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For richer for poorer, in sickness and in health: Should Australia embrace same-sex marriage?

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In 2004, the Marriage Act 1961 (Cth) was amended to clarify that legal marriage requires a heterosexual union. This article will examine whether this amendment was consistent with the existing state of the common law, legislative trends throughout Australia and current societal values. It will also canvass the legal and social arguments in support of and in opposition to same-sex marriage. Arguments in support of legal same-sex unions based on equality before the law and international obligations will also be discussed. The recent amendments in Australia will then be contrasted with legal reforms in Canada aimed at ensuring that their Federal legislation is consistent with the equality provisions of the Charter of Rights and Freedoms. Finally, an alternative system of relationship registration will be posed as a possible compromise.

Introduction

In the end, leaving aside (as secular governments should) objections that may be held by particular religions, the case against homosexual marriage is this: people are unaccustomed to it. It is strange and radical. That is a sound argument for not pushing change along precipitously. Certainly it is an argument for legalising homosexual marriage through consensual politics (as in Denmark), rather than by court order (as may happen in America). But the direction of change is clear. If marriage is to fulfill its aspirations, it must be defined by the commitment of one to another for richer for poorer, in sickness and in health -- not by the people it excludes.¹

The subject of same-sex marriage is currently topical. At the time of writing, both the Tasmanian and New South Wales parliaments are considering Private Members' Bills seeking to legalise same-sex marriage at State level.² These Bills, if passed, would have little impact upon existing marriage laws, as such legislation must be passed by the Commonwealth Parliament.³ However, they indicate strong opposition to the amendments made in 2004 to the Marriage Act 1961 (Cth) (Marriage Act) which inserted a formal definition of 'marriage' to clarify that legal marriage requires a heterosexual union.⁴ A provision was also included that a same-sex marriage performed in a foreign jurisdiction would not be legal in Australian law.⁵ The impetus for these changes were media reports that several Australian same-sex couples were planning to marry in overseas jurisdictions on the basis that their marriages would be recognised under Australian law, upon their return.⁶

Prior to these amendments, the Marriage Act contained no formal definition of marriage.⁷ It had also provided that a marriage solemnised in a foreign country would be valid provided that the parties fulfilled the requirements under the Marriage Act.⁸ There appeared to be no express requirement that a foreign marriage had to be heterosexual. It therefore may have been open to legal argument that a same-sex marriage, particularly one legally entered into in a foreign jurisdiction, would be valid in Australia.⁹

In his second reading speech the Federal Attorney-General, Phillip Ruddock, explained the reasons for the amendment clarifying that marriage had to be a heterosexual union, being based on:

The government has consistently reiterated the fundamental importance of the place of marriage in our society. It is a central and fundamental institution. It is vital to the stability of our society and provides the best environment for raising children. The government has decided to take steps to reinforce the basis of this fundamental institution.¹⁰

The Attorney-General further argued that the amendment merely reflected what was the understanding of 'marriage' held by the majority of the Australian population, being that such a union had to be heterosexual.¹¹

These amendments to the Marriage Act occurred at a time when there has been extensive legislative reform at both Commonwealth and State and Territory level to effectively accord same-sex couples equal legal rights to married couples in many other areas of the law. In several overseas jurisdictions, same-sex marriage was being legalised or seriously considered.¹² At the time of writing, amendments in Canada and Spain to legalise same-sex marriage are progressing through their respective parliaments.¹³ In stark contrast, in Australia, despite some opposition, the amendment to our legislation requiring a heterosexual union passed through parliament with the support of the Opposition Labor Party.¹⁴

In this article, the legal requirement for a heterosexual union will be examined in detail, to determine whether, at the time of the amendments, this position was consistent with the existing common law, legislative trends throughout Australia and current societal values. It will also canvass the legal and social arguments in support of, and in opposition to, same-sex marriage. Arguments in support of legal same-sex unions based on requirements for equality before the law and Australia's international obligations will also be discussed. The recent amendments to our Marriage Act will be contrasted with the Canadian reforms aimed at ensuring that their Federal legislation was consistent with the equality provisions of the Charter of Rights and Freedoms. Finally, the alternative of a system of legal registration of relationships, as recently implemented in Tasmania, will be suggested as a compromise.¹⁵

At the outset it should be noted that there are a significant and increasing number of same-sex couples in Australia. In 2001 there were 20,000 same-sex couples living together throughout Australia, double the number of same-sex couples that were living together in 1996.¹⁶ However, to put these figures in perspective, in terms of their proportion of the Australian couple population, the Australian Bureau of Statistics has reported that this reflects only .5% of the entire couple population.¹⁷

The historical origins of marriage and the existing common law at the time of the 2004 amendment

Prior to the 2004 amendments to the Marriage Act, at common law, it had generally been assumed that marriage had to be between a man and a woman.¹⁸ However, there had been some debate about issues of legal personality, whether the terms 'man' and 'woman' in the Marriage Act, could encompass a person who had been born one sex and then transferred to the opposite sex through gender reassignment surgery. In examining these issues, Australian courts had considered societal values underlying marriage and the significance of the Christian religion to legal conceptions of modern marriage. Courts had also given some thought to whether, in the future, 'marriage' should be extended to include same-sex unions.

It is interesting to note that the definition of 'marriage' inserted in 2004 reflects the nineteenth century English common law definition contained in *Hyde v Hyde & Woodmansee*.¹⁹ In that case Lord Penzance stated that, 'marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.' Our 2004 amendment reflects that, historically, our Australian marriage laws, derived from UK laws which derived from Christian values.²⁰

Linked to these religious origins, was the underlying assumption that marriage was for the primary purpose of procreation and therefore required two people of the opposite sex who could engage in a sexual relationship and were

biologically capable of having children. This was illustrated by the English case of *Corbett v Corbett* in which Ormrod J decided that a transsexual woman could not fall within the definition of 'woman' for the purpose of the UK Marriage Act as she was not physically able to have children. He stated:

sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.²¹

Ormrod J set out a three step test to determine a person's 'true sex' for legal purposes, being based on their genitals, gonads and chromosomes as at the time of birth.²² He held that the transsexual person in question, April Ashley, was legally a man, as she had been born a man, even though she had undergone gender reassignment surgery to become essentially female and also perceived herself to be of the female gender.

In Australia, arguments seeking to apply the *Corbett* decision were submitted in both the Family Court and on appeal, in the Full Court of the Family Court in the case of *In Re Kevin (Validity of marriage of transsexual)*.²³ This case concerned the validity of a marriage of a transsexual person, Kevin, who had been born female and at the time of marriage was a post-operative transsexual male. The issue for the court was, again, legal personality and whether Kevin was a 'man' for the purposes of the Marriage Act.

Counsel on behalf of the Federal Attorney-General, Mr Burmester, argued that marriage was a social institution having its origins in ancient Christian law and that procreation was an essential element of marriage as it provides the foundation for the family. He further argued that the *Corbett* decision should be followed and, accordingly, Kevin could not fall within the definition of 'man' in the Australian Marriage Act as according to the three step test set out by Ormrod J, Kevin had been a male at birth.²⁴

These arguments were rejected by both the trial judge, Mr Justice Chisholm and on appeal, by the Full Court of the Family Court. Although the Appeal Court accepted that marriage had had its origins in ancient Christian law, it stated that marriage was now secularised in Australia.²⁵ The court rejected the proposition that the essential purpose of marriage in modern Australia is procreation, as the court reasoned, many couples have children outside marriage and some are unable to have children.²⁶ The court took a more inclusive approach to the definition of 'man' in the Marriage Act and concluded that the words 'man' and 'woman' should be given their ordinary, everyday contemporary meaning. It rejected the *Corbett* three-step test for gender and was of the view that, in determining gender, the time of marriage was the relevant point that gender should be determined and that all relevant matters need to be considered, including the person's life experiences and self-perception. The court came to the conclusion that a post-operative transsexual was a 'man' under that Act and accordingly, declared his marriage to be valid.²⁷

Although the courts in *Re Kevin* assumed that marriage had to be a heterosexual union, the decision suggests a liberal interpretation of marriage and a rejection of the proposition that the primary purpose of marriage is procreation. At least at common law, prior to the 2004 amendment to the Marriage Act, the courts were open to the proposition that the parties to a marriage do not have to be biologically capable of having children.

Prior to the *Re Kevin* decisions, a judge in the High Court had considered that 'marriage' should be interpreted by the courts according to a meaning that would align with current social values and could possibly in the future encompass same-sex marriage. In the High Court case of *Re Wakim; Ex parte McNally*, Mr Justice McHugh stated:

In 1901 'marriage' was seen as meaning the voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same-sex marriages, although arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two *people* to the exclusion of others.²⁸

Several Family Court cases have dealt with issues arising from legal disputes concerning children conceived as a result of assisted reproductive technology. In coming to their decisions, these judicial officers have acknowledged the reality of same-sex couples creating 'non-traditional families'.²⁹ In the case of *Re Patrick: An application concerning contact*,³⁰ Justice Guest offered a liberal legal definition of 'family' to include a same-sex couple and their child. His Honour stated: 'In my view, Patrick's "family" is comprised of the mother and the co-parent. It is a homo-nuclear family. They are his parents.'³¹ He further stated:

The term 'family' has a flexible and wide meaning. It is not one fixed in time and is not a term of art. It necessarily and broadly encompasses a description of a unit which has 'familial characteristics'. Not all families function in the same way. Never the less, they enjoy common characteristics such as those demonstrated by the applicants. Theirs is not of a casual or transitory nature but one that has embraced exclusivity and permanency. They are emotionally and financially inter-dependant and I have no doubt, share common interests, activities and companionship. Their biological and psychological relationship to and mutual care of Patrick makes it so much more obvious. In my view it would stultify the necessary progress of family law in this country if society were not to recognise the applicants as a 'family' when they offer that which is consistent and parallel with heterosexual families, save for the obviousness of being a same-sex couple. The issue of their homosexuality is, in my view, irrelevant.³²

The former Chief Justice of the Family Court, Alastair Nicholson, has also strongly argued that same-sex families should be recognised. He has said, 'it is not procreation that defines a family relationship, but the commitment and financial and emotional interdependence of family members'.³³

Therefore at the time of the 2004 amendments it is clear that, at common law, legal marriage required a heterosexual union. However, the courts had indicated that legal conceptions of marriage are no longer linked to Christian values and that it is now a secularised institution in Australian society. They were also of the view that procreation was no longer the fundamental purpose of marriage and that the parties to a marriage do not have to be biologically capable of having children, enabling the meanings of 'man' and 'woman' in the Marriage Act to be more inclusive. Our courts, particularly the Family Court, have shown a willingness to accept the domestic reality of same-sex couples and judicial statements have provided support for 'non-traditional' families. However, whether these legal observations reflect the values of the majority of Australians is a question that will be examined later in this article.

Commonwealth and State and Territory legislative trends

The 2004 amendments to the Marriage Act occurred at a time when there had been strong legislative trends throughout Australia, at both Commonwealth and State and Territory level, to devolve to same-sex couples the same rights as married couples in many other areas of the law. For example, also in 2004, the Commonwealth Government amended the Superannuation Industry (Supervision) Act 1993 (Cth)³⁴ and the Income Tax Assessment Act 1936 (Cth)³⁵ so that a person who had been living in an 'interdependency relationship' within a same-sex relationship, would be eligible to receive concessionally taxed superannuation benefits upon the death of their partner.³⁶

Queensland,³⁷ New South Wales,³⁸ Victoria,³⁹ Western Australia⁴⁰ Tasmania,⁴¹ the Northern Territory⁴² and the Australian Capital Territory⁴³ had all been involved in legislative reform to ensure that a same-sex partner has identical rights to a married spouse in almost every area of law at State and Territory level. These amendments have resulted in, for example, a same-sex partner being entitled to an inheritance if their partner dies suddenly without a will, having the ability to seek compensation if their partner is wrongfully killed or injured and being eligible to pay concessional rates of stamp duty if a property is transferred into joint names. South Australia is presently considering similar legislation.⁴⁴

In Queensland, the Discrimination Law Amendment Act 2002 (Qld) inserted a new definition of 'de facto partner', to include same-sex couples, into s 32DA of the Acts Interpretation Act 1954 (Qld). This Act also had the effect of making consequential amendments to a wide range of Queensland legislation to give all de facto couples, including same-sex, the same entitlements as married couples.⁴⁵ In contrast to many of the other States, South Australia has been

the slowest jurisdiction to reform the law in this area. However, this State has enacted legislation creating equal superannuation entitlements for same-sex-couples⁴⁶ which empowers same-sex partners, in certain circumstances, to claim superannuation entitlements on the death of their partner.⁴⁷

At present same-sex couples can apply to adopt children in the Australian Capital Territory and Western Australia, provided that they satisfy the eligibility requirements for adoption.⁴⁸ In Tasmania, legislation does not give rights to general placement adoption, however, step-parents can adopt their partner's children.⁴⁹ In all three jurisdictions the parties must have been in a de facto relationship for at least three years to be eligible to make an adoption application.⁵⁰

These developments show that, in many areas of the law, same-sex couples now have equal rights to married couples. The situation in relation to property adjustment for same-sex couples upon separation also shows that, in some areas of Australia, they have either the same rights or close to the same level of legal rights as married couples.

Same-sex couples and legal rights to property adjustment upon separation in State and Territory jurisdictions around Australia

Unlike married couples, where property adjustment upon separation is determined by the Family Law Act 1975 (Cth) (Family Law Act), de facto property settlement is covered by State and Territory legislation. In all jurisdictions, apart from South Australia, the legislation is inclusive of same-sex couples, however, the various statutes vary in the rights that they devolve. South Australia is presently considering legislation to rectify this.⁵¹

In Queensland, Western Australia, the Australian Capital Territory and Tasmania the various statutes are modeled on the Family Law Act, to the extent that the court can take into account the parties' financial and non-financial contributions, their present and future economic needs, and contributions made as a homemaker and parent. However, in this group, Queensland is the only jurisdiction that does not replicate the Family Law Act rights to enable a party to apply for spousal maintenance, in the appropriate circumstances.⁵²

In Queensland, Western Australia and the Australian Capital Territory, generally couples should have resided together for two years or have a child of the relationship or one party has made substantial contributions.⁵³ In Tasmania, if there is a registered deed of relationship, there is no duration of cohabitation requirement. However, if the parties had not registered a deed, the duration of relationship requirements are the same as in the other three jurisdictions.⁵⁴ In all jurisdictions, apart from Western Australia, where the Family Court of Western Australia has power to deal with the application, a property application must be taken to a State or Territory court.

The rights of de facto couples in these jurisdictions can be contrasted with the situation in New South Wales, Victoria and the Northern Territory. In these jurisdictions, the court cannot take into account the parties' future economic needs. It can only have regard to financial and non-financial contributions and their homemaker and parent contributions.⁵⁵ This legislation is therefore narrower than the Family Law Act, however, this group is also not consistent in relation to maintenance rights. Both the New South Wales and Northern Territory legislation provides for 'spousal' maintenance rights and in this regard the court can take into account future economic needs, however, in Victoria a party cannot apply for spousal maintenance.⁵⁶

It is therefore clear that a party living in one area of Australia may be entitled to a lower quantum of property settlement than a party in another jurisdiction as the court cannot consider future economic needs⁵⁷ and may not have the right to

apply for 'spousal' maintenance.⁵⁸ In all jurisdictions at present all de facto couples are ineligible to access the super-splitting laws available under the Family Law Act that enable, in appropriate circumstances, a party's superannuation fund to be split into two separate funds.⁵⁹

On 8 November 2002 a meeting of the Standing Committee of Attorneys-General (SCAG) in Fremantle agreed to a referral of powers to the Commonwealth in relation to property disputes relating to separating de facto couples.⁶⁰ At the time of writing, only four jurisdictions have passed the appropriate referral legislation.⁶¹ The Victorian Attorney-General, has criticised the Federal Government for stating that its intention is to accept the heterosexual referrals, however, to refuse same-sex referrals.⁶²

Apart from legislative trends and an examination of legal entitlements in the various areas of the law, it is important to examine the arguments for and against same-sex marriage. Both social-science research and community views can inform this debate.

The policy arguments for and against same-sex couples having rights to legally married

The issue of whether the marriage power set out in the Constitution could support a Commonwealth law that recognised same-sex marriages has been dealt with in other academic writing in some detail.⁶³ It has been argued that there is a method for interpreting constitutional terms which can support such a contention. It has been argued that 'marriage' is a constitutionalised legal term of art and that its meaning can be informed by developments since Federation in common law and statute.⁶⁴ It will be assumed for the purposes of this article that the power contained in the Constitution could support such an amendment to the Marriage Act.

The arguments for and against same-sex marriage are many and require a detailed discussion. The primary objection put forward is that legal marriage between heterosexual couples is the social entity that best benefits society as it can ensure procreation and promote the institution of the family.⁶⁵ It has also been said that marriage 'carries with it strong religious connotations for many people ... Although as a matter of law it is now a secular institution, it is rarely treated as such by the public or the legislators'.⁶⁶ There are also fears expressed that any support for same-sex marriage represents a threat to heterosexual marriage and may encourage people to enter into homosexual unions which, in turn, will lead to a range of social problems.⁶⁷ Following from this, some would argue that the institution of heterosexual marriage and the unique commitment that married couples make to each other, should be supported and protected by the law by the retention of clear legal distinctions between the rights of legally married couples and the unmarried.⁶⁸

However, many others would argue that recognition of same-sex families in no way detracts from the status of heterosexual marriages.⁶⁹ A recent committee inquiry rejected the argument that legal recognition of same-sex relationships will discourage people from forming heterosexual relationships and in turn encourage them to form homosexual relationships. The committee also could not find any evidence to support the contention that the legal recognition of same-sex couples would lead to social problems such as family breakdown.⁷⁰

In fact it is clear that, with the advent of assisted reproductive technology, greater numbers of same-sex unions are providing for the nurture and support of children and forming their own family units. In 2001 the number of couples in same-sex de facto relationships was 20,000. In this same year same-sex couples represented .5% of all married and de facto couples and .1% of all couples with children. Children were present in 11% of same-sex households.⁷¹

Concerns have also been expressed that a homosexual union is not an appropriate environment in which to provide for

the nurture and support of children⁷² and that if parents have a homosexual orientation this could have a detrimental impact on their children or encourage them to also develop such sexual orientation.⁷³ There have been writers that support these contentions⁷⁴ although their work has been strongly criticised.⁷⁵ These concerns, however, can be countered by the majority of recent research findings, for example, that lesbian mothers were shown to be just as child-centered and as nurturing as their heterosexual counterparts⁷⁶ and that the children from lesbian families did not exhibit higher rates of psychological disorders than their counterparts from heterosexual families.⁷⁷ It has also been demonstrated that there are no differences in children of homosexual parents in relation to 'children's sex role identification, level of happiness, level of social adjustment, sexual orientation, satisfaction with life or moral and cognitive development'.⁷⁸ At common law, both in Australia and in Canada, there has been judicial recognition that a homosexual parent can provide just as effective an upbringing for a child as a heterosexual parent.⁷⁹

A further argument against same-sex marriage, used by the Federal Attorney-General when introducing the Bill that contained the amendments to the Marriage Act, was that the majority of Australians understand that marriage is a heterosexual union. There is some support for this contention in both social science research and community surveys. For example, research conducted into the values that Australians held about desirable family structures revealed that the majority held traditional family values and supported the ideal of a life-long monogamous heterosexual marriage, with most respondents disapproving of homosexuality and homosexual relationships.⁸⁰ Sixty-three percent of respondents rejected the proposition that same-sex couples should be allowed to legally marry and 71% rejected the proposition that they should be allowed to adopt children.⁸¹

There have also been several polls conducted as to community opinion in relation to same-sex marriage. A recent Newspoll survey revealed that a small majority of respondents were not in support of same-sex marriage, 44% of respondents being against same-sex marriage and 38% of respondents being in favour of same-sex marriage.⁸² In 2004, when the Marriage Legislation Amendment Bill was being debated, there was support from members of the House of Representatives from both the Liberal and Labor party for the proposition that a heterosexual union reflected the values of the majority of Australians in relation to marriage.⁸³ In a recent committee inquiry in South Australia, only a small majority of submissions received were in support of the State de facto property legislation being amended to include same-sex couples.⁸⁴

There is some sociological support that marriages are more stable than de facto partnerships and that married couples are more inclined to pool their financial resources.⁸⁵ Research also reveals that de facto couples tend to have less traditional family values and more egalitarian views towards gender roles and the division of domestic labour.⁸⁶ It has been also been argued that 'marriage provides individuals with a sense of obligation to others, and it is an institution assumed to be a life-long commitment with contractual obligations'.⁸⁷ Further, that it is for the benefit of society that couples enter into legal marriages as these relationships result in more lasting unions that play an important role in the nurture and support of children.⁸⁸

This research has been conducted into heterosexual married unions, and one could question whether, if same-sex couples are permitted to legally marry, they would also obtain similar social benefits of legal marriage in increased security and stability. In a recent committee inquiry, it was submitted that legal recognition of same-sex unions would encourage the community to be more accepting of these couples, which would in turn contribute to their personal well-being and reduce their social exclusion.⁸⁹

Statistics reveal a declining number of heterosexual marriages in Australia and growth in the number of de facto partnerships with children. In 2002 there were 105,400 marriages registered in Australia, and the marriage trend since 1981 shows that marriage rates are declining.⁹⁰ In that same year, there were 50,727 divorce applications lodged in Australia courts.⁹¹ The 2001, Census figures reveal that 59% of married couples had children living in their household. In that same year, 12% of all couples were living in de facto relationships and 42% of these couples had the care of children.⁹² Of these couples, 20,000 couples were living in same-sex de facto relationships and 11% had the care of children.⁹³

These figures show that the importance of heterosexual marriage in our society is diminishing and that marriage may not necessarily provide a stable long-lasting partnership.⁹⁴ In contrast, the number of same-sex de facto relationships is increasing and many such partnerships are providing for the nurture and support of children. At present with a high divorce rate⁹⁵ and low birth rate⁹⁶ in Australia, it could be argued that our legal system should be aiming to protect and support the entity of 'the family' rather than restricting legal marriage to heterosexuals, that both heterosexual and same-sex couples should be able to receive the full support and recognition of the law.

Another contention is that some same-sex couples have no wish to legally marry as they wish to opt out of both the social and legal implications of marriage.⁹⁷ This may be the case for a proportion of same-sex couples.⁹⁸ However, family lawyers would attest to the fact that many people are not aware of the legal distinctions accompanying married or de facto status and may not even consider their legal rights until they separate and obtain legal advice. Further, that if same-sex couples had the legal option of whether or not to legally marry that they then could exercise their own free choice. At present when same-sex couples separate they are subject to the same laws as married couples in relation to parenting orders⁹⁹ and child support obligations.¹⁰⁰ However, both heterosexual and same-sex couples are subject to different laws relating to property adjustment, according to the State or Territory in which they live.

A compelling reason to allow same-sex couples to legally marry relates to their legal rights to property adjustment and maintenance in the event of separation. If married, both parties would be subject to the Family Law Act. This would provide increased protection to the financially weaker, or dependent party. This is most significant when one party has stayed at home or relegated their career as secondary to the nurture and support of the family and the children of the relationship. It is after commencing a family, that often for practical and financial reasons, one partner will play a greater role in the care of the home and children.

At present, the key deficiencies in the legal rights of the unmarried as opposed to the married are that, depending on what State or Territory they live in, future economic needs may not be taken into account in determining property adjustment¹⁰¹ and they may not have the right to apply for 'spousal' maintenance.¹⁰² In all jurisdictions at present they also cannot access the super-splitting laws that enable a party's superannuation fund to be split into two separate funds.¹⁰³ These are the key rights that are crucial for a partner, who has stayed at home to care for the home and family, to access.

Arguments for legal same-sex marriage based upon Australia's obligations to uphold the principle of equality before the law and international law

Apart from the various policy arguments outlined above, there is a compelling argument that same-sex couples and their families are part of the community and deserve recognition and equal protection under the law.¹⁰⁴

Australia purports to uphold the principles of a liberal democracy, including adherence to the principles of the rule of law.¹⁰⁵ An element of this concept is that all Australians should have equality before the law and that withholding from same-sex couples the right to legally marry is contrary to this fundamental principle.¹⁰⁶ 'Equality before the law' requires that all Australians should have equal rights and are entitled to equal outcomes in their treatment by the law.¹⁰⁷ It has been said that, 'A central tenet of liberalism is that all individuals have rights, including the right to be treated as political equals'.¹⁰⁸ Flowing from this, it has been argued, homosexual individuals have the right to be treated by the Commonwealth Government with equal concern and respect in relation to their economic interests. Consequently, homosexual de facto couples should be entitled to equal rights to legal marriage as their heterosexual counterparts and the advantages that flow from this. This would mean that, in the event of separation, that all of their domestic affairs, both relating to their children and to their financial affairs, can fall within the domain of the Family Law Act.¹⁰⁹

Australia's commitments under international law are consistent with this argument.¹¹⁰ Both Art 23 of the International Covenant on Civil and Political Rights (ICCPR)¹¹¹ and Art 16 of the Universal Declaration of Human Rights (UDHR)¹¹² provide to the effect that men and women of marriageable age should have the right to marry and found a family. The UDHR provides in Art 16(1): 'They are entitled to equal rights as to marriage, during marriage and at its dissolution.'¹¹³ Further, both the ICCPR and the UDHR contain provisions confirming the equality before the law requirements.¹¹⁴

We can contrast the present position in Australia with the situation in Canada. In that country, in 2004, the Federal Government became concerned that the federal requirement for heterosexual marriage breached the equality provisions of the Charter of Rights and Freedoms.¹¹⁵ The government took this issue to the Canadian Supreme Court which confirmed that proposed federal amendments to allow same-sex marriage would be consistent with the Charter.¹¹⁶

Although Australia has no equivalent Charter or Bill of Rights, we do have a written Constitution.¹¹⁷ Unfortunately, this document contains a limited number of what could be considered 'human rights' and does not contain any provision upholding equality before the law.¹¹⁸ However, State legislation throughout Australia prohibits discrimination against parties on the basis of sexual orientation.¹¹⁹ There has also been human rights legislation recently enacted in the Australian Capital Territory. The Human Rights Act 2004 (ACT) contains a specific provision about equality before the law and is based on Art 15 of the Canadian Charter. Section 8(3) states that: 'Everyone is equal before the law and entitled to the equal protection of the law without discrimination.' The section also sets out examples of discrimination including discrimination on the basis of sex, sexual orientation or other status.¹²⁰

Finally, it can be argued that it is inconsistent for the Federal Government to indicate that it will devolve to same-sex couples the same rights as married couples, for example, eligibility for concessional taxed superannuation benefits upon the death of their partner, and then to deny such couples the right to marry.

An alternative model of relationship registration

Despite the strong arguments in support of same-sex marriage, this article has canvassed current Federal Government and community opposition to same-sex marriage.¹²¹ A possible legal compromise is an alternate means of recognising personal relationships at Commonwealth level, by way of a system of legal registration of same-sex relationships. At State level this is currently illustrated by the situation under Tasmanian legislation, the Relationships Act 2003 (Tas).

This legislation gives same-sex de facto couples equivalent legal status to married couples, at State level. It provides a

voluntary process by which they can achieve legal recognition of their relationship, by the registration of a deed of relationship, called a 'personal relationship agreement', with the Registrar of Births, Marriages and Deaths.¹²² If the parties later separate and their relationship has been registered, there is no need for either of them to prove the existence of their de facto relationship and no requirement to show that they cohabited for any particular period of time.¹²³ This is equivalent to the situation in relation to married couples under the Family Law Act 1975 (Cth).¹²⁴

Similar legislation is presently being contemplated in South Australia. The Relationships Bill 2005 (SA) was introduced into the South Australian parliament on 25 May 2005. It seeks to provide a legal system of recognition and registration of relationships for de facto couples, both heterosexual and same-sex, and for people living in what are described as 'caring relationships', where one person provides domestic support and personal care for another.¹²⁵ Under s 11 of the proposed legislation, two adults can apply to the Registrar of Births, Deaths and Marriages to register a deed of relationship. The legislation runs parallel to the existing de facto property legislation, the De Facto Relationships Act 1996 (SA), which deals with property adjustment for heterosexual couples. The Relationships Bill 2005 (SA) proposes that an application can be made under this legislation by a member of heterosexual or same sex couple or a member of a 'caring relationship'. If the parties were in a heterosexual de facto relationship they have the option of applying under this proposed legislation or under the De Facto Relationships Act 1996 (SA).¹²⁶

It is argued that such a system of relationship registration could be implemented at Federal level. This would give same-sex couples legal recognition of their relationship and at the same time appease concerns that legal same-sex marriage could erode the institution of marriage and the entity of the family. Obviously, a criticism of such a system could be that it is an artificial way for same-sex couples to be recognised and distinguished from their heterosexual counterparts and that it would leave a situation of legal inconsistency as same-sex couples now have equivalent legal rights under almost all other areas of the law. An overriding concern would be that same-sex couples would remain excluded from the provisions of the Family Law Act in relation to property adjustment upon separation. This would particularly result in potential injustice for a partner who has stayed at home to care for the home and family. However, it remains a legal option, although not one that proponents of equality would support. It remains, however, as a possible compromise in the present political and social climate.

Conclusion

The numerous legislative developments around Australia at both Commonwealth, and State and Territory level, indicate that already two jurisdictions allow same-sex partners general rights to adopt children¹²⁷ and three jurisdictions have property adjustment legislation that virtually mirrors the provisions of the Family Law Act, apart from the ability to access the super-splitting provisions, for same-sex couples.¹²⁸ In recent years, there have clearly been strong legislative trends to provide equal legal rights to same-sex couples in all other areas of the law, such as when one partner dies and the other seeks access to succession, superannuation, or compensation entitlements. South Australia is now the last remaining State presently considering legislation that will provide equal rights for same-sex partners at State level.

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

There are clearly strong arguments for same-sex couples having equality before the law and having the right to marry

under Commonwealth law. There are compelling social policy considerations, that overall the institution of marriage is waning in popularity and with Australia's decreasing marriage rate and low birth rate that the law should be protecting and promoting the entity of 'the family' in any form. There has been recognition, at common law, that a legitimate family can be formed by a same-sex couple, being a 'homo-nuclear family'.¹²⁹ Australian courts, particularly the Family Court, have been supportive of same-sex families. They have been prepared to take account of extensive social science research, and now regard homosexual parents as being able to provide just as effective an upbringing for their children as heterosexual parents.¹³⁰ There are also compelling arguments in support of same-sex marriage based on Australia's requirements according to its fundamental foundation as a liberal democratic society for equality before the law and assertions based on Australia's human rights obligations under international law.

However, this article has also canvassed that there is evidence that many Australians are not yet ready to embrace legal same-sex marriage and still cling to traditional values of the family as represented by a heterosexual couple and their children. Social science research and community attitudes reflected in a recent Newspoll survey lend support to this argument. The present Federal Government has also made clear its position that it considers that legal marriage is a heterosexual union and that to make it otherwise would lead to the erosion of the institution of marriage and the family in our society.¹³¹ It could be argued that, according to our political system of representative and responsible government, the government's position may represent the views of the majority of Australians.

In this event, if Australia is not yet ready for same-sex marriage, the alternative model of a system of relationship registration as currently illustrated in Tasmania may be an effective compromise. If implemented at Commonwealth level, it would provide for legal recognition of same-sex relationships throughout Australia.

In any event, it is clear that developments in the area of same-sex couples and their legal rights will continue around Australia and throughout the world. These issues continue to arouse interest and stimulate debate at social, legal and political levels. It may be that, at the present point in time, the majority of Australians are not yet ready to embrace same-sex marriage. However, it will be interesting to observe whether community values evolve in the future to enable same-sex couples to achieve true equality before the law.

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1 Economist.com, *Gay Marriage Let them Wed*, 4 January 1996, <http://www.economist.com/opinion/displaystory.cfm?story_id=2515389> (accessed 17 May 2005).

2 In Tasmania, the Same-Sex Marriage Bill 2005 (Tas), Same-Sex Marriage (Celebrant and Registration) Bill 2005 (Tas) and Same-Sex Marriage (Dissolution and Annulment) Bill 2005 (Tas) were all introduced into the House of Assembly on 12 April 2005 by Nicholas McKim, Member of The Greens, Member of the House of Assembly. In New South Wales the Same-Sex Marriage Bill 2005 (NSW), Same-Sex Marriage (Celebrant and Registration) Bill 2005 (NSW) and Same-Sex Marriage (Dissolution and Annulment) Bill 2005 (NSW) were all introduced into the Legislative Council on 4 May 2005 by Lee Rhiannon, Member of The Greens, Member of the Legislative Council. See also 'Greens introduce same-sex marriage legislation into NSW Parliament', Press Release, 4 May 2005. Both the Tasmanian and New South Wales Same-Sex Marriage Bills provide in their long titles as being 'An Act providing for marriage between adults of the same-sex'.

3 Commonwealth Constitution Pt V s 52(xxi). See also J Millbank, 'Advice to Gay and Lesbian Rights Lobby of NSW on Same-Sex Marriage Bill 2005', 10 May 2005, <<http://www.glr.org.au/issues/advicefinal.pdf>> (accessed 25 May 2005).

4 The definition was inserted into s 5(1) to provide that marriage is 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. The purpose of this amendment was set out in: Commonwealth Attorney-General, *Second Reading Speech*, House of Representatives, 27 May 2004, p 1.

5 Section 88EA. The government had also sought to prevent same-sex couples from adopting children overseas, however, these

amendments were not successful. Section 111C(4A) of the Marriage Legislation Amendment Bill 2004 (Cth) had proposed to amend the Family Law Act 1975 (Cth) to prevent same-sex couples from adopting children through international adoption agencies.

6 *Second Reading Speech*, above n 4, p 1.

7 Section 46 of the Marriage Act 1961 (Cth) had provided in the words that an authorised celebrant must say when solemnising a marriage, 'Marriage, according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. At common law, it had always been assumed that marriage had to be a heterosexual union. *In Re Kevin (Validity of marriage of transsexual) (No 2)* (2003) 30 Fam LR 1; FLC 93-127 at [67].

8 Section 88D.

9 Commonwealth Attorney-General in his second reading speech had stated, 'Australian law does, as a matter of general principle, recognise marriages entered into under the laws of another country, with some specific exceptions. It is the government's view that this does not apply to same-sex marriages. The amendments to the Marriage Act contained in this Bill will make it absolutely clear that Australia will not recognise same-sex marriages entered into under the laws of another country, whatever country that may be. As a result of the amendments contained in this Bill same-sex couples will understand that, if they go overseas to marry, their marriage, even if valid in the country in which it was entered into, will not be recognised as valid in Australia': *Second Reading Speech*, above n 4, p 2.

For an examination of the arguments for and against whether a foreign same-sex marriage could have been recognised in Australia prior to the amendments, see P Nygh, 'The Consequences for Australia of the new Netherlands law permitting same gender marriage' (2002) 16 *AJFL* 139.

10 *Second Reading Speech*, above n 4.

11 *Ibid.*

12 In 2001, the Netherlands became the first country to recognise same-sex marriage, followed by Belgium, and the Canadian provinces of British Columbia and Ontario in 2003. Several European countries, including Sweden, recognise same-sex civil unions, which provide the same rights as for heterosexual couples. This year the Supreme Court in the State of Massachusetts in the United States ruled that same-sex couples could not be excluded from marriage under the State Constitution. At present, four states in the United States are considering same-sex marriage legislation, being California, New York, Rhode Island and Vermont. However, 39 other states have passed laws prohibiting or refusing to recognise same-sex marriage. Two other countries, France and Sweden, are also currently considering introducing legislation permitting same-sex marriage: Commonwealth Parliament, Bills Digest No 155, 2003-2004, Marriage Legislation Amendment Bill 2004, p 19
<http://www.aph.gov.au/Senate/committee/legcon_ctte/marriage/info/bills_digest.pdf> (accessed 31 May 2005).

13 Bill C-38, the Canadian Civil Marriage Bill 2005, seeking to legalise same-sex marriage at Federal level, was passed by the lower house, the House of Commons, on 28 June 2005 and referred to the Senate for further consideration, Bill C-38 Legislative history, <http://www.parl.gc.ca/common/Bills_ls.asp?lang=E&Parl=38&Ses=1&ls=C38&source=Bills_House_Government> (accessed 30 June 2005). In Spain, the Spanish Congress of Deputies passed legislation legalising same-sex marriage on 30 June 2005. Gay marriages will be permitted in Spain as soon as the law, which passed the Congress of Deputies in a 187 to 147 vote, is published in the official government registry, according to the parliamentary press office. J Green, 'Spain Legalizes Same-Sex Marriage', *The Washington Post washington post.com*, 1 July 2005, <<http://www.washingtonpost.com/wp-dyn/content/article/2005/06/30/AR2005063000245.html>> (accessed 6 July 2005).

14 For example, Members of The Greens opposed the Bill. Michael Organ stated, 'I should say at the outset that the Greens oppose this Bill. We object to such blatantly discriminatory legislation being brought before the parliament and we oppose the discrimination against individual Australians based upon their sexuality': The Commonwealth, *Second Reading*, House of Representatives, 17 June 2004 (Michael Organ, Member for Cunningham). Also see, K-A Walsh and M Wood, 'Same-sex marriage ban not decent and not fair', *The Sun-Herald*, 15 August 2004, p 1.

15 The system was implemented by the Relationships Act 2003 (Tas).

16 Australian Bureau of Statistics, *Australia Now, Year Book Australia, Population, Same-sex couples families*, <<http://www.abs.gov.au/ausstats/abs@.nsf/0/a704b82ff251365dca256f720083303f?OpenDocument>> (accessed 27 May 2005).

17 Australian Bureau of Statistics, *Marriages and Divorces, Australia*, 16 November 2003, p 3.

18 *In Re Kevin (Validity of marriage of transsexual) (No 2)* (2003) 30 Fam LR 1; FLC 93-127. The Full Court at [67] stated: 'For the purposes of these proceedings it was common ground that marriage is a union between a man and a woman signified by certain

formalities and carrying with it a status recognised by the law. The issue of whether a marriage can occur between people of the same-sex is not an issue in this case.'

19 (1866) LR1P&D 130 at 133. For an account of the history of marriage from pre-Christian times, see H Finlay, *To Have But Not To Hold*, The Federation Press, Sydney, 2005, Ch 1.

20 It has been stated: 'The law of marriage itself is directly descended from concepts developed originally within the Eastern and Western branches of the ancient Catholic Church and latterly, so far as this country is concerned, by the Ecclesiastical Courts in England, applying the dogma of the Church of England.' The Hon Chief Justice Alastair Nicholson, 'The Changing Concept of Family -- The Significance of Recognition and Protection' (1997) 11 *AJFL* 13 at 17. See also H Finlay, *To Have But Not To Hold*, above n 19, Ch 1.

21 *Corbett v Corbett (Otherwise Ashley)* [1971] P 83 at 105-6; [1970] 2 All ER 33.

22 *Ibid.*

23 *In Re Kevin (Validity of marriage of transsexual)* (2001) 28 Fam LR 158; FLC 93-087 and *In Re Kevin (Validity of marriage of transsexual)* (2003) 30 Fam LR 1; FLC 93-127.

24 *In Re Kevin (Validity of marriage of transsexual)* (2003) 30 Fam LR 1; FLC 93-127 at [139]-[141].

25 *Ibid.* The court stated, at [151]:

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

26 *In Re Kevin (Validity of marriage of transsexual)* (2003) 30 Fam LR 1; FLC 93-127 at [153].

27 *Ibid.*, at [374]-[389]. See the similar decision in New Zealand of the *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603. Contrast with the decision of the House of Lords in England, in *Bellinger v Bellinger* [2003] 1 AC 563; [2002] 3 All ER 1. The House of Lords held that it was a matter for parliament whether to extend the meanings of 'male' and 'female' in s 11(c) of the Matrimonial Causes Act 1973 to include a person born one gender but who later became a person of the opposite gender. This was because it would represent a major change in the law and justified extensive enquiry, public consultation and discussion. The government had also indicated its intention to investigate these issues. The UK Gender Recognition Act 2004 in fact addresses this issue and s 7 recognises that a transgender person can marry in their acquired gender provided that they satisfy the provisions of the legislation.

28 (1999) 198 CLR 511; 163 ALR 270 at [45].

29 Fogarty J in the case of *B v J* (1996) 21 Fam LR 186 at 198; FLC 92-716 at 83,632. The court held that the sperm donor was not the legal parent of the child in question and could not be liable for child support.

30 (2002) 28 Fam LR 579; FLC 93-096.

31 *Ibid.*, at [323].

32 *Ibid.*, at [325].

33 Nicholson, above n 20, at 18. This has been acknowledged overseas, for example, in Canada with a judicial statement that 'the traditional family is not the only family form, and non-traditional family forms may equally advance true family values': Madame Justice L'Heureux-Dube in *Canada (Attorney-General) v Mossop* [1993] 1 SCR 554 at 634.

34 Section 27AAB.

35 Section 36.

36 Both sections provide that people have an interdependency relationship if: (a) they have a close personal relationship; and (b) they live together; and (c) one or each of them provides the other with financial support; and (d) one or each of them provides

the other with domestic support and personal care.

37 Discrimination Law Amendment Act 2002 (Qld).

38 Property (Relationships) Legislation Amendment Act 1999 (NSW) amended the De Facto Relationships Act 1984, the Bail Act 1978, the Duties Act 1997 and Family Provision Act 1982. The Miscellaneous Acts Amendment (Relationships) Act 2002 (NSW) amended inter alia the Conveyancers Licensing Act 1995, Credit Act 1984, Crimes (Administration of Sentences) Act 1999, Criminal Procedure Act 1986 and Defamation Act 1974.

39 The Statute Law Amendment (Relationships) Act 2001 (Vic) amended inter alia the Administration and Probate Act 1958, the Duties Act 2000, the First Home Owners Grant 2000, the Stamps Act 1958 and the Wills Act 1997. The Statutes Law Further Amendment (Relationships) Act 2001 amended the Parliamentary Salaries and Superannuation Act 1968.

40 The Family Court (Amendment) Act 2002 (WA) amended the Family Court Act 1997 (WA) and conferred jurisdiction on the Family Court of Western Australia to deal with property adjustment and maintenance orders of separated de facto couples, including same-sex couples. The Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (WA) amended inter alia the Adoption Act 1994, Artificial Conception Act 1985, Human Reproductive Technology Act 1991, Parliamentary Superannuation Act 1970, State Superannuation Act 2000, Equal Opportunity Act 1984 (WA) and Criminal Code 1913 (WA).

41 The Relationships (Consequential Amendments) Act 2003 (Tas) made consequential amendments to enable same-sex couples to claim the same entitlements as married couples under all relevant Tasmanian legislation. For example, the Administration and Probate Act 1935, Duties Act 2001, Evidence Act 2001, Fatal Accidents Act 1934, Retirement Benefits Act 1993, Status, Testator's Family Maintenance Act 1912 and the Workers Rehabilitation and Compensation Act 1988.

42 The Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003 amending the Interpretation Act 1980 (NT). Consequential amendments were made to inter alia the Family Provision Act, the Motor Accidents Compensation Act and the Superannuation Act.

43 The Legislation (Gay, Lesbian and Transgender) Amendment Bill 2002 (ACT) amended many pieces of Territory legislation to include same-sex couples, including the Domestic Relations Act 1994 (ACT). The Sexuality Discrimination Legislation Amendment Act 2004 (ACT) amended further legislation to remove any discrimination relating to a person's sexuality and relationship status. For example, the Administration and Probate Act 1929, Family Provision Act 1969, Public Trustee Act 1985 and Workers' Compensation Act 1951.

44 The Statutes Amendment (Relationships) Bill 2004 (SA) was read for the second time in the Legislative Council and then referred to the Social Development Committee for an inquiry into the Bill. The Bill seeks to amend 82 State Acts so that same-sex and heterosexual de facto couples will be treated identically under the majority of South Australian laws. The committee reported on 25 May 2005 and the Bill has now been reintroduced with some minor amendments. At the time of writing, the Bill has been read for the second time and debate adjourned: Legislative Council, Notices and Orders of the Day, 6 July 2005, <http://www.parliament.sa.gov.au/legcouncil/noticepaper_lc.htm> (accessed 6 July 2005).

45 For example, the Anti-Discrimination Act 1991, Guardianship and Administration Act 2000, Judges (Pensions and Long Leave) Act 1957, Land Tax Act 1915, Property Law Act 1974, Public Trustee Act 1978, Succession Act 1981, Supreme Court Act 1995 and Workcover Act 1996.

46 Statutes Amendment (Equal Superannuation Entitlements for Same-Sex Couples) Act 2003 (SA). A new definition of 'putative spouse' was inserted into several pieces of legislation relating to superannuation entitlements. The definition of 'putative spouses' is two persons of the same-sex who are cohabiting in a marriage-like relationship for five years (or an aggregate of five years in a six year period).

47 The relevant new sections are as follows: s 7A of the Parliamentary Superannuation Act 1984, s 4A of the Police Superannuation Act 1990, s 3A of the Southern State Superannuation Act 1994, and s 4A of the Superannuation Act 1988.

48 Adoption Act 1993 (ACT) ss 18 and 39 and Adoption Act 1994 (WA) ss 39 and 40. In some States an application for adoption can be made by one person, for example, in New South Wales ss 26 and 27 of the Adoption Act 2000 (NSW) allows an application by one person in certain circumstances.

49 Under s 20 of the Adoption Act 1988 (Tas) the court may not make an adoption order in favour of a person unless they have been married or in a registered relationship under the Relationships Act 2003 for a period of at least three years and unless the other party to the relationship is the natural or adoptive parent of the child proposed to be adopted; or either party to the relationship is a relative of the child proposed to be adopted.

50 Adoption Act 1993 (ACT) s 18, Adoption Act 1994 (WA) s 39 and Adoption Act 1988 (Tas) s 20.

51 The Relationships Bill 2005 (SA) was introduced into the lower house, the House of Assembly, in the South Australian Parliament on 25 May 2005. This Bill seeks to provide a system of legal recognition of de facto relationships including same-sex relationships, and caring relationships such as where one person provides domestic support and care for another. It also provides for property adjustment in the event of the breakdown of the relationship. The Bill has been adjourned for debate.

52 Section 72 of the Family Law Act 1975 (Cth) provides that a party to a marriage is liable to maintain the other party, to the extent that they are reasonably able to do so, provided that the applicant is unable to support herself or himself adequately and either has the care and control of a child of the marriage who is under 18, or by reason of physical or mental incapacity for appropriate gainful employment or for any other adequate reason and in addition, having regard to any relevant matter outlined in s 75(2).

53 Property Law Act 1974 (Qld) ss 291-2, 297-309, Family Court Act 1997 (WA) s 205Z and Domestic Relationships Act 1994 (ACT) s 12.

54 Relationships Act s 37.[#0009]

55 Property Relations Act 1984 (NSW) s 20(1), Property Law Act 1958 (Vic) s 285 and De Facto Relationships Act 1991 (NT) s 18. Contributions as a parent can be made by the parties to a child of their relationship or to a child of either party.

56 Property (Relationships) Act 1985 (NSW) s 27 and De Facto Relationships Act (NT) s 26.

57 In New South Wales, Victoria and the Northern Territory.

58 In Queensland, Victoria and South Australia.

59 Under Pt VIII B of the Family Law Act 1975 (Cth). Western Australia did seek to pass legislation that would have referred power to the Commonwealth to legislate for de facto couples accessing super-splitting at State level. The Commonwealth Powers (De Facto Relationships) Bill 2003 (WA), however, lapsed on 31 January 2005.

60 The Attorney-General, Commonwealth of Australia, *Commonwealth Wins De Facto Property Powers*, Press Release, 8 November 2002, p 1. Section 51(xxxvii) of the Constitution permits the Commonwealth Parliament to make laws with respect to matters referred to them by the parliament or parliaments of any State or States.

61 The Commonwealth Powers (De Facto Relationships) Act 2003 (NSW), the Commonwealth Powers (De Facto Relationships) Bill 2003 (Qld), De Facto Relationships (Northern Territory Request) Act 2003 (NT) and Commonwealth Powers (De Facto Relationships) Act 2004 (Vic) refers power to the Commonwealth in relation to property issues on the breakdown of de facto relationships. As agreed at the SCAG meeting in 2002, all pieces of legislation refer power to the Commonwealth under two separate property headings, those concerning heterosexual de facto couples and those concerning same-sex de facto couples. This is to allow the Commonwealth to legislate in relation to heterosexual couples only, as that is the approach that they have indicated they would take.

62 Attorney-General, Victoria, 'Debate over the rights of same-sex couples heats up', Press Release, 8 March 2004, p 1. A spokesman for the Attorney-General said, 'The Commonwealth regards same-sex couples as being in a different situation to heterosexual couples': I Munro, 'Gay couples left out of court shift', *The Age*, March 2002
<<http://www.theage.com.au/articles/2002/03/07/1015365729478.html?oneclick=true>> (accessed 8 June 2005).

63 D Meagher, 'The times are they a-changin'? -- Can the Commonwealth parliament legislate for same-sex marriages?' (2003) 17 *AJFL* 134.

64 *Ibid.*, at 149-54.

65 *Second Reading Speech*, above n 4, p 1.

66 Nicholson, above n 20, at 17. In 2001, 74% of Australians aged 18 years and over reported affiliating with a religion, 27% reported being Catholic, 21% Anglican, 21% of other Christian denominations and 5% of non-Christian religions: Australian Bureau of Statistics, *Year Book Australia 2003, Population Religion*, at <<http://www.abs.gov.au/ausstats/abs@.nsf/0/9658217EBA753C2CCA256CAE00053FA3?Open>> (accessed 8 June 2005). The Shadow Attorney-General, Nicola Roxon, acknowledged the religious significance of marriage to many Australians when she stated: 'To very many Australians marriage is a vital social and religious institution and has particular significance for its structural role in the raising of a family': The Commonwealth, *Second Reading*, House of Representatives, 16 June 2004 (Nicola Roxon, Shadow

Attorney-General). For an example of opposition to same-sex marriage on religious grounds, see The Commonwealth, *Second Reading Speech*, House of Representatives, 16 June 2004 (Robert Baldwin, Member of the House of Representatives).

67 When reporting on the Social Development Committee's inquiry into the Statutes Amendment (Relationships) Bill 2004 (SA) it was noted that of the many submissions made to the committee against the legal recognition of same-sex relationships many concerns were based on religious teachings and beliefs that recognition of same-sex relationships would erode the institutions of marriage and the family. It was stated that 'the main objection was that the Bill may reduce the status and importance of marriages and families in our society and lead to moral decay and a range of social problems': South Australia, Social Development Committee: Statutes Amendment (Relationships) Bill, Legislative Council, 25 May 2005, pp 17-18 (The Hon G E Gago).

68 L Willmott, B Mathews and G Shoebridge, 'Defacto relationships property adjustment law -- A national direction' (2003) 17 *AJFL* 1 at 9; R L Deech, 'The Case Against Legal Recognition of Cohabitation' (1980) 29 *International and Comparative Law Quarterly* 480 at 484.

69 Nicholson, above n 20, p 14. See also Madame Justice L'Heureux-Dube when she stated in Canada (*Attorney-General v Mossop*, above n 33, at 634:

It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may also advance true family values.

70 Social Development Committee's inquiry into the Statutes Amendment (Relationships) Bill 2004 (SA), above n 67, p 18.

71 *Marriages and Divorces, Australia*, above n 17, p 4.

72 Prime Minister John Howard has stressed 'the right of children to a father': 'Potshot Two and IVF: The State of Play', *Sydney Morning Herald*, (Sydney), 15 August 2000. Referred to in J Millbank, 'From Here to Maternity: A Review of the Research on Lesbian and Gay Families' (2003) 38(4) *Aust Jnl of Social Issues* 541 at 545.

73 For example, in the Family Court case of *Re L* (1983) FLC 91-353 at 78,363-7, Baker J held that, where a homosexual parent is seeking a custody order, that a list of matters be taken into account, two of these matters being firstly whether children raised by homosexual parents may themselves become homosexual, or whether such an event is unlikely and secondly whether a homosexual parent could show the same love and responsibility as a heterosexual parent.

74 Reference to various writers who have made these contentions are contained in: E Tauber and L Maloney, 'How is the issue of Lesbian and Gay Parenting addressed in Family Reports' (2002) 16 *AJFL* 185 at 187.

75 *Ibid.*, at 187. The authors dismissed these writers' contentions on the basis that the writers were of the view that homosexuality was sinful or a mental illness and that some of the research conducted was found to be conceptually and methodologically inadequate.

76 Dr C Murray, 'Same-Sex Families: Outcomes for Children and Parents' February (2004) *Family Law* 136 at 137; C Patterson, 'Children of Lesbian and Gay Parents' (1992) 63 *Child Development* 1025; F Tasker and S Golombok, 'Children raised by lesbian mothers: The empirical evidence' (1991) *Family Law* 184; J Millbank, 'Same-sex couples and family law', paper presented at the Third National Conference, Melbourne, 20-24 October 1998. A comprehensive review of social science research is undertaken in Millbank, above n 72, at 561-71.

77 *Ibid.*

78 E Tauber and L Maloney, 'How is the issue of Lesbian and Gay Parenting addressed in Family Reports' (2002) 16 *AJFL* 185 at 187 quoting the research results of S Golombok and F Tasker, *Growing up in a Lesbian Family: Effects on Child Development*, The Guilford Press, New York and London, 1997.

79 Lindenmayer J in *Brook and Brook* (1977) FLC 90-325. In the Canadian case, *Re K* (1995) 15 RFL (4th) 129 at 161, the court considered expert evidence in relation to the parenting abilities of homosexual parents and held that that there was no evidence that they could not adequately parent their children. The court stated that: 'there is no cogent evidence that homosexual couples are unable to provide the very type of family environment that the legislation attempts to foster, protect and encourage, at least to the same extent as "traditional" families parented by heterosexual couples.' These cases were discussed in Nicholson, above n 20, at 21.

80 D De Vaus, 'Family Values in the Nineties: Gender Gap or Generation Gap?' (Spring/Summer 1997) 48 *Family Matters* 4 at 9.

81 *Ibid.*, at 9.

82 Newspoll Market Research, *Survey re gay marriage*, conducted 4-6 June 2004 among 1200 adults aged 18 and over in all States of Australia and in both city and country areas. Of the 44% against, 33% were 'strongly against' and 11% were 'somewhat against'. The 38% in favour of same-sex marriage, 20% were 'strongly in favour' and 18% were 'somewhat in favour'. Of the 1200 people surveyed, 18% were uncommitted <http://www.newspoll.com.au/cgi-bin/display_poll_data.pl> (accessed 26 May 2005).

83 See, for example, The Commonwealth, *Second Reading*, House of Representatives, 16 June 2004 (Nicola Roxon, Shadow Attorney-General); The Commonwealth, *Second Reading Speech*, House of Representatives, 16 June 2004 (Robert Baldwin, Member of the House of Representatives).

84 Social Development Committee's inquiry into the Statutes Amendment (Relationships) Bill 2004 (SA), above n 67, p 17. Over 2000 submissions were received by the committee, 57% were in support of the Bill and 43% were opposed to it.

85 H Glezer, 'Cohabitation and Marriage Relationships in the 1990s' (1997) 47 *Family Matters* 5 at 8.

86 *Ibid.*, at 7-8.

87 *Ibid.*, at 6.

88 *Ibid.*, at 6; New South Wales Law Reform Commission, Report 36, *De Facto Relationships*, 1983, at [5.49]-[5.50]. See also L Waite, 'Does Marriage Matter?' (1995) 32 *Demography* 483-507.

89 Social Development Committee's inquiry into the Statutes Amendment (Relationships) Bill 2004 (SA), above n 67, p 17

90 *Marriages and Divorces in Australia*, above n 17, p 4.

91 Family Court of Australia, *Annual Report, 2001-2002*, p 29. These figures represent the total of divorce applications filed in both the Family Court of Australia and the Federal Magistrates Court.

92 *Marriages and Divorces in Australia*, above n 17, p 3.

93 *Ibid.*, p 4

94 The birth rate in Australia is well below the world average. In 2000 the average was 1.75 babies per woman: Australian Bureau of Statistics, *Year Book Australia, 2003, Population and Births*, available at <<http://www.abs.gov.au/ausstats/abs@.nsf/0/aed01ba4382accf5ca256cae00053f9f?OpenDocument>>.

95 In 2001 the crude divorce rate was 2.8 per 1000 population and 55,330 divorces were granted that year: Australian Bureau of Statistics, *Year Book Australia, 2003, Population, Marriages and Divorces*, *ibid.*, p 4.

96 *Ibid.*

97 Report 36, above n 88, at [5.51]-[5.55]. J Millbank and K Sant, 'A Bride in her Every-Day Clothes: Same-Sex Relationship Recognition in NSW' (2000) 22 *Sydney L Rev* 181 at 185.

98 *Ibid.* The argument has been put forward that access to 'marriage' was not a common goal, at least in the Sydney gay community, and that the primary concern was that gay couples not suffer legal, social and economic disadvantages: see H Katzen, 'The Bride Wore Pink -- Legal Recognition of Lesbian and Gay Relationships', paper delivered at First World Congress on Family Law and Children's Rights, Congress Papers, Sydney, 1993, pp 721, 731.

99 Part VII of the Family Law Act 1975 (Cth). The States and Territories referred their power to the Commonwealth over ex-nuptial children over a decade ago, for example in Queensland see the Commonwealth Powers (Family Law -- Children) Act 1990 (Qld).

100 The Child Support Assessment Act 1989 (Cth) applies to children whether or not their parents were legally married: s 20(2).

101 In New South Wales, Victoria and the Northern Territory.

102 In Queensland, Victoria and South Australia.

103 Under Pt VIII B of the Family Law Act 1975 (Cth).

104 Submissions made to the Social Development Committee's inquiry into the Statutes Amendment (Relationships) Bill 2004 (SA), above n 67.

105 D Clarke, *The rule of law. Principles of Australian Public Law*, LexisNexis Butterworths, 2003, p 101; S Bottomley and S Parker, *Law in Context*, 2nd ed, Federation Press, 1997, p 51.

106 An early definition of equality before the law was expounded by A V Dicey in his definition of the rule of law. He stated that equality before the law required, 'the equal subjection of all classes to the ordinary law of the land'. Dicey's concept of what equality before the law meant was not our modern interpretation, his intent was that ordinary citizens, including officials, should be subject to ordinary courts and there should not be separate administrative courts set up to deal with officials: Clarke, above n 105.

107 Clarke, above n 105.

108 Willmott, Mathews, Shoebridge, above n 68, at 15. For a full discussion of a rights-based argument see Willmott, Mathews, Shoebridge, *ibid*, at 14-17; R Dworkin, *Taking Rights Seriously*, Duckworth, London, 1977, pp 198-9. See also R Dworkin, *A Matter of Principle*, Harvard University Press, Cambridge, 1986, 1985, pp 187-92, 359-72.

109 Willmott, Mathews, Shoebridge, *ibid*, at 14-17.

110 The fundamental principle is that treaty obligations to which Australia is a party have no direct effect within Australia's domestic legal system unless they are implemented into effect by Commonwealth, State or Territory legislation: *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; *Bradley v Commonwealth* (1973) 128 CLR 557 at 582; 1 ALR 241; *Kioa v West* (1985) 159 CLR 550 at 570; 62 ALR 321; *Dietrich v R* (1992) 177 CLR 292 at 305; 109 ALR 385. However, international law (including treaties to which Australia is a party but not yet implemented by statute) can indirectly affect Australian law in various ways, for example, by influencing the interpretation of statutes: *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; 110 ALR 97; by influencing the development of the common law: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42; 107 ALR 1; and by raising a legitimate expectation, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; 128 ALR 353.

111 Opened for signature 16 December 1966 [1980] ATS 23 (entered into force 23 March 1976).

112 Adopted and proclaimed by the United Nations General Assembly resolution 217 A (III) of 10 December 1948.

113 Article 23(4) of the ICCPR provides that 'State parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution'.

114 Article 14 of the ICCPR states that, 'All persons should be equal before the courts and tribunals' and Art 26 setting out that 'All persons are equal before the law and are entitled without discrimination to the equal protection of the law' <<http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>> (accessed 30 June 2005). Article 7 of the Universal Declaration of Human Rights, 'All are equal before the law and entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.' See also Willmott, Mathews, Shoebridge, above n 68, at 18-20.

115 The Charter is contained in Pt 1 of the Canadian Constitution Act 1982. Article 15 of the Charter of Rights and Freedoms provides that: 'Every individual is equal under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

116 *Reference re Same-Sex Marriage* [2004] 3 SCR 698 at [73].

117 The Commonwealth of Australia Constitution Act 1900 (Cth).

118 The Constitution does not contain many human rights. An example of what may be termed a 'human right' is contained in s 116 which provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The Australian Constitution, <<http://www.aph.gov.au/senate/general/constitution/chapter5.htm>> (accessed 30 June 2005).

119 Equal Opportunity Act 1995 (Vic) s 6(d) and (l), Anti-Discrimination Act 1991 (Qld) s 7(l), Anti-Discrimination Act 1977 (NSW) s 49ZG, Equal Opportunity Act 1984 (SA) s 29(3), Anti-Discrimination Act 1998 (Tas) s 16(c) and (d), Anti-Discrimination Act 1992 (NT) s 19(c), Discrimination Act 1991 (ACT) s 7(1)(b), The Equal Opportunity Act 1984 (WA).

120 The Act commenced on 1 July 2004.

121 *Second Reading Speech*, above n 4, p 1; De Vaus, above n 80, at 9; Newspoll Market Research, above n 82.

122 Relationships Act 2003 (Tas) Pt 2.

123 *Ibid*, ss 14 and 19.

124 Couples can register their personal relationship agreement if both are domiciled or ordinarily resident in Tasmania: Relationships Act 2003 s 11. To do so, they must complete a deed of registration form at the Registrar of Births, Deaths and Marriages and each complete a Statutory Declaration setting out that they consent to the registration, are not married and are not already a party to a deed of relationship: s 11(2). They also have to provide evidence of their identity and pay the requisite registration fee. There is a 28 day cooling off period and either party within this time can make a written application to the registrar to withdraw their application: s 12.

125 Relationships Bill 2005 (SA) ss 4 and 5.

126 *Ibid*, s 9.

127 The Australian Capital Territory and Western Australia.

128 Western Australia, the Australian Capital Territory and Tasmania.

129 *Re Patrick: An application concerning contact*, above n 30, at [323].

130 For example, Lindenmayer J in *Brook and Brook* (1977) FLC 90-325.

131 *Second Reading Speech*, above n 4.

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