman or a husband and wife. |

Source: Human Rights Campaign 'Statewide Marriage Laws' www.hrc.org Accessed 9/5/06.

On 24 January 2005, Senator Wayne Allard introduced a bill (S J Res 1) in the Senate that proposed an amendment to the US Constitution to declare that marriage shall consist only of the union of a man and a woman. It would prohibit the Constitution or any State constitution from being construed to require that marital status or its legal incidents be conferred upon any union other than that of a man and a woman. Congressman Dan Lungren introduced a similar bill (H J Res 39) in the US House of Representatives on 17 March 2005. On 18 May 2006, the Senate bill was placed on the Senate Legislative Calendar under General Orders. Despite President Bush indicating his support for the constitutional amendment, it was rejected by the US Senate on 7 June 2006.¹¹⁴

¹¹⁴ 'Senate blocks same-sex marriage ban', *Guardian Unlimited*, 7/6/06 www.guardian.co.uk

7 KEY ISSUES

The issues surrounding the status of same-sex relationships as well as parenting matters have been discussed in earlier sections of this paper. This section is concerned with some other aspects of the debate regarding same-sex relationships, particularly financial matters. It should be noted that the issues discussed in this section are just a sample of the many areas still being debated.¹¹⁵

Millbank has noted that ‘By 2005 same-sex couples have been placed on an equal footing with heterosexual de facto couples in almost every area; although Federal law is the notable exception to this trend’.¹¹⁶ According to the Gay and Lesbian Rights Lobby:

In the federal legislative areas of superannuation, health insurance and Medicare, social security, veteran’s entitlements, immigration and taxation, the status of ‘spouse’ is defined as heterosexual only, excluding same-sex couples from the rights and obligations held by heterosexual couples. The lack of legal recognition has a real and daily impact on the lives of thousands of gay and lesbian Australians.¹¹⁷

The Human Rights and Equal Opportunity Commission is currently conducting an inquiry (launched on 3 April 2006) into discrimination against people in same-sex relationships, particularly in terms of discrimination in the area of financial and work-related entitlements and benefits.¹¹⁸ The scope of the inquiry includes such areas as taxation, social security, Medicare, concessions under the Pharmaceutical Benefits Scheme, leave entitlements, compensation for workplace injuries, pensions, retirement benefits, superannuation, benefits payable to veterans of the Australian armed forces, and intestacy. The closing date for submissions was 2 June 2006.

In its discussion paper for the inquiry, HREOC identified some of the current areas of law in which same-sex couples may experience discrimination at the federal level.¹¹⁹ These include:

- **Social security benefits** – Section 4(2) of the *Social Security Act 1991* (Cth) provides that a person is a member of a couple for the purposes of the Act if the person is legally married to another person and is not living separately and apart

¹¹⁵ For further information on the law as it relates to same sex couples and their families see: Barry R (ed) *The Law Handbook: Your practical guide to the law in New South Wales*, 9th ed, Redfern Legal Centre Publishing, 2004, chapter 39.

¹¹⁶ Millbank, above n 23, p 2.

¹¹⁷ Gay and Lesbian Rights Lobby, above n 34, p 2.

¹¹⁸ Information on the inquiry is available from the HREOC website, ‘Same-Sex: Same Entitlements’, www.humanrights.gov.au/samesex/index.html

¹¹⁹ Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements*, Discussion Paper, HREOC, 2006.

from the other person on a permanent or indefinite basis. A person may also be a member of a couple if all of the following conditions are met: the person has a relationship with a person of the opposite sex; the person is not legally married to the partner; the relationship between the person and the partner is a marriage-like relationship; both the person and the partner are over the age of consent applicable in the State or Territory in which they live; the person and the partner are not within a prohibited relationship for the purposes of section 23B of the *Marriage Act 1961*. Payments under the Act are therefore calculated on the basis that a person living in a same-sex relationship is single. Some of the social security benefits thought to be limited to members of a heterosexual couple include partner bereavement payments; widow allowance; and access to health care cards and pensioner concession cards.

- **Taxation** – The Gay and Lesbian Rights Lobby argues that under the *Income Tax Assessment Act 1936* (Cth) the following income tax benefits may not be enjoyed by those in a same-sex relationship: dependant spouse rebate (section 159J); housekeeper rebate (section 159L); child-housekeeper rebate (section 159J); parent rebate (section 159J); superannuation rebate (sections 159T to 159TC); and the medical expenses rebate (section 159P).¹²⁰ They argue further that the pensioner rebate (section 160AAA), low-income aged person's rebate (section 160AAAA); and the medical expenses rebate (section 159P) provide heterosexual couples with concessional rates when determining their eligibility whilst denying such benefits to those in a same-sex relationship.
- **Health concessions** – for the purposes of qualifying for safety net concession cards and pharmaceutical benefit entitlement cards, a family is defined as including an opposite sex spouse and children. According to the Gay and Lesbian Rights Lobby, the definition of a family unit which is used to calculate the Medicare safety net, 'causes great disadvantage to same-sex couples and families with substantial out-of-pocket medical costs, because same-sex couples are treated as two individuals with two individual safety nets'.¹²¹
- **Superannuation entitlements** – Superannuation laws were expanded in 2004 as a result of the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth) in terms of the category of dependants eligible to inherit assets upon the death of a member of the fund. The definition of 'dependant' in section 27A of the *Income Tax Assessment Act 1936* (Cth) was altered to include, in addition to a spouse/former spouse and any child, 'any person with whom the first person has an interdependency relationship'. An 'interdependency relationship' exists if two people:
 - have a close personal relationship;

¹²⁰ Gay and Lesbian Rights Lobby, above n 34, pp 2-3.

¹²¹ Ibid, p 3.

- live together;
- one or each of them provides the other with financial support; and
- one or each of them provides the other with domestic support and personal care.

These definitions were inserted into the section of the Act concerned with liability to taxation, notably superannuation, termination of employment and kindred payments.

The definition of an interdependency relationship was also inserted into the *Retirement Savings Accounts Act 1997* and the *Superannuation Industry (Supervision) Act 1993*. Whilst same-sex couples were not specifically included in the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004*, it is thought that it should now be easier for the same-sex partner of the deceased to inherit superannuation assets.¹²² However, specific legislation that applies to Commonwealth employees, members of the Australian Defence Force and parliamentarians still appears to discriminate against same-sex couples.

- **Workers compensation under Comcare** – same-sex partners are excluded from the definition of spouse and dependant.
- **Pensions and compensation for veterans** – persons in a same-sex relationship and currently serving in the defence force have access to the same entitlements as those in heterosexual relationships. However, same-sex partners do not receive veterans' pensions and compensation entitlements paid to the spouse of a former member of the Defence Force.
- **Travel entitlements for Parliamentarians** – the spouse of a Member of the Commonwealth Parliament may enjoy some benefits. However, same-sex couples are excluded.
- **Judicial pensions** – A surviving spouse may receive 62.5% of the Judge's pension entitlement. However, the *Judges Pensions Act 1968* (Cth) appears to exclude same-sex relationships.

¹²²

Millbank, above n 23, p 9.

8 LEGAL RECOGNITION: ONGOING DEBATES

There are various views on whether same-sex couples should be able to marry and/or have access to assisted reproductive technology. Some Australians see heterosexual marriage as an institution that needs to be protected. Others believe the current definition of marriage (between a man and a woman) further entrenches the discriminatory treatment of same-sex relationships. Not all members of the gay and lesbian community support same-sex marriage, viewing marriage as an outdated and heterosexual institution.

A factor in debates over parenting issues is the reality that many gay and lesbian persons are already parents, whether from a previous heterosexual relationship, or through use of assisted reproductive technology. The debate frequently centres on such concepts as ‘the best interests of the child’. Some believe it is in the best interests of a child to be raised in a home with two parents – a mother and a father. Others argue that those in a same-sex relationship are equally able to care for and nurture a child. Parenting issues are broad, and encompass such considerations as family law, adoption, and assisted reproductive technology.

This section outlines some of the common arguments raised for and against same-sex marriage. The debates regarding same-sex parenting and access to assisted reproductive technology are similarly presented.

8.1 Marriage

8.1.1 *What are the arguments in favour of same-sex marriage?*

- Providing same-sex marriage as an option is necessary for true equality before the law. The symbolic aspect of such equality is also important.
- The option of same-sex marriage provides same-sex couples with the choice of whether or not to marry, in the same way that heterosexual couples may choose.
- Same-sex marriage would allow for comprehensive relationship recognition across all federal law.
- It allows for consistency with the international obligations of Australia.
- Allowing same-sex marriage would further the acceptance of same-sex couples. This would contribute to their greater personal wellbeing and social inclusion. The prohibition of same-sex marriage, according to Berns and Berman:

marginalises lesbian and gay people in Australia and sends a message to the wider community that same-sex unions are not morally or legally acceptable. It perpetuates homophobia, tacitly encouraging discrimination against an already marginalised group of Australian citizens.¹²³

¹²³

Berns and Berman, above n 75, p 107.

- Society has changed. The legal concept of marriage is no longer linked to Christian values. Marriage has become a secular institution.
- Allowing same-sex marriage does not necessarily detract from heterosexual marriage.
- The change in society's attitude towards same-sex relationships is reflected in the courts, which have demonstrated a willingness to accept the marriage of same-sex couples.
- Procreation is no longer seen as the fundamental purpose of marriage. According to then Democrats Senator Brian Greig:

marriage is not about having children. Infertile couples are allowed to marry. Elderly couples are allowed to marry. Couples who do marry but decide not to have children are not then made to divorce. Being married and having children are not axiomatic.¹²⁴

- There is no evidence that social problems, such as the breakdown of families, would proliferate should same-sex marriages be recognised.

8.1.2 *What are the arguments against same-sex marriage?*

- Allowing same-sex marriage would undermine the institution of marriage. The successful passage of the Commonwealth *Marriage Amendment Act 2004* has been described as 'enshrining marriage between a man and woman and excluding homosexual relationships... a great victory for the institution of marriage, the preservation of marriage, the sanctity of marriage and the wellbeing of our nation'.¹²⁵
- Marriage has strong religious connotations for many people.
- Heterosexual marriage provides the greatest benefit to society as it ensures procreation and promotes the family.
- The majority of Australians see marriage as a heterosexual union. The Prime Minister, the Hon John Howard MP, has reportedly stated that the majority of Australians do not support same-sex marriage, 'I think it is a form of minority fundamentalism to say that you have to, in every aspect of one's institutions and one's arrangements in society, have technical equivalence'.¹²⁶

¹²⁴ Greig B, *CPD (Senate)*, 12/8/04, p 26509.

¹²⁵ Clarke D, *NSWPD*, 19/10/04, p 11532.

¹²⁶ 'Australians don't support gay marriage: Howard', *ABC News Online*, 23/5/06.

- Cooper has identified concerns that ‘any support for same-sex marriage represents a threat to heterosexual marriage and may encourage people to enter into homosexual unions which, in turn, will lead to a range of social problems’.¹²⁷
- Same-sex marriage is not necessary for opposing discrimination and homophobia. According to the Prime Minister, the Hon John Howard MP:

We will always seek to remove areas of discrimination against homosexuals, gay and lesbian people, we don’t seek to maintain discrimination but there is a special place in Australian society for marriage, the institution of marriage as historically understood, and we do not intend to allow that to be in any way undermined.¹²⁸

- There are alternative and more appropriate ways of recognising same-sex relationships, for example, relationship registration.
- The availability of same-sex marriage does not assist those who may be reluctant to make a public declaration of their sexual orientation. It could therefore further entrench divisions as it creates a divide between those who are married and those who are not.
- Marriage is a patriarchal institution that has been used for the oppression of women.

8.2 Same-sex parenting and assisted reproductive technology

8.2.1 *What are the arguments in support of same-sex parenting?*

- Children with homosexual parents do not differ in terms of sex role identification, happiness, social adjustment, sexual orientation, life satisfaction, and moral and cognitive development.¹²⁹
- Lesbian mothers are just as child-centred as heterosexual mothers, and their children do not exhibit higher rates of psychological disorders.¹³⁰ The sexuality and marital status of a woman does not necessarily bear on the ability of a woman to care for a child.

¹²⁷ Cooper, above n 46, p 164.

¹²⁸ Howard J, Joint Press Conference with the Hon Kevin Andrews MP, and Mr Nicholas Wilson, Executive Director of the Office of Workplace Services, Parliament House, Canberra, 30/3/06. Transcript available from www.pm.gov.au

¹²⁹ Tauber E and Moloney L, ‘How is the issue of lesbian and gay parenting addressed in family reports’, *Australian Journal of Family Law*, 16(3) December 2002, p 187.

¹³⁰ Cooper, above n 46, p 166.

- Courts have recognised that a homosexual parent can be just as effective as a heterosexual parent.
- The law should reflect the identity of those who have formally accepted responsibility for the care of a child.¹³¹
- According to Tobin:

the family can still remain the fundamental unit of society and the optimal place in which all children should be raised and provided with care. But the effective functioning of this unit is not to be assessed by reference to its structure of the sexuality of its members, rather than the capacity of its members to ensure the “healthy development of a child through the provision of a stable, consistent, warm and responsive relationship between a child and his or her care giver”.¹³²

- There is no legitimate basis, in terms of the rights or best interests of the child, for the denial of adoption services or access to assisted reproductive technology for same-sex couples.¹³³
- Permitting same-sex parents to access assisted reproductive technology may assist with the prevention of discrimination against children with same-sex parents.
- Prohibiting access to assisted reproductive technology can encourage self-insemination practices. This raises a number of health and social issues such as the proper screening of donor semen for communicable diseases, and provision of counselling of the potential issues involved regarding ongoing parenting roles.¹³⁴

8.2.2 *What are the arguments against same-sex parenting?*

- Every child needs a male role model and a female role model actively engaged in his or her life: ‘there are certain benchmark institutions and arrangements in our Australian society that you don’t wreck, such as our traditional Aussie marriage and the right of every child to have a male father and a female mother, not two “fathers” or two “mothers”’.¹³⁵

¹³¹ Tobin J, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*, Victorian Law Reform Commission, Melbourne, 2004, p 10.

¹³² Ibid.

¹³³ Ibid, p viii.

¹³⁴ Magri, above n 101, p 7.

¹³⁵ Nile F, ‘Fred Nile says no! to homosexual marriages’, *Media Release*, 8/3/04.

- Same-sex relationships are not an appropriate environment for the care and support of children.
- Same-sex parents could have a detrimental impact on children regarding gender identity and sexual orientation.
- Same-sex relationships distort family values. Children with same-sex parents grow up with gender confusion.¹³⁶
- The children of same-sex couples will have difficulty with social adjustment. The stigmatisation of same-sex relationships can have a detrimental impact on children.
- There may be less social support for a family with same-sex parents, thus increasing the isolation of such a family.
- Same-sex adoption is inconsistent with the right of a child to know and be cared for by his or her genetic parents. A child born as the result of anonymous sperm donation may experience some difficulties later in life in terms of his or her identity.¹³⁷
- Access to assisted reproductive technology should not be made available to those who are not physically infertile, on the basis that it is not appropriate to provide medical treatment to women who do not have a medical condition.¹³⁸

¹³⁶ Collins M, 'Sydney says no to gay adoption', *Southern Cross*, May 2006.

¹³⁷ 'Who Am I?', *Four Corners*, ABC Television, 3/3/06.

¹³⁸ Rickard M, *Is it medically legitimate to provide assisted reproductive treatments to fertile lesbians and single women?*, Commonwealth Parliamentary Library Research Paper 23, 2001.

9 CONCLUSION

The last decade or so has witnessed substantial changes in the legal recognition of same-sex relationships in Australia. Anti-discrimination laws prohibit discrimination on the grounds of sexual orientation and most jurisdictions have defined de facto relationships in such a way as to include same-sex couples. According to Cooper:

The developments around Australia... have shown that, in most State and Territory jurisdictions in Australia, same-sex couples now have equivalent or almost equivalent rights at State and Territory level. Giving same-sex couples the right to legally marry appears to be the last frontier in terms of their bundle of legal rights, along with rights of adoption, which are still recognised in only a minority of jurisdictions.¹³⁹

The recognition of same-sex relationships in Australia is generally on a presumptive basis, that is, no active steps need to be taken for the relationship to be recognised. However, other relationship models, such as relationship registration and civil unions, are starting to emerge. Same-sex couples living in Tasmania have been able to register their relationship since passage of the *Relationships Act 2003* (Tas). People in a same-sex relationship in the ACT will shortly be able to participate in a civil union ceremony as a result of the enactment of the *Civil Unions Act 2006* (ACT), and a civil unions bill will possibly be introduced in the Victorian Parliament in the second half of 2006.¹⁴⁰ Same-sex marriage bills have been introduced in the Tasmanian and NSW Parliaments.

However, the bulk of the changes have occurred in the states and territories. Areas of law remain at the federal level where those in a same-sex relationship are afforded different rights and obligations when compared to heterosexual couples. Some of these areas, notably financial matters, are currently the subject of an inquiry by the Human Rights and Equal Opportunity Commission.

The community remains divided in what it believes is the best approach to same-sex couples and the issues of marriage, adoption and parenting. Debates on these topics frequently elicit strong responses, and can cause tension between the various governments in Australia. The Federal Government recently announced its intention to override the ACT legislation on civil unions. The extent of further change, and the pace at which reform occurs, in relation to the legal recognition of same-sex relationships in Australia, therefore remains to be seen.

¹³⁹ Cooper, above n 46, p 173.

¹⁴⁰ 'Independent MP pushes for government support on gay unions', *AAP*, 8/6/06.

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