

**No Mr Muehlenberg, There's No Sex With Labradors:<sup>+</sup>  
Flat-Earthers Come Round to the Ordinary Family Lives of Sexual Outsiders.<sup>+</sup>**

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"Man's best friend" was alleged to be more intimate than a great mate in documents put before the High Court of Australia by the Australian Family Association when it intervened in *Ausn Catholic Bishops Conference & Anor, Ex parte – Re Justice Sundberg C22/2000*. The following transcript of the exchange with Mr Ellicott QC appearing on behalf of the Association is available at <http://www.austlii.edu.au/au/other/hca/transcripts/2000/C22/9.html>:

**"KIRBY J:** ....On that question, what is the significance of the annexure to your submissions of Mr Muehlenberg on the challenge of homosexuality? What is the relevance of that to this case? I am referring to pages 193 and following in the application book. There is [sic] some very strange statements in that document about sex with Labradors, and so on.

**MR ELLICOTT:** Yes, I do not rely on that, your Honour, I am sorry - - -

**McHUGH J:** It should not have been in there. It is put in on some question of standing and the submissions that were put to a parliamentary committee have been put in but it does not advance the argument for standing one iota, to put in - - -

**KIRBY J:** It is full of statements about unhealthy practices and weird and strange assertions and it comes in your documents and it is in our book. I would not want you to think that I have not looked at - - -

**MR ELLICOTT:** I did not expect it to go in the book.

**KIRBY J:** Well, it is here.

**MR ELLICOTT:** In fact, it is very kind of your Honour to mention to me that it is there because I have not seen it. I do not rely on it and if it offends your Honour or any of the Bench - - -

**McHUGH J:** Well, it offends me.

**MR ELLICOTT:** I apologise, but I do not rely on it and I did not even know the book was going to be prepared. I thought we were just coming here to intervene on a question of law.

**GAUDRON J:** There is another point to it, too. We read these materials in preparation for the Court cases. Why we should be subjected to the waste of our time when you are not going to rely on it, I do not understand, and why we should, in addition, be subject to the offensive nature of it, I do not understand.

**KIRBY J:** On the face of things, it seems to be a strong argument for anti-discrimination legislation.

**MR ELLICOTT:** I mean we are grown people. Your Honours, they are really not offensive and - - -

**GAUDRON J:** On the face of it, it seems to have [sic] a good reason for not allowing interveners in.

**MR ELLICOTT:** I mean, it is difference who you can read [sic], but it is offensive - I suppose it is offensive on an evidentiary basis and somebody, I guess, should have objected to it in front of Justice Gummow. But it has all got into there as only representing the material that was put before the Court which was material that was put before the Senate and they do not get offended.

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<sup>+</sup> Thanks for this term to J. Millbank and W. Morgan (2001) 'Let Them Eat Cake and Ice Cream: Wanting Something More from the Relationship Recognition Menu' in R. Wintemute and M. Andenaes (Eds) (2001) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* Hart, Oxford, 316.

<sup>#</sup> Email: [dannysan@uunet.com.au](mailto:dannysan@uunet.com.au). The paper is presented in my voluntary role as a representative of DCI-Australia; website - <http://www.dci-au.org>. I am grateful as always to The Honourable Alastair Nicholson AO RFD, Chief Justice of the Family Court of Australia, for whom I have worked in a paid role since 1993. He is a continuous source of encouragement for me to think, learn and write about family law generally and children's rights particularly. My thanks for helpful comments in the course of preparing this paper to Michael Beresford-Smith, Judy Cashmore, Reg Graycar, Margaret Harrison, Janet Jukes, Jenni Millbank, Marcia Neave, Miranda Stewart and Kristen Walker. Any errors are of course my own.

**McHUGH J:** *When I read it over the weekend the thought occurred to me it ought to be stricken from our record. It is totally irrelevant."*

## ***Introduction - Ordinary? Duuuh!***

Most of the time there is nothing particularly exotic about the typical lives of *sexual outsiders* - the term I use in this paper to collectively encompass gay men, lesbians, intersex, transsexual and transgendered people.<sup>1</sup>

Bills have to be paid and the shopping has to get done, including heartworm tablets for the Labrador. The brakes are shot so it's going to be a hassle using public transport to get the kids to their granny's 80<sup>th</sup> birthday.

Pride parades, fair days and mardi gras are festive highlights on the standard calendar everyone uses. The wardrobes aren't full of glamour costumes or overalls.

Sexual outsiders vote and pay taxes - more taxes actually, if you compare a sexual outsider couple with a married or *de facto* heterosexual unit.<sup>2</sup>

Sexual outsiders are born into families and make them too by blood ties, by affiliations and by their right as citizens to benefit from available scientific advances in assisted reproductive technology services.<sup>3</sup> It is not as though some secret unique method of family formation was discovered in and disseminated from an underground pink laboratory.

If the concept of family is "changing" legally towards inclusiveness of sexual outsiders' family lives, it's because for too long too many law-makers and their coterie of lobbyists were like a flat-earth society of Homer Simpsons bent on keeping the law dumbed-down.

Fortunately though, Australia is blessed with an impressive array of scholars, advocates, politicians and activists - the categories are neither mutually exclusive nor the occupants sexual outsiders - who are not prepared to see Australia become Homer's cartoon town of Springfield. As Professor Reg Graycar puts it:

*"The slogan "We are family" has been heard not only in the streets and in the marches, but also in the law journals and in the courts."<sup>4</sup>*

It is also being heard in the parliaments of Australia and overseas jurisdictions. And because of the intellectual and strategic calibre of anti-Homer alliances, the challenge to be legally included as ordinary has extraordinary and deep resonance:

*"The lesbian and gay [and transgender] law reform program has highlighted the need to address the multiple forms of regulation that constitute family law, that is, the constellation of laws and practices that construct, privilege or devalue, impact upon, recognise or ignore, the variety of relationships in which people live their lives."<sup>5</sup>*

## ***Challenge Through Coalition***

I take a moment to pay tribute to us. We work on this justice project of inclusiveness in what is usually an amazing coalition among: sexual orientations, gender identities, theoretical disciplines, social classes, and cultural backgrounds. It is our luck that there are eminent public figures we can see, hear, read and be inspired by. They deserve our visible support,

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<sup>1</sup> See Millbank and Morgan note + above.

<sup>2</sup> M Stewart (1999) 'Domesticating Tax Reform: The Family in Australian Tax and Transfer Law' Vol. 21 No. 3 *Sydney Law Review*, 271.

<sup>3</sup> Article 27 Universal Declaration of Human Rights; Article 15(b) International Covenant on Social Economic and Cultural Rights.

<sup>4</sup> R. Graycar (2000) 'Law Reform by Frozen Chook: Family Law Reform for the New Millenium?' Vol. 24 No. 3 *Melbourne University Law Review* 737 at 742

<sup>5</sup> *Ibid.*

especially when attacked by "some poorly trained pit bull" that "drips with loathing and disdain ... seemingly for homosexuals"<sup>6</sup>

For each high-profile champion of a fairer society there are many more who just go about their day standing or making their ground. Some do so despite a loud atmosphere of at best tittering and at worst violence in the workplace, school or neighbourhood.<sup>7</sup> Some persist in the face of ostracism from parallel affiliations that are condemnatory of sexual difference and the people who won't join the hateful chorus. I am thinking particularly here of sexual outsiders and their parents, friends, children and relatives who stand up to homophobic orthodoxies such as those within the Catholic Church, at enormous personal suffering. In order to live out a genuine commitment to the rhetoric of family solidarity, they face off bigotry.

The good news is that our State and Territory Governments and Parliaments (I deliberately exclude the present Commonwealth Government for reasons apparent later in this paper) are listening to calls for the jettisoning of prejudice, albeit at different rates. They are doing so in a way which informs a stage theory of law reform.

### **Just Stages We're Going Through**

Writing of lesbian and gay legal initiatives in Western liberal democratic states (and applicable too I think to transgender, transsexual and intersex people), Jenni Millbank has identified three stages of inclusion:

*"... initiatives seem to have shifted from the right to be privately sexual, that is the right to have same-sex relationships at all (mostly, but not entirely a male issue), to the right to be individual civic subjects, protected from discrimination in the work place and in the provision of services, toward the right to have relationships given status by the law."<sup>8</sup>*

Kees Waaldijk has identified a similar historical progression in the European context which, unlike Australia, generally favours the end goals of "opt in" registration systems of same-sex relationships and/or same-sex marriage.<sup>9</sup> In what is described as a "standard sequence":

*"[e]ach step in the process seems to pave the way for a next step. The standard sequence of steps seems to be underpinned by an internal logic. Once people engaging in homosexual activity are no longer seen as **criminals**, but instead as **citizens**, they can hardly be denied their civil rights, including their right not to be treated differently because of their (criminally irrelevant) sexual orientation. In this way, the step of anti-discrimination not only follows but builds on the step of decriminalisation. Similarly, the very idea of non-discrimination with regard to sexual*

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<sup>6</sup> G. Craven 'Coward's way leaves victim defenceless' *The Australian* (newspaper) 14 March 2002 available at

[http://www.theaustralian.news.com.au/common/story\\_page/0,5744,3946576%255E7583,00.html](http://www.theaustralian.news.com.au/common/story_page/0,5744,3946576%255E7583,00.html)

<sup>7</sup> See for example: G. Mason and S. Thomsen (Eds) (1997) *Homophobic Violence*, The Hawkins Press; J Irwin (1999) *The Pink Ceiling is Too Low: Workplace Experiences of Lesbians, Gay Men and Transgender People*, Australian Centre for Lesbian and Gay Research, University of Sydney; D Dempsey (2000) *Enough is Enough: A Report on Discrimination and Abuse Experienced by Lesbians, Gay Men, Bisexuals and Transgender People in Victoria*, Victorian Gay and Lesbian Rights Lobby available at <http://home.vicnet.net.au/~vglr1>.

<sup>8</sup> J. Millbank (1996) 'Which, then, would be the 'husband' and which the 'wife'? : Some Introductory Thoughts on Contesting 'the Family' in Court' Vol. 3 No. 3 *E Law - Murdoch University Electronic Journal of Law*, at par 1, available at [www.murdoch.edu.au/elaw/issues/v3n3/millbank.html](http://www.murdoch.edu.au/elaw/issues/v3n3/millbank.html). In suggesting there is commonality amongst sexual outsiders I do not want to be taken to ignore the spectrum of differing rights claim agendas and priorities within this group. The approach taken by the Victorian Lesbian and Gay Rights Lobby to transgender, transsexual and intersex advocacy is an illustration. A decision was made early in the Lobby's life that it would support the establishment of a distinct transgender lobby rather than attempt to provide coverage beyond lesbians and gay men.

<sup>9</sup> "The strategies which will be most useful to sexual outsiders are those which are sensitive to the local context. In Australia, this has resulted in sites of conflict surrounding the meaning of "de facto relationship" and "spouse", rather than the meaning of "marriage". It has also resulted in legislative reform efforts being shaped in a "de facto" context." : Millbank and Morgan note + above at 316.

*orientation, simply demands that no one shall be disadvantaged by law because of the gender of the person he or she happens to love. In this way, the links between the steps of decriminalisation, anti-discrimination, and partnership legislation are not only sequential (in the European countries that have gone that far) but also morally and politically compelling.*"<sup>10</sup> (emphasis in original, footnote omitted)

Both scholars recognise, as Millbank puts it, that:

*"[t]his shift in rights-focus, from decriminalisation, to civil protection, to civil recognition is, of course, not entirely a linear one."*<sup>11</sup>

This is an internationally applicable caveat against uncritically seeing any one stage as fully completed and a reminder of the continuing need for law reform attention to all three stages. It is also particularly apt for a federal polity such as Australia in which there are significant geographical differences in how manifold factors combine to drive or impede the inclusion of sexual outsiders. These local factors include: regional political party cultures; the stance and influence taken by the media and religious bodies; the strength and savvy of advocacy agents such as sexual outsiders' lobby groups; and the human rights organisations which lend support to the cause.

As is the case with any law reform project, a great deal hinges too on the position adopted by lawyers' associations and the vigour with which they press it in aid of fairness, justice and inclusiveness.

### ***The Scope of This Paper***

The family lives of sexual outsiders in Australia are framed by our progress along the pathway of decriminalisation → civil protection → relationship recognition and this paper provides a discussion of domestic legislation and law reform proposals as at 15 March 2002 within this framework. The survey is weighted towards recent legislative developments at the third stage, and how they were recently given effect in my home State of Victoria.<sup>12</sup>

The paper then turns to consider what I suggest is a distinctive fourth stage of rights development - parenting parity, the right to found a family by adding a child. It is within this contentious site of civil participation on the issue of access to assisted reproductive services that arguments based on unfitness to parent, bad outcomes for children and the rhetoric of children's rights are mustered in the attempt to exclude sexual outsiders. Single would-be mothers are also targeted and the Commonwealth Government's Sex Discrimination Amendment Bill (No.1) 2000 is examined as a case in point. The purported rationale for the Bill is shown to be based on false assumptions and supported by neither empirical evidence nor legal principle.

The paper finishes with some suggestions as to how Australia should harmonise its diverse range of relationship and "child" definitions and legally advance through this fourth stage with an accurate, properly informed understanding of children's rights.

### ***Stage 1 - Out of Sight, Out of Crime***

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<sup>10</sup> (2000) 'Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe' Vol. 17 No. 1 *Canadian Journal of Family Law* at 62.

<sup>11</sup> Millbank note 8 above at par 1. Using the example of the U.S.A. State of Texas, it is noted by N. Maxwell, A. Mattijssen, and C. Smith (1999) 'Legal Protection for All the Children: Dutch-American Comparison of Lesbian and Gay Parent Adoptions' Vol 3.1 *Electronic Journal of Comparative Law*, available at <http://law.kub.nl/ejcl/31/art31-2.html> that: "In several [U.S.A.] states, same-sex sexual contact is still a crime - even in the very same states where the courts have granted same-gender co-parent adoptions." In a similar vein, legislation prohibiting discrimination on the grounds of "homosexuality" was in effect before the consensual male sex was decriminalised in New South Wales.

<sup>12</sup> The *Statute Law Amendment (Relationships) Act 2001* (Vic.) and the *Statute Law Further Amendment (Relationships) Act 2001* (Vic.).

Superficially, Australia has largely passed through the first pathway stage of decriminalisation. Yet while consensual sex in private *per se* is no longer a criminal offence anywhere in Australia, sexuality-based differences persist in vulnerability to and application of the criminal law.

Higher age of consent provisions for male to male sex are one obvious illustration. The age of consent is equal at 16 years of age in the Australian Capital Territory and Victoria, and 17 years of age in South Australia and Tasmania. In New South Wales and the Northern Territory the age of consent for male to male sexual activity is 18 years of age, while it is 16 for heterosexual sexual activity.

The disparity is greatest in Western Australia: 16 years of age for heterosexual sex; 21 years for male consensual sex. In moving the Acts Amendment (Lesbian and Gay Law Reform) Bill 2001(WA) which *inter alia* will set the common age of 16, the Attorney-General highlighted the absurdity of the existing law:

*"... it is legal for a 16-year-old girl to engage in consensual sexual relations with a 16-year-old boy, and a 16-year-old girl to engage in consensual sexual relations with a 16-year-old girl; however, it is a criminal offence, punishable by five years in prison, for a 16-year-old boy to engage in consensual sexual activity with another 16-year-old boy."*<sup>13</sup>

A recent analysis for the New South Wales Gay and Lesbian Rights Lobby reports that:

*"There are divergent ages of consent throughout Australia at present. There are sometimes different ages of consent within jurisdictions based on gender or sexual orientation (as in NSW), by specific acts, or in terms of the context in which certain specific acts take place. In all states the consent of the young person remains irrelevant.*

*The NSW homosexual male age of consent legislation stands alongside West Australia and the Northern Territory as one of the least liberal in the nation.*

...

*Most of the OECD-type nations, all of the Western European democracies, and the majority of the former communist states in Eastern Europe and the Balkans have significantly more progressive homosexual age of consent measures than NSW. The Netherlands has the most liberal age of consent. In a sample of 50 nations where male homosexuality is legal only 7 had an age of consent similar to or higher than NSW for gay men."*<sup>14</sup>

The Western Australian Ministerial Committee on Lesbian and Gay Law Reform<sup>15</sup> highlighted another criminal law inequality which would be addressed by passage of the current Bill; that

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<sup>13</sup> Second Reading Speech to the Acts Amendment (Lesbian and Gay Law Reform) Bill 2001 (WA).

<sup>14</sup> R. J Roberts and P Mapplestone (2002) *The Age of Consent and Gay Men in New South Wales*, NSW Gay and Lesbian Rights Lobby, Sydney.

<sup>15</sup> Paragraph 2 of the Committee's report, *Lesbian and Gay Law Reform - Report of the Ministerial Committee June 2001*, states:

*"The Terms of Reference established by the Attorney General are consistent with policies endorsed at the 1999 ALP Conference. At that Conference it was agreed that the following policies regarding Sexuality and Law Reform would be adopted:*

*Labor believes that all people are entitled to the same respect, dignity, and ability to participate in society and to receive the protection of the law regardless of their sexual orientation or gender identity. Labor will implement policies and legislate generally to give effect to this belief and in particular will:*

- Amend the Western Australian Equal Opportunity Act to provide that it be unlawful to discriminate against people on the basis of their sexual orientation;*
- Amend the Western Australian Criminal Code to provide for uniform ages of consent to sexual conduct;*
- Repeal the preamble to and part two of the Law Reform (Decriminalisation of Sodomy) Act;*
- Establish a special inquiry to investigate and make recommendations concerning the legal recognition and regulation of bona fide domestic relationships involving same sex*

health and education activities may be an offence where a positive slant is put on gay and lesbian intimacy. The Committee's Report found the "condemnatory and discriminatory nature" of the State's decriminalising statute was unjustified and exacerbated by provisions which raise the risk of criminal sanctions against people undertaking health promotion and suicide prevention strategies with young people. As put by Christopher Kendall and Mala Dharmananda:

*"110. ... In 1989, the WA Parliament proclaimed the Decriminalisation Sodomy Act. In effect, this Act decriminalised sodomy (setting the age of consent for gay male consensual sexual activity at 21), but simultaneously declared Parliament's disapproval of homosexual behaviour in its Preamble. Specifically, the Preamble of the Act reads:*

*WHEREAS, the Parliament does not believe that sexual acts between consenting adults in private ought to be regulated by the criminal law:*

*AND WHEREAS, the Parliament disapproves of sexual relations between persons of the same sex;*

*AND WHEREAS, the Parliament disapproves of the promotion or encouragement of homosexual behaviour;*

*AND WHEREAS, the Parliament does not by its action in removing any penalty for sexual acts in private between persons of the same sex wish to create a change in community attitude to homosexual behaviour;*

*AND WHEREAS, in particular the Parliament disapproves of persons with care supervision or authority over young persons urging them to adopt homosexuality as a lifestyle and disapproves of instrumentalities of the state so doing:*

*Be it therefore enacted...*

*111. Sections 23 and 24 under Part 2 of the same Act make it a criminal offence to promote homosexual behaviour. Section 23, entitled 'Proselytising Unlawful' reads:*

*It shall be contrary to public policy to encourage or promote homosexual behaviour and the encouragement or promotion of homosexual behaviour shall not be capable of being a public purpose.*

*112. Section 24 deals with educational institutions and states that it shall be "unlawful to promote or encourage homosexual behaviour as part of the teaching in any primary or secondary educational institution.*

*113. The [W.A. Ministerial] Committee noted that in addition to the condemnatory and discriminatory nature of the Preamble itself, in the context of these sections, educative strategies that seek to reduce the level of youth suicide and reduce the level of HIV/AIDS transmission may be problematic. It has been suggested, for example, that safe sex and education campaigns may be impeded by section 23. To the extent that the terms 'promoting' and 'encouraging' homosexual behaviour are ambiguous and unclear, these could arguably apply to beneficial activities such as publishing or broadcasting HIV/AIDS material in schools, and appear to do little more than add to the isolation and exclusion of young lesbians and gay men, while discouraging those best suited to alleviate this pain from doing anything about it. "*<sup>16</sup>

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*couples;*

- Ensure that women have a choice regarding their reproductive lives on the basis of sound social and medical advice; and*
- Ensure that women can access reproductive technology regardless of their marital status or sexual orientation."*

The report is available at

[http://www.ministers.wa.gov.au/Feature\\_stories/GayLesbian/LesbianLawReform.pdf](http://www.ministers.wa.gov.au/Feature_stories/GayLesbian/LesbianLawReform.pdf).

<sup>16</sup> C. Kendall and M. Dharmananda (2001) 'Report of the Western Australian Ministerial Committee on Lesbian and Gay Law Reform' Vol. 8 No. 4 *E Law - Murdoch University Electronic Journal of Law*, available at <http://www.murdoch.edu.au/elaw/issues/v8n4/kendall84.html>.

## Stage 2 - Equal Importunity?

So far as anti-discrimination laws are concerned, protection under Commonwealth statute is negligible despite the past attempts of individual parliamentarians to introduce legislative reforms.<sup>17</sup> All States and Territories except Western Australia have prohibitions on "sexuality" based discrimination but the Acts Amendment (Lesbian and Gay Law Reform) Bill 2001(WA) would introduce such a protection.<sup>18</sup> The terminology of the relevant ground varies across jurisdictions.

The most primitive (in terms of evolution through the stages) is found in Queensland where the protection evokes criminal law considerations. Discrimination is prohibited on the grounds of "lawful sexual activity", a highly inadequate form of coverage as demonstrated by a lesbian's attempt to bring a claim against a fertility clinic on this basis.<sup>19</sup> "Lawful sexual activity" was also the only limited protection available in Victoria until the present State Government added the ground of "sexual orientation". The distinction is significant. This term, like sexuality-based grounds such as "homosexuality" "lesbianism", "transsexuality" and "bisexuality", importantly acknowledges the identity dimensions of sexual others.<sup>20</sup>

That law reform work remains to be done in the anti-discrimination field is also seen in the fact that each of the schemes provides that discrimination is nonetheless lawful on enumerated grounds by certain bodies (e.g. religious and charitable institutions) in key areas. For example, section 37 of the *Anti-discrimination Act 1992* (NT) provides:

### "37. Exemptions - sexuality

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<sup>17</sup> For example, the Sexuality Discrimination Bill 1995 introduced into the Senate by Senator Sid Spindler of the Australian Democrats on 29 November 1995. The Bill prompted the Senate Legal and Constitutional Committee's Inquiry into Sexuality Discrimination the report of which is at [http://www.apf.gov.au/senate/committee/legcon\\_ctte/citizens/contents.htm](http://www.apf.gov.au/senate/committee/legcon_ctte/citizens/contents.htm). Also, the Superannuation (Entitlements of same sex couples) Bill (Cth) was introduced into the House of Representatives by Mr Anthony Albanese MP in June 1998 and then the same Bill was introduced into the Senate on 15 February 2000. It was referred to the Select Committee on Superannuation and Financial Services for inquiry the report of which is at [http://www.apf.gov.au/senate/committee/superfinan\\_ctte/samesex/Contents.htm](http://www.apf.gov.au/senate/committee/superfinan_ctte/samesex/Contents.htm)

<sup>18</sup> The Bill is much more comprehensive and far reaching than just that. See Kendall and Dharmananda note 16 above.

<sup>19</sup> The *Anti-Discrimination Act 1991* (Qld) does not contain a definition of "lawful sexual activity". It is discussed by the Supreme Court of Queensland Court of appeal in *JM v. QFG & GK* [2000] 1 Qld R 373. Davies JA commented: "*being engaged in a relationship is not an activity; it is a state. The activity is the sexual activity which may or may not be carried on in that relationship. It was accepted by the appellant in this Court that the President was incorrect in describing that relationship as lawful sexual activity and that the activity must be lesbian sexual activity.*" The case is critiqued in: Millbank and Morgan note +; J. Millbank (1997) 'Every Sperm is Sacred? Denying Women Access to Fertility Services on the basis of Sexuality or Marital Status' Vol. 22 No. 3 *Alternative Law Journal* 126; D. Sandor (1997) 'Children Born From Sperm Donation: Financial Support and Other Responsibilities in the Context of Discrimination' Vol. 4 No. 1 *Australian Journal of Human Rights*, 175 available at <http://www.austlii.edu.au/au/other/ahric/ajhr/V4N1/ajhr4111.html>.

<sup>20</sup> Section 4 of the *Equal Opportunity Act 1995* (Vic) defines the phrase "lawful sexual activity" to mean "*engaging in, not engaging in or refusing to engage in a lawful sexual activity*". Prohibition of discrimination on this ground was introduced into the *Equal Opportunity Act 1995* (Vic.) by the then Liberal Government. W. Morgan (1996) 'Still in the Closet: The Heterosexism of Equal Opportunity Law' Vol. 1 No. 2 *Critical Queeries* 119 at 127 comments:

*"The Scrutiny of Acts and Regulations Committee recommended that "sexual preference" should be used in the legislation. But even this term was too inflammatory to some on the backbench of the liberal and national parties who threatened to cross the floor. To appease its backbench, the Government finally adopted the "lawful sexual activity wording, combined with the "working with children" and religious belief" exemptions outlined above. The adoption of this wording caused furor amongst the lesbian and gay communities. "Lawful sexual activity was widely regarded as offensive because it denied an identity to lesbians and gay men, reducing our sexuality to mere acts."* (footnotes omitted, emphasis in the original); see footnote 30 at 301 for a list of the grounds in each jurisdiction. See also the discussion of the phrase "lawful sexual activity" in M. Stewart (1995) 'Equal Opportunity Except for you... and you ... and you' Vol. 20 No. 4 *Alternative Law Journal* 196.

*A person may discriminate against another person on the grounds of sexuality in the area of work where -*  
*(a) the work involves the care, instruction or supervision of children; and*  
*(b) the discrimination is reasonably necessary to protect the physical, psychological or emotional well-being of children, having regard to all the relevant circumstances of the case including the person's actions."*

Compared with gay men and lesbians, the protections afforded to transsexual / transgendered persons are more limited still with anti-discrimination provisions still non-existent in Queensland or at Commonwealth level.<sup>21</sup> Reform was effected late last year in Tasmania<sup>22</sup> and the issue is on the agenda in Western Australia.<sup>23</sup>

Even more scarce is protection for sexual outsiders against discrimination on the grounds of their relationship status. The definition in most jurisdictions limits such protection to circumstances where a person is cohabiting with a person of the opposite sex in a *de facto* relationship. Victoria is an exception. Its *Equal Opportunity Act 1995* (Vic.) prohibits discrimination on the basis of the status of being a "domestic partner" which means:

*"... a person 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)".*

Importantly for today's topic, from that provision also flows protection for family members of the domestic relationship.

It appears that Western Australia would follow suit if the proposed reforms pass<sup>24</sup> and so too Tasmania if the unanimous recommendations of the Parliament's Standing Committee on Community Development are enacted.<sup>25</sup>

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<sup>21</sup> See Millbank and Morgan above note + at footnote 30. See also the legislation discussed by Chisholm J in *Re Kevin and Jennifer (validity of marriage of transsexual)* [2001] FamCA 1074 [http://www.familycourt.gov.au/judge/2001/html/rekevin\\_text.html](http://www.familycourt.gov.au/judge/2001/html/rekevin_text.html). The ill-fated Commonwealth Sexuality Discrimination Bill 1995 included coverage of transsexuals.

<sup>22</sup> *Anti-Discrimination Amendment Act 2001* (Tas).

<sup>23</sup> As a process associated with the Western Australian Ministerial Committee on Lesbian and Gay Law Reform, discrimination on the basis of gender identity or against those persons who are transgendered is the subject of a working party, that was convened by the Western Australian Equal Opportunity Commissioner that has not yet reported.

<sup>24</sup> Kendall and Dharmananda note 16 above.

<sup>25</sup> Joint Standing Committee on Community Development (2001) *Report on The Legal Recognition of Significant Personal Relationships*, Parliament of Tasmania, tabled 20 December 2001, available at <http://www.parliament.tas.gov.au/ctee/commdev.htm>. At 8, the Committee's recommendations are:

- "1. *The Committee recommends the amendment of the De Facto Relationship Act 1999 to extend its scope to include same sex and other significant personal relationships. In so doing the Committee acknowledges the importance of marriage in our society and recognises the traditional and religious associations which give this relationship its pre-eminence and would not want to see any change to the institution of marriage or the rights and privileges it enjoys.*
2. *The Committee suggests that this may be achieved by either:*
  - (a) *extending the meaning of de facto relationship to cover same sex relationships, or*
  - (b) *replacing the term 'de facto relationship' with an all-encompassing term such as 'domestic relationship' or 'significant personal relationship' to cover all relevant relationships.*
3. *The Committee recommends that a catch-all provision is included in the De Facto Relationship Act 1999 to ensure that same sex and other significant relationships are captured within the meaning of de facto spouse or partner for the purposes of other relevant Acts such as the Anti-Discrimination Act 1998, Testator's Family Maintenance Act 1912, Administration and Probate Act 1935, Duties Act 2000 and statutory compensation Acts.*
4. *The Committee recommends that any future legislative reform in this area consider the adoption of an optional system of registration of significant personal relationships.*
5. *The Committee recommends the amendment of Tasmanian public sector superannuation schemes to give recognition to same sex relationships."*

Parenthetically, it is interesting to note that the *HIV/AIDS Preventive Measures Act 1993* (Tas) actually contained an inclusive definition of partner:

In the case of each of these States, it is informative to the non-linear nature of the stage approach that there was, or would be, a "looping back" to anti-discrimination measures at the same time as the jurisdiction recognises the status of the relationship: the anti-discrimination ground that relates to relationship status is amended to reflect inclusiveness of sexual outsiders' relationships. Somewhat surprisingly, this logical step is not automatic. Jurisdictions such as New South Wales and the Australian Capital Territory, which have enacted significant relationship recognition reforms, today still confine the prohibition of discrimination to heterosexual relationships.<sup>26</sup>

### **Stage 3 - A Rose By Any Other Name**

Looking to the third stage of the theoretical pattern - relationship recognition - the legal landscape is very jagged. Neighbours on one or other side of our internal borders, in relationships that fall outside the "norm", have to live under the shadow of significantly different legal regimes. Moving across the imaginary map line may mean that a family unit either becomes or ceases to be recognised as such under the law.

Roughly speaking, heterosexual unmarried couples have come closer to a position of parity with married spouses first, through administrative practice, then through piecemeal amendments and then ultimately by the passage of a dedicated legislation amending the interpretation of a wide range of other acts. The legal device used in Australia has been what is termed a presumptive or ascription model which treats certain, usually cohabiting, partners "as if" they are a married couple for certain legal purposes without them having had to take any positive action to have the relationship recognised.<sup>27</sup> However, the result has been

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*"partner" means a spouse, a de facto spouse or a person with whom another person is living in a domestic relationship;"*

The Tasmanian Gay and Lesbian Rights Group comments at

[http://www.tased.edu.au/tasonline/tasqueer/updates/updt9\\_2.html#ssrelns](http://www.tased.edu.au/tasonline/tasqueer/updates/updt9_2.html#ssrelns):

*"Ironically, successive Tasmanian Liberal Governments have already recognised same sex relationships in two specific areas. The first is the 1993 HIV/AIDS Preventative Measures Act. At the time that this law passed through Parliament no-one seemed to notice that it was the first piece of legislation in Australia to count same sex partners within the definition of "spouse". The second example was the payment of compensation to the bereaved male partner of one of the men killed by Martin Bryant. The payment was the same as that received by bereaved heterosexual partners."*

<sup>26</sup> Section 39 of the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on the ground of "marital status" which is defined in section 4(1) to mean:

*"the status or condition of being:*

- (a) single,
- (b) married,
- (c) married but living separately and apart from one's spouse,
- (d) divorced,
- (e) widowed, or
- (f) in cohabitation, otherwise than in marriage, with a person of the opposite sex."** (emphasis added).

Section 7(1)(d) of the *Discrimination Act 1991* (ACT) prohibits discrimination on the ground of "marital status" which is defined in section 4(1) to mean

*"the status or condition of being—*

- (a) single;
- (b) married;
- (c) married but living separately and apart from one's spouse;
- (d) divorced;
- (e) widowed; or
- (f) the de facto spouse of another person;"** (emphasis added).

"De facto spouse" is defined in that section to mean:

*"a person of the opposite sex to the firstmentioned person who lives with the firstmentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person;"*

<sup>27</sup> "4.13 The earliest Commonwealth income maintenance program was established under the *Invalid and Old-Age Pensions Act 1908*, which provided non-contributory, means-tested invalid and old age pensions. This Act did not refer specifically to de facto relationships, but within a very short time the

described as "an appalling lack of uniformity of overall approach as well as in relation to specific provisions".<sup>28</sup>

### ***That's Amore***

With some variations in language, and sometimes with the added requirement of a minimum period of cohabitation or there being a child of the relationship, legislatures were commonly content in this process to insert the term "de facto" with little definitional elaboration beyond using terms such as "marriage-like" "*bona fide*" and "domestic".<sup>29</sup> It seems to have been taken for granted that legal equivalence for de factos was to be restricted to partners who conformed to almost all of the trappings of a married couple. The obvious did not need spelling out in statute.

Courts and tribunals were, however, required to analyse particular unmarried relationships with reference to the "indicia" of a marriage relationship. The caselaw was particularly shaped by decisions arising under social security legislation and by the start of the 1980s, it was evident that particular emphasis was being placed on "the nature, extent and duration of common residence, and on the presence of a sexual relationship".<sup>30</sup>

Reg Graycar and Jenni Millbank observe that the 1981 'de facto relationships' reference to the New South Wales Law Reform Commission was the starting point for comprehensive legislative schemes recognising heterosexual cohabiting relationships:

*"Before then, a small number of state (and federal) laws had already recognised de facto relationships for certain purposes. While the terms of reference of the inquiry referred to "the law relating to family and domestic relationships", and specifically to de facto relationships, the Law Reform Commission decided to focus exclusively upon heterosexual de facto relationships and not extend its recommendations to "other domestic or household relationships, such as those constituted by parents and*

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*administrators adopted a policy that de facto couples should not be placed in a better position than a married couple. Thus, where claimants were considered to be living together "as a married couple" without being married to each other, the rate of pension was limited to that payable to a married couple, rather than that payable to two unrelated individuals.*

4.14 *The first specific recognition of de facto relationships in Commonwealth legislation appeared in the Australian Soldiers' Repatriation Act 1920. This Act provided a pension to the wife of a deceased or incapacitated member of the Armed Forces, including a woman*

*"recognised as the wife of [the] member although not legally married to him if the [Repatriation] Commissioner is satisfied that [the woman] was wholly or partly dependent upon the earnings of that member." " New South Wales Law Reform Commission (1983) *De Facto Relationships*, Report 36, Chapter 4 available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R36CHP4>.*

In Chapter 4 of Law Commission of Canada (2001) *Beyond Conjuality: Recognizing and supporting close personal relationships*, there is a discussion of the advantages and disadvantages of the four models for the legal regulation of personal relationships: private law contracts, ascription legislation, registration schemes and marriage, available at <http://www.lcc.gc.ca/en/themes/pr/cpra/chap4.html#113e>.

<sup>28</sup> And this assessment was within a paper which confined its attention to property settlement regimes for unmarried partners: see Law Council of Australia (1998) *A Proposal for Model De Facto Relationships Legislation*. This submission noted:

*"The Law Council recommends that model legislation be enacted by each State and Territory. Model legislation would probably be more palatable to individual States who, for particular reasons, don't necessarily want to be as adventurous as other States and Territories. The most obvious example of this relates to the application of the legislation. The ACT already has legislation which applies not only to heterosexual relationships, but also to homosexual and dependent relationships. Queensland has indicated an intention to proceed in the same way. For other States, such an approach might be unpalatable. Model legislation would enable State governments to enact legislation which, in general terms, adopts a uniform approach, while at the same time preserving to States the right to adopt a different approach in relation to critically important areas." It recommended that "dependent relationships" should be covered by the model law.*

<sup>29</sup> See the discussion in Chapter 17 of New South Wales Law Reform Commission at note 27 above available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R36CHP17>.

<sup>30</sup> *Ibid*, especially par 17.11.

*adult children siblings, homosexual couples or larger groups living in a common household.*"<sup>31</sup>

It is dangerous, with 20 years' hindsight, to try to judge the wisdom of the Commission in imposing these limitations, however, it is hard to resist the view that it was a mistake. The powerful positive influence of the Report for heterosexual couples in New South Wales and beyond had the equally deep effect (not intention) of marginalising other interdependent relationships from legal recognition. Of course, there would have been pragmatic decisions to be made about the scope of the reference and the socio-political climate of the day, and the Commission acknowledged that:

*"[t]here may well be a case for change in other areas of law affecting domestic relationships, but we think the necessary investigations can and should be undertaken as a separate exercise."*<sup>32</sup>

Yet even so, it is the fact that the Commission decided to confine itself to opposite sex "marriage-like" couples at a time when the New South Wales *Anti-Discrimination Act 1977* prohibited discrimination on the grounds of *inter alia* "homosexuality".<sup>33</sup> This constraint to the Inquiry was not a justiciable act of discrimination by the Commission but it was a heterosexual interpretation of the reference, at odds with the State's public policy expressed in law. The nationally snowballing consequence was that legal privileges attached to certain unmarried relationships only if the parties were opposite sexed. Sexual outsiders' relationships were legally shunned.<sup>34</sup>

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<sup>31</sup> R. Graycar and J. Millbank (2000) 'The Bride Work Pink... To the Property (Relationships) Amendment Act 1999' Vol. 17 No. 1 *Canadian Journal of Family Law*, 227 at 230

<sup>32</sup> New South Wales Law Reform Commission note 27 above at 22 available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R36CHP1>.

<sup>33</sup> New South Wales Law Reform Commission note 27 above at 88 available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R36CHP4>.

<sup>34</sup> The Commission's recommendation that a distinction be maintained between marriage and de facto status has also had unfortunate consequences for heterosexual couples:  
*"The premise of the 1983 report and the resulting legislation was that marriage was a fixed benchmark against which other sorts of relationships could be compared and in effect, ranked. But in the meantime, marriage rates have declined, and the recognition of de facto relationships has proceeded far more quickly than was perhaps anticipated. Hardly any legal distinctions remain in other areas of State law between those married de jure and those married de facto. So there is a certain irony in the fact that the Act most frequently seen as affecting the rights and obligations of those in de facto relationships – the Property (Relationships) Act 1984 – is the one main area of distinction in NSW law between those in marital relationships and those in cohabiting couple relationships (whether heterosexual or, now, same sex)."* : R. Graycar (2001) 'Law Reform: Concept of family under review' Vol. 39 No. 3 *Law Society Journal* 64 available at

[http://www.lawsocnsw.asn.au/resources/ljsj/archive/apr2001/64\\_1.html](http://www.lawsocnsw.asn.au/resources/ljsj/archive/apr2001/64_1.html)

J. Dewar 'Family Law and Its Discontents' Inaugural Professorial Lecture' at 8, available at <http://www.gu.edu.au/ins/lils/coll/proflects/dewar99.pdf>, describes the effect and underlying rationale as follows:

*"The powers available to a Court under this legislation are often less extensive than those available in respect of married couples under the Family Law Act. In particular, there is no equivalent of the forward-looking 's.75(2) factors' in State de facto legislation, and the powers to order continuing maintenance are more limited than under the Family Law Act. The reason for this is the perceived need to maintain a privileged status for marriage, and to avoid imposing on unmarried couples obligations that they may not wish to undertake."*

In *Evans v Marmont* (1997) 42 NSWLR 70, the New South Wales Court of Appeal sat a specially constituted bench of five justices (Gleeson CJ, Mason P, Priestley JA, Meagher JA, McLelland CJ in Equity) to resolve whether a court could take account of factors other than contribution such as those found in section 75(2) of the Family Law Act. Gleeson CJ and McLelland CJ in Equity (Meagher J agreeing) held that only contributions are relevant. In doing so, their Honours relied on the Commission Report and the Legislature's "deliberate" intention to maintain a distinction between marriage and de facto relationships. The Law Council of Australia's 1998 comparison of State and Territory property laws, note 25 above, identified the *Domestic Relationships Act 1994* (ACT) and the *Property Law Act 1974* (QLD) as containing the equivalent of section 75(2) factors. The *De Facto Relationship Act 1999* (Tas.) can now be added to the list and is presently (see note 25 above) limited to opposite sex couples.

Law reform attention did then turn to inclusion, and still does. What follows is a necessarily technical survey of current provisions which are inclusive of sexual outsiders.<sup>35</sup> Some overarching trends associated with the evolution of the statutory ascription schemes will be seen to emerge in this review and should be kept in mind:

- First, there has been a shift away from relying upon an intuitive understanding of when a relationship was covered by law reform towards greater specification in legislation about how to spot a "legal" unmarried relationship.
- Second, in these users'-guides, sex and cohabitation has lesser significance.
- Third, and confusingly, the greater specificity in definitions has resulted in the frequently appearing terms of "de facto relationship" and "domestic relationship" having different meanings in different jurisdictions. Their inclusiveness can only be understood by reference to the words of the defining statute.
- Fourth, a similar variance is seen in respect of which children are deemed to be of the relationship.
- Fifth, recent reforms demonstrate a trend towards a more omnibus rather than ad hoc approach to revising the statute books.

### **The Commonwealth**

Immigration law has been a main site of Commonwealth legislative activity. Prior to the introduction of reg 1.09A of the *Migration Regulations* (Cth) 1993, applications for a same-sex partner to live in Australia were dealt with, if at all, by way of Ministerial discretion and the Government was at pains to point out that such applications were not part of the Family Reunion Programme. A four year period of cohabitation was required (later reduced to thirty months) and:

*"homosexual partners were required to demonstrate a **genuine** commitment at the time of the application and then, because of ongoing policing by the Department of Immigration, they also had to prove these genuine relationships to be **successful** over a specified time. No such requirements were made for heterosexual couples in the migration programme."*<sup>36</sup> (emphasis in original)

Regulation 1.09A introduced an interdependency basis for the granting of a visa which is amenable to be applied to the relationships of sexual outsiders but not confined to such relationships. Eligibility requires of the applicant and the Australian citizen that:

- "(i) they have a mutual commitment to a shared life to the exclusion of any spouse relationships or any other interdependent relationships; and
- (ii) the relationship between them is genuine and continuing; and

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<sup>35</sup> Law reform proposals in Tasmania and Western Australia are discussed in the course of the paper. No mention is made of the Northern Territory as there have neither been past nor present concrete proposals. So far as South Australia is concerned:

*"Attempts by Labour and the Democrats to have gay relationships recognised in the De Facto Relationships Bill have finally been defeated. The De Facto Relationships Bill was introduced into the Upper House by Attorney-General Mr Griffin and was intended to allow heterosexual couples in de facto relationships to settle property disputes before the Family Court rather than the civil courts. The Bill was passed in the Upper House in May but only after Labor and the Democrats insisted the definition of "de facto" include gay relationships. The Bill then went to the Lower House, where the gay amendment was rejected after a conscience vote. Two weeks later the Bill was re-introduced into the Upper House. Labor and Democrats refused to accept the Bill without gays being included in the definition. The Bill became deadlocked. A committee was formed to resolve the differences. After confidential discussions the committee announced that the Bill would be passed but without the gay relationships being recognised."* Adelaide Gay Times No. 94, 2 August 1996 at 1. An audit of legislation which discriminates against lesbian and gay couples was recently completed with the participation of the Equal Opportunity Commission of South Australia. Fifty-four pieces of legislation were identified: see <http://www.aidsCouncil.org.au/LGE%20Brochure.pdf>. It has not yet been possible to obtain the audit report.

<sup>36</sup> J. Hart (1992) 'A Cocktail of Alarm: Same-sex couples and Migration to Australia 1985-90' in K. Plummer (Ed) *Modern Homosexualities*, Routledge, London, at 124.

- (iii) *they:*  
(A) *live together; or*  
(B) *do not live separately and apart on a permanent basis.*"<sup>37</sup>

For the making of a determination, reg 1.09A(5) directs attention to matters under the following headings: the financial aspects of the relationship; the nature of the household; the social aspects of the relationship; the nature of the persons' commitment to each other; the degree of companionship and emotional support that the persons draw from each other; whether the persons see the relationship as a long one. Regulation 1.09.A(6) states:

*"[i]f 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason."*

However, in practice:

*"The current Federal Government has taken several steps to limit the availability of family immigration generally, with some limitations particular to interdependency. There is a "cap" on the number of interdependency permits granted, and this was reduced from 650 in 1995-96 to 400 in 1996-97. ... In 1997 new legislation imposed a one year cohabitation requirement for applicants for interdependency visas."*<sup>38</sup>

As the Honourable Justice Michael Kirby has pointed out, discrimination persists in both law and practice:

*"... for heterosexual de facto relationships and "interdependency relationships", the partners must be able to prove a twelve months committed relationship before being eligible to proceed with the application. In the case of heterosexual relationships, this precondition can be overcome, quite simply, by marriage. In some countries which still criminalise, prosecute or stigmatise persons who establish a same-sex household, proof of twelve months cohabitation will be difficult or even impossible. Provision is made for waiver of this requirement in compelling circumstances.*

*A second important omission from current immigration law is of persons from overseas seeking either to migrate or enter Australia temporarily from including in their application as members of their family unit (and thus bringing with them) persons with whom they presently reside in their country of origin in a same-sex relationship."*<sup>39</sup>

The Commonwealth *Family Law Act 1975* is also relevant to adult relationship recognition, although in an indirect way. The late 1980s saw the referral of legislative power in respect of *ex nuptial* children to the Commonwealth by all States except Western Australia under placitum 51(xxxvii) of the *Constitution*. As a result, the *Family Law Act 1975* applies to all private law disputes concerning children (except adoption) irrespective of the marital status of their parents.<sup>40</sup>

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<sup>37</sup> In making the determination, regard is had to the factors contained in reg 1.09A(5) which directs attention to: the financial aspects of the relationship; the nature of the household; the social aspects of the relationship; the nature of the persons' commitment to each other; the degree of companionship and emotional support that the persons draw from each other; whether the persons see the relationship as a long one.

<sup>38</sup> J. Millbank (1998) 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?' Vol. 12 No. 2 *Australian Journal of Family Law* 99 at 115.

<sup>39</sup> M. Kirby (1999) 'Same-sex Relationships - Some Australian Legal Developments', paper presented at the University of London Kings College School of Law Conference on the Legal Recognition of Same-sex Partnerships, London, 3 July 1999 available at [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_samese.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_samese.htm).

<sup>40</sup> In Western Australia there is mirroring State legislation: the *Family Court Act 1997* (WA). Inconveniently for the families concerned, the determination of financial disputes between unmarried parents is a State or Territory matter since the demise of the "cross-vesting" scheme as a result of the High Court's decision in *Re Wakim; Ex parte McNally & Ors* (1999) 198 CLR 511. The issue of State referral of this legislative power is discussed later in this paper. For further discussion of the

Proceedings for parenting orders under the *Family Law Act 1975* (Cth) are typically but not solely concerned with dispute resolution. They can also serve as a means, usually uncontested, by which the partner of the parent may become a legal co-parent. A court exercising jurisdiction under the Act has no power to accord a formal status to the nature of the relationship between unmarried adults.<sup>41</sup> It can, however, create legal relationships in the form of orders for day to day and long term parenting responsibilities between a child and any other person that mirror those deemed by law to automatically arise between a biological or adoptive parent and the child.

Where the parties have an order in hand, it may assist in meeting definitions under State and Territory laws, however, unlike adoption orders, parenting orders run only until the child is 18 years of age<sup>42</sup> and they do not create succession rights.

### **Queensland**

In the case of Queensland, its law reform commission's 1991 Discussion Paper<sup>43</sup> was radical for the time in suggesting a property division scheme that was open to all cohabitants regardless of their relationship. However by the time of the Commission's 1993 Report,<sup>44</sup> the recommended proposal was limited to and used the following definition of "de facto relationship":

*"the relationship between 2 persons (whether of a different or the same gender) who, although not legally married to each other have lived in a relationship like the relationship between a married couple for two years".*

The 1999 amendment ultimately introduced into the *Property Law Act 1974* (Qld) for the purposes of that Act, added qualitative dimensions to the cohabiting couples which are eligible, presumably defining the elements of a marriage-like relationship. Section 260 provides:

- "(1) A "de facto spouse" is either 1 of 2 persons, whether of the same or the opposite sex, who are living or have lived together as a couple.*  
*(2) For subsection (1) –*
- (a) 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; and*
  - (b) 2 persons are not a couple only because they are cotenants"*

Section 259 contains a broad set of meanings to a "child" of de facto spouses and it is noteworthy that par (d) is inclusive of a child of a same sex relationship:

- (a) a biological child of the de facto spouses*

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constitutional dimensions see Graycar note 4 above and A. Nicholson (2000) 'Family Law in Australia – Bargaining in the Shadow of the Constitution' No. 55 *Family Matters*, 22.

<sup>41</sup> As compared with its power in respect of marriages: see section 113 of the *Family Law Act 1975* (Cth), the basis upon which an application was brought in *Re Kevin and Jennifer (validity of marriage of transsexual)* note 21 above. The Commonwealth Attorney-General has appealed the decision.

<sup>42</sup> For the sake of completeness it should be mentioned that a parenting order may be made for the maintenance of a child who has attained the age of 18 years.

<sup>43</sup> Queensland Law Reform Commission (1991) *Shared Property: Resolving Disputes Between People Who Live Together and Share Property*, Discussion Paper 36.

<sup>44</sup> Queensland Law Reform Commission (1993) *De Facto Relationships*, Report 34. A. Sweet (1996) *The Law and Resolution of De Facto Property Disputes - Research Bulletin No. 9/96*, Queensland Parliamentary Library, intimates that the Commission received a moralistic backlash when she notes at 27:

*"Initially the Queensland Law Reform Commission issued a Discussion Paper in October 1991 called Shared Property which endorsed consideration of extending legislation to property disputes involving non-marriage-like domestic relationships. However, upon receiving submissions in response to the paper it modified its position and limited its consideration to de facto relationships only."*

- (b) a child of the female de facto spouse whose male de facto spouse is presumed or proved to be the father
- (c) a child adopted by the de facto spouses
- (d) a child who, at a time during the de facto relationship, is or was –
  - (i) treated by either de facto spouse as a child of the relationship; and
  - (ii) ordinarily a member of the de facto spouses' household

The scope of recognition to date has been limited. The *Industrial Relations Act 1999* (Qld) contains a definition of spouse which encompasses "a de facto spouse, including a spouse of the same sex as the employee" for the purposes of carer's leave, parental and adoption leave provisions. The *Domestic Violence (Family Protection) Act 1989* (Qld) was also amended in late 1999 to include same-sex partners as eligible applicants for protection orders.

### **The Australian Capital Territory**

It was around the time of the introduction of reg 1.09A into the *Migration Regulations 1993* (Cth) that the Australian Capital Territory was considering a discussion paper on the subject of relationships recognition.<sup>45</sup> The *Domestic Relationships Act 1994* (ACT) was subsequently enacted and deals with property related disputes by empowering a court to make a just and equitable adjustment of the parties' interests in property based upon not just past contributions, but also what may be termed "future needs". The key provision is section 3 which provides:

*"s 3 (1) domestic relationship means a personal relationship (other than a legal marriage) between 2 adults in which 1 provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage;*

*(2) For the purposes of the definition of domestic relationship in subsection (1)-*  
*(a) a personal relationship may exist between persons although they are not members of the same household; and*

*(b) a personal relationship shall not be taken to exist between persons only because one of them provides a service for the other-*  
*(i) for fee or reward;*  
*(ii) on behalf of another person (including a government or body corporate); or*  
*(iii) on behalf of an organisation the principal objects or purposes of which are charitable or benevolent."*

...

*(4) A reference in this Act to a child of the parties to a domestic relationship shall be read as a reference to each of the following children:*

- (a) a child of whom the parties are the parents;*
- (b) a child of whom the parties are presumed, by virtue of the Artificial Conception Act 1985, to be the father and mother;*
- (c) a child adopted by both parties;*
- (d) a child for whom both parties accept responsibility for his or her long-term welfare."*

In the *De Facto Relationships Act 1984* (ACT), a de facto partner is defined in section 3(1) in terms of living with a member of the opposite sex on a bona fide domestic basis although not married to him or her. As can be seen, these are not necessary qualities of a "domestic relationship". It is therefore tempting to view the *Domestic Relationships Act 1994* (ACT) as locating "de facto marriages" as one species of "domestic relationships" which can encompass sexual outsiders but as with the *Migration Regulations 1993* (Cth), also other relationship types.

<sup>45</sup> ACT Attorney-General's Department (1993) *A Proposal for Domestic Relationship Legislation in the ACT*.

While this characterisation would be formally correct because a "domestic relationship" includes a "de facto marriage", to do so would ignore the greater prevalence of Territory laws which recognise "de facto marriages" but not "domestic relationships".<sup>46</sup> The Act is therefore open to the criticism of creating a third tier of relationship recognition - just one type of unmarried relationship that accommodates sexual outsiders only for property division purposes.<sup>47</sup>

Yet even if its practical reach is overly limited, the *Domestic Relationships Act 1994* (ACT) has symbolic importance:

*"in moving to emotional and financial interdependence as the key indicators of a legally recognised relationship, [the Act] rejected sex and cohabitation as the only criteria for a 'real' relationship. In doing so, it left behind the state of marriage and 'marriage-like' relationships as the only recognised relationships in Australian law, and was in that sense truly revolutionary."*<sup>48</sup>

The influence of the Commonwealth and Australian Capital Territory reforms can be seen in the more recent developments in New South Wales and Victoria. As with reg 1.09A(5) of the *Migration Regulations 1993* (Cth) both incorporate an attempt to itemise the matters to which a decision-maker should look in determining whether a recognised relationship exists or has existed. Also, both Victoria and New South Wales accord legal status to a broader range of interdependent relationships but with significant differences that will be pointed out below.

### **New South Wales**

The Property (Relationships) Amendment Act 1999 (NSW) amended the prior definition of a "de facto relationship" to include same-sex cohabiting couples and in addition created a new status category known as a "domestic relationship", which is also non-heterosexist. Like the ACT legislation, a "de facto relationship" is included within the meaning of a "domestic relationship" but unlike the ACT legislation, both include sexual outsiders and domestic relationships are recognised within a larger range of statutes.

Section 4(1) of the Property (Relationships) Act 1984 now reads:

*"For the purposes of this Act, a **de facto relationship** is a relationship between two adult persons:*

- (a) who live together as a couple, and*
- (b) who are not married to one another or related by family."*

Section 4(2) then draws upon the "checklist" of factors listed by Powell J in the Supreme Court of NSW decision of *D v McA*<sup>49</sup> in one of the first cases dealing with the pre-amendment definition of "de facto". At the time, it was couched in terms of living with an opposite sex partner in "a bona fide domestic basis" although not married to him or her. Consistent with the coverage of sexual outsiders, section 4(2) omits Powell J's reference to the matter of "the procreation of children" but otherwise reproduces his Honour's checklist in statutory form as follows:

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<sup>46</sup> I am indebted to Jenni Millbank for this insight.

<sup>47</sup> Graycar and Millbank note 31 above observe at 246-7:

*"that broad definition of 'domestic relationship' applies only to the property division legislation. In 1996, amendments were made to the family provision (testators' family maintenance/dependants' relief) legislation which extended eligibility to a domestic partner. Domestic partner was defined, in contrast to the 1994 Act, as someone "who lived with the deceased for 2 years continuously at any time during the life of the deceased" and the Act also included the category of "eligible partner" (defined as a non-legal spouse, who "whether or not of the same gender as the deceased – lived with the deceased at any time as a member of a couple on a genuine domestic basis"). In 1996 amendments to the ACT's intestacy legislation, eligibility was extended to a new category of same sex "eligible partners", but this does not include domestic partners as defined in the 1994 legislation."*

<sup>48</sup> J Millbank (2000) 'Domestic Gifts: Who is using the Domestic Relationships Act 1994 (ACT)?' Vol 14 No 3 *Australian Journal of Family Law* 163

<sup>49</sup> (1986) 11 Fam LR 214 at 227.

*"In determining whether two persons are in a **de facto relationship**, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:*

- (a) the duration of the relationship,*
- (b) the nature and extent of common residence,*
- (c) whether or not a sexual relationship exists,*
- (d) the degree of financial dependence or interdependence, and any arrangements or financial support, between the parties,*
- (e) the ownership, use and acquisition of property,*
- (f) the degree of mutual commitment to a shared life,*
- (g) the care and support of children,*
- (h) the performance of household duties,*
- (i) the reputation and public aspects of the relationship."*

The expanded coverage of "de facto relationships" now covers areas such as property division after relationship breakdown, inheritance, accident compensation, certain state taxes, decision-making in times of illness and decision making about deceased partners.

A new status with more limited application was also introduced.<sup>50</sup> Section 5 establishes the definition of "domestic relationships" and does so in a way which maintains the criterion of "living together" seen in the Act's definition of "de facto relationship", a criterion it will be recalled is not present in the definition of "domestic relationship" found in the *Domestic Relationships Act 1994* (ACT). Section 5 states:

- "(1) For the purposes of this Act, a **domestic relationship** is:*
- (a) a **de facto relationship**, or*
  - (b) 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.*
- (2) For 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)."*

In yet another Australian definition of a child of the parties, sub-section (3) speaks in terms of 'a child for whose long term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*)'.

The need for more widely reaching law reform in New South Wales was recognised at the time the new provisions were proposed:

*"An earlier bill, the De Facto Relationships Amendment Bill, introduced into Parliament in 1998 by the Australian Democrats, had provided for a larger number of enactments to be amended so that they applied to same sex couples. It also had a wider definition of "domestic relationship". Questions about the breadth of the amending legislation were referred to the Legislative Council's Standing Committee on Social Issues and before that Committee reported, the Government introduced and enacted its own bill.*

*In December 1999, the Committee recommended that the Government examine all NSW legislation "to determine whether amendments need to be made to ensure a consistent application of the new definition of 'de facto'" in the 1999 legislation and that employment related laws and awards should be made consistent with the Property (Relationships) Legislation Amendment Act 1999. The Committee also*

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<sup>50</sup> The definition is found in laws concerning statutory property division, inheritance, bail and stamp duty.

recommended that the definition of "close personal relationship" in s 5(1)(b) be "broadened to encompass a wider range of interdependent personal relationships", including non-cohabitants.

...

The 1999 amendments added several new provisions in the Property (Relationships) Act 1984 including section 5(3) which defines a "child of the parties to a domestic relationship" to include "a child for whose long-term welfare both parties have parental responsibility (within the meaning of the Children and Young Persons (Care and Protection) Act 1998". While this may extend to same sex co-parents, the Standing Committee on Social Issues noted in its report that there are many contexts in which lesbian and gay co-parents do not have legally recognised relationships with the children of their partners. The Committee recommended that "the issue of legal recognition of non-biological parents to ensure children of those in non-traditional domestic relationships are not disadvantaged be fully examined". Another issue raised was the fact that the Federal child support scheme may not take into account lesbian and gay co-parents."<sup>51</sup>

These matters have been the subject of inquiry by the New South Wales Law Reform Commission since September 1999. Submissions to be considered in a discussion paper were due by 31 May 2000 but the document has not yet issued.

## Victoria

2001 saw the Victorian Parliament pass two tranches of Labour Party Government legislation<sup>52</sup> which changed nearly all relevant State Acts to introduce the gender neutral legal concept of "domestic relationship". Ultimately, the Bills were passed with the support of the Liberal Party and Independent Member Susan Davies.<sup>53</sup> The content of the Bills was developed by the Advisory Committee on Gay Lesbian and Transgender Issues to the Attorney-General, The Hon Rob Hulls MP. The Committee was chaired by Richard Wynne MP, Parliamentary Secretary to the Attorney-General, and included both invited individuals and representatives of a broad range of government and community stakeholder groups.<sup>54</sup>

The express objects of the new legislation affecting 57 Acts so far are:

- To recognise the rights and obligations of partners in domestic relationships where there is mutual commitment to an intimate personal relationship and shared life as a couple, irrespective of the gender of each partner; and
- To prevent discrimination ... by ensuring that all couples irrespective of gender have the same rights and obligations while at the same time recognising the importance of a commitment to a long term relationship and the security of children.

The amendments create the following basic definition for Victorian law:

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<sup>51</sup> New South Wales Law Reform Commission (2000) *Relationships and the Law: Review of the Property (Relationships) Act 1984* (Preliminary Paper) available at <http://www.lawlink.nsw.gov.au/nswlrc.nsf/pages/paperproperty>

<sup>52</sup> *Statute Law Amendment (Relationships) Act 2001* (Vic.) and the *Statute Law Further Amendment (Relationships) Act 2001* (Vic.). This was consistent with the Labour Party's election commitment to implement the recommendations of the March 1998 report of the Equal Opportunity Commission of Victoria *Same Sex Relationships and the Law*.

<sup>53</sup> The Bills were opposed by the National Party and Legislative Assembly Independents Russell Savage and Craig Ingram. Liberal MP Robert Clark crossed the floor to oppose the first Bill and did not vote on the second Bill.

<sup>54</sup> The stakeholder groups included: the Victorian Lesbian and Gay Rights Lobby, Transgender Victoria, Parents and Friends of Lesbians and Gays, the Fertility Access Rights Lobby, the Victorian Aids Council, the ALSO Foundation, Liberty Victoria, the Law Institute of Victoria, and the Equal Opportunity Commission of Victoria. I represented the Australian Section of Defence for Children International to advocate of the obligation contained in Article 2 of the Convention on the Rights of the Child: that children are to be protected from "discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members."

*“ ‘domestic relationship’ means the relationship between two people who, although not married to each other, are living or have lived together as a couple on a genuine domestic basis (irrespective of gender)”.*<sup>55</sup>

Unlike the former legal concept of a “*de facto* relationship” under Victorian law, the partners to a “domestic relationship” need not be a man and a woman; the definition now includes opposite-sex and same-sex relationships, and relationships involving one or two persons who are transgender, transsexual or intersex.<sup>56</sup> It is therefore a substantial change in concept not just a change in terminology and the sweep of the Victorian reforms is the broadest yet enacted in Australia.<sup>57</sup>

In some Acts, the definition of a “domestic partner” is wider, a change that affects heterosexual couples as well, because a “domestic partner” is there defined to mean:

*“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 commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person –*  
*(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).”*<sup>58</sup>

Thus, the same term “domestic relationship” has differing inclusiveness depending on the Act in which it is found, with only the narrow definition containing the expectation that the couple are living or have lived together. Couples who do not meet that expectation might therefore be domestic partners for the purposes of some statutes but not others. The wider definition is mainly found in legislation concerned with criminal law, consumer affairs, and health related decision-making.

The influence of the New South Wales and Australian Capital Territory statutes is evident in the wider Victorian definition, but it is a further Australian definition. Unlike New South Wales, there is no mention of “living together” but unlike the Australian Capital Territory, the persons are defined as being in a relationship as a “couple”. This was not an element of the definition in the Bill as it was originally introduced. The phrase was inserted by motion of Susan Davies MP in the Legislative Assembly. It is too early to tell what interpretative differences, if any, will arise.

Victorian Acts referring to “domestic relationships” (in both the narrow and wider sense) direct attention to the factors set out in Section 275(2) for the purposes of determining whether a domestic relationship exists. Section 275(2) of the *Property Law Act 1984* (Vic.) reproduces section 4(2) of the *Property (Relationships) Act 1984* (NSW) as indicia of a domestic relationship. This provision was not in the Introduction Print of the Bill. The factors were originally contained only in the second reading speech and the definitions were as follow:

*‘ “domestic partner” of a person means a person with whom the person is or has been in a domestic relationship;*

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<sup>55</sup> See the newly amended Section 275 of the *Property Law Act 1958* (Vic).

<sup>56</sup> The legal position of transsexuals under Australian law has recently been reconsidered by Justice Richard Chisholm in the first instance decision of *Re Kevin and Jennifer (validity of marriage of transsexual)* note 21 above. The Commonwealth Attorney-General appealed the decision and the judgment of the Full Court of the Family Court of Australia is reserved.

<sup>57</sup> “*The bill does its work through seven schedules, amending over 40 acts. These cover property related benefits, compensation schemes, superannuation schemes, health-related legislation, criminal law legislation, consumer and business legislation, and a miscellaneous category. The latter includes the Equal Opportunity Act itself. It will now extend to prohibit discrimination on the basis of same-sex relationships, so that at last, discrimination on the basis of sexual orientation will be comprehensively outlawed.*”: Second Reading Speech, 17 November 2000.

<sup>58</sup> A feature of the wider Victorian definition that is not found in the narrow definition is that the parties must be “adult”, a limitation that could give rise to difficulties.

**"domestic relationship"** means the relationship between two people who, although not married to each other, are living or have lived together as a couple on a genuine domestic basis (irrespective of gender);'

An amendment moved by independent MP Susan Davies incorporated the indicia into the resulting Act. Like the approach seen in the New South Wales statute, the list is not exhaustive and no single factor is of particular importance. Section 275(2) expressly states:

*"in determining whether a domestic relationship exists or has existed, all the circumstances of the relationship are to be taken into account, including any one or more of the following matters as may be relevant in a particular case".*

The definition of "child" in section 275 is specific and limited:

**"child"** in relation to domestic partners means--  
(a) a child born as a result of sexual relations between the partners; or  
(b) a child of one of the partners of whom the other partner is presumed to be the father under Part 2 of the **Status of Children Act 1974**; or  
(c) a child adopted by the partners."

This is narrower than the Queensland, New South Wales or Australian Capital Territory child definitions, however in property settlement proceedings, the Court has a discretion to make an order if:

- Failure to make the order would result in serious injustice to the domestic partner who applied for the order and that partner has made substantial contributions for which the partner would otherwise not be adequately compensated if the order were not made; or
- Where the applicant for an order has the care and control of a child of the other domestic partner.<sup>59</sup>

Section 275 is not the reference point for the definition of "child" in other acts. Elsewhere the definition is broader due to an expanded definition of "parent". For example, the *Transport Accident Act 1986* (Vic.) has been amended to make clear that a dependent child of an injured person's domestic partner (as well as a dependent child of the injured person), is entitled to compensation. Similar extensions of benefit have been introduced into State superannuation schemes by amendment of, for example, the *Emergency Services Superannuation Act 1986* (Vic.) and the *Transport Superannuation Act 1988* (Vic.). Section 3(1) of the *Health Act 1958* (Vic.) now provides that the definition of parent includes:

*"(a) a step-parent;  
(b) an adoptive parent;  
(c) a foster parent;  
(d) a guardian;  
(e) a person who has day to day care and control of a child and with whom the child ordinarily resides;"*

Changes to the *Administration and Probate Act 1958* (Vic.) will for the first time entitle an unmarried partner to a share of the deceased's residuary estate. Previously, such entitlement was limited only to a husband or wife and did not cover a *de facto*. To be eligible, the surviving partner must have lived continuously with the deceased for at least two years or must be the parent of a "child" (narrowly defined) of the intestate. "Parent" is defined as *"includ[ing] a person who has day to day care and control of the child and with whom the child is ordinarily resident"*.<sup>60</sup> Where the deceased leaves both a spouse and an eligible domestic partner, section 51A of the Act sets out a scheme to apportion the residuary estate between them.<sup>61</sup>

<sup>59</sup> Section 281 *Property Law Act 1958* (Vic.)

<sup>60</sup> Section 3(1) of the *Administration and Probate Act 1958* (Vic.)

<sup>61</sup> The simpler scheme was originally proposed but the Liberal Party called for a more graded approach. As to some anticipated problems, including the determination of when the domestic relationship commenced, see C. Sparke (2002) 'When is a spouse not a spouse?' Vol 76 No.1 *Law Institute Journal*, 60.

**'51A. Distribution between spouse and domestic partner**

(1) If an intestate leaves both a spouse and a domestic partner, the entitlement to the partner's share of the intestate's residuary estate is to be determined in accordance with the following table.

**TABLE**

| <i>Period that domestic partner has lived as domestic partner of intestate continuously before intestate's death</i> | <i>Spouse's entitlement to partner's share</i> | <i>Domestic partner's entitlement to partner's share</i> |
|----------------------------------------------------------------------------------------------------------------------|------------------------------------------------|----------------------------------------------------------|
| <i>Less than 4 years</i>                                                                                             | <i>Two-thirds</i>                              | <i>One-third</i>                                         |
| <i>4 years or more but less than 5 years</i>                                                                         | <i>Half</i>                                    | <i>Half</i>                                              |
| <i>5 years or more but less than 6 years</i>                                                                         | <i>One-third</i>                               | <i>Two-thirds</i>                                        |
| <i>6 years or more</i>                                                                                               | <i>None</i>                                    | <i>All</i>                                               |

*Note: There is a minimum requirement that the domestic partner lived with the intestate continuously for at least 2 years immediately before the intestate's death, unless the domestic partner is the parent of a child of the intestate who was under 18 at the time of the intestate's death--see definition of "domestic partner" in section 3(1)."*

Other amendments benefit children through improved protection of the rights of their parent and her or his non-heterosexual partner. Discrimination on the grounds of "marital status" is prohibited under Victorian law. As a result of the recent changes, "marital status" now includes being a "domestic partner" for the purposes of the *Equal Opportunity Act 1995* (Vic.). The definition of "relative" also now extends to include a child or grandchild of the domestic partner and also the child of certain family members of the partner.<sup>62</sup> This means, for example, that a child with a parent in a same-sex domestic relationship can utilise the Act to complain that he or she is receiving less favourable treatment because of his or her parent's relationship.

There was predictable political jumpiness to the amendments being applied to the legislation governing the Children's Court of Victoria and the public family law fields of child protection and juvenile justice procedures and orders. It's bound to happen when reforms associated with sexuality are proposed to an Act with the name the *Children and Young Persons Act 1989* (Vic.) ("CYPA"). Fortunately however, it seems that most parliamentarians looked to the substance of the amendments which the President of the Children's Court of Victoria, her Honour Judge Jennifer Coate, has recently explained:<sup>63</sup>

[Prior to the *Statute Law Further Amendment (Relationships) Act 2001* (Vic.)]

**"parent"**, in relation to a child, includes--

- (a) the father and mother of the child; and
- (b) the spouse of the father or mother of the child; and
- (c) a person who is living with the father or mother of the child as if she were his wife or he were her husband (as the case requires) although not married to him or her; and
- (d) a person who has custody of the child; and
- (e) a person whose name is entered as the father of the child in the register of births in the Register maintained by the Registrar of Births, Deaths and

<sup>62</sup> Section 4 of the *Equal Opportunity Act 1995* (Vic.).

<sup>63</sup> J. Coate (2001) 'A Wider Meaning of "Parent" under the Victorian Children and Young Persons Act' No. 31 *Australian Children's Rights News*, 31-32.

*Marriages under Part 7 of the **Births, Deaths and Marriages Registration Act 1996**; and*

*(f) a person who acknowledges that he is the father of the child by an instrument of the kind described in section 8(2) of the **Status of Children Act 1974**; and*

*(g) a person in respect of whom a court has made a declaration of, or a finding or order regarding, the paternity of the child;”*

*As a result of the amending Act, paragraph (c) now reads “the domestic partner of the father or mother of the child”.*

...

*The new definition is a sign of respect for the reality of some children’s lives - that there are children who are cared for within family units which comprise a father or mother in a non-heterosexual relationship. That is of more than abstract importance. I would hope that it helps us make better decisions about children by encouraging family members to be more candid about their relationships and their circumstances. For this to occur, appropriate sensitivity needs to be shown by all people in the system who are involved in such cases.*

*The practical legal effect of the new definition extends certain obligations to the parent’s domestic partner. For example, section 261 of the CYPA establishes an offence of intentionally causing harm or failing to protect a child from harm. It applies to persons with a duty of care towards a child and the law clearly recognises that a parent has such a duty.*

*The procedural rights of domestic partners under the Act are also enhanced by the more inclusive definition of “parent”. Some illustrations can be seen in:*

- *The Court’s obligation to take steps to ensure (with interpreter assistance if necessary) that the proceedings are comprehensible to the child’s parents and allowing parents to participate fully in the proceeding;*
- *The requirement that the Court is respectful of the cultural identity of the child’s parents;*
- *The Court’s obligation to explain the orders that it makes to parents;*
- *The duty upon probation officers to consult and co-operate with parents when directed by the court to visit and supervise a child and in making any inquiries, to cause as little prejudice as possible to the reputations of the child concerned and of his or her parents;*
- *The duty of child protection investigators to inform the child’s parents that any information they give may be used for the purposes of a protection application;*
- *The presumed entitlement of a parent to know where a child has been placed by protective interveners;*
- *The right of a parent to receive a copy of reports and to call a report writer for cross-examination;*
- *The standing of a parent to apply to the Victorian Civil and Administrative Tribunal for a review of certain administrative decisions concerning the child*
- *The capacity of a parent to enter into an undertaking on behalf of the child under the Bail Act 1977 (Vic.).*

*In conclusion, there is no downside to the CYPA amendments and it is a credit to the Victorian Parliament that the bill appears to have progressed fairly smoothly to enactment. Now it falls to all the various organisations concerned with children, including the Children’s Court, to incorporate these important changes into their programs, practices and training.”*

Two Acts were deliberately excluded by the Victorian Government from the recent law reform: the *Adoption Act 1984* (Vic.) and the *Infertility Treatment Act 1995* (Vic.).<sup>64</sup>

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<sup>64</sup> In contrast, adoption and fertility service access are not excluded from the Western Australian Government’s Acts Amendment (Lesbian and Gay Law Reform) Bill 2001 - second read in the Legislative Assembly on 14 November 2001: available at <http://www.parliament.wa.gov.au/parliament/bills>

In respect of adoption, married couples are eligible to apply in all jurisdictions. Where unmarried couples may adopt, eligibility is restricted to heterosexual de facto partners. To the extent that individuals wish to adopt, they face the hurdle of demonstrating that exceptional circumstances exist and in practice, this is only satisfied where the child is a relative of the applicant or a difficult to place "special needs" child.

*"While a lesbian or gay applicant is legally entitled to adopt a child as a "single person", s/he will be far less favoured by the government and private agencies which place children, than the many married and heterosexual de facto couples who apply. Thus same sex couples are excluded by law from adopting, while a single or apparently single, lesbian or gay man is disadvantaged by law and almost completely excluded in practice."*<sup>65</sup>

IVF, semen screening and donor insemination were originally restricted in Victoria to legally married couples but the *Infertility Treatment Act* 1995 (Vic.) was amended in 1997 to permit access by *de facto* couples after the Human Rights and Equal Opportunity Commission ruled the original limitation to be discriminatory.<sup>66</sup> Single women and lesbian couples remain

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<sup>65</sup> Millbank note 38 above at 121. Unmarried heterosexual couples may adopt in New South Wales, Victoria, the Australian Capital Territory, South Australia and Western Australia. See further: D. Sandor (1997) 'Same Sex Couples Can Adopt in Ontario: The Canadian Case of *Re K* and its Significance to Australian Family Law' Vol 11 No. 1 *Australian Journal of Family Law* 23. See also section 112 of the *Children's and Young Persons Act* 1989 (Vic.) by which the Children's Court of Victoria may in certain circumstances, make a "permanent care order" in respect of a child that has been subject to "public law" care and protection proceedings. The grants what is termed "custody" and "guardianship" to a named person or persons until the child reaches majority. The adoption pre-requisites do not apply.

Looking to international developments, a majority of the seven member European Court of Human Rights recently held against a single gay man's application contesting the refusal of France to permit him to be eligible to adopt an unrelated child: *Fretté v. France* (36515/97, judgment notified on 26 February 2002, presently available only in French, press release by the Court Registrar at <http://www.echr.coe.int/Eng/Press/2002/feb/Frettéjudepress.htm>).

Writing of the decision, King College academic Robert Wintemute who was advocate for Mr Fretté before the Court, points out that using his own translation of the judgments:

*"the three dissenting judges acknowledged that States had "a certain margin of appreciation ... in the sensitive field of adoption by homosexual persons", and that the Court should not "pronounce itself in favour of any model of the family whatsoever". But the majority opinion had allowed "a total margin of appreciation" to States, which was contrary to the case-law of the Court and "such as to provoke a regression in the protection of fundamental rights". The Council of State's decision rests on "the opinion that to be raised by homosexual parents would be, ... in every situation, prejudicial for the child. The Council of State did not explain, ... for example by referring to scientific studies on same-sex parenting, which have become more and more numerous in recent years, why and how the interest of the child was opposed in this case to the application for a 'preliminary approval' made by the applicant."*

*On the question of proportionality, the three dissenting judges acknowledged that States had "a certain margin of appreciation ... in the sensitive field of adoption by homosexual persons", and that the Court should not "pronounce itself in favour of any model of the family whatsoever". But the majority opinion had allowed "a total margin of appreciation" to States, which was contrary to the case-law of the Court and "such as to provoke a regression in the protection of fundamental rights". The Council of State took a "decision of principle, without applying a test of proportionality precisely or concretely, and without taking into account the situation of the person concerned. The refusal was absolute and pronounced without any explanation other than the choice of life of the applicant, considered in a general way and in the abstract, which became itself an irrebuttable presumption of contra-indication against any proposed adoption, whatever it may be. Such a position prevents a court, radically, from taking concretely into account the interests at stake and finding a way to reach a practical agreement between them. At the moment when every country in the Council of Europe is undertaking resolutely to reject every form of prejudice and discrimination, we regret that we cannot join the opinion of the majority."*: summary submitted by R. Wintemute to *Lesbian/Gay Law Notes*, copy on file with the author. Mr Fretté has until 26 May 2002 to request that the case be referred to the 17 member Grand Chamber of the Court.

<sup>66</sup> *MW, DD, TA and AB v Royal Women's Hospital* (1997) EOC ¶92-886. As a result of the *Infertility Treatment (Amendment) Act* 1997 (Vic.), the definition of "wife" means "in relation to a man who is

excluded by the words of the legislation and section 7 of the *Infertility Treatment Act 1995* (Vic.) criminalises resort to private methods:

**"7. Donor insemination**

(1) *A person may only carry out artificial insemination of a woman using sperm from a man who is not the husband of the woman at a place other than a hospital or centre licensed under Part 8 for the carrying out of donor insemination if he or she--*

(a) *is a doctor who is approved under Part 8 to carry out donor insemination; and*

(b) *is satisfied that the requirements of Divisions 2, 3 and 4 and section 36 have been met.*

*Penalty: 480 penalty units or 4 years imprisonment or both."*

The present statutory schemes in South Australia and Western Australia also expressly confine access to assisted reproductive technologies to married and heterosexual de facto couples,<sup>67</sup> while elsewhere it "is instead governed by a web of state and federal policy as well as individual hospital or clinic policy and informal practice."<sup>68</sup>

The March 1998 report of the Equal Opportunity Commission of Victoria *Same Sex Relationships and the Law* stated at 28-29:

*"The issues of access to reproductive technology and adoption rights for people in same sex relationships were the most contentious of all the issues raised by the Commission's discussion paper.*

*Most submissions relating to these issues referred to 'the rights of the child' being of paramount importance in determining the parameters of accessibility to reproductive technology and adoption. Many people felt that the rights of the child would be best served by tests addressing suitability to parent that were not related to the sexuality or gender of prospective parents. Others felt that all discrimination against same sex couples should be addressed except these issues.*

*After analysing these submissions, the Commission is of the opinion that further consideration and community consultation is necessary prior to any further reform in these areas."*

This recommendation was embraced within the pre-election promises of the State Labour Party and it has committed itself as a government to referring these two Acts to the Victorian Law Reform Commission.<sup>69</sup> Nearly two and half years have passed since the Government took office but no referral has yet occurred. During this period, litigation over the *Infertility Treatment Act 1995* (Vic.) and threatened Commonwealth legislation to ensure the validity of discriminatory State and Territory laws has triggered national attention to assisted reproductive technology access. The next sections of this paper consider how these events and related developments point to a fourth stage in the sequence of legal inclusiveness that was described in this paper's introduction.

### ***Keep Out of Reach of Children***

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*living with a woman in a de facto relationship, means the woman with whom he is living in that de facto relationship" (and vice versa for "husband"), wherein de facto is used in the traditional sense.*

<sup>67</sup> Although in *Pearce v South Australian Health Commission* (1996) 66 SASR 486, the Full Court of the Supreme Court of South Australia held the marital status restriction under the State Act is inoperative due to conflict with the *Sex Discrimination Act 1984* (Cth).

<sup>68</sup> Millbank note 38 above at 119.

<sup>69</sup> "... the issues of access to adoption and infertility treatment for couples of the same gender are to be referred to the Law Reform Commission. The government has made it clear that any outcomes from the Law Reform Commission's consideration of these issues will be considered in the next term of the Bracks government.": Second Reading Speech, *Statute Law (Amendment) Act 2001* (Vic.).

Two years ago, a case was brought by a medical practitioner who wished to provide infertility treatment to a single woman, Ms. Meldrum. Dr McBain challenged the requirement in the *Infertility Treatment Act 1995* (Vic.) that to be eligible to undergo infertility treatment a woman must either be married and living with her husband on a genuine domestic basis or be living with a man in a de facto relationship. Sundberg J of Federal Court of Australia held that the exclusion of such women is inconsistent with the Commonwealth *Sex Discrimination Act 1984* (Cth). His Honour found at par 19:

"19. Section 8 of the State Act provides that a woman's marital status, namely her status as a married woman or one living in a de facto relationship, is an essential requirement for the availability of a treatment procedure. Section 22 of the Commonwealth Act makes it unlawful for a person to refuse to provide services to another on the ground of the latter's marital status. That is what s 8 requires a provider of infertility treatment to do. It requires the applicant to treat Ms Meldrum less favourably than a married woman or one in a de facto relationship. It is not possible for the applicant to obey both s 8 and s 22. The sections are directly inconsistent, and the former is inoperative to that extent. The Full Court of the Supreme Court of South Australia came to that conclusion with respect to a provision of the *Reproductive Technology Act 1988* (SA) that is somewhat similar to s 8: *Pearce v South Australian Health Commission* (1996) 66 SASR 486."<sup>70</sup>

### **The Churches Call in The High Court**

The correctness of the *McBain* decision is under challenge in a very unusual way. The Commonwealth Attorney-General took the rare step of lending his fiat to the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church enabling them to commence proceedings in the original jurisdiction of the High Court, under section 75(v) of the *Constitution*, seeking Writs of Prohibition, Certiorari, and Mandamus.<sup>71</sup> The grant of the fiat was legally peculiar in circumstances where:

- These organisations were not parties at first instance - Sundberg J granted their application to be heard as *amici curiae* to make submissions concerning the best interests of children having refused the Churches' application to intervene which was not pressed;<sup>72</sup>
- Neither Dr McBain nor the respondents at first instance sought to appeal;
- Although notices were given to all Attorneys-General under section 78B of the *Judiciary Act 1902* (Cth) none of them, including the Commonwealth Attorney-General, elected to intervene in the original proceedings;
- A highly comparable inconsistency had already been found by the Full Court of the Supreme Court of South Australia in *Pearce*<sup>73</sup> which ostensibly involved a heterosexual single woman and did not prompt legislative activity by the present Commonwealth Government;
- Prior to the grant of the fiat, the Prime Minister on 1 August 2000 had issued a press release stating that: "Cabinet had before it advice from both the Solicitor General and the Chief General Counsel. Both were of the view that the decision of the Federal Court in the McBain case represented a correct interpretation of the law and that, as a consequence, the chances of an appeal succeeding were quite remote.";<sup>74</sup> and

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<sup>70</sup> *McBain v State of Victoria* (2000) 99 FCR 116 also available at

[http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2000/1009.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/1009.html).

<sup>71</sup> Attorney-General, *Media Release*, 'Catholic Bishops granted a fiat for High Court case' 14 August 2001 available at [http://www.ag.gov.au/aghome/agnews/2001newsag/1025\\_01.htm](http://www.ag.gov.au/aghome/agnews/2001newsag/1025_01.htm).

<sup>72</sup> *Australian Catholic Bishops Conference & Anor, Ex parte The Hon Justice Sundberg* C21/2000 (17 October 2000) available at <http://www.austlii.edu.au/au/other/hca/transcripts/2000/C21/1.html>.

<sup>73</sup> *McBain v State of Victoria* note 70 above at par 3. See the discussion of the case and the arguments of the Catholic Church in K. Walker (2000) '1950s Family Values v Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria' Vol. 11 *Public Law Review* 292.

<sup>74</sup> Press Release, Amendment to Sex Discrimination Act, Office of the Prime Minister, 1 August 2000 (Appendix 5 to *Senate Legal and Constitutional Committee Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No.1) 2000* available at

[http://www.aph.gov.au/senate/committee/legcon\\_ctte/sexdisreport/Contents.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/sexdisreport/Contents.htm). Kristen Walker notes that:

- The Commonwealth Attorney-General subsequently intervened in all controversies in his own right notwithstanding the grant of the fiat.

The High Court's judgment is reserved. If the challenge is successful, the exclusionary provisions of the *Infertility Treatment Act* 1995 (Vic.) would be legally restored.<sup>75</sup> If the appeal fails, it would render inoperative, not just the Victorian provision but also by implication at least, equivalent restrictions in other Acts. As it appears that Ms Meldrum sought the fertilisation procedure due to medical reasons, the context of the High Court's decision may be limited to women with what might be termed a medical basis of "clinical infertility".

Victoria's Infertility Treatment Authority was poised late last year to formally expand the definition of "clinical infertility" to include prospective recipients who are what it termed "psychologically infertile" because they are unable to have intercourse. The criterion has its origins in the services for heterosexual women who were averse to penetration due to past experience or the medical condition of vaginismus. The proposals would have extended to include all Victorian women who meet the criterion.

The application of the new category to lesbians attracted particular controversy and ultimately led to abandonment of the expanded definition. The Victorian Premier portrayed the Authority's plan as an unwelcome but unavoidable imposition because they were based on the *McBain* decision (in which the State of Victoria and the Victorian Minister for Health took a "neutral" position on the alleged inconsistency "that is to say they neither asserted there is no inconsistency nor conceded an inconsistency."<sup>76</sup>)

The Leader of the State Liberal Party immediately floated the idea of Parliamentary steps to override any such Authority guidelines<sup>77</sup> and The Hon. Bill Forward MLC subsequently introduced the Infertility Treatment Amendment Bill 2001 into the Legislative Council. The Bill would insert the following section:

*"4A. Treatment procedure not authorised in certain circumstances  
This Act does not authorise the carrying out of a treatment procedure on a woman where the doctor is satisfied that the woman is unlikely to become pregnant other than by a treatment procedure unless the doctor is also satisfied, on reasonable grounds--  
(a) that the woman has a physical condition causing an inability to become pregnant other than by a treatment procedure; or  
(b) that sperm produced by the husband of the woman is unlikely to cause the woman to become pregnant from an oocyte produced by her other than by a treatment procedure; or  
(c) that the husband of the woman is unable to produce sperm.".*<sup>78</sup>

The Authority's choice of label and the mooted expectation that women will have to satisfy a psychiatric assessment also came under fire for offensively pathologising same-sex attracted women.<sup>79</sup>

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*"A fiat is simply a device to allow a person to take a legal case where they might not have standing. It arose in England as a way to allow public interest matters to come before the courts; but in England the Attorney-General is not a member of Cabinet, and the fiat has not become politicised. In Australia, because of the Attorney-General's political position, the fiat is generally granted on political grounds - when the government's ideological position corresponds with that of the person seeking the fiat (though there have been some historical exceptions to this).": available at*

<http://www.nwjc.org.au/avcwl/lists/public/through-our-eyes/msg00015.html>.

<sup>75</sup> The transcript of argument on 4, 5 and 6 September 2000 before the High Court is at [www.austlii.edu.au/au/other/hca/transcripts](http://www.austlii.edu.au/au/other/hca/transcripts) indexed as *Ausn Catholic Bishops Conference & Anor, Ex parte – Re Justice Sundberg* C22/2000. It is currently not known whether the Coalition federal government will persist with the *Sex Discrimination (Amendment) Act 2000* (Cth) discussed in D. Otto (2000) 'Wrongly counter-posing women's and children's rights: the debate over limiting access to reproductive technologies' No. 27 *Australian Children's Rights News*, 24.

<sup>76</sup> *McBain v State of Victoria* note 70 above at par 3.

<sup>77</sup> G. Kosta and M. Ketchell 'Door opens to baby help for lesbians' *The Age* (newspaper) 15 November 2001 sourced from [www.theage.com.au/news/state/2001/11/15/FFXG2J5ZZTC.html](http://www.theage.com.au/news/state/2001/11/15/FFXG2J5ZZTC.html)

<sup>78</sup> Second read 28 November 2001, not yet debated.

## ***The Wild(ly Progressive) West***

In contrast to Victorian angst, adoption and access to assisted reproductive technology have not been quarantined from the Acts Amendment (Lesbian and Gay Law Reform) Bill 2001(WA). The accompanying Second Reading Speech<sup>80</sup> says of adoption:

*"Adoption Act 1994: currently, under the Western Australian Adoption Act 1994 partners in same-sex relationships cannot adopt children. This is unjust for members of gay and lesbian relationships, because they cannot adopt the offspring of their partner if the children were conceived through artificial insemination or a friend with little or no interest in the child; nor their partners' children from previous heterosexual relationships. Therefore, although both partners in same-sex relationships care for the children, the non-biological parent has no legal rights in relation to those children. This causes many problems; for example, in medical emergencies, and after the death of the biological parent, the non-biological parent has no legal rights to care for children.*

*The Acts Amendment (Lesbian and Gay Law Reform) Bill amends the Adoption Act to enable same-sex couples to be considered eligible to jointly adopt a child. It also amends the Adoption Act so that a same-sex partner who has long-term and day-to-day care of children of the birth parent will be able to be considered the joint guardian for the children being adopted.*

*Again, all other criteria against which the eligibility of the adopting parents will be assessed in order to adopt a child remain intact. I note that same-sex couples who wish to adopt a child would, as a matter of course, have had to have cohabited for a continuous period of no less than three years and be of good repute. This reflects the current provision in relation to heterosexual couples, and corresponds with the Government's intention to ensure that the key focus relates to what is in the best interests of the child.*

*A new criterion requiring applicants to show a desire and ability to provide a suitable family environment is proposed by amendments made to the Bill in consideration in detail in the other place. This reinforces the Government's commitment to ensuring that the interests of the child are central and pivotal in the decision-making process concerning adoption. The assessment by the Adoption Applications Committee of an application for suitability for adoptive parenthood and the placement of a child for adoption or with a view to the child's adoption by the director general will not be subject to challenge on the basis of unlawful discrimination. Accordingly, the Equal Opportunity Act 1984 is being expressly amended to exclude from the definition of "services" in the Act these decisions made under the Adoption Act 1994."*

In respect of access to assisted reproduction services, it is noteworthy that the Ministerial Committee appreciated that there is a personal as well as medical context. It said at par 8.2:

*"It has been suggested that medically fertile lesbian women should not be entitled to access reproductive technology because they have "the option" of having sexual intercourse with a man. Women whose childlessness is not due to medical conditions but to personal preferences are categorised as "socially infertile". The Commonwealth Department of Parliamentary Library considered this question amongst others, concerning the medical legitimacy of providing reproductive services to fertile lesbian and single women.*

*The report notes that sexual and emotional orientation is a deep and inescapable fact about life and person that may be considered to be a characteristic that defines their core identity. Penetrative sex with a man might be more than distasteful or uncomfortable to traumatic.*

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<sup>79</sup> J. Tomlins 'Psychologically infertile? No, I'm simply gay' *The Age* (newspaper) 17 November 2001 sourced from [www.theage.com.au/news/state/2001/11/17/FFXOYR1U2UC.html](http://www.theage.com.au/news/state/2001/11/17/FFXOYR1U2UC.html)

<sup>80</sup> WA Legislative Council

*This is not to ignore the fact that some lesbians might, when faced with no other viable alternatives, resort to sexual intercourse with a man they know in order to conceive. To the extent that it is usually lesbian couples that seek assisted reproduction, the prospect of distress or offence on the part of the lesbian partner needs to be taken into account as well. The Parliamentary Library report argued that sexual intercourse with men is simply not a realistic or viable option for many lesbians couples as attested by:*

*reported attitudes of lesbian women who choose assisted insemination because they do not want to violate their fidelity by sleeping with a man, nor introduce a third party into their family plans. And, in case there is still some residual doubt about the suggested alternative, the question can be asked as to why the same option should not also be expected of heterosexual women whose male partners are infertile. If it were to be expected of lesbian couples but not heterosexual ones, that one partner should just sleep with someone else, in what would the medically relevant difference consist? "*<sup>81</sup> (footnotes omitted)

Taking account of this and other analyses, the Committee recommended and the Government is reported to have accepted:

***Recommendation 31:*** *That section 23 of the Human Reproductive Technology Act 1991 (WA) be amended to enable lesbian couples access to IVF where one woman in the relationship is medically infertile.*

***Recommendation 32:*** *That section 23 of the Human Reproductive Technology Act 1991 (WA) be amended to enable lesbian couples who may be considered "socially infertile" to access AI.*

***Recommendation 33:*** *That the objects and preamble of the Human Reproductive Technology Act 1991 (WA) be amended to recognise that reproductive services are not limited to married or de facto heterosexual couples, and are inclusive of lesbian couples.*<sup>82</sup>

Although there is no specific proposed amendment to implement recommendation 32, it is understood that that the overall effect of the changes would be to confirm the availability of donor insemination services to single and partnered women irrespective of marital status or sexual orientation and without the requirement that they have a clinical fertility problem.<sup>83</sup>

#### **Stage 4 - Blanket Bans and Wriggling Rights Rhetoric**

There is room for legitimate debate over the regulation of access to adoption and assisted reproductive services.<sup>84</sup> There may be rational bases for excluding particular applicants due to individual past conduct which is indicative of poor care-giving capacity, for example a proven history of child abuse. But blanket bans based on the irrelevant characteristics of marital status or sexual orientation are just plain old prejudice

Swaddling the prejudice in badly fabricated window dressing about the rights and needs of children is dishonest but also predictable. Those who seek to cordon-off access from sexual outsiders are in a predicament. Although there are gaps in the first three stages of legal

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<sup>81</sup> Citing Department of Parliamentary Library (2000) Research paper No 23, *Is it Medically Legitimate to Provide Assisted Reproductive Treatments to Fertile Lesbians and Single Women?* Canberra.

<sup>82</sup> Kendall and Dharmananda note 16 above. The report is at

[http://www.ministers.wa.gov.au/Feature\\_stories/GayLesbian/LesbianLawReform.pdf](http://www.ministers.wa.gov.au/Feature_stories/GayLesbian/LesbianLawReform.pdf). Although there is no specific amendment to implement recommendation 32, it is understood that Crown Counsel advises that the effect of the changes frees up access to donor insemination services to single and partnered women irrespective of marital status or sexual orientation.

<sup>83</sup> Personal Communication, M Darmananda, 26 February 2002.

<sup>84</sup> Indeed there are important questions about whether there should be any access to expensive technologies at all in light of other health spending demands, but it should be remembered that donor insemination and semen screening are relatively cheap procedures. Likewise, the severance of legal ties to birth families which adoption involves is an ongoing debate.

inclusiveness, the discourse foundations are now firmly embedded in the liberal ideology of equal treatment of individuals (of course with notable exceptions).<sup>85</sup> Parenting opponents are therefore cornered into shifting the discourse so that they appear to be on high "child-focussed" moral ground and this strategy manifests as a trio of categorical claims about:

- Unfitness to parent;
- Harm to children; and
- Violation of children's rights.

These claims are of course not new and have arisen in the course of progress through the first three stages. They are, however, the essential planks of arguments against sexual outsiders' access to adoption and fertility services and unlike the contests at previous stages, opposition to progress stands or falls on the acceptance of these arguments. For this reason, it seems to me that this is a fourth stage in the sequence that should be distinguished as a rights claim concerning parenting parity, the right to found a family. This is complementary with Professor John Dewar's view that:

*"Along side the growing recognition of non-marital relations between adults has been the growth in the significance of parenthood as a legal status."<sup>86</sup>*

Consistent with the non-linear model of progress, gains in fourth stage inclusiveness have already been made in Australia:

- Disputes under the *Family Law Act 1975 (Cth)*<sup>87</sup> are determined on their merits without any negative legal presumptions attaching to a party's sexual orientation or marital status;<sup>88</sup>
- In theory, sexual outsiders are as eligible to apply to adopt as any other individual in all jurisdictions, with proposed amendments in Western Australia leading the way in putting same sex couples on equal footing with opposite sex couples;
- Most jurisdictions do not have laws that prohibit sexual outsiders from access to assisted reproduction services.

It could have been either adoption or access to reproductive services that served as the vehicle for the next flurry of stage activity. As it happened, the *McBain* litigation cast a vivid national spotlight on fertility services and added an important twist. The effect of opponents

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<sup>85</sup> In addition to the exceptions pointed out in this paper, there is the quarantining of "marriage".

<sup>86</sup> Dewar, note 34 at 10 suggests: *"The increased significance of parenthood can be seen as the function of three separate developments. First, it is a necessary consequence of a policy of removing any distinction in the legal treatment of marital and non-marital children, and of eradicating the common law concept of illegitimacy. Australian legislators in the 1970s were amongst the first in the world to bring about this change. One effect of this is that, from the child's point of view, the marital status of the parents is, or should be irrelevant - what matters, in other words, is parenthood, not marriage. Second, as already noted, the decline in marriage as a social practice has meant that some other legal technique was needed to link men to children, and to impose parental obligations on men, especially obligations of support. Parenthood is a way of tying men into the non-marital family. As Richard Collier has suggested [R.Collier (1995) *Masculinity, Law and the Family*, Routledge at.207], the rise of parenthood can be seen as a "widening of the net of paternal authority through facilitating the making of links between men and children just at the time when rising trends of divorce, cohabitation, step-parenthood and serial marriage might appear to have been breaking down the traditional family unit". Third, parenthood has become a means by which family law maintains a notional set of links between family members after separation. I will suggest later that family law is increasingly emphasising the maintenance of economic and legal ties between parents and children after separation, as if to create the illusion of permanence in the face of instability. Since, by definition, neither marriage or cohabitation are available for the purpose, these continuing links are founded on parenthood."* As I have pointed out earlier, sexual outsiders in a family which includes a child may consensually seek concurrent parenting responsibilities through orders under the *Family Law Act 1975 (Cth)*. In creating greater legal certainty for the child, the partners also gain a form of relationship recognition.

<sup>87</sup> Usually, but not always about a child of the sexual outsider; for an interesting fact situation see the first instance Family Court of Australia decision of Burr J in *KAM and MJR; JIG (intervener)* (1999) FLC ¶92-847

<sup>88</sup> *"The major issue in this regard is not the law itself, which is value neutral, but its administration through judges (and lawyers whose attitudes may be determinative in negotiations).":* Millbank note 38 above at 123-4. See further: Sandor note 65 above.

rallying for an exclusionary outcome has been to align single women with sexual outsiders because the trio of arguments was aimed not just at sexual outsiders but single women too.<sup>89</sup>

### ***Never Mind the Form, Feel the Quality***

The first two aspects of opponents' arguments are amenable to empirical research and the best available evidence (which is acknowledged to have longitudinal limitations) is roundly against the doomsayers. Reviewing the literature in respect of sexual outsiders, Jenni Millbank concludes:

*"Over the past 25 years a considerable body of credible social science research on lesbian and gay parents and their children has built up. It shows convincingly that lesbian and gay parents are 'like' heterosexual parents in that their children do not demonstrate any important differences in development, happiness, peer relations or adjustment.*

*Much research through the 1970s and 1980s was targeted towards searching for evidence of homosexuality or 'gender dysfunction' in children of lesbians and gay men. Later studies compared children across family types using a broader range of standard indicators for well-being and social adjustment (such as Bem's Sex Role Inventory, Coopersmith Self-Esteem Inventory, Weschler Intelligence Scale for Children).*

*Through all of these studies, there was no evidence of significant differences among children across different family types on any of these scales.*

*Recent and increasingly detailed and methodologically rigorous studies by researchers such as Charlotte Patterson in the USA and Fiona Tasker and Susan Golombok in the UK have demonstrated that it is family processes and not family structures that are determinative of children's well being. That is, the number of adults and the sex of the adults in a household has no bearing on children's well being – one adult or two, female or male, heterosexual or homosexual - whereas the happiness of the relationship between adults in the household, and the openness of warmth and communication between the adult/s and the children do have a major impact on children."*<sup>90</sup>

In respect of single-mother families, Kristen Walker's assessment is that:<sup>91</sup>

*"many studies of single-mother families are based on divorced families, where there will be several factors operating that are not present for a family that has been a single-mother family from conception. In particular, children from divorced families experience and are affected by the breakdown of the relationship between their parents.<sup>92</sup> Thus, studies of such families are of limited assistance in assessing the development of children raised completely by single mothers.*

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<sup>89</sup> Unmarried heterosexual couples were also targeted until the proposed amendments were revised by the Commonwealth Government.

<sup>90</sup> J. Millbank (2002) *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, The Gay and Lesbian Rights Lobby (NSW) Inc, Sydney, a comprehensive synthesis of social science research spanning more than 30 studies undertaken in the past 24 years, covering more than 1000 children. See also the critical review of social science research concerning single parent families discussed in Walker note 73 above. I acknowledge that a less certain view of the social science findings is suggested by the split decision in *Fretté v. France* cited in note 65 above, however without an English translation of the judgment, I cannot assess the grounding for the majority's apparent view as described in the press release by the Court Registrar, that: "*In the present case, concerning the competing interests of the applicant and adoptable children, the Court could only note that the scientific community – especially child-care specialists, psychiatrists and psychologists – was divided over the possible consequences of children being brought up by one or more homosexual parents, regard being had in particular to the limited number of scientific studies on the subject published to date.*" (*Fretté v. France* note 65 above).

<sup>91</sup> Walker note 73 at 302-3. Footnotes in the original were 56 to 60.

<sup>92</sup> [Golombok, *Parenting: What Really Counts* (2000) Routledge, London], p 9.

Second, where studies have examined families that have always been single-mother families, there is growing evidence that the key reasons why children from such families may have developmental problems, when compared to their counterparts from two-parent families, are poverty and lack of social support.<sup>93</sup> Studies, which are only recently being conducted, of single-mother families who are financially secure and have adequate social support, indicate that children from such families do not experience a greater level of developmental problems than their counterparts from two-parent families.<sup>94</sup>

This suggests that the best interests of the child are not affected so much by the fact that they have one parent, but rather by the problems that many single mothers face financially and socially. One would expect that financial and social difficulties would also impact on the welfare of children in many two-parent families. However, one notable feature of the campaign against single women's access to assisted reproductive services has been the assumption that the two-parent family is always good for children. As Mary Mackintosh notes:

"[m]any of the negative stereotypes of lone parents have as their obverse the idealized images of married parenthood that feminists have exposed as dangerous fantasies."<sup>95</sup>

There has been little attention paid to the fact that many two-parent families provide an unhealthy — and, in some cases, dangerous — environment for children's development.<sup>96</sup> A real concern for children would focus on addressing the risk factors that may lead to problems for children; single motherhood is not one of these, poverty and lack of social support are."

In circumstances where the data concerning outcome-focussed arguments are contrary to the categorical claims of exclusionists (even taken at their highest, the data are unresponsive of wholesale disqualification) these proponents are left with only an appeal to children's rights. The *amici curiae* raised this device to no effect before Sundberg J in *McBain*<sup>97</sup> and the rhetoric of children's rights was also invoked to justify the Sex Discrimination Amendment Bill (No. 1) 2000 (Cth) which was introduced by the Government in response to his Honour's decision.<sup>98</sup> The Bill is a recent and useful vehicle for dissecting the children's rights argument and this paper now turns to critique it.

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<sup>93</sup> Ibid, pp 9-10; Burghes, "Debates on Disruption: What Happens to the Children of Lone Parents?" in Bortolaia Silva, *Good Enough Mothering? Feminist Perspectives on Lone Mothering* (1996), p 157.

<sup>94</sup> Golombok, op cit ..., pp 9-10; Golombok, Tasker and Murray, "Children Raised in Fatherless Families from Infancy" (1997) 38 *Journal of Child Psychology and Psychiatry* 783.

<sup>95</sup> Mackintosh, "Social Anxieties About Lone Motherhood" in Bortolaia Silva, op cit n 57, pp 148, 150.

<sup>96</sup> See, eg, O'Neill, "Dangerous Families" in Briggs (ed), *Children and Families: Australian Perspectives* (1994), p 126.

<sup>97</sup> Walker note 73 above at 295 summarises the claim by the Catholic *amici curiae* as follows (footnote omitted):

"The Catholic Church's second argument was that the term "services" should be read so as not to conflict with Australia's international obligations. The Church asserted that the Declaration on the Rights of the Child (DRC), the Convention on the Rights of the Child (CRC), the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) recognise the right of a child to be born into a family consisting of a male and female parent. Counsel for the Church conceded that there is no express recognition of such a right, but argued that this right was assumed by the treaties on which he relied. For example, the DRC provides that a child "shall wherever possible, grow up in the care and under the responsibility of his parents". Article 5 of the CRC states that States parties shall respect the "responsibilities, rights and duties of parents". Both the ICCPR and the ICESCR recognise that the family is the fundamental unit of society and is entitled to protection and assistance. The Church contended that the implication of these provisions was that a child has a right to grow up with two parents, male and female."

<sup>98</sup> Introduced in the life of the previous Parliament on 17 August 2000 and not re-introduced to date. As Walker note 73 above at 300 points out "The political reaction to the McBain decision was intense. Archbishop Pell of the Catholic Church asserted that the decision would create a whole new generation of "stolen children". Senator Harradine wept on national television." (footnotes omitted).

## ***The Commonwealth Cloaks Prejudice in "Children's Rights" Claims***

The effect of the proposed amendments would be to allow - but not to require - States and Territories to legislate to impose, require or permit refusal or restrictions to access on the basis of marital status to in-vitro fertilisation, artificial insemination, gamete, zygote or embryo transfer, or any other services to assist in non-coital fertilisation. Married and opposite sex de facto couples were not insulated from the intended impact of the original version of the Bill. Dianne Otto has observed:

*"There followed an immediate outcry, to which the Government again hastily responded by promising another amendment that would protect the access rights of women in de facto heterosexual relationships. This further response revealed the Government's real motivation, which was to deny access to single women and women in lesbian relationships because it considered such families undeserving."*<sup>99</sup>

This was not the publicised rationale for the Bill. In foreshadowing the initiation of amending legislation, the Prime Minister's media release announced and the Second Reading Speech subsequently repeated:

*"This issue primarily involves the fundamental right of a child within our society to have the reasonable expectation, other things being equal, of the care and affection of both a mother and a father."*<sup>100</sup>

Typical to the invocation of children's rights to counter sexual outsiders' rights claims, this assertion misrepresents the "issue" in a range of ways.

First, as the Commonwealth Department of Parliamentary Library's submission to the Western Australian Committee (cited above) clearly spells out, all other things are not equal for single women and lesbians. Also, yet another and different inequality would arise from passage of the Bill because the amendments would not produce a uniform national outcome. States and Territories that do not have restrictive legislation would be unaffected by the amendments.<sup>101</sup>

Secondly, the children's rights argument lacks a legal basis even if one accepts for the purposes of argument, the underlying proposition, unsupported by either domestic or international law, that a children's rights discourse is applicable to a contemplated child that has not been conceived, let alone born. There is simply no "fundamental right" either in Australian or international law such as that which is asserted. No provision of the Convention on the Rights of the Child speaks in the language of the right to "a mother and a father". The term "father" does not appear at all and the term "mother" only appears in Article 24 (2)(d) which deals with appropriate pre-natal and post-natal health care for mothers. Contrary to the Government's claim, the Convention Preamble refers to:

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<sup>99</sup> Otto note 75 above at 25 explains:

*"In response to concern that the original amendments proposed in the Bill might be interpreted as allowing the States and Territories to deny de facto couples access to ART services, these amendments were modified. The modifications were introduced into the House of Representatives on 27 November 2000 and specifically exclude married and de facto couples from groups to whom State and Territory governments might refuse or restrict ART services."*: Senate Legal and Constitutional Committee Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No.1) 2000 at par 2.9 available at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/sexdisreport/Contents.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/sexdisreport/Contents.htm)

<sup>100</sup> Note 74 above.

<sup>101</sup> "2.12 If this Bill is enacted those provisions of the Victorian Infertility Treatment Act 1995 found inconsistent with the Commonwealth Act by the Federal Court and declared invalid will again become operable. A similar position will apply in South Australia and Western Australia. The impact of the amendments in the latter States is discussed in Appendix 3. In the Northern Territory, the exclusion of ART services from the operation of the Anti-Discrimination Act will effectively be authorised.

2.13 In other States and Territories there is no legislation directly restricting access to infertility services. Therefore, unless these States and Territories choose to introduce such legislation, they will not be affected by the proposed amendments to the Commonwealth Act." : Senate Legal and Constitutional Committee Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No.1) 2000 available at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/sexdisreport/Contents.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/sexdisreport/Contents.htm)

"Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a **family environment**, in an atmosphere of happiness, love and understanding" (emphasis added).

Kristen Walker's international law critique further reveals:<sup>102</sup>

"The most relevant provision in the CRC is Art 7, which provides that a child shall have the right "**as far as possible**, to know and be cared for by his or her parents" (emphasis added). This statement does not require that a child be born into a family consisting of a mother and a father. It provides no definition of who constitute a child's parents; nor does it require that a child's parents be of particular genders. It does not preclude the recognition of a lesbian couple as a child's parents. Given that most societies recognise parenting of children to whom the parents are not biologically related (through adoption and step-parenting, for example), there is no basis for restricting the term "parents" in the international instruments to "biological parents".

There is little jurisprudence on the meaning of "parents" in international human rights law. However, the South African Constitutional Court has cautioned against a narrow interpretation of the term "family" in international human rights instruments.<sup>103</sup>

"The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the 'natural' and 'fundamental' unit of our society. However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change.<sup>104</sup> In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."

This reasoning would extend to the interpretation of the term "parents" in international instruments.

Further, the right of a child to know and be cared for by his or her parents, protected by Art 7, is to be respected "as far as possible" — it is not an absolute right and may be departed from where necessary. Thus, where it is not feasible for a child to be cared for by both (or all) his parents, then that outcome is not required.

In addition, Art 2 of the CRC provides that the rights enumerated in the treaty are to be ensured without any discrimination, including discrimination on the basis of the child's or **his parent's sex** or other status.<sup>105</sup> This would include sexual orientation and marital status.<sup>106</sup> Finally, the CRC recognises that a child "should grow up in a family environment in an atmosphere of happiness, love and understanding".<sup>107</sup> This accords with the social science research, discussed below, that demonstrates that what is important in childhood development is the family environment in which a child grows up, not the family structure or sexuality of his or her parents.<sup>108</sup>

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<sup>102</sup> Walker note 73 above at 296-7. Footnotes in the original were 26-31. Recalling again *Fretté v. France* note 65 above, I cannot see that the decision advances a children's rights argument. Even if the reasoning as to adoption were applied to assisted reproductive technology, the Registrar's summary does not speak of the "rights" of children; at best it refers to children's "interests".

<sup>103</sup> *Dawood v Minister of Home Affairs* (unreported, CCT 35/99, 7 June 2000)

(<http://www.law.wits.ac.za/lawreps.html>) at [31] (per O'Regan J).

<sup>104</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [2000 (2) SA 1 (CC)] at [47]-[48] and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* [1996 (4) SA 744 (CC)] at [99]. See also the helpful discussion in Sinclair and Heaton, *The Law of Marriage* (Juta, Cape Town, 1996) Vol 1, pp 5-15.

<sup>105</sup> See CRC, Art 2(1).

<sup>106</sup> See *Toonen v Australia* (Comm No 488/1992, UN GAOR Hum Rts Comm, 50th Sess, UN Doc CCPR/C/50/D/488/1992) (31 March 1994).

<sup>107</sup> CRC, Preamble.

<sup>108</sup> See generally, Golombok, *Parenting: What Really Counts* (2000), Routledge, London.

Looking to what could be relied upon as a domestic source, the closest would be the objects provision of section 60B of the *Family Law Act* 1975.<sup>109</sup> However this is qualified by the best interests principle and further, it was conceded by the present Attorney-General and held by the Full Court of the Family Court of Australia in *B and B: Family Law Act* 1995, that "the rights given to children under s.60B are not rights which are legally enforceable".<sup>110</sup>

Thirdly, the Commonwealth Government's stated rationale for the Bill contains the unwarranted and unsubstantiated assumption that known donors are always absent from children's lives. The research identifies a continuum of arrangements including donor involvement and, in any event, reveals no basis for presuming that children are damaged by the absence of the donor in the child's life. The findings reinforce the importance of the quality of relationships surrounding the developing child - the "family environment" which is recognised by the Convention on the Rights of the Child.

It is against these points of critique that a fourth criticism arises. Families, in fact, do not conform to the idealised structure which underpins the Commonwealth Government's preferred approach to the regulation of reproductive services. As Katrine del Villar notes, even commentators who accept the premise that it is always in a child's interests to grow up with a mother and a father

*"have criticised the extent of the government's commitment to children. They have pointed out that the proposed amendment is designed to remedy a 'problem' which is statistically insignificant, while showing no real concern for the very real problems faced by large numbers of children. While perhaps 150 single women across the whole of Australia may be interested in access to IVF or donor insemination, approximately one million Australian children currently live in single-parent families."*<sup>111</sup>

Allied to this criticism is a bitter irony. A Government relying on its purported concern for children's rights introduces a Bill which sends a deeply derogatory and damaging message to the many children who are now, or in the past have been, nurtured in family forms that do not match up with some treasured sepia portrait of the 1950s hetero-nuclear intact family.

Next, it is necessary to consider the health risks that would be enabled by the Bill. It clearly permits States and Territories to restrict access to what the Bill terms "artificial insemination" but its ambit appears wider. It would be consistent with the policy of the Bill that semen-screening services, at least for a self-identifying lesbian, would fall within proposed section 22(1D) as a service "provided for the purpose of assisting in non-coital fertilisation" and that discriminatory access could be legislated with constitutional impunity.

The health dimension to the Bill requires two distinctive critiques. Both take as a factual starting point, the research evidence showing that despite restrictive, discriminatory and even criminalising legal environments, sexual outsiders and single heterosexual women resort to

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<sup>109</sup> "60B(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

60B(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and

(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children."

<sup>110</sup> The Full Court of the Family Court of Australia (Nicholson CJ, Fogarty and Lindenmayer JJ) *B and B: Family Law Reform Act* 1995 (1997) FLC ¶92-755 at par 10.57.

<sup>111</sup> K. del Villar (2001) *Bills Digest No. 24 2000-01 Sex Discrimination Amendment Bill (No. 1) 2000* available at <http://www.aph.gov.au/library/pubs/bd/2000-01/01BD024.htm>. I would suggest her sources underestimate interest in donor insemination.

private informal methods.<sup>112</sup> The critiques also start from the knowledge that semen-borne diseases are prevalent and detectable through screening methods associated with fertility services.

The first concern is focussed solely on the rights of women. The Bill would constitute a deliberate Commonwealth step in laying the groundwork for jurisdictions to jeopardise the health rights of certain would-be mothers by excluding them from accessing clean, screened sperm. It is not to the point that the Commonwealth Government is merely permitting rather than imposing discriminatory limitations. The Bill speaks as harshly as the Commonwealth Government can in this field within constitutional constraints.

The second health critique demurs to the exclusionists' unusual assumption that a "child" merely in contemplation has rights. Even if this is accepted for the purposes of argument, to bar service access is then additionally a deliberate denial of the health rights of the numerous "children" whose would-be mothers are already known to circumvent the law and by-pass services in order to conceive. This seems impossible to justify except by a strange utilitarian logic. Otherwise, the Commonwealth Government has a secret reason to believe that discriminatory legislation protected by its proposed amendments will lead to greater compliance than is currently the case.

Finally, one can't help wondering why the Commonwealth Government's purported concern for children's rights did not and still has not expressed itself in leading the charge for a consistent national approach to real and pressing identified legislative gaps. Children's rights to knowledge about their identity should be the focus of attention, not the marital status or sexual orientation of would-be parents. Irrespective of with whom children are raised, whether they are adopted or are conceived as a result of assisted reproduction services, children generally want to know who their biological parents are, and they need information about their medical history and genetic inheritance.

One could have taken a different view from Otto of the Commonwealth Government's motives, if it were taking a lead role in standardising such children's rights matters across Australia, either by the attempt to establish model legislation across jurisdictions or Commonwealth legislation in reliance upon Australia's ratification of the Convention on the Rights of the Child. It is not.<sup>113</sup>

### **More Unwelcome Advances by the Commonwealth**

In fact, Otto's assessment of the Commonwealth Government's message of disdain for sexual outsiders' relationships is reinforced by its position in respect of State referral of power in respect of "de facto" relationships. In his address to the Family Courts of Australia 25<sup>th</sup> Anniversary conference last year, the Attorney-General spoke of the need for such a referral and that he had presented a paper on the subject to the Standing Committee of Attorneys-General in Darwin. He explained the proposal saying:

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<sup>112</sup> This point is made in the united position taken by The NSW Anti-Discrimination Board, the Queensland Anti-Discrimination Commission, the Victorian Equal Opportunity Commission, the Western Australian Equal Opportunity Commission and the South Australian Equal Opportunity Commission in vigorously opposing the amendment: *Media Release 'State agencies oppose amendment to the Sex Discrimination Act'*, 14 November 2000.

<sup>113</sup> *"Under international law, children have a right to preserve their identity, and their biological heritage may also be relevant for the diagnosis of genetically inherited health risks. The Australian Health Ethics Committee in 1996 strongly recommended the passage of comprehensive and complementary legislation in all States and Territories dealing with this issue. The National Health and Medical Research Council's Ethical guidelines on assisted reproductive technology state that children born from the use of assisted reproductive services should have access to information, including identifying information, about their biological parents. This recommendation has not been followed up. In fact, legislation in some States prevents disclosure of identifying information about donors, although access may be permitted to non-identifying genetic information about the donor, for example for health reasons."*: K. del Villar note 111 above. The Commonwealth's failure to respond to the recommendations in the report Australian Law Reform Commission/Human Rights and Equal Opportunity Commission (1997) *Seen and Heard*, ALRC, Sydney, is a broader sign of its lack of genuine concern for children's rights.

*"Australian families deserve to be treated consistently, regardless of where they live. It is my hope that the States will recognise the advantages and agree to refer these powers to the Commonwealth."*<sup>114</sup>

But only some families are "deserving". The Commonwealth Government's recently announced position is that it would seek to legislate only for heterosexual couples, a prejudiced stance which the Victorian Attorney-General described, correctly, as "homophobic, outdated and undemocratic".<sup>115</sup> Although the Commonwealth Attorney-General was reported as unable to explain the reason for such jurisdictional apartheid, it is a retrograde attempt to undermine third stage reforms. The States are rightly resistant and must be encouraged to continue to oppose the Commonwealth's proposal. It is irrational for many reasons:

- Such narrowness would deliberately exacerbate an illegitimate distinction amongst unmarried couples based solely the genders of the partners to a relationship.
- In doing so, the Commonwealth Government would be intentionally compounding the existing irregularity of financial settlement regimes for private relationships within Australia.
- Importantly for the Law Council of Australia, the proposal would be at odds with the model code proposed in 1998 by the Family Law Section, which preferred coverage of "dependent relationships" rather than solely heterosexual ones.<sup>116</sup>
- The Law Council of Australia's position has gained much subsequent strength since 1998. Inclusive reforms have already been effected in New South Wales, The Australian Capital Territory, Victoria and Queensland, and there are current proposals in Western Australia and Tasmania.
- Worst of all, children within the families of sexual outsider couples would be ghettoed by their families' exclusion from the "advantages" the Attorney referred to; this is a very queer policy indeed for a Commonwealth Government that has claimed to anchor its position in the rubric of "children's rights".

### **Conclusion - Beyond the White Picket Fence and the Null Hypothesis**

The legislation reviewed in this paper highlights the continuing need to remedy discriminatory gaps within all four stages of legal inclusiveness: decriminalisation → civil protection → relationship recognition → parenting parity. Any further steps away from prejudicial legal assumptions about sexual outsiders will be an advance but from a children's rights perspective, the contemporary agenda should focus on parenting parity.

This fourth stage is where the rights and interests of children are most directly entwined with and dependent upon the legal respect, protection and status that is accorded to the relationships among children and their caregivers. It is also the discourse site where opponents to progress have the greatest capacity to harm children. Their arguments demean sexual identities, family forms and ways of family formation that do not match a conservative "ideal".

Gallingly, the exclusionists illegitimately lay claim to children's rights as a justification. Yet they appear oblivious to the fact that there are children who hear and read what is being said, and that some are getting a message of pity at best, or at worst "you should not have been born".

Diversity in family form and formation are social facts and they are increasingly (albeit patchily) recognised by Australian laws. Wishing it were otherwise is as pointless as seeking to lock the meaning of "vehicle" into what it was in an early 1900s Act.<sup>117</sup> Likewise, we have reached the turning point in our empirical knowledge as was the case with unmarried

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<sup>114</sup> 'Family Law - past, present and future', Hotel Inter-Continental, Sydney, 26 July 2001 at par 103 available at <http://www.law.gov.au/ministers/attorney-general/articles/family.html>.

<sup>115</sup> I. Munro 'Gay couples left out of court shift' *The Age* (newspaper) 8 March 2002 available at <http://www.theage.com.au/articles/2002/03/07/1015365729478.html>.

<sup>116</sup> Law Council of Australia note 28 above.

<sup>117</sup> See a discussion of the meaning of "family" along these lines in the House of Lords' decision *Fitzpatrick v Sterling Housing Association Ltd* [2001] AC 27.

heterosexual families years ago, where law reform advocates for sexual outsiders should no longer be expected to "prove" that their family forms do not matter and it is family functioning that counts. Jenni Millbank puts it succinctly:

*" Nearly three decades of research has consistently yielded the same results: the children of lesbians and gay men are in no way disadvantaged or badly affected by their parents' sexuality. The debate about whether lesbians and gay men should be "allowed" to be parents is redundant. They are, and in increasing numbers.*

*Instead of debating whether lesbians and gay men are good parents, what we must now focus upon is the unmet needs of these new family forms.*

*A lesbian mother, cannot, for example, use the Child Support Agency if she and her female partner break up and that partner does not provide child support. Gay men who form families with lesbian mums are caught between the legal status of donor (legally, nothing) and father (legally, a full parent, to the exclusion of the co-mother) - whereas it is clear that many of them are somewhere in between."*<sup>118</sup>

This paper is not the place for a full discussion of the content and strategy for the way forward. It has charted some background for such planning but must be read in conjunction with evaluations of the different mechanisms by which law reform has been achieved to date.<sup>119</sup> Some broad initial suggestions do, however, come to mind following on from this paper's review.

1. In the current political climate, the present Commonwealth Government is hostile to fourth stage reforms.<sup>120</sup> Counteractive efforts will be necessary and in doing so, the Commonwealth's motives for prejudicial proposals must be laid bare. The focus of proactive energy should, however, be on State and Territory Governments and their policy making conferences. But commonwealth governments do change and an agenda for the reform of federal laws should be worked up in the meantime in a way that tries to optimise the possibilities offered by the current common Labor Party complexion to all State and Territory Governments.
2. Strong, smart, and credible community based lobbies seem to be getting powerful local results, particularly when they are able to work with a committed member of the Government in the formulation of legal policy.<sup>121</sup> Sexual outsider communities which do not enjoy such a lobby need to establish or strengthen them before finding and cultivating a relationship with an identified MP. Those communities should be able to gain assistance from lobbies elsewhere and lobbies that have already achieved third stage reforms should collaborate in their plans to bring about fourth stage change with an eye to filling earlier stage gaps.
3. State and Territory based lobbies need both a strong network amongst themselves and also strategic alliances with compatible rights-focussed organisations. In campaigns, there should be involvement of an authoritative children's NGO such as the Australian Section of Defence for Children that can bring a clear-sighted critique to spurious children's rights arguments and publicise its assessment. My experience in the Victorian process was that it helps to anticipate, educate and counter the predictable conservative backlash against third stage reforms, both privately and in the media, and that it is an investment in achievement of the next stage.

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<sup>118</sup> J Millbank 'Gay families belie the old biases' *Sydney Morning Herald*, 25 February 2002 available at <http://www.smh.com.au/news/0202/25/text/opinion4.html>. See also Sandor note 19 above.

<sup>119</sup> See for example: Millbank and Morgan note + above; Morgan note 20 above; Graycar and Millbank note 31 above; Hart note 36 above; Kallen note 121 below.

<sup>120</sup> "The Prime Minister said his position on homosexuality was "tolerant but conservative"...": D. Brearley 'Heffernan's key witness under a cloud' *The Australian* (newspaper) 16 March 2002 available at [http://www.theaustralian.news.com.au/common/story\\_page/0,5744,3960685%255E601,00.html](http://www.theaustralian.news.com.au/common/story_page/0,5744,3960685%255E601,00.html).

<sup>121</sup> For an international comparison that pre-dates the Victorian and Western Australian developments, see E. Kallen (1996) 'Gay and Lesbian Rights Issues: A Comparative Analysis of Sydney, Australia and Toronto, Canada' Vol. 18 *Human Rights Quarterly*, 206.

4. These strong networks will provide the foundation for the inevitable project which aims to harmonise the current irregularity of legal frameworks concerning all stages of legal inclusiveness and the varying definitions they contain. In my view, the project should be community-led because if left to governments, there is a greater risk of a lowest common denominator result instead of a best model outcome.
5. The threat of the Commonwealth only legislating to cover the resolution of financial disputes among unmarried heterosexual couples must not be allowed to become reality. It would become the next lowest common denominator, making a mockery of the positions that have been taken by most State and Territory governments and parliaments, and the Family Law Section of the Law Council of Australia. These entities must maintain a strong, visible and unambiguous rebuttal of impractical as well as unprincipled Commonwealth proposals.
6. Finally there is a need to capitalise on the promise by the Victorian Government that it will refer the questions of adoption and access to assisted reproductive services to the Victorian Law Reform Commission. The reference is an opportunity to decisively assess children's rights arguments and should contain an express request that the Commission do so. Ideally, and more likely but not assured when all State and Territory Governments are Labour, the Commission's product should be one which other State and Territory Governments agree to rely upon in progressing Australia to the fourth stage of inclusiveness. There is no simple answer to how this could be achieved politically, organisationally and promptly in a way that does not produce a lowest common denominator result.

Even these starting points make for one heck of a wish list. But just because something may be complex, fraught with difficulty, and a big ask doesn't mean it shouldn't be tried and isn't worth doing. After all, facing tough challenges is commonplace in the ordinary family lives of sexual outsiders.

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