

RECOGNITION OF LESBIAN AND GAY FAMILIES IN AUSTRALIAN LAW – PART ONE: COUPLES[∞]

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[∞] This article on same-sex couples, and the one to follow on parents, is dedicated to the memory of Danny Sandor. Danny was widely known and loved in family law circles and will long be remembered as an indefatigable human rights advocate, particularly in the area of children's rights. I want to note here his incredible contribution to the development of gay and lesbian relationship rights in Australia. Danny was directly involved in the Victorian partnership reforms but was also indirectly involved in almost everything that has happened in same-sex family law reform for the past decade, as he helped to generate, cross-pollinate and popularise many of the key ideas behind the reforms. Danny's particular genius was to know everyone, hear everything, and conclude virtually every conversation with a new acquaintance by linking them together with one of his friends or colleagues for a new project.

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I INTRODUCTION

A wide range of state and federal laws recognise and regulate intimate and familial relationships. Such laws include inheritance, immigration, guardianship and superannuation as well as the areas that we traditionally think of as 'family law': property division and disputes over children following relationship breakdown.¹

There is no reliable demographic data on how many adults identify as lesbian or gay in Australia, but there is information to indicate that many lesbians and gay men live in long-term relationships, some of which include children. The Australian census has never asked individuals to identify their sexuality, but in 1996 and 2001 invited people to record if they are living in a same-sex relationship. These figures underestimate the numbers of couples for a variety of reasons: in 1996 the question itself was confusingly worded, and many people were unaware that they were able to record their relationship for the first time. The census does not record couples who do not cohabit. In addition, there are still many same-sex couples who would not feel comfortable recording their relationship on an official document such as a census. An increasing willingness to be open, combined with a more clearly worded question as to relationship status, may explain the fact that the number of same-sex couples recording their relationship in the census doubled from 1996 to 2001.²

In a 2001 survey of 670 lesbians, gay men and transgender people in Victoria, 27 per cent of respondents were not currently in a serious relationship, 14 per cent were in a relationship with a partner they did not live with and 59 per cent were living with their partner. Women were more likely than men to live with their partner (85 per cent of women in a serious relationship cohabited, compared to 73 per cent of men in a serious relationship).³

Lesbians and gay men may have children born into previous heterosexual relationships. Women are also increasingly having children within lesbian relationships, through the use of assisted reproduction. A smaller number of lesbians and gay men may have children through adoption or fostering. Of the same-sex couples who recorded their relationship in the 2001 census, 5 per cent of gay male couples were living with children, while 19 per cent of lesbian couples were living with children.⁴

Prior to 1999, same-sex couples were recognised in only two areas of New South Wales ('NSW') law concerning the rights of victims of crime (from 1996),⁵ and three areas of Australian Capital Territory ('ACT') law concerning property division on

¹ See Reg Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium?' (2000) 24 *Melbourne University Law Review* 737.

² From 10 000 to 20 000 couples: Australian Bureau of Statistics, *Year Book Australia: Feature Article: Same-Sex Couple Families* (2005).

³ Victorian Gay and Lesbian Rights Lobby, *Everyday Experiments: Report of a Survey into Same-Sex Domestic Relationships in Victoria* (2001).

⁴ Australian Bureau of Statistics, above n 2.

⁵ *Victims Support and Rehabilitation Act 1996* (NSW); *Victims Rights Act 1996* (NSW). At that time one other anomalous regulation required disclosure of a same-sex partner's interest: *Protection of the Environment Administration (Disclosure by Board Members) Regulation 1992* (NSW).

relationship breakdown (1994) and inheritance (1996).⁶ In 1998 the exclusion of same-sex couples from all but a tiny handful of such laws led to the conclusion that, '[a]s members of families of choice in which we form partnerships and raise children, we are almost universally ignored'.⁷ There has been an enormous shift in Australian law since that time. Commencing with NSW in 1999, every state and territory except South Australia has undertaken legislative reform affording wide-ranging recognition to gay and lesbian partnerships within their jurisdiction. South Australia has had a Bill before Parliament since 2004 to the same effect, which is likely to be reintroduced in 2006.⁸ These reforms place same-sex partnerships on an equal footing with heterosexual de facto couples in literally hundreds of Acts concerning almost every area of law; although federal law is the notable exception to this trend.

As part of these reforms, Western Australia, the Northern Territory and the ACT also passed laws recognising the relationship of the non-biological mother with her child or children in lesbian-led families; and Western Australia, the ACT and Tasmania provided for the possibility of other parenting avenues for lesbians and gay men such as adoption.

To date very little has been written about these changes and there is no source of information on how these many and varied reforms compare with one another, or indeed how they combine to form a matrix of recognition around Australia. This article will examine recognition of same-sex couples undertaken in recent years by outlining the sequence of reforms in each jurisdiction and their key features, including how the categories of relationship have been defined and the processes by which change has occurred. It will then examine those areas of law where inequality remains, particularly legislation at the federal level that continues to exclude same-sex couples. As this article is focused on relationship and family recognition measures, other important legal developments in a number of Australian jurisdictions during recent years, such as equalisation of discriminatory age of consent provisions, reforms to anti-discrimination laws (including anti-vilification measures), and transgender recognition, will not be addressed.

While this first article focuses on the recognition of couple relationships, a second article to be published in the August issue of this journal will examine issues surrounding parenting for lesbian and gay families. This later piece on children will cover both access to parenting avenues for lesbians and gay men, and also the issue of parental status of children born into non-traditional families. Thus, it will include a discussion of the laws around adoption and surrogacy in Australia, as well as access to fertility services. It will also discuss options for the recognition of non-biological mothers in lesbian families and the legal status of known donors in such families. The

⁶ *Domestic Relationships Act 1994* (ACT); *Family Provision (Amendment) Act 1996* (ACT); *Administration and Probate (Amendment) Act 1991* (ACT). See Jenni Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?' (1998) 12 *Australian Journal of Family Law* 99, 133; Reg Graycar and Jenni Millbank, 'The Bride Wore Pink ... To the *Property (Relationships) Amendment Act 1999*: Relationship Law Reform in New South Wales' (2000) 17 *Canadian Journal of Family Law* 227.

⁷ Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families', above n 6, 102.

⁸ In 2004 and 2005 the South Australian Labor government struggled to pass legislation as it did not control the Legislative Council (Upper House) of Parliament. The various forms of the Bill are discussed below in Section III(h). Following the South Australia election in March 2006, the Labor government now has control of both houses.

second article will examine in detail parenting reforms recently undertaken in Western Australia, the ACT and the Northern Territory (which are noted but not discussed in any detail in this first article) and consider the extent to which such reforms may carry through to other Australian jurisdictions.

II ISN'T SAME-SEX MARRIAGE BANNED?

In contrast to the trend of progressive reform undertaken in the states and territories, the federal government has not amended laws to recognise same-sex relationships in areas within its exclusive power. Until recently, federal law largely discriminated through omission, with the government simply refusing to acknowledge and include lesbian and gay families. However, in recent years, the federal government has also undertaken or proposed a series of reforms hostile to lesbian and gay rights claims, including those traditionally within the state arena. This hostility has been particularly acute regarding parenting issues. For example, in 2000, the federal government tried to reverse the effect of the finding in *McBain v Victoria*⁹ that the legislative exclusion of unmarried women from fertility services was unlawful discrimination on the basis of marital status under the *Sex Discrimination Act 1984* (Cth). While *McBain* was brought on behalf of a single heterosexual woman seeking in vitro fertilisation ('IVF') treatment, much political and public debate focused on lesbian access to fertility services.¹⁰ Although the amendments twice passed the House of Representatives, they were blocked in the Senate.¹¹ These issues are discussed in more detail in the second article from this project.

Given the repeated avowals of the Prime Minister and members of his Cabinet that same-sex couples are neither family nor spouses,¹² it is of interest to contrast two laws passed by federal Parliament in 2004 concerning same-sex relationships. While one

⁹ (2000) 99 FCR 116 (*McBain*); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372. See Kristen Walker, '1950s Family Values vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria' (2000) 11 *Public Law Review* 292; Kristen Walker, 'The Bishops, the Doctor, his Patient and the Attorney-General: The Conclusion of the *McBain* Litigation' (2002) 30 *Federal Law Review* 507.

¹⁰ See Walker, '1950s Family Values vs Human Rights', above n 9; Walker, 'The Bishops, the Doctor, his Patient and the Attorney-General', above n 9. See also, eg, Matt Price and Clara Pirani, 'Demand for IVF Ban on Lesbians', *The Australian* (Sydney), 2 July 2005, 1; Mike Seccombe, 'Women's Group Leads Fight for IVF', *Sydney Morning Herald* (Sydney), 1 May 2001, 4; Victoria Button, 'Legal Bid to Bypass Fertility Ruling', *The Age* (Melbourne), 28 August 2000, 1; Chloe Saltau and Kerry Taylor, 'IVF Rules Face Court Test, Says Doctor', *The Age* (Melbourne), 9 August 2000, 9.

¹¹ The proposed amendments would have allowed states to discriminate on the basis of marital status in their own legislation if they chose to through removing the application of the *Sex Discrimination Act 1984* (Cth) to fertility services. The federal amendments could not themselves mandate such discrimination.

¹² See Maxine McKew, Interview with Ross Cameron and Tanya Plibersek (ABC Lateline, 28 May 2004); Stefanie Balogh, 'PM Vows Gay Marriage Ban', *The Courier-Mail* (Brisbane), 5 August 2004, 1; Editorial, 'Why Prohibit Gay Marriage?', *The Age* (Melbourne), 10 August 2004, 10; Misha Schubert, 'Australia "Soft on Terror, Hard on Gays"', *The Age* (Melbourne), 13 August 2004, 3.

was directed to expressly prohibiting same-sex marriage, another, passed on the same day, expressly defined same-sex couples as 'family'.¹³

The *Anti-Terrorism Act (No 2) 2004* (Cth) specifically amended the definition of 'close family member' under the *Criminal Code 1995* (Cth) to include a same-sex partner.¹⁴ Close family members are protected from the strict liability offence of association with a terrorist.¹⁵ While this is one of a handful of federal laws to include same-sex couples, it is the *only* one of them to do so by expressly defining same-sex partners *as* family. This change was passed on the same day as the marriage ban, sending the mixed message that, although lesbian and gay couples are not spouses in Australian federal law, in the unlikely event that they are terrorists, their family relationships *will* be accorded recognition. Amendments to anti-terrorism laws in 2005 replicated this definition.¹⁶

Amendments to the *Marriage Act 1961* (Cth) were expressed as giving effect 'to the Government's commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same sex relationships cannot be equated with marriage'.¹⁷ The amendments inserted for the first time a statutory definition of marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life' into the Act, which had previously contained no definition of marriage ('the domestic ban').¹⁸ The amendments also altered s 88E to prevent Australian courts from making a declaration of validity concerning a same-sex marriage contracted overseas ('the overseas ban').¹⁹ Such a declaration could have been made under Part VA of the *Marriage Act 1961* (Cth) granting recognition to foreign marriages (enacting Australia's obligations under the Hague marriage convention)²⁰ or

¹³ This latter development is striking when it is noted that all other federal law inclusive of same-sex couples uses non-couple based, open-ended categories such as 'dependant' rather than spouses or family. This is discussed below in Section IV.

¹⁴ *Criminal Code 1995* (Cth) s 102.1 was amended by the *Anti-Terrorism Act (No 2) 2004* (Cth) sch 3. Section 102.1 now provides: 'close family member of a person means:

- (a) the person's spouse, de facto spouse or same-sex partner; or
- (b) a parent, step-parent or grandparent of the person; or
- (c) a child, step-child or grandchild of the person; or
- (d) a brother, sister, step-brother or step-sister of the person; or
- (e) a guardian or carer of the person.'

¹⁵ *Criminal Code 1995* (Cth) s 102.8(4)(a).

¹⁶ See *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 pt 1 s 105.35(3)(a) defining a 'family member' as including a 'same-sex partner'.

¹⁷ Explanatory Memorandum, Marriage Amendment Bill 2004 (Cth) 1. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31459 (Philip Ruddock, Attorney-General).

¹⁸ *Marriage Amendment Act 2004* (Cth) sch 1.

¹⁹ Section 88EA of the *Marriage Act 1961* (Cth) now provides: 'A union solemnised in a foreign country between:

- (a) a man and another man; or
- (b) a woman and another woman;

must not be recognised as a marriage in Australia.'

²⁰ *Convention on Celebration and Recognition of the Validity of Marriages*, open for signature 14 March 1978, 1901 UNTS 131 (entered into force 1 May 1991).

under private international law rules,²¹ although no claim had actually been heard by any court at the time of the amendments.

The necessity of the domestic ban to prevent the 'erosion'²² of marriage was highly questionable, as, although the Act itself had previously contained no definition, it did imply one through another section,²³ and in its absence courts had universally applied the common law definition of marriage as opposite sex.²⁴ There seemed little or no prospect of such a common law definition changing. Although some judges and commentators had expressed the view that the marriage power entitled the Commonwealth to legislate for same-sex marriage,²⁵ there was never a suggestion that the courts themselves were empowered to bring about such change.²⁶ It seems therefore that the domestic ban did little more than highlight, and entrench, the existing exclusory heterosexual aspect of marriage in Australian law.

The other aim of the amendments, to prohibit recognition of overseas marriages, had a far more directly discriminatory effect in that it did not simply entrench the

²¹ See Peter Nygh, 'The Consequences for Australia of the New Netherlands Law Permitting Same Gender Marriages' (2002) 16 *Australian Journal of Family Law* 139.

²² Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31459 (Philip Ruddock, Attorney-General).

²³ Section 46 of the *Marriage Act 1961* (Cth) states that the celebrant should explain the nature of marriage with words that include 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'

²⁴ Drawn from *Hyde v Hyde* (1866) LR 1 P&D 130. Note particularly that in those jurisdictions which have introduced same-sex marriage through court-based challenges, not one has done so through the alteration of the common law meaning of marriage. Rather, courts have affirmed the common law meaning of marriage as exclusively heterosexual, but have held that this definition is unconstitutional: see, eg, the discussion in *Halpern v Canada* (Attorney-General) (2003) 225 DLR (4th) 529. I am indebted to Reg Graycar for this point.

²⁵ See the obiter of McHugh J in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 553. See also Dan Meagher, 'The Times are They A-Changin'? Can the Commonwealth Parliament Legislate for Same Sex Marriages?' (2003) 17 *Australian Journal of Family Law* 134.

²⁶ The only rationale, implied rather than stated in the Bills Digest, was that the common law definition was 'changing/being elucidated': *Marriage Legislation Amendment Bill 2004, Bills Digest* 155, 2-3. The sole support for this claim was a reference to the transgender marriage case of *Re Kevin* (*Validity of Marriage of Transsexual*) (2001) 165 FLR 404; *A-G (Cth) v Kevin* (2003) 172 FLR 300. Kevin was born female but had undergone gender reassignment surgery and had been issued with a birth certificate, ensuing legal status as a male under NSW law. The digest notes that the Family Court held that Kevin was a man for the purposes of the *Marriage Act 1961* (Cth) and declared his marriage to a woman valid, despite the opposition of the Commonwealth Attorney-General as intervenor and appellant. Although possibly an accurate reflection of government concerns, this reference is spurious in the extreme. The Court was not asked to address the question of same-sex marriage, but rather had to answer the question of who was a 'man' for the purpose of the *Marriage Act 1961* (Cth). The Full Court did not question, and indeed expressly reaffirmed, the common law definition of marriage as exclusively opposite-sex, leading to the *contrary* conclusion to that suggested by the memoranda: (2003) 172 FLR 300, 305 [16]. Moreover, the 2004 amendments to the Act do not affect the validity of transgender marriages as they do not define 'man' and 'woman'. Unless hordes of lesbians are waiting in the wings, determined to undergo gender reassignment surgery and a change of gender status under NSW law so that they may marry their girlfriends, then there is no question that the issues of transgender and same-sex marriage are, and remain, wholly unconnected.

status quo. The overseas ban deprived lesbians and gay men of a legal right to which they may otherwise have been entitled, along with any other resident: to have a marriage validly contracted elsewhere recognised within Australia.²⁷ Although it is possible only a small number of same-sex couples would have availed themselves of this opportunity (by, for instance, marrying in Canada,²⁸ returning to Australia and then applying for a declaration of validity from the Family Court), the effect of the ban should not be underestimated. As greater numbers of jurisdictions elsewhere open marriage to same-sex couples, this right could have become increasingly significant.

The combined effect of the domestic and overseas bans was also one of deliberate and specific discrimination. Rather than exclusion by past acts of omission, lesbians and gay men were singled out for differential treatment in legislation and the malice involved in doing so immediately prior to a federal election should not be underestimated.²⁹ Further, the original Bill also included a blanket ban on same-sex couples being eligible to apply for inter-country adoption.³⁰ As same-sex couples are generally ineligible to apply for inter-country adoption in any event (and even the Bill's explanatory memoranda acknowledged this),³¹ the purpose of this appears to have been to formalise and make public existing inequality.

²⁷ Civil marriage is currently open to same-sex couples in the following jurisdictions: the Netherlands, Belgium, Canada, Spain and the state of Massachusetts in the United States. Of these, however, only Canada permits two non-citizens to marry. Many other jurisdictions also grant same-sex couples 'civil unions'. However civil unions do not always ascribe the same status as marriage (for instance reserving certain rights) and even those that do offer substantially the same rights do not necessarily allow portability of status to other jurisdictions.

²⁸ At the time of the ban, the Canadian Provinces of British Columbia, Ontario and Quebec offered civil marriage to same-sex couples following a series of successful constitutional challenges: see *Egale Canada Inc v Canada (Attorney-General)* (2003) 225 DLR (4th) 472; *Halpern v Canada (Attorney-General)* (2003) 225 DLR (4th) 529; *Hendricks v Quebec (Attorney-General)* [2002] RJQ 2506. As a result, the Canadian federal government referred the issue to the Supreme Court of Canada, asking whether the federal government had power to legislate for same-sex marriage and whether any lesser form of recognition such as civil unions would be a breach of constitutional equality guarantees. The Court held in 2004 that the answer to both questions was yes: *Reference re Same-Sex Marriage* [2004] 3 SCR 698. An Act redefining marriage as 'any two persons' was passed on 19 July 2005 and signed immediately into law: see *Civil Marriage Act*, SC 2005, c 33.

²⁹ On 4 August 2004, the National Marriage Coalition (a group comprising right-wing and fundamentalist religious groups such as the Australian Christian Lobby, the Australian Family Association and the Fatherhood Foundation) hosted a 'National Marriage Forum' at Parliament House, Canberra. The forum was addressed by Prime Minister John Howard, (then) Deputy Prime Minister John Anderson, Tasmanian Senator Guy Barnett and Shadow Attorney-General Nicola Roxon.

³⁰ This Bill was referred to a Parliamentary Committee by the Senate on 23 June 2004. This Committee was due to report after the impending federal election. In response, the government excised the adoption provisions and reintroduced the Bill. For a discussion of the positions of various government and opposition members on the Bill, see Polly Bush, *Another Let's-Attack-A-Minority-Group-Wheel of Fortune*, by John Howard (2004) The Sydney Morning Herald <<http://www.smh.com.au/articles/2004/07/30/1091080443475.html>> at 9 January 2006. The ban on eligibility for overseas adoptions may yet be reintroduced now that the government has control of the Senate.

³¹ Explanatory Memorandum, Marriage Amendment Bill 2004 (Cth) 2.

Another, perhaps unintended,³² consequence of the marriage ban was to capture discussion of the possibilities for relationship reform within very narrow parameters – marriage or marriage ban – and to synonymise these with equality/inequality. In the months following the ban, marriage was presented by many as the only way of achieving 'full', 'real' or 'legal' equality for lesbians and gay men.³³ This is a serious error for a whole range of reasons, most of which have been well explored by others elsewhere,³⁴ and so will be only briefly touched upon here.

In this work and elsewhere I argue that relationship recognition for lesbian and gay families should proceed on the basis of what is *needed* by such families rather than by simply assuming that formal equality is the only, or the most desirable, goal.³⁵ Recognition measures that are equality-seeking should be wide-ranging, accessible and simple to use, pragmatic and flexible; offering the broadest array of coverage to the greatest number of people. Sometimes this will require a comparison to, and equal treatment with, heterosexual couples in similar circumstances. But there will also be situations in which same-sex couples want, or need, to be treated differently. A couple of examples illustrate this point.

If marriage included same-sex couples it would be a permanent public record of an individual's sexual orientation. Same-sex couples are still far less likely than heterosexual couples to be publicly open about their relationship; and even if generally 'out', are very rarely open to absolutely everyone in every circumstance.³⁶ Same-sex and opposite-sex couples are not similarly situated in their own or their families' expectations of marriage. They may not have the same array of choices open to them and, even if they do, may not make the same decisions. Marriage or any other opt-in recognition system, if taken alone, would therefore entrench rather than remedy inequality for the very many same-sex couples who did not marry. Same-sex couples are also differently situated when it comes to having and raising children in that unlike most (but not all) heterosexual parents, one parent is not biologically related to the

³² But perhaps not. Labor's pre-election promise that it would grant same-sex couples comprehensive de facto recognition at the federal level seems to have been entirely lost in the furore surrounding their lack of opposition to the marriage ban. See Polly Bush, *Liberal and Labor Wedged on 'Gay Marriage'* (2004) *The Sydney Morning Herald* <http://webdiary.smh.com.au/archives/polly_bush/000260.html> at 9 January 2006.

³³ See, eg, statements on the Australian Marriage Equality website <<http://www.australianmarriageequality.com>> at 9 January 2006.

³⁴ See, eg, Paula Ettelbrick, 'Avoiding a Collision Course in Lesbian and Gay Family Advocacy' (2000) 17 *New York Law School Journal of Human Rights* 753; Nancy Polikoff, 'We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"' (1993) 79 *Virginia Law Review* 1535; Ruthann Robson, 'Mostly Monogamous Moms?: An Essay on the Future of Lesbian Legal Theories and Reforms' (2000) 17 *New York Law School Journal of Human Rights* 703; Nancy Polikoff, 'Ending Marriage as We Know It' (2003) 32 *Hofstra Law Review* 201; Susan Boyd and Claire Young, 'From Same-Sex to No Sex?': Trends Towards Recognition of (Same-Sex) Relationships in Canada' (2003) 1 *Seattle Journal for Social Justice* 757.

³⁵ See, eg, Jenni Millbank and Kathy Sant, 'A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW' (2000) 22 *Sydney Law Review* 181, 198–9; Graycar and Millbank, 'The Bride Wore Pink', above n 6.

³⁶ See Gail Mason, *The Spectacle of Violence: Homophobia, Gender and Knowledge* (2002) 78–95.

child. Marriage between the parents would *not* necessarily alter the comprehensive lack of legal relationship between the non-biological parent and child.³⁷

Marriage is associated with one-stop, comprehensive, high-status relationship recognition because this is what it has been for heterosexual people in recent decades.³⁸ The real utility of marriage is that it would flow on to all areas of state law regulating relationships. But now that all states and territories already provide comprehensive recognition of both heterosexual and same-sex cohabiting relationships, the need for this flow-on is largely obviated, leaving only the problem of exclusively heterosexual federal laws. Federal recognition of same-sex relationships as *de facto* couples is another option: one that would actually have a wider effect than marriage, as it would cover all of those who did not marry and so, arguably, would be a more substantively 'equal' result for equality seekers than the formal equality of marriage eligibility.

There are many other arguments that can and should be made about the recent quest for marriage in Australia, but space does not permit them to be addressed here. The essential point of this discussion is that while marriage may be legitimately desired by some lesbians and gay men for personal, social or symbolic reasons, it cannot be the only yardstick of legal equality and should not be the only discourse of reform. Further, given that a large number of laws regulating Australian families are state rather than federal, the marriage ban, however egregious, should not overshadow the fact that all state and territory laws in this period have become vastly more inclusive of lesbian and gay couples and families.

III STATE AND TERRITORY LEGISLATIVE ACTION

A NSW

In 1994, the Gay and Lesbian Rights Lobby of NSW ('GLRL') proposed a dual recognition system, incorporating same-sex cohabiting couples within the existing comprehensive *de facto* relationship regime and creating a new category for other significant relationships that would not require the parties to be a couple or to cohabit.³⁹ This latter category would operate in a more limited range of areas.

In 1996, NSW amended two laws that concern the rights of victims of crimes and their families to include a same-sex partner within the definition of 'immediate family'.⁴⁰ This change did not appear to be part of any wider government policy at the

³⁷ Moreover, any recognition that did hinge on marriage alone would further entrench discrimination against unmarried same-sex parents.

³⁸ It is important to note that in the not-so-distant past marriage was a status that largely *deprived* women of rights: such as the right to work in the public service, to refuse consent to sex with her husband, to maintain her own citizenship, and hold her own property: see, eg, Reg Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd ed, 2002) 91-6.

³⁹ Hayley Katzen and Madeline Shaw for the Lesbian and Gay Legal Rights Service, *The Bride Wore Pink* (2nd ed, 1994). See Graycar and Millbank, 'The Bride Wore Pink', above n 6 for discussion.

⁴⁰ These were: *Victims Support and Rehabilitation Act 1996* (NSW) s 9; *Criminal Procedure Act 1986* (NSW) s 23A (since repealed).

time, and was instead the result of an amendment made to legislation that was being debated for other reasons.⁴¹

Two private members' Bills were proposed to grant comprehensive rights to same-sex couples. In 1997, Independent Clover Moore put forward a dual presumption and registration model that would cover both couples and non-couples; and in 1998, the NSW Democrats proposed a Bill incorporating the GLRL comprehensive de facto couple plus limited non-couple model. Neither Bill was debated.⁴²

In 1999, NSW became the first state to pass legislation amending a wide range of laws simultaneously to include same-sex couples. The *Property (Relationships) Legislation Amendment Act 1999* (NSW) inserted a new definition of de facto relationship into what had been the *De Facto Relationships Act 1984* (NSW) (now renamed the *Property (Relationships) Act 1984* (NSW))⁴³ and applied the definition to 20 other pieces of legislation concerning matters such as guardianship, inheritance,⁴⁴ accident compensation, stamp duty and decision-making in illness and after death. The Act was narrower than that posed by the GLRL or either of the preceding private members' Bills in a number of respects, including the lesser number of Acts amended and a narrower application and definition of the non-couple category. It was, however, the first such reform, and later reforms built on and widened this original raft.

A de facto relationship⁴⁵ was redefined as 'two adult persons' who 'live together as a couple' and 'are not married to one another or related by family'.⁴⁶

The Act lists factors that can be taken into account when deciding whether a couple is in a de facto relationship.⁴⁷ These include:

- the duration of the relationship;
- the nature and extent of common residence;

⁴¹ The amendment was put forward by the NSW Shooters Party. See New South Wales, *Parliamentary Debates*, Legislative Council, 21 November 1996, 6386–90 (John Tingle).

⁴² A detailed exploration has been published elsewhere and so will not be repeated here: see Millbank and Sant, 'A Bride in Her Every-Day Clothes', above n 35.

⁴³ Decisions regarding same-sex couples under the *Property (Relationships) Act 1984* (NSW) include: *Michaelopoulos v Pomeroy* [2004] NSWSC 939 (Unreported, Master McLaughlin, 12 October 2004); *Mair v Hastings* [2002] NSWSC 522 (Unreported, Master Macready, 31 May 2002); *Dridi v Fillmore* [2001] NSWSC 319 (Unreported, Master Macready, 30 April 2001). An attempt to make an application under the Act failed in *Penzikis v Brown* [2005] NSWSC 215 (Unreported, Master Macready, 30 March 2005) because the relationship ended before the 1999 amendments commenced.

⁴⁴ Decisions regarding same-sex couples under family provision since the amendments include: *Hooper v Winten* [2002] NSWSC 1071 (Unreported, Windeyer J, 13 November 2002); *Devonshire v Hyde* [2002] NSWSC 30 (Unreported, Master Macready, 13 February 2002).

⁴⁵ Note that the amendments created within the *Property (Relationships) Act 1984* (NSW) a confusing overarching category of 'domestic relationship' which then contained the subcategories of 'de facto' (couple) and 'close personal relationship' (non-couple) within it. This structure was not replicated in the bulk of the other amended Acts (although it was replicated in the *Powers Of Attorney Act 2003* (NSW) and also in the *Crimes Act 1900* (NSW) through amendments made by the *Crimes Amendment (Apprehended Violence) Act 1999* (NSW) and *Crimes Amendment (Police and Other Law Enforcement Officers) Act 2002* (NSW)).

⁴⁶ *Property (Relationships) Act 1984* (NSW) s 4(1).

⁴⁷ *Property (Relationships) Act 1984* (NSW) s 4(2). The criteria were drawn from *D v McA* (1986) 11 Fam LR 214, 227 (Powell J).

- whether or not a sexual relationship exists;
- the degree of financial dependence or interdependence;
- any arrangements for financial support between the parties;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- the care and support of children;
- the performance of household duties; and
- the reputation and public aspects of the relationship.

No one factor is required to find that a de facto relationship exists.⁴⁸

This set of criteria (in identical or near-identical versions) was later adopted by all other jurisdictions when they passed comprehensive recognition laws. This is noteworthy, given that the actual definition of de facto relationship and the terminology used (eg domestic partner, significant relationship) have varied considerably across the jurisdictions. The use of common criteria therefore suggests a higher degree of uniformity than appears on the surface – if a significant relationship and a de facto relationship, however defined, are to be assessed by exactly the same criteria it seems unlikely that they would be held ultimately to differ in any important respect such that a couple were held to meet the definition of one state's laws and not that of another.

Cohabitation is required under NSW law, but a specific period of cohabitation is only required for a small number of laws relating to property division and inheritance,⁴⁹ and not for any of the other myriad Acts. In property division there is also discretion to waive this requirement if it would impose undue hardship on an applicant.⁵⁰ This approach is common to the later reforms of all other jurisdictions, with the exception of the South Australian Bill, which poses a three year cohabitation requirement for de facto relationship status in the operation of all state law.

It is notable that the 1999 amending Act dropped the term 'spouse' which had previously been used (ie 'de facto spouse') and replaced it with 'partner' or 'relationship' to emphasise that there remains a difference between marriage and same-sex partnerships.⁵¹ However 'spouse' is still commonly used in various substantive Acts, which then include a definition stating that spouse includes de facto relationships and a reference to the *Property (Relationships) Act 1984* (NSW) definition of de facto relationship. Thus same-sex couples are defined as spouses, but not directly, rather the link to spousal status is simply once removed.

⁴⁸ See Sant and Millbank, 'A Bride in Her Every-Day Clothes', above n 35, 191–2 for a critique of the criteria, particularly 'reputation and public aspects'.

⁴⁹ See *Property (Relationships) Act 1984* (NSW) s 17; *Wills, Probate and Administration Act 1898* (NSW) s 61B; *Insurance Act 1902* (NSW) s 3; *Protected Estates Act 1983* (NSW) s 4; *Trustee Act 1925* (NSW) s 45(11).

⁵⁰ *Property (Relationships) Act 1984* (NSW) s 17(2).

⁵¹ See *Property (Relationships) Act 1984* (NSW) s 62 which states that '[n]othing in the *Property (Relationships) Legislation Amendment Act 1999* is to be taken to approve, endorse or initiate any change in the marriage relationship, which by law must be between persons of the opposite sex, nor entitle any person to seek to adopt a child unless otherwise entitled to by law.'

The 1999 amendments also created a new category of 'close personal relationship', intended to cover close cohabiting relationships of interdependence across a small number of laws.⁵² This category of relationship is defined as:

a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.⁵³

This category was drafted more narrowly than the definition of domestic partner in the ACT, both in its requirement of cohabitation and of 'personal care' (where the ACT legislation required only 'personal or financial commitment').⁵⁴ In most of the small number of cases in which it has been litigated, the NSW category of close personal relationship has been restrictively defined by the court as requiring proof both of domestic support *and* personal care. In the first case in 2001, ex-lovers in a same-sex relationship who remained living together were held not to be in a close personal relationship.⁵⁵ While 'domestic support' was interpreted as including the prosaic domestic activities of shared cooking, shopping or washing of clothes, 'personal care' was very narrowly defined as requiring 'assistance with mobility, personal hygiene and physical comfort'.⁵⁶ It would be rare indeed for any able-bodied adult to require

⁵² *Bail Act 1978* (NSW); *Coroners Act 1980* (NSW); *Duties Act 1997* (NSW); *Family Provision Act 1982* (NSW); *Trustee Act 1925* (NSW).

⁵³ *Property (Relationships) Legislation Amendment Act 1999* (NSW) s 5(1)(b). Section 5(2) clarifies that,

[f]or the purposes of subsection (1)(b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:

(a) for fee or reward, or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

⁵⁴ Section 3(1) of the *Domestic Relationships Act 1994* (ACT) defines domestic relationship to mean 'a personal relationship between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other and includes a domestic partnership but does not include a legal marriage.' Also note that the later ACT reforms did not use this broad definition, although continuing to use the terminology of domestic, they effectively reverted to a de facto category.

⁵⁵ *Dridi v Fillmore* [2001] NSWSC 319 (Unreported, Master Macready, 30 April 2001). But see obiter remarks suggesting that former lovers who remained cohabiting in an emotionally and financially interdependent relationship may satisfy the close personal relationship category in *Penzikis v Brown* [2005] NSWSC 215 (Unreported, Master Macready, 30 March 2005).

⁵⁶ *Dridi v Fillmore* [2001] NSWSC 319 (Unreported, Master Macready, 30 April 2001) [108]. Master Macready repeated this holding in a family provision case: see *Devonshire v Hyde* [2002] NSWSC 30 (Unreported, Master Macready, 13 February 2002). This approach was approved in *Hinde v Bush* [2002] NSWSC 828 (Unreported, Acting Master Berecny, 13 September 2002) but was not referred to in the family provision case of *Przewoznik v Scott* [2005] NSWSC 74 (Unreported, McDougall J, 4 February 2005) where McDougall J held that a heterosexual relationship that did not manifest sufficient mutual commitment to satisfy the requirements of the de facto relationship category was in fact sufficient to qualify as a close personal relationship. In a marked departure from the earlier cases that suggest the category is still ill-defined, the Court held that the 'dividing point' between de facto and close personal relationships lay in 'the degree of mutual commitment and interdependence' at [18].

such assistance, thus 'personal care' could severely limit the applicability of the category, excluding a wide range of non-traditional relationships.

In 1999, the NSW Legislative Council Standing Committee on Social Issues ('NSW Social Issues Committee') released a report on same-sex relationship recognition in which it recommended, in addition to other matters since acted upon, broadening the definition of the domestic/non-couple relationship category to cover non-cohabitantes as well as increasing the number of Acts under which they are covered.⁵⁷ At the time, a restrictive interpretation of the category to relationships between disabled people and their carers does not seem to have been contemplated. The NSW Social Issues Committee also recommended amendments to the *Anti-Discrimination Act 1977* (NSW) to specifically cover same-sex and domestic relationships and a full examination of the laws relating to children and their non-biological parents, to ensure that such children are not disadvantaged.⁵⁸

In response, the NSW Attorney-General referred the NSW Social Issues Committee's recommendations and other questions on relationship law to the NSW Law Reform Commission in 1999. The Commission issued a Discussion Paper in 2002, but several matters raised in it were overtaken by legislative reform during the reference process.⁵⁹ It is expected that the Commission will issue a report, recommending a same-sex couple registration system and other reforms regarding parenting recognition, some time in 2006.

In the meantime, some ad hoc amendments took place in NSW. For example, the *Superannuation Legislation Amendment (Same Sex Partners) Act 2000* (NSW) included same-sex partners of employees in state government superannuation schemes.⁶⁰ Then in 2002 the disarmingly titled *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW) brought a second major raft of reforms, amending a further 27 NSW laws to include same-sex couples as de facto partners principally in the area of surviving partner entitlements to inheritance of interests such as residential leases and employment benefits (such as the right to a deceased partner's unpaid leave).⁶¹

⁵⁷ Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Domestic Relationships: Issues for Reform - Inquiry into De Facto Relationships Legislation* (1999) recommendations 7, 14–15.

⁵⁸ *Ibid* recommendations 12, 22–3. The Committee also recommended a request to the federal government to amend federal child support legislation to cover same-sex co-parents in the same manner as opposite-sex parents and step-parents.

⁵⁹ New South Wales Law Reform Commission, *Review of the Property Relationships Act 1984* (NSW), Discussion Paper No 44 (2002). For instance, key questions were the scope of application of the new definition of de facto relationship and the basis upon which property division took place, but a great number of other NSW laws were amended in 2002 to include the new definition and, in 2003, NSW referred power over de facto couple property matters to the Commonwealth.

⁶⁰ The Act amended: *Parliamentary Contributory Superannuation Act 1971* (NSW); *Police Association Employees (Superannuation) Act 1969* (NSW); *Police Regulation (Superannuation) Act 1906* (NSW); *State Authorities Non-contributory Superannuation Act 1987* (NSW); *State Authorities Superannuation Act 1987* (NSW); *Superannuation Act 1916* (NSW).

⁶¹ The *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW) amended: *Adoption Act 2000* (NSW); *Adoption Information Act 1990* (NSW); *Conveyancers Licensing Act 1995* (NSW); *Credit Act 1984* (NSW); *Crimes (Administration of Sentences) Act 1999* (NSW); *Criminal Procedure Act 1986* (NSW); *Defamation Act 1974* (NSW); *Dentists Acts 1989* (NSW); *Electricity*

A third raft of reforms is anticipated in 2006, covering areas such as parenting recognition and the inclusion of 'relationship status' in anti-discrimination law, thereby implementing most of the remaining major recommendations of the 1999 NSW Social Issues Committee's Report, with the exception of those concerning the broadening of the definition, and scope of operation, of the 'domestic relationship' category.

All of the above reforms were passed by a Labor government. The opposition Liberal Party did not oppose the 1999 reforms and abstained from voting. Their coalition partners, the National Party, vocally opposed same-sex relationship recognition and only supported the non-couple category, although no votes were eventually cast against the Bill. The NSW Liberals also did not oppose the 2000 or 2002 reforms.

The major remaining area of inequality for same-sex couples in NSW law, not expected to change in the near future, is exclusion from eligibility to apply to adopt children as a couple. Lesbian and gay couples cannot apply to adopt an unrelated child, nor can they use step-parent adoption provisions to adopt the biological child of one partner.⁶² Lesbians and gay men are eligible to apply as individuals, but such adoptions are very rare.⁶³

B Victoria

In 1997 the Equal Opportunity Commission of Victoria ('EOCV') released a discussion paper on same-sex relationships, suggesting a range of options for recognition,⁶⁴ and in a 1998 report recommended a combination of comprehensive de facto relationship cover with an additional option of registration for both same-sex and opposite-sex couples.⁶⁵ The report also recommended a further inquiry and community consultation before making any changes to access to fertility services and adoption laws.

While in opposition, Labor gave a commitment to implement the EOCV report. In May 1999 John Thwaites (in opposition at that time, now Deputy Premier) sought to introduce a private member's Bill to grant comprehensive de facto recognition to same-

(*Pacific Power*) Act 1950 (NSW); *Health Insurance Levies Act* 1982 (NSW); *Industrial Relations Act* 1996 (NSW); *Landlord and Tenant Act* 1899 (NSW); *Landlord and Tenant (Amendment) Act* 1948 (NSW); *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW); *Legal Profession Act* 1987 (NSW); *Local Courts (Civil Claims) Act* 1970 (NSW); *Motor Vehicles Taxation Act* 1988 (NSW); *Police Service Act* 1990 (NSW); *Public Sector Management Act* 1988 (NSW); *Residential Tenancies (Residential Premises) Regulation* 1995 (NSW); *Road Transport (Heavy Vehicles Registration Charges) Act* 1995 (NSW); *Road Transport (Vehicle Registration) Regulation* 1998 (NSW); *Sporting Injuries Insurance Act* 1978 (NSW); *Teaching Services Act* 1980 (NSW); *Transport Administration Act* 1988 (NSW); *Trustee Companies Act* 1964 (NSW).

⁶² Pursuant to s 26 of the *Adoption Act* 2000 (NSW), an adoption order can only be made in favour of one person or a couple. A couple is defined in the dictionary to be a man and a woman who are either married or in a de facto relationship. Step-parent is similarly limited to the married or heterosexual de facto partner of the birth parent. This issue is discussed in more detail in the second article from this project, in the August issue of this journal.

⁶³ See the second article in this series for a detailed explanation.

⁶⁴ Equal Opportunity Commission of Victoria, *Same Sex Relationships and the Law*, Discussion Paper (1997).

⁶⁵ Equal Opportunity Commission of Victoria, *Same Sex Relationships and the Law*, Report (1998).

sex couples, but the government prevented it from being tabled and it was never debated.⁶⁶ Labor assumed government in October 1999 and immediately established an Advisory Committee on Gay, Lesbian and Transgender issues.⁶⁷ It also referred fertility and adoption issues to the newly re-established Law Reform Commission. In 2000 the Advisory Committee reported, outlining areas of inequality and options for reform (unlike earlier reports it included transgender issues) in which it raised the possibility of not limiting rights to cohabitants and/or extending rights to some interdependent non-couple relationships.⁶⁸ The registration option posed in 1998 was not pursued in the 2000 Advisory Committee report, which focused solely on presumptive recognition.

Largely based on the Advisory Committee's recommendations, the *Statute Law Amendment (Relationships) Act 2001* (Vic) – and a few months later the *Statute Law Further Amendment (Relationships) Act 2001* (Vic) – together changed over 60 pieces of law in Victoria to include cohabiting same-sex couples as 'domestic partners' on the same basis as unmarried heterosexual couples.⁶⁹

'Domestic partner' is defined as a person:

⁶⁶ Equal Opportunity (Same Sex Relationships) Bill 1999 (Vic).

⁶⁷ For a discussion of the Victorian process, including the involvement of the Victorian Gay and Lesbian Rights Lobby, see: Miranda Stewart, 'It's a Queer Thing: Campaigning for Equality and Social Justice for Lesbians and Gay Men' (2004) 29(2) *Alternative Law Journal* 75.

⁶⁸ Attorney-General's Advisory Committee on Gay, Lesbian and Transgender Issues, Victoria, *Reducing Discrimination Against Same Sex Couples*, Discussion Paper (2000).

⁶⁹ Acts amended by the *Statute Law Amendment (Relationships) Act 2001* (Vic): *Administration and Probate Act 1958* (Vic); *Duties Act 2000* (Vic); *First Home Owner Grant Act 2000* (Vic); *Land Act 1958* (Vic); *Land Acquisition and Compensation Act 1986* (Vic); *Land Tax Act 1958* (Vic); *Landlord and Tenant Act 1958* (Vic); *Perpetuities and Accumulations Act 1968* (Vic); *Property Law Act 1958* (Vic); *Residential Tenancies Act 1997* (Vic); *Retail Tenancies Reform Act 1998* (Vic); *Sale of Land Act 1962* (Vic); *Stamps Act 1958* (Vic); *Wills Act 1997* (Vic); *Accident Compensation Act 1985* (Vic); *Education Act 1958* (Vic); *Police Assistance Compensation Act 1968* (Vic); *Transport Accident Act 1986* (Vic); *Country Fire Authority Act 1958* (Vic); *Emergency Services Superannuation Act 1986* (Vic); *Parliamentary Salaries and Superannuation Act 1968* (Vic); *State Employees Retirement Benefits Act 1979* (Vic); *State Superannuation Act 1988* (Vic); *Superannuation (Portability) Act 1989* (Vic); *Transport Superannuation Act 1988* (Vic); *Alcoholics and Drug-dependent Persons Act 1968* (Vic); *Coroners Act 1985* (Vic); *Health Records Act 2001* (Vic); *Human Tissue Act 1982* (Vic); *Mental Health Act 1986* (Vic); *Crimes (Family Violence) Act 1987* (Vic); *Victims of Crime Assistance Act 1996* (Vic); *Co-operative Housing Societies Act 1958* (Vic); *Goods Act 1958* (Vic); *Motor Car Traders Act 1986* (Vic); *Partnership Act 1958* (Vic); *Prostitution Control Act 1994* (Vic); *Retirement Villages Act 1986* (Vic); *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic); *Trustee Companies Act 1984* (Vic); *Equal Opportunity Act 1995* (Vic); *Guardianship and Administration Act 1986* (Vic). Acts amended by the *Statute Law Further Amendment (Relationships) Act 2001* (Vic): *Architects Act 1991* (Vic); *Children and Young Persons Act 1989* (Vic); *Conservation, Forests and Lands Act 1987* (Vic); *Corrections Act 1986* (Vic); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic); *Discharged Servicemen's Preference Act 1943* (Vic); *Estate Agents Act 1980* (Vic); *Firearms Act 1996* (Vic); *Meat Industry Act 1993* (Vic); *Racing Act 1958* (Vic); *Water Act 1989* (Vic); *Witness Protection Act 1991* (Vic).

to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender).⁷⁰

Although using the terminology of 'domestic' rather than 'de facto', the categories appear to be similar if not identical; Victoria inserted the NSW list of factors to be considered in determining whether a relationship exists.⁷¹ Like NSW, Victoria dropped the use of 'de facto spouse' in order to emphasise that marriage was not altered. In the second reading speech for the Statute Law Amendment (Relationships) Bill 2000, the Attorney-General stated:

In recognising non-heterosexual relationships in a non-discriminatory way, this bill does not encroach on the status of marriage. Indeed, quite the contrary.

It does treat non-marriage relationships without discrimination on the basis of gender or sexual orientation, but it does not alter the definition of spouse in state legislation. Or rather, it restores the definition of spouse to its original meaning, as a party to a marriage, and removes the various extended definitions in some statutes which had blurred that meaning.⁷²

As in NSW, a pre-requisite of cohabitation for a period of two years is only required for property division and inheritance legislation. Unlike NSW (which specifies 'adult' persons) it is possible that parties under the age of 18 may qualify as domestic partners in Victoria.

These reforms also included a new category of relationship involving non-cohabitantes. Confusingly, this category was also denoted 'domestic relationship'. This broader category of domestic partner is defined as:

An adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial support of a domestic nature for the material benefit of the other, irrespective of gender and whether or not they are living under the same roof.⁷³

This category is broader in definition than that found in NSW in that it does not require 'personal care' and adopts the ACT requirement of 'personal or financial support'. It is also broader in definition than the NSW equivalent in not requiring cohabitation, but is narrower than both NSW and the ACT in that it is solely focused on couples. However, the application of this category is significantly broader than in either NSW (where 'domestic relationship' was given operation in only eight Acts) and the ACT (three Acts) as in Victoria it applies to 31 Acts, including most health-related legislation, criminal law and disclosure and licensing legislation.⁷⁴ Thus Victoria

⁷⁰ *Property Law Act 1958* (Vic) s 275(1).

⁷¹ *Property Law Act 1958* (Vic) s 275(2).

⁷² Victoria, *Parliamentary Debates*, 23 November 2000, 1911-2 (Rob Hulls, Attorney-General).

⁷³ *Property Law Act 1975* (Vic) s 275(1). Note that this is expressed so as not to include someone who provides 'domestic support and personal care' for fee or reward.

⁷⁴ The following acts were amended by the 2001 reforms: *Alcoholics and Drug-dependent Persons Act 1968* (Vic); *Coroners Act 1985* (Vic); *Health Records Act 2001* (Vic); *Human Tissue Act 1982* (Vic); *Crimes (Family Violence) Act 1987* (Vic); *Victims of Crime Assistance Act 1996* (Vic); *Co-operative Housing Societies Act 1958* (Vic); *Motor Car Traders Act 1986* (Vic); *Partnership Act 1958* (Vic); *Prostitution Control Act 1994* (Vic); *Retirement Villages Act 1986* (Vic); *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic); *Trustee Companies Act 1984* (Vic); *Guardianship and Administration Act 1986* (Vic); *Architects Act 1991* (Vic); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic); *Discharged Servicemen's Preference Act 1943* (Vic); *Estate Agents Act 1980* (Vic); *Firearms Act 1996* (Vic); *Legal Practice Act 1996* (Vic);

stands out as the first jurisdiction to offer wide recognition to non-cohabiting couples (followed two years later by Tasmania, which extended the coverage even further).

These reforms were introduced by the Labor government and supported by the Liberal Party in opposition, but opposed by their coalition partner, the National Party.

Like NSW, Victoria did not include adoption laws in the amendments, maintaining an exclusion of same-sex couples from eligibility.⁷⁵ Although individuals may apply to adopt in Victoria, the law provides that they will only be considered in exceptional circumstances.⁷⁶ However, the government referred the question of access to adoption and assisted reproductive technologies — as well as surrogacy and the issue of parental status of children born through assisted means — to the Victorian Law Reform Commission ('VLRC').⁷⁷ In Position Paper Two published by the Commission, it made the interim recommendation that same-sex couples be eligible for all forms of adoption orders on the same basis as heterosexual couples.⁷⁸

In Victoria, access to donor insemination and IVF was limited by legislation to married couples and heterosexual de facto couples prior to the *McBain* challenge (and has effectively been limited to them since through a restrictive definition of 'infertility'). The 2001 relationship reforms did not alter this. In late 2003 the VLRC issued a consultation paper on access to assisted reproductive technologies⁷⁹ and in 2004 issued an informative series of background papers on social and comparative law aspects of the topic.⁸⁰ Position Paper One on reproductive technologies includes interim recommendations that access to fertility services should not entail discrimination on the basis of marital status or sexuality; rather it should be based on whether a woman is 'unlikely to conceive' without such treatment, a criterion that can be met by single heterosexual women and single and coupled lesbians.⁸¹ It also recommends that prohibitions on self-insemination be abolished.⁸² A final report will be issued in mid-2006, and it is unknown at the time of writing whether these recommendations will be pursued or are likely to be enacted.

Meat Industry Act 1993 (Vic); Racing Act 1958 (Vic); Water Act 1989 (Vic); Witness Protection Act 1991 (Vic); Road Safety Act 1986 (Vic); Magistrates Court Act 1989 (Vic); Liquor Control Reform Act 1998 (Vic); Local Government Act 1989 (Vic); Wrongs Act 1958 (Vic); Fair Trading Act 1999 (Vic); Gambling Regulation Act 2003 (Vic); Health Services Act 1988 (Vic).

⁷⁵ Section 11(1) of the *Adoption Act 1984 (Vic)* sets out that an adoption order may only be made in favour of a man and a woman.

⁷⁶ *Adoption Act 1984 (Vic)* s 11(3).

⁷⁷ The reference was made on 11 October 2002. For terms of reference see Victorian Law Reform Commission <<http://www.lawreform.vic.gov.au>> at 13 December 2005.

⁷⁸ Victorian Law Reform Commission, *Assisted Reproductive Technologies and Adoption, Position Paper Two: Parentage* (2005), interim recommendations 26–7.

⁷⁹ Victorian Law Reform Commission, *Assisted Reproduction & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?* Consultation Paper (2003).

⁸⁰ Ruth McNair, *Outcomes for Children Born of ART in a Diverse Range of Families*, Discussion Paper (2004); John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*, Discussion Paper (2004); John Seymour, *ART, Surrogacy and Legal Parentage: A Comparative Legislative Review*, Discussion Paper (2004).

⁸¹ Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Position Paper One: Access* (2005), interim recommendations 11–15, at 19–22.

⁸² *Ibid* interim recommendation 18.

C Queensland

In 1993, in two separate inquiries, the Queensland Law Reform Commission ('QLRC') recommended the creation of a property division regime to include both opposite sex and same-sex couples and alteration of existing intestacy rules to include same-sex couples.⁸³ It is notable that the QLRC was the first law reform commission in Australia to highlight the exclusion of same-sex couples in the course of a general review of an area of law, and recommend equality-based reforms. The community group Queensland Association for Gay and Lesbian Rights lobbied for recognition of same-sex couples in Queensland law through the mid-1990s onwards.

Labor assumed office in Queensland in 1998 and in December 1999 a property division regime was enacted, implementing the recommendations of the QLRC by being open to all unmarried couples.⁸⁴ Also in 1999, Queensland introduced a gender-neutral definition of 'de facto relationship' in industrial law concerning access to parental leave⁸⁵ and in legislation concerning domestic violence protective orders.⁸⁶ These few pieces of apparently unrelated legislation could best be described as the 'toe in the water' approach, testing public reaction before being followed some years later by comprehensive reform.

The approach of the opposition to these changes was mixed: the Queensland Liberals opposed the industrial relations reforms, did not oppose the domestic violence changes, and then allowed a conscience vote on the de facto property regime.

These statutes all defined same-sex couples as 'spouses' in various ways, in contrast to the existing approach in NSW of creating a new category of 'partner'. So, for example, in Queensland industrial law 'spouse' was redefined as including 'a de facto spouse, including a spouse of the same sex as the employee',⁸⁷ while in domestic violence⁸⁸ and property division legislation⁸⁹ 'spouse' was redefined as:

either 1 of 2 persons, whether of the same or the opposite sex, who are living or have lived together as a couple⁹⁰

⁸³ Queensland Law Reform Commission, *De Facto Relationships*, Report No 44 (1993); Queensland Law Reform Commission, *Intestacy Rules*, Report No 42 (1993).

⁸⁴ See *Property Law Amendment Act 1999* (Qld) s 260.

⁸⁵ *Industrial Relations Act 1999* (Qld) Pt 2 Div 3 grants various leave rights to parents and spouses.

⁸⁶ *Domestic Violence (Family Protection) Amendment Act 1999* s 7 amending *Domestic Violence (Family Protection Act) 1989* s 12.

⁸⁷ *Industrial Relations Act 1999* (Qld) sch 5. This definition has since been removed.

⁸⁸ *Domestic Violence (Family Protection) Amendment Act 1999* (Qld) s 7 amending *Domestic and Family Violence Protection Act 1989* (Qld) s 12(1)(c). Further to this, s 12(1A) provides: 'For subsection (1)(c), 2 persons are a couple if they reside together in a relationship that is normally considered by the community to indicate that they are a couple.' Section 12(1B) adds: 'A relationship mentioned in subsection (1A) is one formed on the basis of intimacy, trust and personal commitment and does not include, for example, a relationship where the 2 persons are merely cotenants.' Section 12(1) was amended further by the *Discrimination Law Amendment Act 2002* (Qld), discussed below in more detail.

⁸⁹ *Property Law Amendment Act 1999* (Qld) s 7, amending *Property Law Act 1974* (Qld) s 260(1) to insert the new definition contained in s 32DA(6) of the *Acts Interpretation Act 1954* (Qld). This means that s 260(2) reflects s 12(1B) above but there is no equivalent of s 12(1A).

⁹⁰ *Property Law Act 1974* (Qld) s 260(1). Similar wording was used to amend s 12(1)(c) of the *Domestic and Family Violence Protection Act 1989* (Qld).

adding that:

2 persons are a couple if they live together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment to each other.⁹¹

Another unusual feature of the Queensland process was that it included (limited) parental rights in the first raft of reforms; elsewhere these have generally been left to a later stage in the process.

Comprehensive reform followed three years later with the *Discrimination Law Amendment Act 2002* (Qld), which amended 45 Acts to include same-sex couples as 'de facto partners'.⁹² A wider range of laws was amended by virtue of a provision altering the *Acts Interpretation Act 1954* (Qld)⁹³ such that in all Queensland state legislation any reference to spouse is taken to include a de facto partner unless the substantive Act expressly provides to the contrary. While in opposition, the Liberals officially supported the reforms, although some Opposition members nevertheless voted against them on the basis that there had been insufficient public consultation.

These 2002 reforms departed from the earlier piecemeal amendments in the definition of de facto relationship. As with NSW, the use of 'de facto spouse' was dropped in favour of 'partner'. A definition almost identical to the NSW category was adopted, being:

either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.⁹⁴

In NSW the avoidance of the word 'spouse' was an attempt to appease opponents of reform who argued that it was 'same-sex marriage'.⁹⁵ It is surprising that this differential terminology was pursued in Queensland, given that it had already used

⁹¹ *Property Law Act 1974* (Qld) s 260(2)(a).

⁹² *Acts Interpretation Act 1954* (Qld); *Anti-Discrimination Act 1991* (Qld); *Guardianship and Administration Act 2000* (Qld); *Judges (Pensions and Long Leave) Act 1957* (Qld); *Land Tax Act 1915* (Qld); *Property Law Act 1974* (Qld); *Public Trustee Act 1978* (Qld); *Succession Act 1981* (Qld); *Supreme Court Act 1995* (Qld). Part 14 amends the Acts within the Schedule such that the following Acts take on the definition of s 32DA of the *Acts Interpretation Act 1954* (Qld); *Agricultural Chemicals Distribution Control Act 1966* (Qld); *Ambulance Service Act 1991* (Qld); *Anti-Discrimination Act 1991* (Qld); *Burials Assistance Act 1965* (Qld); *Child Care Act 2002* (Qld); *Child Protection Act 1999* (Qld); *Corrective Services Act 2000* (Qld); *Criminal Code Domestic And Family Violence Protection Act 1989* (Qld); *Duties Act 2001* (Qld); *Education (Teacher Registration) Act 1988* (Qld); *First Home Owner Grant Act 2000* (Qld); *Fossicking Act 1994* (Qld); *Health Services Act 1991* (Qld); *Industrial Relations Act 1999* (Qld); *Interactive Gambling (Player Protection) Act 1998* (Qld); *Mental Health Act 2000* (Qld); *Mobile Homes Act 1989* (Qld); *Parliamentary Contributory Superannuation Act 1970* (Qld); *Partnership Act 1891* (Qld); *Property Agents And Motor Dealers Act 2000* (Qld); *Property Law Act 1974* (Qld); *Queensland Investment Corporation Act 1991* (Qld); *Registration Of Births, Deaths And Marriages Act 1962* (Qld); *Reprints Act 1992* (Qld); *Residential Tenancies Act 1994* (Qld); *Retirement Villages Act 1999* (Qld); *South Bank Corporation Act 1989* (Qld); *State Development And Public Works Organisation Act 1971* (Qld); *State Housing Act 1945* (Qld); *Succession Act 1981* (Qld); *Superannuation (State Public Sector) Act 1990* (Qld); *Supreme Court Of Queensland Act 1991* (Qld); *Tourism Queensland Act 1979* (Qld); *Transplantation and Anatomy Act 1979* (Qld); *Water Act 2000* (Qld).

⁹³ By virtue of a new s 32DA(6) inserted into the *Acts Interpretation Act 1954* (Qld).

⁹⁴ *Acts Interpretation Act 1954* (Qld) s 32DA(1).

⁹⁵ See Millbank and Sant, 'A Bride in Her Everyday Clothes', above n 35.

'spouse' in earlier reforms. But the effect of this new terminology, as in NSW, was minimised by the fact that most Acts continue to use 'spouse' as an umbrella term and then simply define spouse as meaning a de facto 'partner'.

As in Victoria, it is possible that parties under the age of 18 are covered by this definition because, unlike NSW, there is no requirement that the parties be 'adult'. Victoria and Queensland both include 'genuine domestic basis' as an aspect of the definition, unlike NSW, but this difference is minimal when it is noted that Queensland also adopted the NSW detailed criteria for determining the existence of a relationship.⁹⁶

Unusually, Queensland took the pre-existing requirement of a period of two years cohabitation for de facto couples in the property division regime and *extended* it to several other Acts that confer 'large financial benefits or obligations'. This appears to have been on the basis that some of the amended Acts were including de facto couples for the first time.⁹⁷ In contrast, the required cohabitation period for eligibility in inheritance law was actually reduced from five years to two years for de factos as part of the reforms, suggesting an attempt at consistency.⁹⁸

Queensland adoption laws continue specifically to exclude same-sex couples. As in Victoria, individuals are only eligible to adopt in exceptional circumstances under legislative requirements.⁹⁹ There are no current inquiries to suggest that there will be change in this area in the near future.

D Western Australia

Prior to 2001, Western Australia was significantly less progressive on gay and lesbian rights than other Australian jurisdictions. Unlike other states, it had no pre-existing anti-discrimination protections on the basis of sexual orientation. Further, in the 1989 Act that decriminalised gay sex, the state had adopted 'anti-proselytisation' provisions (similar to Britain's notorious Clause 28).¹⁰⁰ These sections provided that it was unlawful and against public policy 'to encourage or promote homosexual behaviour'¹⁰¹ and specifically prohibited such promotion or encouragement in educational institutions.¹⁰² The 1989 Act also set a five-year age difference in the age of consent for gay sex compared with heterosexual sex (21 as opposed to 16); the largest differential

⁹⁶ *Acts Interpretation Act 1999* (Qld) s 32DA(2).

⁹⁷ See Explanatory Memorandum, *Discrimination Law Amendment Bill 2002* (Qld) 3–4. The following Acts had previously not covered heterosexual de facto couples: *Judges (Pensions and Long Leave) Act 1957* (Qld); *Land Tax Act 1915* (Qld); *Public Trustee Act 1978* (Qld); *Supreme Court Act 1995* (Qld); *Parliamentary Contributory Superannuation Act 1970* (Qld). These were all amended to include a two year cohabitation requirement. The *Workcover Queensland Act 1996* (Qld) had previously covered heterosexual de facto couples with a one year cohabitation requirement, which the amendments extended to two years.

⁹⁸ *Succession Act 1981* (Qld).

⁹⁹ See *Adoption of Children Act 1964* (Qld) s 12(3).

¹⁰⁰ *Local Government Act 1988* (UK) s 28, amending *Local Government Act 1986* (UK) s 2A. This provision was repealed by s 122 of the *Local Government Act 2003* (UK). For discussion of s 28, see: Davina Cooper, *Sexing the City: Lesbian and Gay Politics Within the Activist State* (1994); Matthew Waites, 'Regulation of Sexuality: Age of Consent, Section 28 and Sex Education' (2001) 54(3) *Parliamentary Affairs* 495.

¹⁰¹ *Law Reform (Decriminalization of Sodomy) Act 1989* (WA) s 23.

¹⁰² *Law Reform (Decriminalization of Sodomy) Act 1989* (WA) s 24.

in unequal age of consent laws in Australia. These provisions, taken together, seriously impeded safe-sex education campaigns directed towards young gay men.¹⁰³

In March 2001, Labor was elected to government and the Attorney-General immediately established a Ministerial Committee to address inequality in laws that deal with same-sex couples and lesbian and gay human rights more broadly. The Ministerial Committee reported in June of the same year, recommending a broad range of changes to incorporate a gender-neutral definition of de facto relationships into all relevant Western Australian laws, including those on access to parenting and parental status.¹⁰⁴ The Committee also recommended equalisation of the age of consent, comprehensive anti-discrimination protections, and the legislative removal of the so-called 'homosexual panic' defence, a claim of self-defence or provocation in criminal law as a result of a non-violent homosexual advance.¹⁰⁵ These recommendations were strongly supported by the community group Gay and Lesbian Equality (WA), which campaigned for their enactment.

The only recommendation of the Ministerial Committee rejected by the government was the abolition of the 'homosexual panic' defence. All other recommendations were either enacted or referred to relevant Ministers for policy-based action. Together the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* and *Acts Amendment (Equality of Status) Act 2003* amended over 70 statutes in Western Australia to recognise same-sex couples as having de facto relationships.¹⁰⁶

¹⁰³ This issue was referred to by the Western Australian Attorney-General in his Second Reading Speech: Western Australia, *Parliamentary Debates*, Legislative Council, 14 November 2001, 6968 (Jim McGinty, Attorney-General).

¹⁰⁴ Ministerial Committee, Western Australia, *Lesbian and Gay Law Reform* (2001).

¹⁰⁵ On the issue generally, see Stephen Tomsen, 'Hatred, Murder and Male Honour: Gay Homicides and the "Homosexual Panic Defence"' (1994) 6(2) *Criminology Australia* 2; Stephen Tomsen, 'Sexual Identity and Victimhood in Gay-Hate Murder Trials' in Chris Cunneen, David Fraser and Stephen Tomsen (eds), *Faces of Hate: Hate Crime in Australia* (1997). The validity of this defence had been upheld by the High Court of Australia in *Green v The Queen* (1997) 191 CLR 334. See, eg: Adrian Howe, 'More Folk Provoke Their Own Demise: Homophobic Violence and Sexed Excuses – Rejoining the Provocation Law Debate, Courtesy of the Homosexual Violence Defence' (1997) 19 *Sydney Law Review* 336; Graeme Coss, 'Lethal Violence by Men' (1996) 20 *Criminal Law Journal* 305.

¹⁰⁶ Legislation amended by the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA); *Administration Act 1903* (WA); *Adoption Act 1994* (WA); *Artificial Conception Act 1985* (WA); *Births, Deaths and Marriages Registration Act 1998* (WA); *Cremation Act 1929* (WA); *The Criminal Code* (WA); *Equal Opportunity Act 1984* (WA); *Family Court Act 1997* (WA); *Guardianship and Administration Act 1990* (WA); *Human Reproductive Technology Act 1991* (WA); *Human Tissue and Transplant Act 1982* (WA); *Inheritance (Family and Dependents Provision) Act 1972* (WA); *Interpretation Act 1984* (WA); *Law Reform (Decriminalization of Sodomy) Act 1989* (WA); *Members of Parliament (Financial Interests) Act 1992* (WA); *Parliamentary Superannuation Act 1970* (WA); *Public Trustee Act 1941* (WA); *State Superannuation Act 2000* (WA). Acts amended by the *Acts Amendment (Equality of Status) Act 2003* (WA): *Anatomy Act 1930* (WA); *Anzac Day Act 1960* (WA); *Bush Fires Act 1954* (WA); *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA); *Companies (Co-operative) Act 1943* (WA); *Construction Industry Portable Paid Long Service Leave Act 1985* (WA); *Co-operative and Provident Societies Act 1903* (WA); *Coroners Act 1996* (WA); *Country Housing Act 1998* (WA); *Credit Act 1984* (WA); *The Criminal Code* (WA); *Criminal Injuries Compensation Act 1985* (WA); *Criminal Investigation (Identifying People) Act 2002* (WA);

A de facto relationship is defined as:

a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.¹⁰⁷

This definition states that it does not matter whether the parties are the same sex or different sex, nor whether they are legally married or in a de facto relationship with another person. Although exchanging 'partner' for 'spouse', Western Australia departed from other states in continuing to use a definition that reflected those previously used for heterosexual de facto relationships: that they were 'marriage-like'. It is possible that this will prevent the category from including parties under the age of 18.¹⁰⁸ Other differences in terminology may not be significant in practice, as Western Australia also incorporated the NSW list of factors to be considered in determining whether a relationship exists.¹⁰⁹ As in NSW and Victoria, a two-year cohabitation requirement only operates in a small range of property-related laws.

Western Australia is unique among Australian states in that it has its own Family Court. So, unlike reforms in other states which left the federal family law regime untouched, Western Australia was able to absorb same-sex couples into its family law system, both in relation to property disputes and as legal parents in relation to disputes over children.¹¹⁰ This has several important advantages, offering a 'one stop' court, unlike other states where unmarried couples must use the federal Family Court for child-related matters and their relevant state court for property matters. The Family

Criminal Property Confiscation Act 2000 (WA); Curtin University of Technology Act 1966 (WA); District Court of Western Australia Act 1969 (WA); Electricity Corporation Act 1994 (WA); Family Court Act 1997 (WA); Fatal Accidents Act 1959 (WA); Firearms Act 1973 (WA); First Home Owner Grant Act 2000 (WA); Freedom of Information Act 1992 (WA); Gold Corporation Act 1987 (WA); Government Employees' Housing Act 1964 (WA); Health Act 1911 (WA); Health Services (Conciliation and Review) Act 1995 (WA); Hospital Fund Act 1930 (WA); Housing Act 1980 (WA); Housing Loan Guarantee Act 1957 (WA); Industrial Relations Act 1979 (WA); Inheritance (Family and Dependants Provision) Act 1972 (WA); Judges' Salaries and Pensions Act 1950 (WA); Land Tax Assessment Act 2002 (WA); Life Assurance Companies Act 1889 (WA); Liquor Licensing Act 1988 (WA); Local Courts Act 1904 (WA); Local Government Act 1995 (WA); Married Women's Property Act 1892 (WA); Medical Act 1894 (WA); Members of Parliament (Financial Interests) Act 1992 (WA); Mental Health Act 1996 (WA); Mine Workers' Relief Act 1932 (WA); Mine Workers' Relief (Payments Authorisation) Act 1940 (WA); Minimum Conditions of Employment Act 1993 (WA); Mining Act 1978 (WA); The Partnership Act 1895 (WA); Police Act 1892 (WA); Property Law Act 1969 (WA); Rates and Charges (Rebates and Deferments) Act 1992 (WA); Real Estate and Business Agents Act 1978 (WA); Retirement Villages Act 1992 (WA); Settlement Agents Act 1981 (WA); Solicitor-General Act 1969 (WA); Stamp Act 1921 (WA); Strata Titles Act 1985 (WA); Supreme Court Act 1935 (WA); Trustees Act 1962 (WA); Water Corporation Act 1995 (WA); Western Australian Aged Sailors, Soldiers and Airmen's Relief Fund Act 1932 (WA); Western Australian Land Authority Act 1992 (WA); Wills Act 1970 (WA); Workers' Compensation and Rehabilitation Act 1981 (WA).

¹⁰⁷ Interpretation Act 1984 (WA) s 13A(1).

¹⁰⁸ For discussion as to whether an under-age partner could be viewed by the courts as a de facto partner, see Owen Jessup, 'Financial Adjustment in Domestic Relationships in NSW: Some Problems of Interpretation' (Paper presented at the NSW Law Reform Commission Discussion Forum on Relationships and the Law, Sydney, 7 July 2000) [4.3] <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/seminar01.04>> at 19 August 2005.

¹⁰⁹ Interpretation Act 1984 (WA) s 13A(2).

¹¹⁰ Family Court Amendment Act 2002 (WA).

Court of Western Australia also has the ability to take superannuation assets and future needs into account, unlike many state based property regimes, giving a wider pool of property and factors to be taken into account in making an adjustment. Further, the provision for applying for partner maintenance based on child support responsibilities is wider than that available in other state regimes.¹¹¹

Unlike any of the other reforming states to that point, Western Australia also included adoption law in the reforms, so that same-sex couples who have cohabited for three years or more are eligible to apply to adopt unrelated children.¹¹² A same-sex partner is also eligible under step-parent provisions to apply to adopt their de facto partner's child.¹¹³ More sweeping changes to parental rights for lesbian couples occurred with amendments to the *Artificial Conception Act 1985* (WA) that grant presumed parental status to the consenting female de facto partner of a woman who has a child through assisted means.¹¹⁴ All states and territories presume a male de facto partner in this situation to be a father for all legal purposes. Western Australia was the first state to extend this recognition to a female partner, and to amend laws to allow her to be listed as the second parent on the child's birth certificate.¹¹⁵ The significance of this reform is that it does not require lesbian mothers having children within their relationships to go through the costly and potentially daunting process of applying for step-parent adoption – parental status is automatic and applies from birth. This reform is retrospective in operation, thus applying to children born prior to, as well as following, the 2002 reforms. These provisions are discussed in more detail in the second article from this project.

Like Victoria and South Australia, Western Australia legislatively regulates who may access fertility services. Unlike those states, Western Australia also included these laws in its same-sex relationship reform package to remove marital status and sexuality discrimination. Following the 2001 reforms, lesbians may access fertility services to receive donor insemination, and may also access IVF if medically necessary (the reforms also removed the previous requirement, applicable to heterosexual de facto couples, that couples be in a relationship for five out of the past six years in order to be eligible for IVF services).

The Western Australian reforms were by far the most far reaching in Australia to that point, covering every area of law in the state that concerns relationships. In this sense, Western Australia, which until 2001 had been notably regressive in its treatment

¹¹¹ Under the *Family Court Act 1997* (WA) s 77, a parenting plan may also include child support provisions where a plan cannot be made under the *Child Support (Assessment) Act 1989* (Cth). Under s 133 of the *Family Court Act 1997* (WA), 'a person who is the parent of a child under section 6A of the *Artificial Conception Act 1985*' is liable to contribute towards child rearing expenses. Thus mothers who have a child together using assisted conception are equally liable for child raising costs under the regime, although only the birth mother would need to use the *Family Court Act 1997* (WA) to gain support because the co-mother is not a liable parent under the *Child Support (Assessment) Act 1989* (Cth).

¹¹² *Adoption Act 1994* (WA) ss 38, 39(1)(e)(i).

¹¹³ Section 4(b) of the *Adoption Act 1994* (WA) defines step-parent to include the de facto partner of the birth or adoptive parent.

¹¹⁴ *Artificial Conception Act 1985* (WA) s 6A.

¹¹⁵ The *Births Deaths and Marriages Registration Act 1998* (WA) was amended by the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) so that a female partner can be registered alongside the birth mother as a parent.

of gay men and lesbians, leap-frogged over the more cautious reforms of the traditionally progressive jurisdictions. To date only the ACT has equaled the breadth and innovation of the Western Australian reforms.

The Liberal Party strongly opposed every aspect of the 2002 reforms and pledged to repeal them in total should it be returned to government in Western Australia.¹¹⁶ So far it is the only opposition party to make such a declaration in any state or territory.

E Northern Territory

In 2002, the Darwin Community Legal Service published a submission on equality for lesbians and gay men under Northern Territory law.¹¹⁷ This submission was prompted by a community forum rather than any government-initiated inquiry. The submission recommended comprehensive recognition of same-sex couples as de facto partners, and also recommended eligibility for adoption. The submission recommended several other reforms, drawing heavily on the Western Australian Ministerial Committee Report, including equalisation of the age of consent, statutory abolition of the 'homosexual panic' defence, and a reduction of the wide exemptions for religious bodies in anti-discrimination law. It also noted that the sole provider of fertility services in the Northern Territory was obligated under contractual arrangements with the territory government to refuse access to single women and lesbians and recommended that this practice be discontinued.¹¹⁸

In late 2003, the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT) was passed, amending 54 pieces of territory legislation to include same-sex couples as de facto relationships.¹¹⁹ These reforms also extended rights to heterosexual

¹¹⁶ See Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 December 2001, 6914 (Colin Barnett, Leader of the Opposition). This was also a Western Australian Liberal policy in the 2005 state election: see Stacy Farrar, 'Gay Rights Rollback' *Sydney Star Observer*, 9 December 2004. As Labor won the 2005 election the issue is unlikely to arise for consideration before 2008. Interestingly the Liberals did not oppose the 2003 reforms on the basis that they were largely consequential to the 2002 Acts.

¹¹⁷ Darwin Community Legal Service, *Equality Before the Law: Gay and Lesbian Law Reform in the NT* (2002).

¹¹⁸ *Ibid* 11.

¹¹⁹ *De Facto Relationships Act 1991* (NT); *Interpretation Act 1978* (NT); *Status of Children Act 1979* (NT); *Administrators Pensions Act 1981* (NT); *Stamp Duty Act 1978* (NT); *Supreme Court (Judges Pensions) Act 1980* (NT). Legislation amended by Schedule 1: *Aboriginal Land Act 1978* (NT); *Administration and Probate Act 1969* (NT); *Adult Guardianship Act 1988* (NT); *Aged and Infirm Persons' Property Act 1979* (NT); *Agents Licensing Act 1979* (NT); *Associations Act 2003* (NT); *Births, Deaths And Marriage Registration Act 1996* (NT); *Cemeteries Act 1952* (NT); *Compensation (Fatal Injuries) Act 1974* (NT); *Co-operatives Act 1997* (NT); *Coroners Act 1993* (NT); *Crimes (Victims Assistance) Act 1982* (NT); *Criminal Property Forfeiture Act 2002* (NT); *Domestic Violence Act 1992* (NT); *Emergency Medical Operations Act 1973* (NT); *Family Provision Act 1970* (NT); *First Home Owner Grant Act 2000* (NT); *Gaming Machine Act 1995* (NT); *Human Tissue Transplant Act 1979* (NT); *Juries Act 1963* (NT); *Lands Acquisition Act 1979* (NT); *Law Reform (Miscellaneous Provisions) Act 1956* (NT); *Legal Practitioners Act 1974* (NT); *Legal Practitioners (Incorporation) Act 1989* (NT); *Legislative Assembly Members' Superannuation Act 1979* (NT); *Legislative Assembly (Register of Members' Interests) Act 1982* (NT); *Local Government Act 1993* (NT); *Maintenance Act 1971* (NT); *Meat Industries Act 1996* (NT); *Medical Services Act 1982* (NT); *Mental Health and Related Services Act 1998* (NT); *Motor Accidents (Compensation) Act 1979* (NT); *Northern Territory Electoral Act 1995* (NT);

de facto couples in two Acts that had previously been restricted to married couples.¹²⁰ The amendments also included aboriginal customary marriages within the definition of 'spouse' across a range of territory laws.

The reforms were introduced by the new Labor government. The opposition Country Liberal Party allowed a conscience vote on the Bill, with two members, including now current opposition leader Jodeen Carney, crossing the floor to vote in favour of the reforms.

Like Western Australia, the Northern Territory defined a de facto relationship as that between two people who 'are not married but have a marriage-like relationship', adding that it is irrelevant whether the parties are of different sexes or the same sex and whether or not they are also married or in another de facto relationship.¹²¹ As elsewhere, the NSW test for determining the existence of a de facto relationship was incorporated.¹²² Unlike other jurisdictions, the Territory had previously maintained a difference in terminology between married 'spouses' and de facto 'partners' and so this was retained in the amendments.

The legislation equalised the age of consent and narrowed exemptions in anti-discrimination law, but recommendations to abolish the 'homosexual panic' defence and permit access to adoption were not enacted. Thus same-sex couples are excluded from eligibility to apply for adoption of children, and as in Victoria and Queensland, individuals are only eligible under the relevant statute in exceptional circumstances.¹²³

However, this raft of reforms did include amendments to the *Status of Children Act 1975* (NT) to recognize the non-biological parent in lesbian couples who have children through assisted reproduction¹²⁴ and to allow both mothers to be listed on the child's birth certificate. These changes are retrospective in operation, granting broad-ranging presumptive recognition to the second parent in most lesbian families. This is somewhat surprising given the refusal to amend adoption law, and given that this proposal was not part of the original submission that triggered reform. As these sections mirror exactly those in Western Australia,¹²⁵ it appears that the Western Australian legislation was the impetus for this reform.

The Northern Territory introduced one further change to parenting rights: to redefine the child born to one party in a de facto relationship as a 'step-child' in the same way that the child of a party to a legal marriage would be.¹²⁶ This amendment affects a small but significant range of Acts, including in the areas of inheritance and

Partnership Act 1997 (NT); *Pastoral Land Act 1992* (NT); *Police Administration Act 1978* (NT); *Prostitution Regulation Act 1992* (NT); *Public Trustee Act 1979* (NT); *Retirement Villages Act 1995* (NT); *Superannuation Act 1986* (NT); *Supreme Court (Judges Long Leave Payments) Act 1980* (NT); *Swimming Pool Fencing Act 2002* (NT); *Taxation (Administration) Act 1978* (NT); *Territory Insurance Office Act 1979* (NT); *Totalisator Licensing and Regulation Act 2000* (NT); *Traffic Act 1987* (NT); *Witness Protection (Northern Territory) Act 2002* (NT); *Work Health Act 1986* (NT).

¹²⁰ *Administrators Pensions Act 1981* (NT); *Supreme Court (Judges Pensions) Act 1980* (NT).

¹²¹ *De Facto Relationships Act 1991* (NT) ss 3A(1), 3A(3).

¹²² *De Facto Relationships Act 1991* (NT) s 3A(2).

¹²³ *Adoption Act 1994* (NT) s 14(1).

¹²⁴ *Status of Children Act 1975* (NT) s 5DA(1).

¹²⁵ Compare *Status of Children Act 1975* (NT) s 5B and *Artificial Conception Act 1985* (WA) s 4.

¹²⁶ *Acts Interpretation Act 1978* (NT) s 19A(4).

guardianship,¹²⁷ reflecting the limited number of pre-existing laws in which the relationship of step-child is given legal status in the Northern Territory. This change would not be needed for children born through assisted reproduction into lesbian families, but would, for instance, change the status of children born into prior relationships as well as those adopted by only one partner. Such a change is unusual in that it was not proposed in the Legal Service submission, and appears to have been drawn from the 2003 Tasmanian legislation which included the child of a partner's previous significant relationship as a step-child for the purpose of family provision law.¹²⁸ This expanded category of step-child has not been pursued in any other jurisdiction.

F Tasmania

Tasmania took a different approach to the other states in that it introduced a de facto relationship category but it *also* simultaneously introduced a registration system. It also varies from other states in that it does not require cohabitation for recognition of a de facto relationship.

In 1997, the Tasmanian Gay and Lesbian Rights Group adopted the approach taken by Clover Moore's NSW Bill. Under this broad model, couples and non-couples could be recognised through a presumptive status as well as by registration, neither of which required cohabitation.¹²⁹ A private member's Bill in the same terms was introduced into the Tasmanian Parliament in 1998 by Greens MP Mike Foley¹³⁰ and the same Bill was reintroduced in 1998 by Greens member Peg Putt, but neither was debated.

In 1999, the Bill was referred to a parliamentary inquiry, which did not report before Parliament dissolved in 2000. This inquiry was reconstituted after Parliament resumed, and finally reported in 2001. The Committee recommended that same-sex couples be granted widespread presumptive recognition and that recognition also be granted to other significant relationships.¹³¹ The Committee left open whether this ought to be done by including same-sex relationships within the definition of de facto relationship, or by replacing 'de facto relationship' with an 'all encompassing term' such as domestic or significant relationship.¹³² The Committee departed from the model proposed in the Bill by stating that although a registration system may be appropriate for future reform it was not vital. It proposed the 'safety net' of a presumptive model as the most appropriate starting point for reform.¹³³

In 2003 the *Relationships Act 2003* (Tas) and *Relationships (Consequential Amendments) Act 2003* (Tas) passed into law, amending 73 statutes. These Acts were introduced by a Labor government. The Liberal opposition allowed its members a conscience vote.

¹²⁷ *Compensation (Fatal Injuries) Act 1974* (NT); *Crimes (Victims Assistance) Act 1982* (NT); *Family Provision Act 1970* (NT); *Legislative Assembly Members' Superannuation Act 1979* (NT); *Stamp Duty Act 1978* (NT); *Taxation Administration Act 1978* (NT).

¹²⁸ *Testator's Family Maintenance Act 1912* (Tas) s 2.

¹²⁹ See Rodney Croome, 'Relationship Law Reform in Tasmania' (2003) 7 *Word is Out* 1. However, note that the remarks on adoption do not reflect the final Act, which was far more restrictive.

¹³⁰ Significant Personal Relationships Bill 1998 (Tas).

¹³¹ Joint Standing Committee on Community Development, Tasmania, *Report on the Legal Recognition of Significant Relationships* (2001) 6-7.

¹³² *Ibid* 8.

¹³³ *Ibid* 49.

These reforms were in effect a modified and narrower version of the Greens' Significant Personal Relationships Bills. The 2003 law differed from the Bills in that it limited most presumptive recognition to couples, and defined the non-couple category far more narrowly. This final version did not follow the Committee's approach and instead introduced both presumptive recognition and a registration system simultaneously.

The Act introduced the umbrella term 'personal relationship', of which there are two subcategories, 'significant relationship' and 'caring relationship'.

'Significant relationship' is the couple-based category and replaces the term 'de facto' in all Tasmanian statutes. A significant relationship is defined as:

a relationship between two adult persons

- (a) who have a relationship as a couple; and
- (b) who are not married to one another or related by family.¹³⁴

The use of the terminology 'significant relationship' is largely semantic, as the definition is virtually identical to that of 'de facto relationship' used by other states. However, one key difference is that the Tasmanian definition does *not* require the couple to live together, only that they have a relationship as a couple (although the fact of cohabitation is still a relevant consideration in determining whether a significant relationship exists). For unregistered significant relationships, Tasmania incorporates in total the NSW criteria for determining the existence of a de facto relationship.¹³⁵ For registered relationships, the registration itself is proof of the existence of the relationship.¹³⁶

After registration a 28 day 'cooling off' period applies, in which either party may withdraw their consent to the registration.¹³⁷ Registration started on 1 January 2004 and, as at 1 January 2006, a total of 57 significant relationships were registered. Of these, 12 were opposite-sex couples and 45 were same-sex couples. There was a relatively even gender breakdown with 24 gay male couples and 21 lesbian couples.¹³⁸

The major difference in the legal status of registered and unregistered couples is in adoption law.¹³⁹ Unregistered couples remain ineligible to apply to adopt children as a couple. Registered couples are eligible to apply,¹⁴⁰ but only to a limited extent, as they may only adopt children who are related to one member of the couple.¹⁴¹ These amendments also insert a new section into the *Adoption Act 1988* (Tas) providing that a person whose child is being adopted 'may express a preference as to the sexual orientation or marital status of the adoptive parents' and that 'where practicable this preference will be accommodated'.¹⁴² Taken together, these provisions may render

¹³⁴ *Relationships Act 2003* (Tas) s 4(1).

¹³⁵ *Relationships Act 2003* (Tas) s 4(3).

¹³⁶ *Relationships Act 2003* (Tas) s 4(2).

¹³⁷ *Relationships Act 2003* (Tas) s 13(1).

¹³⁸ Telephone communication with Tasmanian Registry of Births, Deaths and Marriages, 4 January 2006.

¹³⁹ The other difference is that registering a relationship, like entering a marriage, automatically revokes one's will: see *Wills Act 1992* (Tas) s 20(2).

¹⁴⁰ *Adoption Act 1988* (Tas) s 20(1).

¹⁴¹ *Adoption Act 1988* (Tas) s 20(2A).

¹⁴² *Adoption Act 1988* (Tas) s 24(1)(b).

inclusion of same-sex registered couples in the Tasmanian adoption regime a Pyrrhic victory.

In 2003, the Law Reform Institute of Tasmania recommended that eligibility to apply for all kinds of adoption not be limited by relationship status, and also recommended presumptive recognition of the non-biological mother in lesbian families who have children through assisted reproduction.¹⁴³ At the time of writing, these recommendations have not yet been enacted. Notably, the 2003 reforms when tabled had included presumptive recognition of the co-mother through amendments to the *Status of Children Act 1974* (Tas). However, this provision was dropped by the government after an amendment was proposed by an Independent and supported by Liberal members.¹⁴⁴ In 2004, the Parliamentary Joint Standing Committee on Community Development undertook an inquiry into the omission of presumptive recognition for co-mothers, and recommended that these clauses be reintroduced.¹⁴⁵ At the time of writing there was no legislation drafted, or in train, to implement this recommendation.¹⁴⁶

The non-couple category of 'caring relationship' is defined 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.¹⁴⁷

This definition largely mirrors the definition of a close personal relationship in NSW,¹⁴⁸ again with the significant exception that Tasmania does not require cohabitation. The NSW criteria for determining the existence of a de facto relationship were also adopted for this category, with three variations. The criteria of 'whether or not a sexual relationship exists' and 'care and support of children' were dropped from the list and the additional criterion of 'the level of personal care and domestic support provided by one or each of the parties to each other' was inserted.¹⁴⁹ Registration of a caring relationship is proof of the existence of a relationship.

In contrast to significant relationships, for caring relationships the difference in legal status granted by registration is considerable. Unregistered caring relationships are recognised in a limited number of Acts.¹⁵⁰ Registered caring relationships are included in a slightly wider range of Acts, mostly those that concern property rights.

¹⁴³ Tasmania Law Reform Institute, *Adoption by Same Sex Couples*, Final Report No 2 (2003), recommendations 1, 3.

¹⁴⁴ Although the amendment was about to be defeated in the lower house, it was voluntarily agreed to by the government on the basis that it would have jeopardised the Bill in the upper house: see Tasmania, *Parliamentary Debates*, Legislative Council, 28 August 2003 (Michael Aird, Leader of the Government in the Council).

¹⁴⁵ See Joint Standing Committee on Community Development, Tasmania, *Report on Amendments to the Relationships (Consequential Amendments) Bill 2003* (2003), 12–13.

¹⁴⁶ Social Development Committee, South Australia, *Statutes (Amendment) Relationships Bill 2004* (2005), 101.

¹⁴⁷ *Relationships Act 2003* (Tas) s 5.

¹⁴⁸ See above section III A for a discussion of the NSW provisions.

¹⁴⁹ *Relationships Act 2003* (Tas) s 5(5).

¹⁵⁰ Unregistered caring relationships are only recognised in five Acts and regulations: *Criminal Justice (Mental Impairment) Act 1999* (Tas); *Motor Accidents (Liabilities & Compensation) Regulations 2000* (Tas); *State Service Regulations 2001* (Tas); *War Service Land Settlement Act 1950* (Tas); *Workers' (Occupational Diseases) Relief Fund Act 1954* (Tas).

So, for instance, someone in a registered caring relationship is eligible to inherit under intestacy provisions and apply for property and maintenance settlements at the end of a relationship, while someone who is unregistered is not. However it must be noted that – even if registered – caring relationships are covered in far fewer laws than significant relationships.¹⁵¹

Before registration of a caring relationship, each party must have received independent legal advice.¹⁵² After registration, a 28 day 'cooling off' period applies, in which either party may withdraw.¹⁵³ Registration started on 1 January 2004 and as at 1 January 2006 there were no caring relationships registered in Tasmania.¹⁵⁴

G ACT

The ACT took a markedly different approach to that taken in property division regimes elsewhere in Australia when it introduced the *Domestic Relationships Act 1994* (ACT). This Act was the first in Australia to formulate a property division regime that was not limited to couples, or to those who cohabit, but was open to anyone who had a 'domestic relationship'.

A 'domestic relationship' under the 1994 Act was defined as:

a personal relationship (other than a legal marriage) between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage.¹⁵⁵

This 'catch-all' category did not specifically mention same-sex couples but was intended to include them.¹⁵⁶ The Act was introduced by a Labor government but,

¹⁵¹ Registered caring relationships are recognised in 16 Acts and regulations: *Probate Rules 1936* (Tas); *Administration and Probate Act 1935* (Tas); *Burial and Cremation (Cremation) Regulations 2002* (Tas); *Coroners Act 1995* (Tas); *Criminal Justice (Mental Impairment) Act 1999* (Tas); *Duties Act 2001* (Tas); *Environmental Management and Pollution Control Act 1994* (Tas); *Land Tax Act 2000* (Tas); *Motor Accidents (Liabilities & Compensation) Regulations 2000* (Tas); *Partnership Act 1891* (Tas); *Retirement Benefits Regulations 1994* (Tas); *Retirement Benefits (Parliamentary Superannuation) Regulations 2002* (Tas); *State Service Regulations 2001* (Tas); *War Service Land Settlement Act 1950* (Tas); *Workers' (Occupational Diseases) Relief Fund Act 1954* (Tas); *Workers' Compensation and Rehabilitation Act 1988* (Tas).

¹⁵² *Relationships Act 2003* (Tas) s 11(3).

¹⁵³ *Relationships Act 2003* (Tas) s 12. It is very unclear why this provision was included. Nothing in the earlier Bill or reports suggested such an approach and no explanation is offered in the explanatory memorandum or second reading speech.

¹⁵⁴ Telephone communication, Tasmanian Registry of Births, Deaths and Marriages, 4 January 2006.

¹⁵⁵ See *Domestic Relationships Act 1994* (ACT) s 3(1). The 2003 amendments changed this definition to:

domestic relationship means a personal relationship between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other and includes a domestic partnership but does not include a legal marriage.

¹⁵⁶ See Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 April 1994, 1119 (Terry Connolly, Attorney-General and Minister for Health). For a discussion of the operation of the Act see Jenni Millbank, 'Domestic Rifts: Who is using the *Domestic Relationships Act 1994* (ACT)?' (2000) 14 *Australian Journal of Family Law* 163.

unusually, was passed with bipartisan support, with the Shadow Attorney-General speaking warmly in favour of the reform.¹⁵⁷

In 1996, amendments were made to family provision and intestacy laws to define an eligible partner as someone 'whether or not of the same gender' who lived with the deceased on a 'genuine domestic basis'.¹⁵⁸ These reforms differed in breadth from the 1994 Act in that they did require cohabitation and a couple relationship. Although originally proposed by Labor, the territory government had changed and these amendments were passed by the new Liberal government. The 1996 reforms remain the only same-sex relationship recognition in Australia passed by a state or territory Liberal government.

In 2001 Labor formed a minority government with the support of the Tasmanian Greens party and in early 2002 the Chief-Minister asked the Department of Justice and Community Safety to review all ACT legislation with a view to developing a law reform proposal to give effect to the principle that:

all people are entitled to respect, dignity and the right to participate in society and to receive the protection of the law regardless of their sexual orientation or gender identity.¹⁵⁹

An issues paper was released in December 2002, which raised the recognition of same-sex relationships including reproductive and parenting rights, discrimination against transgender and intersex people, as well as vilification laws and the 'homosexual panic' defence.¹⁶⁰ The paper also raised the possibility of a registration system for same-sex couples. The Department convened three focus groups to discuss the proposals: a gay, lesbian and bisexual focus group, a transgender focus group and an intersex focus group.

In response to this consultative review, a community lobby group called 'Good Process' was formed in October 2002 to represent the views of gay, lesbian, bisexual, transgender and intersex people. Good Process conducted its own community consultations, made a submission to the review and lobbied for a number of key amendments in the first legislative package.

In May 2003 the government issued a report to Parliament. The report incorporated community comment and indicated in detail what legislative amendments were

¹⁵⁷ See Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 May 1994, 1800 (Gary Humphries).

¹⁵⁸ *Administration and Probate Act 1929* (ACT) s 44 and *Family Provision Act 1969* (ACT) s 4. These definitions were again changed by the 2004 reforms, to drop the wording 'whether or not of the same gender'.

¹⁵⁹ Jon Stanhope, 'Foreword' to *Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT: An Issues Paper* (2002) ACT Department of Justice and Community Safety <http://www.jcs.act.gov.au/eLibrary/papers/same_sex_%20issues_paper.pdf> at 14 December 2005. There was also a motion put to the Legislative Assembly by Australian Democrats member, Roslyn Dundas on 28 August 2002 calling for a broad range of issues to be considered and community participation in the process. The motion was passed with amendments to acknowledge the work underway: see Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 28 August 2002, 2982-95 (Roslyn Dundas, MLA).

¹⁶⁰ Jon Stanhope, above n 159.

required to give effect to the proposals.¹⁶¹ The *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* (ACT) and *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) together amended 41 pieces of territory law to include same-sex couples as 'domestic partnerships'. The amendments replace the terms 'spouse' and 'de facto' in ACT law with 'domestic partner' for all married and unmarried couples. The reforms were based upon a de facto relationship model and did not incorporate any form of registration system. Various amendments to give full effect to new gender status for transgender people were also passed. No changes were made to the availability of the 'homosexual panic' defence as a broader review of the law of provocation was underway at the time. The first of these amending Acts was actually passed prior to the tabling of the 2003 report.

Confusingly, 'domestic relationship', although the same term, is *not* given the same definition as that used in the 1994 Act. 'Domestic partnership' in the omnibus 2003 and 2004 Acts is defined as:

the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis.¹⁶²

Although using the terminology of 'domestic' rather than 'de facto' relationships, the ACT legislation also incorporated the NSW list of factors for consideration in determining whether a relationship exists.¹⁶³

Like Western Australia, the ACT carried out reform of adoption law to render same-sex couples eligible to adopt related and unrelated children.¹⁶⁴ The ACT introduced a further change to recognize the non-biological parent in lesbian couples who have children through assisted reproduction, as Western Australia and the Northern Territory had also done. In the ACT this was achieved by replacing the *Artificial Conception Act 1985* (ACT) and *Birth (Equality of Status) Act 1988* (ACT) with the *Parentage Act 2004* (ACT).¹⁶⁵ This Act is retrospective, applying to children born before the amendments as well as those born afterwards.¹⁶⁶ These changes took place in the second raft of reforms.

All of the 2003 and 2004 reforms were passed by a Labor government, without the support of the Liberal opposition. In speaking on the 2003 reforms, the Liberal party stated that they supported the main aim of 'removing discrimination', but objected to the terminology in the Bill. Specifically they objected to the use of 'domestic partner' as a generic term for all couple relationships, believing that it did not 'acknowledge the special status of marriage'.¹⁶⁷

The ACT could be characterised, along with Queensland, as having taken a 'toe in the water' approach: passing a group of fairly minor laws followed some years later by comprehensive reform. As in Victoria and Western Australia, the major reforms were divided into two separate Acts passed in fairly close proximity to each other, with the

¹⁶¹ *Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT: Government Report to the ACT Legislative Assembly* (2003).

¹⁶² *Legislation Act 2001* (ACT) s 169(2).

¹⁶³ *Legislation Act 2001* (ACT) s 169(2).

¹⁶⁴ *Adoption Act 1993* (ACT) s 18.

¹⁶⁵ *Parentage Act 2004* (ACT) s 51.

¹⁶⁶ *Parentage Act 2004* (ACT) s 120.

¹⁶⁷ See Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 11 March 2003, 839 (Brendan Smyth, Leader of the Opposition).

first raft containing more 'straightforward' areas and the second raft including those considered to be more contentious or complex (including, in particular in Western Australia and the ACT, parenting issues).¹⁶⁸

Unlike other jurisdictions, the ACT proceeded to open consideration of further forms of relationship recognition for same-sex couples very soon after the passage of the de facto reforms. In May 2005, the ACT Department of Justice and Community Safety published a discussion paper raising the options of registered partnerships, civil unions and territory based marriage for same-sex couples.¹⁶⁹ In March 2006 the ACT government introduced a Bill to enact a civil union regime, closely modelled on the New Zealand system which is open to both same-sex and heterosexual couples.¹⁷⁰

H South Australia

South Australia has been far slower than other states to pursue reform. Its reforms and reform proposals are also more limited in the range of couples covered because of the time limit required before recognition is accorded.

In 2001, a community working party called 'Let's Get Equal' issued a short position paper modelled on the NSW and Victorian reforms, urging relationship recognition through extension of the de facto relationship category to same-sex couples and the introduction of a non-couple relationship category to cover other close cohabiting relationships.¹⁷¹ In 2002 the new Labor government gave a commitment to introduce relationship reform for same-sex couples, but was hampered in this process by the fact that it did not have control of the upper house in its first term of government.¹⁷²

The *Statutes Amendment (Equal Superannuation Entitlements for Same Sex Couples) Act 2003* (SA) changed four statutes to grant same-sex partners access to death benefits under superannuation schemes for state employees (for example those for police and public servants). This Act rather awkwardly defined 'putative spouses' as including same-sex couples if they are:

cohabiting with each other in a relationship that has the distinguishing characteristics of a relationship between a married couple (except for the characteristics of different sex and legally recognised marriage and other characteristics arising from either of those characteristics).¹⁷³

Unlike de facto relationship recognition in other states, this change only covers couples who have lived together for five years.

In 2003, the Attorney-General's Department issued a brief discussion paper calling for input on 'the implications' of a de facto relationship model for recognition of same-

¹⁶⁸ Jon Stanhope, above n 159, 4.

¹⁶⁹ Australian Capital Territory Department of Justice and Community Safety, *The Recognition of Same Sex Relationships in the ACT* (2005) <<http://www.jcs.act.gov.au/eLibrary/papers/RecognitionofSameSexRelationships-discussionpaper.pdf>> at 14 December 2005.

¹⁷⁰ Civil Unions Bill 2006 (ACT), introduced to the Legislative Assembly on 28 March 2006.

¹⁷¹ Let's Get Equal, *Position Statement: Legal Recognition of Same Sex Relationships in South Australia* (2001) < http://www.letsgetequal.org.au/LetsGetEqual_PositionStatem.pdf> at 28 March 2006.

¹⁷² For a discussion of the South Australian process, see Matthew Loader, 'Recognising Same Sex Relationships: Ideas and an Update from South Australia' (2003) 7 *Word is Out* 8-18.

¹⁷³ *Statutes Amendment (Equal Superannuation Entitlements for Same Sex Couples) Act 2003* (SA) s 7A.

sex relationships.¹⁷⁴ No recommendations were published and the government moved directly to legislation. In 2004, the Statutes Amendment (Relationships) Bill 2004 (SA) ('the 2004 Bill'), which posed amendments to 82 state laws to include same-sex couples, was introduced into the lower house and upper house simultaneously.

The 2004 Bill dropped the terminology of 'putative spouse' and replaced it with 'de facto partner'. De facto partner is defined as a person who is:

... (irrespective of the sex of the other)... cohabiting with that person on a genuine domestic basis (other than a married couple).¹⁷⁵

Unlike de facto recognition in other states, this would only cover couples who had lived together for three years (or for three of the last four years, unless the couple had a child together in which case there is no time requirement).¹⁷⁶ The 2004 Bill included the NSW criteria for determining whether a de facto relationship exists. It also introduced an umbrella term of 'domestic partner', as in Victoria and the ACT, intended to include both married spouses and all de facto partners.¹⁷⁷

Although more restrictive than every other state in that it would require a three-year cohabitation period for every area of law (rather than just those that concern major property entitlements), this Bill marked a broadening of eligibility within the context of South Australian law. This is due to the pre-existing five year cohabitation requirement for heterosexual de facto couples in South Australia, necessary for recognition under almost all state laws.

The Bill was withdrawn from the lower house of Parliament and was referred to the Social Development Committee by the upper house. The Committee issued a report in May 2005. The Committee recommended dropping the term 'domestic partner' so as to maintain a distinction in the language of South Australian statutes between married spouses and de facto partners.¹⁷⁸ It also recommended the inclusion of explicit provisions to allow religious educational and other institutions to discriminate on the basis of a same-sex relationship.¹⁷⁹ The Committee also recommended the exploration of recognition for non-couple dependent relationships.¹⁸⁰ These recommendations

¹⁷⁴ Attorney-General's Department of South Australia, *Removing Legislative Discrimination Against Same-Sex Couples: Discussion Paper* (2003). Principally, the paper asked for comment on 'any financial, legal or other implications that should be taken into account in removing discrimination against same-sex partners' in various areas. It also raised the question of what language should be used to refer to couples and the issue of access to reproductive services.

¹⁷⁵ Statutes Amendment Relationships Bill 2004 (SA) s 72, proposing amendment to the definition of de facto within the *Family Relationships Act 1975* (SA).

¹⁷⁶ Statutes Amendment (Relationships) Bill 2004 (SA) s 11A(1)(a).

¹⁷⁷ See, eg, Statutes Amendment (Relationships) Bill 2004 (SA) s 66(2), proposing amendment to the definition of 'domestic partner' in the *Domestic Violence Act 1994* (SA) s 3 to include a spouse or de facto partner.

¹⁷⁸ Social Development Committee, South Australia, *Statutes (Amendment) Relationships Bill 2004* (2005) 5, recommendation 1.1.

¹⁷⁹ *Ibid* recommendation 2.

¹⁸⁰ *Ibid* recommendation 4. The principal South Australian gay and lesbian group has urged such recognition: see Let's Get Equal, *Position Statement* (2001) <http://www.letsgetequal.org.au/LetsGetEqual_PositionStatem.pdf> at 24 August 2005; and Let's Get Equal, *Removing Legislative Discrimination Against Same-Sex Couples: Submission by the Let's Get Equal Campaign* (2003) 12, <<http://www.letsgetequal>.

largely appear to be concessions to conservative opponents as the government did not control the upper house of Parliament. Nevertheless, the Committee divided equally along party lines, with three government members supporting the legislation and three opposition members in dissent.¹⁸¹ The Committee Chair cast her deciding vote in order to create a majority report that favoured the legislation.

The South Australian Liberals continued their opposition to the 2004 Bill by introducing their own Bill into the upper house on the same day that the Committee report was tabled there. The Liberal Bill was based upon an opt-in model that covered all 'non-traditional' relationships equally. It proposed a system whereby same-sex couples and non-couple relationships could be registered 'like a contract'.¹⁸² This model did not recognise same-sex couples *as* couples, or include any form of presumptive recognition.¹⁸³

An amended government Bill reflecting changes recommended by the majority report was introduced into the upper house in late 2005.¹⁸⁴ The terminology of 'domestic partner' was continued but no longer included married spouses, who were treated as a distinct category (although their substantive rights were unaltered). The response of the Liberals was to move a series of amendments introducing a new category of 'domestic co-dependents' into the Bill. A person is a 'domestic co-dependant' if:

- (a) the person lives with the other in a relationship of dependence
- (b) the person is party to a certified domestic relationship property agreement with the other.¹⁸⁵

This provision differs significantly from the Tasmanian regime for the registration of caring relationships. The domestic co-dependent provisions only cover cohabittees but, more importantly, they have no mechanism for the relationship to be registered or recorded by any state agency. It is a purely private form of certification.¹⁸⁶

org.au/LGESubmissionV3.pdf> at 24 August 2005. Non-government members also urged such recognition in their dissenting report: see Social Development Committee, South Australia, above n 146, 177. However note that conservative supporters of non-couple recognition tend to value it instead of, or above, recognition of same-sex couple relationships: see Social Development Committee, South Australia, *Statutes (Amendment) Relationships Bill 2004* (2005) 78–9.

181 Among other things, the dissenting report recommended the reintroduction of the term 'putative spouse': Social Development Committee, South Australia, above n 146, 179.

182 See 'FAQs about the Relationships Bill' <<http://www.sa.liberal.org.au/brindal/content/files/documents/Relationships%20Attachment%201.doc>> at 14 December 2005.

183 Relationships Bill 2005 (SA).

184 Statutes Amendment (Relationships No 2) Bill 2005 (SA).

185 Statutes Amendment (Relationships No 2) Bill 2005 (SA) s 72 (4). A certified property agreement requires only that each party make a full disclosure of assets to each other and each party's signature to be attested by a lawyers' certificate: s 72(1). A relationship of dependence is defined in the same terms as a close personal relationship in NSW law, with the exception that it requires 'domestic support *or* personal care' rather than 'and' personal care: see s 72(5).

186 Another issue is that parties could certify an agreement but not in fact be dependent on each other, in which case it is unclear whether or not they meet the definition in the Bill: see Statutes Amendment (Relationships No 2) Bill 2005 (SA) s 72(5).

The government did not oppose these amendments. Thus a hybrid Bill, including comprehensive de facto couple recognition *and* recognition of certified cohabiting domestic co-dependents passed the upper house on 21 November 2005 but did not pass the lower house before Parliament finished sitting for the year.¹⁸⁷ In March 2006 Labor won the state election and gained control of the upper house, so it is expected that another Bill will be introduced in the near future, although it is not known at the time of writing whether the later hybrid version or the original version will be introduced.

Notable exclusions from all forms of the South Australian Bill, and discussion in the report, are the issues of eligibility of same-sex couples to apply for adoption orders, and equitable access to reproductive services.

IV REMAINING AREAS OF INEQUALITY

Most state laws now treat opposite and same-sex couples equally following the various reforms outlined above. The impact of such reforms is greater bearing in mind that opposite-sex couples and married couples were generally already on an equal footing at the time of the reforms.

The remaining areas of inequality between same-sex and opposite-sex couples are therefore in federal law and in areas of state law that concern parenting. Parenting will be addressed at length in the second article from this project, so the remainder of this article will focus on inequality in federal law.

A Superannuation

Superannuation law automatically recognises children and spouses, including heterosexual de facto spouses, as 'dependants'. This is the statutory category of beneficiary entitled to inherit the contributor's funds if they die, and to do so directly, thereby avoiding the significantly higher taxes that would apply if the funds passed into the deceased's estate and on to their beneficiaries under a will or through intestacy provisions. Same-sex couples are not defined as de facto partners in superannuation law and thus cannot automatically inherit a partner's vested contributions and death benefits as statutory dependants.¹⁸⁸

After years of pressure from a broad range of individuals,¹⁸⁹ lobby groups and human rights organisations,¹⁹⁰ the Opposition,¹⁹¹ and the Superannuation industry

¹⁸⁷ Hansard records from the last day of sitting reveal vigorous debate as to why the Bill had not yet been read a second time, with the government asserting that the opposition had deliberately impeded its process: see South Australia, *Parliamentary Debates*, Legislative Assembly, 1 December 2005, 4335 (Patrick Conlon, Minister for Transport).

¹⁸⁸ *Superannuation Act 1976* (Cth) Part VI, specifically s 81, s 89. For a more detailed analysis of the operation of these provisions and their inter-relation with taxation law see Miranda Stewart, 'Superannuation, Same-Sex Couples and Interdependency: Between Equality, Property and Family' (2006) 28 (3) *Sydney Law Review*, forthcoming.

¹⁸⁹ See *Brown v Commissioner for Superannuation* (1995) 21 AAR 378.

¹⁹⁰ See, eg, Human Rights and Equal Opportunity Commission, *Superannuation Entitlements of Same-Sex Couples: Report of Examination of Federal Legislation* (1999); Gay and Lesbian Rights Lobby, 'Time to Act on Super Reforms' <<http://www.girl.org.au/OLD/html/Superannuation.htm>> at 12 August 2005.

itself,¹⁹² the federal government agreed to amend superannuation laws in 2004 to make it more likely that a lesbian or gay partner can inherit a deceased member's vested superannuation contribution. It is important to note that although the government offered this reform up to appease gay men and lesbians angered by the marriage ban,¹⁹³ the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth) did *not* specifically recognise same-sex relationships, nor did it treat them on an equal footing with heterosexual de facto relationships.¹⁹⁴

The amendments did *not* expand the category of de facto as state reforms have done, but instead inserted a new sub-category of 'interdependent relationship' under the category of 'dependant'.¹⁹⁵ 'Interdependent relationship' is defined as covering cohabiting 'close personal relationships' where one or both parties provide the other with 'financial support' *and* 'domestic support and personal care'.¹⁹⁶ The definition of such relationships expressly covers carer relationships in which one party has a disability.¹⁹⁷ This definition mirrors the non-couple based relationship definition used in certain NSW laws, and is restrictively interpreted in NSW as requiring actual physical care-giving in addition to emotional support and financial interdependence.¹⁹⁸ The fact that a far broader definition of 'interdependency', in place in federal law for over a decade and routinely used by same-sex couples,¹⁹⁹ was not adopted suggests that the use of the narrow NSW definition was intentionally restrictive.²⁰⁰

191 Labor MP Anthony Albanese introduced the Superannuation (Entitlements of Same Sex Couples) Bill into the house on five different occasions, in 1998, 1999, 2000, 2001 and 2004. In April 2000 a majority of the Senate Select Committee on Superannuation and Financial Services recommended that the Bill be passed.

192 For example, the Association of Superannuation Funds of Australia has made numerous submissions on the issue.

193 For example, see Bush, above n 30.

194 Furthermore, Stewart notes that some federal employee schemes remain excluded from the reforms, and the reforms are limited in that they do not address the children of same-sex couples: Stewart, above n 188.

195 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10. Note also that extension of employment benefits to same-sex couples in the Australian defence forces in late 2005 was achieved through an internal directive creating a new category of 'interdependent relationships': see Saffron Howden, 'Rights for Gay Troops' Herald-Sun, 22 October 2005.

196 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10A(1).

197 *Superannuation Industry (Supervision) Act 1993* (Cth) s 10A(2).

198 Under the *Property (Relationships) Act 1984* (NSW), the non-couple relationship known as a 'close personal relationship' is defined in s 5(1)(b), (2). This section was interpreted in *Dridi v Fillmore* [2001] NSWSC 319 at [108] where Master Macready held that 'domestic support and personal care' were a cumulative requirement. The Master further held that personal care entailed caregiving beyond that in ordinary reciprocal relationships; requiring 'assistance with mobility, personal hygiene and physical care'.

199 See reg 1.09A(2) of the *Migration Regulations 1994* (Cth) for the definition of interdependent relationship. See, eg: *ABCDEAV* [2004] MRTA 203; *Lewis (Bryan Francis)* [2003] MRTA 5630 and *Parker (Sarah)* [2004] MRTA 2545.

200 Note the remark by Liberal MP Ross Cameron that 'the provision is not specifically directed towards same-sex couples. It relates to a concept of interdependence which will specifically benefit for example carers of children with profound disabilities or even perhaps members - elderly sisters who may live together in an interdependent relationship' quoted in Bush, above n 30.

Apart from the symbolic impact of continuing to characterise same-sex partnerships as non-spousal and non-familial, the amendments to superannuation law perpetuate inequality by placing a heavier burden on same-sex couples, who must continue to *prove* a high level of financial and domestic interdependence to qualify as dependants. No such proof is required for heterosexual cohabiting couples. Further, if the NSW interpretive approach is followed, this definition of dependant could continue to exclude most same-sex couples. It appears that thus far the tax office has taken a somewhat broader view.²⁰¹ If unsuccessful, a same-sex de facto partner may still inherit but only indirectly, through a will if they are the beneficiary, or through intestacy provisions if there is no will. However, the fact that the benefit passes through the estate exposes it to taxation and reduces its value.²⁰²

B As taxpayers in sickness and in health

Relationship recognition is less important in Australian taxation law than elsewhere because while in many other jurisdictions couples must file joint tax returns, in Australia it is the individual who is the tax unit.²⁰³ However there are some deductions and rebates that are available to 'couples' and 'families' and the number and value of such rebates has increased under the current federal government, signalling a small but significant move towards 'the family' rather than the individual as the tax unit.²⁰⁴ These benefits include the dependent spouse rebate,²⁰⁵ the parent rebate (for helping to support a spouse's elderly parents),²⁰⁶ the superannuation rebate (for contributing to a spouse's superannuation fund),²⁰⁷ rebates for medical expenses paid on behalf of family members,²⁰⁸ a private health insurance offset²⁰⁹ and certain pension-related rebates.²¹⁰ All of these categories include heterosexual unmarried couples, but none are available to same-sex couples.

²⁰¹ In ATO Interpretive Decision ID 2005/143, a son who undertook heavy lifting and buying groceries was held to satisfy the 'domestic support and personal care' requirement: see Stewart, above n 188.

²⁰² Beneficiaries must pay income tax on distributions from the deceased estate. See Australian Taxation Office, *Managing the Tax Affairs of Someone Who has Died: Tax Obligations of Beneficiaries* (2005) <<http://www.ato.gov.au/individuals/content.asp?doc=/content/31669.htm&page=5&H5>> at 24 August 2005.

²⁰³ See Miranda Stewart, 'Domesticating Tax Reform: The Family in Australian Tax and Transfer Law' (1999) 21 *Sydney Law Review* 453.

²⁰⁴ Ibid 461. See, eg, comment by John Howard: 'when we restructure the tax system, families, dependent children, will be big winners...it has been one of my policy goals in public life to improve the tax system to give greater recognition to Australian parents': *ABC Radio National*, 16 March 1998.

²⁰⁵ *Income Tax Assessment Act 1936* (Cth) s 159.

²⁰⁶ *Income Tax Assessment Act 1936* (Cth) s 159.

²⁰⁷ *Income Tax Assessment Act 1936* (Cth) s 159T.

²⁰⁸ *Income Tax Assessment Act 1936* (Cth) s 159P.

²⁰⁹ *Income Tax Assessment Act 1997* (Cth) sub-div 61G, sub-div 61H.

²¹⁰ *Income Tax Assessment Act 1936* (Cth) s 160AAAA, s 160AAA. For information about which pensions qualify for the rebate, see Australian Taxation Office, *Pensioner Tax Offset: What Pensions Qualify?* (2005) <<http://www.ato.gov.au/individuals/content.asp?doc=/Content/19732.htm&page=2&H2>> at 13 December 2005. Any unused portion of the tax offset can be transferred between spouses.

There are significantly higher income thresholds for the payment of the Medicare levy and the Medicare surcharge for couples and families than there are for individuals. For example, in 2005, spouses with or without dependent children are considered family and are jointly entitled to a \$100,000 income threshold before the surcharge applies, compared with the \$50,000 income threshold for individuals.²¹¹ Same-sex couples are not defined as family under this legislation and may therefore pay more than heterosexual couples for public health cover (particularly if there are significant income differentials within the couple).

There are a number of benefits under social security laws that are paid to couples. These include partner benefits for someone whose partner is on a disability pension, sickness allowance or Austudy.²¹² Some grants are provided to people whose partners have died such as widows' pensions²¹³ and bereavement allowance.²¹⁴ None of these benefits are available to same-sex couples.²¹⁵

The denial of eligibility to apply for a defence force widow's pension led one gay man to bring a complaint against Australia to the United Nations Human Rights Committee. In the 2003 case, *Young v Australia*, Edward Young argued that his Article 26 right to equality and Article 17 right to privacy and family life under the International Covenant on Civil and Political Rights ('ICCPR') were breached by Australia granting pension rights to heterosexual de facto partners but not to same-sex couples. The Human Rights Committee agreed and issued an opinion adverse to Australia.²¹⁶ The Committee decided that although State parties are not obliged to extend rights to unmarried couples, once they choose to do so then they are obliged to do so equally – treating same-sex and opposite-sex unmarried couples alike. No action has been taken at a federal level in response to this determination.

The exclusion of same-sex couples from the definition of 'spouse' under social security law does, however, entitle one member of the couple to claim certain benefits that are only available to single people or available to them at a higher rate than if they received one half of a couple entitlement. An unemployed person in a same-sex relationship may lawfully claim unemployment benefits if their partner is working, or may claim the single rate if both members of the couple are unemployed. Likewise a biological mother may presently claim parenting support if she is not working in paid

²¹¹ *Medicare Levy Act 1986* (Cth) s 3A. See also Australian Taxation Office, *Medicare Levy Surcharge: What are the Income Thresholds?* (2005) <http://www.ato.gov.au/individuals/content.asp?doc=/content/mls_booklet.htm&page=8&H8> at 24 August 2005.

²¹² *Social Security Act 1991* (Cth) s 771HA(1).

²¹³ *Social Security Act 1991* (Cth) s 147 (wife pension), s 362 (widow class B pension).

²¹⁴ *Social Security Act 1991* (Cth) s 315.

²¹⁵ Under the *Social Security Act 1991* (Cth) s 4(1), a person is a member of a couple if the person is 'legally married to another person' and not 'living separately and apart from the other person on a permanent or indefinite basis'. Alternatively, a person need not be married to their partner to be a member of a couple, but their partner must be of the opposite sex.

²¹⁶ *Young v Australia* [2003] Communication No 941/2000 (18 September 2003). The case was also important as it was the first time that the Committee had held that the substantive guarantee of equality under Article 26 of the ICCPR extends to lesbians and gay men who are covered under 'other status'. This question had been left undecided in the previous cases of *Toonen v Australia* [1994] Communication No 488/1992 (4 April 1994) and *Joslin v New Zealand* [2002] Communication No 902/1999 (30 July 2002).

employment and her female partner is. 'Spouses', including de facto partners, are excluded from such benefits, but same-sex couples are not classified as spouses for these purposes.

There does not appear to have been any economic modelling undertaken in Australia to date in order to determine the potential impact of same-sex recognition in taxation and social security.²¹⁷

C Family Court

In 1988 all states except Western Australia referred their legislative powers over children born outside marriage to the Commonwealth, so that since that time the Family Court can hear all disputes relating to residence and contact with children regardless of whether the parents were ever married. However, unmarried couples' disputes about property continue to fall under state jurisdiction, so unmarried couples are forced to use the federal Family Court for disputes over children and state courts for disputes over property.²¹⁸ When the various states passed laws recognising same-sex couples, these reforms included access to existing state property division regimes for unmarried couples, so that now same-sex couples have equal access to such laws in all states except South Australia. In the ACT and Tasmania such regimes also cover non-couples. In Western Australia, the 2002 reforms brought same-sex couples within the Family Court of Western Australia.²¹⁹

The iniquities in excluding unmarried couples from the family law regime are manifold. First, there is the obvious issue that couples with children may face the expense and difficulty of engaging in two separate proceedings. Secondly, particularly among state property regimes for de facto couples that were introduced earlier on (such as NSW), the court may only take into account past contribution, in contrast to the family law regime's twin focus on past contribution and future need.²²⁰ For women, particularly those who have lost income through raising children, a state regime will almost certainly provide a lower share of a couple's property than would be allocated under the *Family Law Act 1975* (Cth). Recognising this, some states such as South Australia and Queensland, which passed their laws later, included a broader range of factors to be taken into account in dividing property, an approach more similar to the *Family Law Act 1975* (Cth).

²¹⁷ Contrast the research papers undertaken to inform the relationship reference of the Law Commission of Canada: Claire Young, 'What's Sex Got to Do With it? Tax and the "Family"', (2000) Law Commission of Canada <http://www.lcc.gc.ca/research_project/cpra/publications-en.asp#rp> at 8 March 2006; Kathleen Lahey, 'The Benefit/Penalty Unit in Income Tax Policy: Diversity and Reform' (2000) Law Commission of Canada <http://www.lcc.gc.ca/research_project/cpra/publications-en.asp#rp> at 8 March 2006.

²¹⁸ Note that there was for a brief period a cross-vesting scheme by which the Family Court could exercise state jurisdiction. However this was struck down by the High Court in *Re Wakim* (1999) 198 CLR 511. See Dorothy Kovacs, 'After the Fall: Recovering Property Jurisdiction in the Family Court in the Post Cross-vesting Era' (2001) 25 *Melbourne University Law Review* 3, 69-70.

²¹⁹ *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA). Of particular note is the *Family Court Act 1997* (WA) div 8 sub-div 2.

²²⁰ Note that it was seen as important at the time that heterosexual de facto recognition was first introduced *not* to grant the same property rights to those who 'chose' not to marry: see New South Wales Law Reform Commission, *De Facto Relationships*, Report 36 (1983).

Thirdly, the Family Court now has the power to divide superannuation contributions between parties.²²¹ Superannuation funds are a significant asset, indeed often the largest asset a person owns. State courts do not have the power to divide such funds.

In an attempt to resolve these problems, the states and Commonwealth negotiated a referral of powers by the states over property and de facto couples. In 2003 and 2004, NSW,²²² Queensland,²²³ Victoria²²⁴ and the Northern Territory²²⁵ referred their powers over de facto relationships to the Commonwealth. Other states (except Western Australia, which has its own Family Court²²⁶) are expected to follow. In the referral legislation a de facto relationship is defined as 'a marriage-like relationship (other than a legal marriage) between two persons'.²²⁷ All state Attorneys-General were of the view that the referral included same-sex couples.²²⁸

However, the Commonwealth government has refused to accept a referral of power over same-sex couples and has indicated that it will not cover them in its reforms. This means that once the referral of powers is complete, the simplicity and broader jurisdiction of the Family Court regime to divide property will only be available to heterosexual couples, while same-sex couples will need to continue using state and territory courts for their property disputes.

D Immigration

Couples and families may be recognised in immigration law in two ways. One is that non-citizens applying to work or live in Australia may apply as a family unit, so for instance the family of a skilled person accompany the primary visa holder although they themselves would not qualify for visas.²²⁹ This avenue of immigration has not been available to same-sex couples to date, such that both partners have to

²²¹ *Family Law Act 1975* (Cth) Part VIIIIB.

²²² *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW).

²²³ *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld).

²²⁴ *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic).

²²⁵ *De Facto Relationships (Northern Territory Request) Act 2003* (NT).

²²⁶ The Family Court of West Australia has the power to take superannuation assets into account as property, but cannot divide funds for de facto couples. It thus passed a limited referral of power in 2005, covering only the power to divide superannuation funds for de facto couples. The referral includes heterosexual and same-sex couples separately so that a later federal government may take up the same-sex referral: see *Commonwealth Powers (De Facto Relationships) Act 2005* (WA).

²²⁷ Above n 221–224, s 3.

²²⁸ 'State Attorneys-General have all agreed that if state power over de facto property disputes is to be referred to the Commonwealth it should include all power in relation to de factos under state legislation, including same-sex de factos': Queensland, *Parliamentary Debates*, Legislative Assembly, 9 September 2003, 3274 (Rod Welford, Attorney-General and Minister for Justice); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 7 October 2004, 5366 (Peter Toyne, Attorney-General and Minister for Justice); New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 September 2003, 3236 (Neville Newell, Parliamentary Secretary); Victoria, *Parliamentary Debates*, Legislative Assembly, 14 October 2004, 1059 (Rob Hulls, Attorney-General).

²²⁹ In 2003–4 an estimated 63,300 people on skilled employment visas came to Australia: Department of Immigration and Multicultural Affairs, *Migration Program Statistics* (2004).

independently qualify in order to immigrate.²³⁰ In March 2006 the Immigration Minister announced that this provision would be amended from 1 July 2006 to permit a same-sex partner to be included on the primary visa application.²³¹

The other provision is where a non-Australian partner of an Australian resident or citizen wants to migrate to join them in Australia. Heterosexual couples may apply to do this under spouse (including de facto) and fiancée visa categories, neither of which are available to same-sex couples.²³² An additional category is the 'interdependency' visa, which is open to any two people with a 'genuine and continuing' relationship. This latter category can cover non-couples, but has also been used by same-sex couples.²³³

V CONCLUSION: TRENDS AND LESSONS

In the space of six years, Australia has gone from having virtually no recognition of same-sex partnerships to broad-ranging recognition across almost all state and territory law. In all jurisdictions except South Australia, same-sex and heterosexual couples are now on an equal footing under legislation in areas such as inheritance of a partner's property, victims', workers' and accident compensation, consent to a partner's medical treatment, and (until the federal regime for heterosexual couples comes into operation) property division.

This process has been achieved through a combination of 'testing the water' and 'leap-frog' reforms. Early limited steps taken by the ACT, NSW and Queensland tested public reaction and political resistance and found that, apart from vocal disapproval from some religious groups, there was little genuine or widespread public opposition to change. This 'testing the water' approach led to broad omnibus reforms some years later. The ACT has also pursued an ongoing process of staggered change since that time.

When the first omnibus reform package was passed by NSW it was in many ways still limited, excluding a number of Acts, especially those that had public cost implications and those that included parenting rights. The NSW changes were not widely opposed and this led the way for 'leap-frog' reforms, where jurisdictions with little or no same-sex relationship recognition then passed laws within a short period that far exceeded the coverage or innovation of those enacted in NSW in 1999. For example the 2001 Victorian omnibus reforms were far more comprehensive than NSW in terms of the range of laws covered and widespread inclusion of non-cohabiting couples. Western Australia and Tasmania were by far the most dramatic 'leap-frogs', both having long been the most regressive states regarding gay and lesbian rights

²³⁰ See, eg, 'Gay Ban Bad for GP Shortage' *Sydney Morning Herald*, 11 June 2005, 9, reporting that three overseas doctors offered positions in 2005 could not take them as their same-sex partners were refused family visas.

²³¹ 'Migration Shift on Same-Sex Partners' *Daily Telegraph* (Sydney) 6 March 2006. It is not clear whether this category will define same-sex couples as de facto couples, or, like other recent federal reforms, as 'dependants'.

²³² Of the 32,354 partner visas granted in 2003-4, 26,681 were spouse visas, 5,034 were prospective marriage visas and 639 were interdependency visas: see Department of Immigration and Multicultural and Indigenous Affairs, *Population Flows: Immigration Aspects 2003-04 Edition* (2005) 26.

²³³ See above n 199.

(being, for example the last states to include homosexuality as a protected ground under anti-discrimination laws).²³⁴ The sweeping reforms in Western Australia included a wide range of parenting rights and the broad Tasmanian reforms covered non-cohabiting couples and also introduced the first relationship registration system in Australia. A fair inference is that jurisdictions have taken courage from each others' reforms and gone further with their own.

In general, the jurisdictions that enacted reform later amended a wider range of laws, were more likely to do so without testing the water first and were more likely to include parenting rights in the package. However a number of jurisdictions still followed the Victorian approach of dividing reforms into two rafts of legislation, saving the more 'contentious' aspects to the later raft to ensure that they did not sink the first. The exception to this general trend is South Australia, the last state to introduce same-sex relationship recognition legislation. South Australia proposed amending a wide range of laws but used a narrower definition of 'de facto' relationship than in all other states and did not include any parenting rights.

This trend of Australian states building upon and exceeding each other's reforms accords with a general global trend in same-sex relationship recognition described by Dutch expert Kees Waaldijk as 'the law of small change'.²³⁵ Waaldijk argues that across Europe there is a clear pattern of 'steady progress' across 'standard sequences' in each country, beginning with decriminalisation of gay sex, setting an equal age of consent, the introduction of anti-discrimination protections for individuals and then various incremental legislative changes recognising same-sex partnerships and parenting.²³⁶ While such progress is not necessarily linear (for example, with backlash measures occurring simultaneously) and not always in the sequence identified by Waaldijk, in a federation such as Australia a similar overall trend can be noted. I would suggest that it is appropriate to consider the various state and territory jurisdictions in a cumulative sense as having built upon each others' 'small changes' to produce, in a remarkably short space of time, significant national change.

Another general trend evident in the Australian process is that all major reforms were introduced by Labor governments, many of them in their first term of office. This is consistent with worldwide trends, where same-sex reforms have been pursued by overwhelmingly centre-left and leftist governments.²³⁷

There does not appear to be any clear path across the various jurisdictions in terms of reform process. Some, such as those in NSW, Queensland and the Northern Territory, were conducted by government without any real form of public consultative process.²³⁸ Others, such as Western Australia and Victoria, used select expert/community committees to develop or inform the relationship reform agenda (although Victoria subsequently held open law reform processes on parenting rights).

²³⁴ Tasmania was the last state in Australia to repeal criminal prohibitions on gay sex in 1997, and Western Australia maintained a widely unequal age of consent for gay sex until 2001.

²³⁵ See Kees Waaldijk, 'How the Road to Same-Sex Marriage Got Paved in the Netherlands' in Robert Wintemute and Mads Andenaes (eds) *The Legal Recognition of Same-Sex Partnerships* (2001).

²³⁶ *Ibid* 439–42.

²³⁷ See Robert Wintemute, 'Conclusion' in Wintemute and Andenaes, above n 235.

²³⁸ Note that NSW does have an ongoing law reform reference begun in 1999, but thus far none of the reforms passed have been generated by it.

The ACT held open processes for all stages of reform. Tasmania and South Australia accepted limited public input through the parliamentary committee process.

There is also considerable variation in terms of how gay and lesbian community groups engaged in reform processes. In some jurisdictions, such as NSW and Tasmania, it was gay and lesbian community groups who first developed the models that formed the basis of legislation. In the Northern Territory it was initiated by a community legal centre. In others, such as the ACT and South Australia, community groups formed to respond to proposals originating from government rather than themselves developing reform models. In the middle ground, in Victoria and Western Australia, representatives of gay and lesbian community groups consulted with government through advisory committees that formulated the platform for legislative action.

Perhaps unusually, Australian reforms have faced relatively little parliamentary opposition, with the Liberal shadow cabinet often offering either no opposition or a conscience vote. Only in Western Australia and South Australia has the opposition seriously attempted to prevent reform. At the time of writing, Western Australia is the only state with an opposition committed to repeal of existing same-sex relationship recognition if it achieves government.

These trends are in stark contrast to the federal arena where there have been virtually no positive reforms in recent years, with a number of actual and threatened retrograde reforms posed by the federal coalition government. Control of the Senate in its own right by the government from July 2005 (for the first time since 1981) means that the position of same-sex families at federal level is likely to worsen before it improves. The few advances at federal level have been through the extension of a limited non-couple 'interdependent' category and have not been of broad effect.

It is notable that conservative parties and conservative governments, even those that are prepared to grant substantive rights to same-sex couples, are extremely reluctant to acknowledge same-sex couples *as* couples. Pointedly, both federal and South Australian conservatives are prepared only to acknowledge same-sex couples on the same footing as non-couples, rather than on the same footing as heterosexual unmarried couples. Even in a number of progressive reform states, the use of the term 'spouse' in conjunction with 'de facto' was either dropped or vigorously disputed. This suggests a further trend that mirrors international developments; a shift away from substantive legal rights as the main focus of contest, towards a focus on naming, symbolism and the 'special-ness' of marriage.

Finally, it is worth recalling that formal legal equality is a necessarily step towards, but not a guarantee of, equal treatment. I suggest that formal inclusion within existing legal frameworks is in fact only a beginning of a transformation to a more genuinely equal legal regime. Equitable treatment, including in some circumstances treatment that is not necessarily based on an assumption of formal equality or identical interests with heterosexual couples, may be a far more difficult and long-term goal. As yet there is relatively sparse case law under the new provisions, most of which have only been in place for a couple of years. But more than a hint of lingering discrimination is suggested by the following remark in one of the first cases in NSW in which a gay partner's family provision claim was heard under the *de facto* category. The case concerned the claim of a surviving partner for a shared residence, and was largely successful. However, the Supreme Court Master concluded the judgment thus:

The relationship was a long one. It was for 31 years. It had its own commitments between the two parties to the relationship, but it must be noted that, in fact, it was only a de facto relationship and in this sense one cannot quite compare it to the situation of a married heterosexual couple who have made the public commitment of marriage....²³⁹

Exactly how the partners in that case, prevented by law from marrying and separated only by death, were meant to make a greater public commitment to each other is left to the imagination. This judgment suggests that in Australia unmarried relationships, whether legally recognised or not, are still considered as 'only' de factos, as always lesser than 'the real thing'. It remains to be seen whether the raft of reforms described in this paper, and other possible recognition options, such as registration systems like that enacted in Tasmania and the civil union system to be introduced in the ACT, will shift such attitudes, or whether they will in fact enhance the symbolism of marriage as a separate and unequal status.²⁴⁰

²³⁹ *Mair v Hastings* [2002] NSWSC 522, (Unreported, Master Maccready, 31 May 2002) [50]. There are examples in other NSW cases of judges appearing insensitive to the realities of gay and lesbian life, for instance by holding it against the credit of a gay man that he was not prepared to answer, in open court, questions about whether his former partner had died of AIDS, and that in filling out a government application for an interdependency visa for his present partner, he had not disclosed that they met through an escort agency: *Dridi v Fillmore* [2001] NSWSC 319 at [77]. It did not seem to occur to the judge that a gay person in that situation would be exposing themselves to the considerable risk of discrimination by responding truthfully, and that a lack of candour in such circumstances might be reasonable.

²⁴⁰ See discussion of equality jurisprudence and civil unions in: *Reference re Same-Sex Marriage* [2004] 3 SCR 698; *Opinion of the Justices to the Senate* 802 N E 2d 565 (2004); *Minister for Home Affairs & Anor v Fourie and Anor* [2005] ZACC 7 (1 December 2005).