

## Introduction

In a society with escalating divorce rates, diminishing marriage rates, acceptance of same-sex relationships, gender reassignment and reproductive technologies, same-sex relationships are a reality which Australian law should recognise. Accordingly, federal, state and territory legislation should be reformed to permit homosexual marriage.

## Same-Sex Marriage in Australian Law

In 2004 s5(1) of the *Marriage Act 1961* (Cth) was amended to prescribe marriage as 'the union of a man and woman'. Similarly, s88EA was altered so homosexual marriages in foreign jurisdictions would not be acknowledged in Australia.<sup>1</sup> Before these changes there was no express requirement that foreign marriages had to be heterosexual;<sup>2</sup> however, common law specified that marriage was a heterosexual union.<sup>3</sup>

With regards to the federal legal status of homosexual couples in Australia, Parliament has passed three major pieces of legislation affecting same-sex couples. Firstly, de-facto amendments gave all de-facto couples the same rights under federal law. Secondly, superannuation law amendments gave spouses, same-sex partners and dependants equivalent rights. Thirdly, over one hundred pieces of federal legislation were amended to provide greater equality between heterosexuals and homosexuals in workplace regulation, healthcare, workers compensation and social security.<sup>4</sup>

Similarly, the Same-Sex Marriages Bill 2006 was introduced into Federal Parliament to reverse the *Marriage Amendment Act 2004*. Although the bill has been delayed indefinitely, it would alleviate legislative discrimination and provide equality at a federal level.

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<sup>1</sup> S88EA of the *Marriage Act 1961* (Cth); Certain unions are not marriages. A union solemnised in a foreign country between: (a) a man and another man; or (b) a woman and another woman; must not be recognised as a marriage in Australia.

<sup>2</sup> It should be noted that s46 of the *Marriage Act 1961* (Cth) had provided that the following must be stated by an authorised celebrant when solemnising a marriage; 'marriage, according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.

<sup>3</sup> *Re Kevin (Validity of marriage of transsexual) (No 2)* (2003) 30 Fam LR 1, 67.

<sup>4</sup> 'Lesbian/Gay Law Notes', *Lesbian and Gay Law Association Foundation of Greater New York* (2008) 237-238.

Correspondingly, state governments are reforming legislation to ensure married and same-sex partners have equal rights in most areas of state and territory law. For example, the *Anti-Discrimination (Amendment) Act 1982* (NSW) prevents discrimination on the grounds of sexuality,<sup>5</sup> however, federal legislation to the same effect does not currently exist.

**Recommendation 1:** Enact federal legislation, prohibiting discrimination on the basis of sexuality.

Motions such as the Same-Sex Marriage Bill 2005 (NSW),<sup>6</sup> petitioned to allow homosexual marriage. However, the Gay and Lesbian Rights Lobby argued that although such legislation would permit marriage among homosexuals in New South Wales, it would not give total parity under Australian law<sup>7</sup> and the motion failed. Similarly, in 2004, the Same-Sex Marriage Bill 2004 (Tas) was established allowing homosexual marriage in Tasmania. Although these bills were not approved, it highlights that states or territories could possibly legislate for homosexual marriage.<sup>8</sup>

### **Who can legislate in relation to Same-Sex marriage?**

Significant debate surrounds whether the Constitutional marriage power could support Commonwealth law recognising same-sex marriages, or if such legislation could be enacted at a state level.

<sup>5</sup> The *Anti-Discrimination (Amendment) Act 1982* (NSW) states that discrimination on the basis of homosexuality occurs if a person treats another less favourably because they are a homosexual.

<sup>6</sup> Also see; Same-Sex Marriage (Celebrant and Registration) Bill 2005 (NSW) and Same-Sex Marriage (Dissolution and Annulment) Bill 2005 (NSW).

<sup>7</sup> Karina Anthony and Talina Drabsch, 'Legal Recognition of Same-Sex Relationships' (2006) *NSW Parliamentary Briefing Paper 9/06*; 10.

<sup>8</sup> Kristen Walker, 'The Same-Sex marriage debate in Australia' (2007) 11 *The International Journal of Human Rights* 109, 118.

The Commonwealth has the power to make laws ‘with respect to marriage.’<sup>9</sup> However, the<sup>10</sup>High Court is yet to determine whether this power extends to homosexual marriage. Australian courts have recognised that marriage traditionally required ‘a voluntary union for<sup>11</sup>life between one man and one woman to the exclusion of all others’ under s46(1) of the *Marriage Act 1961*. However, the courts have also acknowledged a modern interpretation of marriage as: ‘a voluntary union for life between *two people* to the exclusion of others’ which<sup>12</sup>could encompass same-sex marriage. If the High Court takes a generous interpretation of<sup>13</sup>the federal powers of the Commonwealth and accepts a modern definition, then the Commonwealth should be capable of legislating regarding same-sex marriage.<sup>14</sup>

With regards to whether states and/or territories could legislate regarding homosexual marriage, it depends on whether the proposed legislation would be consistent with the *Marriage Act* under s109 of the *Constitution*. However, only judicial determination will definitively answer this question, with regard to the facts and the actual interaction between federal and state law in the context of those facts.<sup>15</sup>

### **Policy and Value Arguments**

In Australia, the primary objection against homosexual marriage is that lawful marriage

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between heterosexuals is the social entity that best benefits society, promoting the family unit and ensuring procreation. Accordingly, the Family Court has regard to ‘preserving and protecting the institution of marriage as the union of a man and a woman’ when making

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<sup>9</sup> s51(xxi) of the *Australian Constitution*.

<sup>10</sup> Patrick Parkinson, *Australian Family Law in Context* (4<sup>th</sup> ed, 2009) 182.

<sup>11</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 553; 451. This definition of marriage originally comes from *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130,133. Similarly, in the *Marriage of C and D* (1979) 5 Fam LR 636; the Family Court of Australia found that there was an implicit threshold requirement defining ‘marriage,’ to mean the voluntary union of one man and one woman, on the basis of the statutory formulae.

<sup>12</sup> *Ibid.*

<sup>13</sup> Augusto Zimmermann ‘The Marriage Power: Constitutional Issues’ (2007) 72 *National Observer-Australia and World Affairs*, 5.

<sup>14</sup> Michael Kirby, ‘Law and Sexuality: The Contrasting Case of Australia’ (2001) 12 *Stan. L. & Pol’y Rev.* 1, 21.

<sup>15</sup> George Williams, ‘Advice re proposed Same-Sex Marriage Act’ (2005) *Tasmanian Gay and Lesbian Rights Group*, < [http://tgllrg.org/more/82\\_0\\_1\\_0\\_M3/](http://tgllrg.org/more/82_0_1_0_M3/)> at 25 March 2009.

<sup>16</sup> Commonwealth Attorney-General, *Second Reading Speech*, House of Representatives, 27 May 2004, 1.

judgements.<sup>17</sup> Secondary objections relate to societal and religious values holding that<sup>18</sup> procreation is the purpose of marriage, therefore requiring a male and female. Further arguments relate to the understanding of 'family' as a heterosexual concept and fears that homosexual marriage will threaten heterosexual marriage.

Such objections to same-sex marriage involve unjust and archaic attitudes. It is commonly regarded that states have a genuine interest in legislating for marriage because of societal benefits. Although no such interest exists regarding same-sex marriage, this does not excuse withholding legal recognition of homosexual relationships.<sup>19</sup> Additionally, with the heterosexual marriage rate diminishing,<sup>20</sup> the current high divorce and low birth rates,<sup>21</sup> it is easily arguable that our legal system should aim to uphold the 'family unit'. Consequently, homosexual and heterosexual couples should receive the full support and recognition of the law.<sup>22</sup>

Recent court decisions reject that in contemporary society, procreation is the principal

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purpose of marriage and common law has recognised legitimate families of homosexual<sup>24</sup> couples, being 'homo-nuclear families'. Similarly, traditional religious notions of marriage have declined as religious celebrants are no longer required and non-religious civil

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17 s43 *Family Law Act 1975* (Cth).

18 In accordance with English precedent; *Corbett vs. Corbett (otherwise Ashley)*(1970) 2 WLR 1306.

19 Alastair Nicholson, 'The Changing Concept of a Family – The Significance of Recognition and Protection' (1997) 11 *Australian Journal of Family Law* 13, 17.

20 *Population and Births* (2003) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/0/aed01ba4382accf5ca256cae00053f9f?OpenDocument>> at 10 March 2009.

21 *Population, Marriages and Divorces* (2003) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/0/aed01ba4382accf5ca256cae00053f9f?OpenDocument>> at 11 March 2009.

22 Donna Cooper, 'For richer for poorer, in sickness and in health: Should Australia embrace same-sex marriage?' (2005) 19 *Australian Journal of Family Law* 153, 155.

23 Above n 3.

24 *Re Patrick: An application concerning contact* (2002) 28 Fam LR 579, 323.

celebrants more commonly perform marriage ceremonies than ministers of religion.<sup>25</sup> In regards to the heterosexual notion of family, courts have held 'family' to have a wide meaning broadly encompassing depiction of a unit with 'familial characteristics'.<sup>26</sup> Furthermore,<sup>27</sup> research has shown that recognition of homosexual families does not threaten or diminish the status of mixed-sex marriages.

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**Recommendation 2:** Define 'family' in the *Family Law Act 1975* (Cth) as: 'a fundamental group in society typically consisting of two or more people who share goals and values, have long-term commitments to one another and usually reside in the same dwelling,'<sup>28</sup> so that the Act encompasses same-sex couples.

Some members of the community believe that to discriminate between relationships that are intrinsically different, such as homosexual and heterosexual, is not necessarily wrong.<sup>29</sup> However, marriage equality is not about treating all couples the same, but removing unjust treatment to provide equality throughout the community.<sup>30</sup> Some same-sex couples may choose not to marry, like some heterosexual couples, but they should have a choice. The segregation of homosexuals from marriage perpetuates an important symbolic injustice by denying couples from a significant institution through which society acknowledges important relationships.<sup>31</sup> This exclusion also sends a message that homosexuals are unequal and devalued, alienating those who invest in the values of a shared social order.<sup>32</sup>

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

26 Above n 23.

27 A New South Wales Legislative Council Standing Committee on Social Issues issued a report in 1999 rejecting the argument that legal acknowledgement of homosexual relationships will discourage people from forming heterosexual relationships and in turn encourage them to form homosexual relationships. The committee also could not find any evidence that legally acknowledging same-sex couples would result in increased social problems including the breakdown of families.

28 Detra Davis, 'The Meaning of Family' <<http://www.greatoffers4u.com/articles/3926>> at 30 March 2009.

29 Paul Russell, 'Inquiry Into The Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008 and other matters', (2008) *Submission to The Legal and Constitutional Affairs Committee of The Australian Senate* 4.

30 Above n 18, 14.

31 Above n 6, 111.

32 Andrew Sullivan, *Virtually Normal - An Argument About Homosexuality* (1995) 181.

**Recommendation 3:** Amend s5(1) of the *Marriage Act 1961* (Cth) to define marriage as: 'a voluntary union for life between *two people* to the exclusion of others.'

### International Influence

Compelling international arguments exist regarding the legalization of homosexual marriage in Australia. The Netherlands first legalized homosexual marriage in 2001<sup>33</sup> with other countries following,<sup>34</sup> indicating an international acceptance of homosexual marriage.

Australia professes to advocate the ideology of liberal democracy, adhering to the rule of law.

<sup>35</sup> Under this philosophy, equality requires identical rights and equivalent outcomes at law.<sup>36</sup>

The *International Covenant on Civil and Political Rights* and the *Universal Declaration of Human Rights* provide that all people should: be equal at law; have the right to found a family and marry.<sup>37</sup> Furthermore, the *First Optional Protocol to the International Covenant on Civil and Political Rights* enables Australians to notify the International Human Rights Committee if their rights are violated.<sup>38</sup>

Similarly, the Hague Convention allows scope for homosexual marriage as marriage is not confined to Judeo-Christian, Western notions<sup>39</sup> and should be construed in its 'broadest, international sense'.<sup>40</sup> This interpretation implies an international understanding of the changing nature of relationships within modern society, extending to same-sex marriage.

33 Peter Nygh, 'The Consequences for Australia of the New Netherlands Law Permitting Same Gender Marriages', (2002) 16 *Australian Journal of Family Law*, 140.

34 By mid 2008 Belgium, Canada, Norway, South Africa and Spain had also passed legislation permitting same-sex marriage.

35 D. Clarke, *The rule of law. Principles of Australian Public Law*, (2003) 101.

36 S. Parker, *Law in Context* (2<sup>nd</sup> ed, 1997) 105.

37 For example, Article 7 of the UDHR states, 'All are equal before the law and entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.' Article 14 of the ICCPR states that, 'all persons should be equal before the courts and tribunals.' Article 26 holds that 'all persons are equal before the law and are entitled without discrimination to the equal protection of the law'; Mashood Baderin, 'A comparative analysis of the right to a fair trial and due process under international human rights law and Saudi Arabian domestic law', (2006) 10 *The International Journal of Human Rights* 3, 241-284.

38 *Young v Australia* 941/2000 (18 September 2003).

39 A. Malmstrom, *Explanatory Report on the Hague Marriage Convention* (1978), cited in Peter Nygh, 'The Consequences for Australia of the New Netherlands Law Permitting Same Gender Marriages', (2002) 16 *Australian Journal of Family Law*, 142.

40 Above n 32, 111.

**Recommendation 4:** Amend s88EA the *Marriage Act 1961* (Cth) so that valid overseas homosexual marriages are acknowledged in Australia.

## Registration Systems

If the Commonwealth government does not allow homosexual marriage it should, at least, provide a means of formally acknowledging same-sex relationships. Choice-based systems such as registered partnerships permit people to make the choice as to whether their relationship is to be given legal status.<sup>41</sup>

Civil unions and registration systems are 'opt-in' schemes requiring action to receive benefits. Accordingly, such systems may only be utilised by the socially and economically privileged or may not be widely used. Consequently, overseas registered partnerships show low coverage rates.<sup>42</sup>

The ACT has enacted civil partnership legislation<sup>43</sup> and the City of Sydney Relationships Register<sup>44</sup> allows homosexual and heterosexual couples to declare their commitment to a shared life. Although, unlike marriage, the declaration does not confer legal rights but it is used to reveal a relationship and demonstrate commitment to a shared life.<sup>45</sup>

Arguably, the Commonwealth could enact laws for a non-marriage system of registration for homosexual relationships under the Constitutional marriage power.<sup>46</sup> However, implementation at a federal level could result in several issues as homosexual couples would still be excluded from the *Family Law Act 1975* (Cth). Furthermore, a register could simply

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41 Jenni Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?' (1998) 12 *Australian Journal of Family Law* 99, 111.

42 Above n 8, 4.

43 *Civil Partnerships Act 2008* (ACT).

44 *City of Sydney Relationships Declaration Information Pack*, City of Sydney, September 2005. <[www.cityofsydney.nsw.gov.au](http://www.cityofsydney.nsw.gov.au)> accessed 20 March 2009.

45 Above n 8, 18.

46 Furthermore, the Commonwealth could possibly provide a registration system under the external affairs power of s51(xxix) of the *Constitution* or the reference power under s51(xxxviii) of the *Constitution*.

act as an artificial method for homosexuals to be recognised and separated from heterosexuals, resulting in legal inconsistencies as same-sex couples now have equivalent rights under almost all other areas of law.<sup>47</sup>

To avoid these issues, Federal Labour policy is to encourage the states and territories to establish registers of homosexual relationships.<sup>48</sup> A possible means of doing this would be the *Relationships Act 2003* (Tas) which affords registered homosexual couples corresponding legal status to married couples, at a state level.

**Recommendation 5:** If the government refuses to permit same-sex marriage under Australian law, a same-sex relationship register should be implemented at a state level.

## **Conclusion**

Overall, compelling arguments support same-sex marriage within Australia such as; equality, changing societal values, policy arguments and international human rights obligations.

To afford homosexual couples equality, the above recommendations need to be implemented as it is unjust and discriminatory for homosexuals to have many equal rights to married couples but to deny them the right to marry.<sup>49</sup>

Whether we call it same-sex marriage, relationship registration or civil unions, the granting of marriage related benefits to homosexual relationships in Australia is long overdue and should be implemented to afford equality to same-sex couples, who should no longer experience prejudice by being excluded from the institution of marriage.

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47 Above n 21, 157.

48 Above n 4, 238.

49 Above n 21, 157.



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