A Political Trophy or an Essential Human Right?

The Federal Recognition of Same-Sex Relationships

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"People are not fools. Once they recognise the overwhelming commonalities of shared human experience, the alienation and demand for adherence to shame crumbles. Once they reflect upon the utter unreasonableness of insisting that homosexuals change their sexual orientation, or suppress and hide their emotions…the irrational insistence and demand for legal sanctions tends to fade away. Once they know that friends and family, children, sisters or uncles, are gay, the hatred tends to melt. In the wake of changing social attitudes inevitably come changing laws…" Justice Michael Kirby.[1]

[1] Justice Michael Kirby, Same-Sex Relationships: An Australian Perspective on a Global Issue' in Robert Wintemute and Mads Andenæs, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (2001), 9.

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Contents:

Introduction

Australia is currently engaged in a complex debate concerning the federal recognition of same-sex relationships. This debate has provoked numerous responses from the Australian community, both supporting and opposing same-sex relationship recognition.

On the one hand, many Australians support the recognition of same-sex relationships on the basis of equality, non-discrimination and respect for basic human rights.[2] They believe that the current lack of federal recognition of same-sex relationships is unjustly discriminatory because it restricts the legal rights and entitlements of same-sex couples and their families, whilst denigrating their relationships as less valuable than those of the heterosexual norm.[3] Moreover, the non-recognition of same-sex relationships is opposed because it breaches several of Australia's international human rights obligations.[4]

On the other hand, some Australians oppose the federal recognition of same-sex relationships, believing that such recognition will unduly endorse same-sex relationships[5] and may encourage other people to engage in homosexual practices.[6] It is feared that recognising same-sex relationships will undermine the traditional heterosexual family unit and marriage, to the detriment of Australian society.[7] Furthermore, it is argued that once the same-sex recognition 'floodgates' are opened, other people will seek to recognise all sorts of 'immoral' relationships, for example polygamous marriages.[8] In this sense, some opponents of same-sex relationship

[2] Ibid, 21; Alastair Nicholson, 'The Changing Concept of Family: The Significance of Recognition and Protection' (1997) 6 *Australasian Gay and Lesbian Law Journal* 13, 14.
[3] Email from Peter Furness to Kate Whitehouse, 12 April 2008; Email from Stephen Jones to Kate Whitehouse, 10 April 2008. Please note that a copy of all emails is held on file with the author.
[4] See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, ATS 1980 No 23, art 2(1), 26 (entry into force 13 November 1980).
[5] 'Same sex and the city', *The Age* (Melbourne), 20 February 2007 <http://www.theage.com.au/news/in-depth/same-sex-and-the-city/2007/02/19/1171733679309.html#> at 12 February 2008.
[6] Donna Cooper, 'For richer or poorer, in sickness and in health: Should Australia embrace same-sex marriage' (2005) 19(2) *Australian Journal of Family Law* 153, 164; Nicholson, above n 2, 14.
[7] Jenni Millbank and Kathy Sant, 'A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW' (2000) 22 *Sydney Law Review* 181, 181; New South Wales Parliamentary Library Research Service, *Legal Recognition of Same-Sex Relationships*, Briefing Paper No 9/06 (2006), 58.
[8] Australian Christian Lobby, 'British Recognition for Polygamous Marriages Contains a Warning for Australia' (Press Release, 4 February 2008).

recognition argue that it is actually necessary to discriminate against same-sex couples in order to protect Australian society.[9]

To further complicate this debate, there is no consensus amongst the gay and lesbian community as to how their relationships would best be recognised.[10] Many people in the gay and lesbian community want to have equal access to the institution of marriage, arguing that this is the only form of relationship recognition which can give gay and lesbian couples true equality, respect and protection.[11] Moreover, many gay men and lesbian women want to be able to publicly celebrate their relationships by partaking in a legally recognised marriage ceremony.[12] As a result, ceremonial recognition has dominated much of the discussion concerning the recognition of same-sex relationships. However, other members of the gay and lesbian community believe that the institution of marriage is outdated, oppressive and capable of detrimentally altering the nature of same-sex relationships.[13] They do not want same-sex marriage to be legalised because this may further entrench the institution's pre-eminence, creating a hierarchy of relationships between couples who are and who are not married.[14] Accordingly, a number of scholars and members of the gay and lesbian community seek alternative means of recognising their relationships, namely through de facto recognition and opt-in recognition systems, such as a civil union or relationship registry.[15]

It is clear that the debate concerning the recognition of same-sex relationships cannot be confined to one which purely involves legal considerations. Rather, this multifaceted debate raises questions of religion, morality, politics and ethics, as well as questions

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[9] Interview with Jim Wallace, Director Australian Christian Lobby (National Press Club, 11 April 2008), copy on file with the author.
[10] Lesbian and Gay Legal Rights Service, *The Bride Wore Pink*, Second Edition, Gay and Lesbian Rights Lobby (February 1994), 4.
[11] Email from Peter Furness to Kate Whitehouse, 12 April 2008; Email from Stephen Jones to Kate Whitehouse, 10 April 2008; New South Wales Gay and Lesbian Rights Lobby, *All Love is Equal…Isn't It? The recognition of same-sex relationships under federal law*, Consultation Report, February 2007, 16-18.
[12] Email from Stephen Jones to Kate Whitehouse, 10 April 2008.
[13] Nitya Duclos, 'Some Complicating Thoughts on Same-Sex Marriage' (1991) 31 *Law & Sexuality: A Review Lesbian and Gay Legal Issues* 30, 48; Paula Ettelbrick, 'Since When Is Marriage a Path to Liberation' in William Rubenstein (ed), *Lesbians, Gay Men, and the Law* (1993) 401, 403; Nancy Polikoff, 'We will get what we ask for: why legalizing gay and lesbian marriage will not "dismantle the legal structure of gender in every marriage"' (1993) 79 *Virginia Law Review* 1535, 1536.
[14] Brenda Cossman, 'Family Inside/Out' (1994) 44 *University of Toronto Law Journal* 1, 9; Ettelbrick, above n 13, 402; Polikoff, above n 13, 1536; Kristin Walker, 'The Same-Sex Marriage Debate in Australia' (2007) 11 *The International Journal of Human Rights* 109, 124.
[15] Interview with Rodney Croome, Tasmanian Gay and Lesbian Rights Group (Telephone interview, 7 April 2008) copy on file with the author; New South Wales Gay and Lesbian Rights Lobby, above n 11, 25; Victorian Gay and Lesbian Rights Lobby, *Not Yet Equal: report on the VGLRL same sex relationships survey 2005*, Final Report, July 2005, 6.

over the role of Australia's international human rights obligations.[16] The debate also questions the importance of symbolic rather than substantive recognition for same-sex couples.

This thesis contends that the Commonwealth should implement a federal opt-in recognition system, that is a relationships registry or civil union system, for all couples, regardless of gender. An alternative means of relationship recognition is necessary because of the practical limitations, ideological concerns and political difficulties of both de facto recognition and marriage. Although the Commonwealth Government has recently begun to amend discriminatory Commonwealth laws to better recognise same-sex relationships as de facto relationships,[17] such recognition is, by itself, inadequate. An opt-in recognition system is needed, even in the unlikely event that the political obstacles to same-sex marriage are overcome in the near future.

To adequately recognise the diverse range of same-sex and opposite-sex relationships, three forms of relationship recognition must necessarily exist together. Firstly, presumptive de facto recognition is required to protect couples who do not wish to formally solemnise their relationships. Secondly, access to the institution of marriage is needed for couples who wish to partake in a legally recognised ceremony, because of the institution's cultural, social and religious importance. Thirdly, an opt-in form of recognition system is necessary to recognise and protect same-sex and opposite-sex couples. This third form of recognition will give couples more conclusive and symbolic recognition than de facto legislation can provide and is particularly necessary for same-sex couples who are currently prohibited from marrying. Same-sex couples should have a choice as to how their relationships are recognised.[18] Consequently, the gay and lesbian community should not be engaged in an either/or debate concerning the recognition of their relationships. Rather, all three recognition forms should be made available to same-sex and opposite-sex couples.

[16] See Wayne Morgan, 'Queering International Human Rights Law' in Carl Stychin and Didi Herman (eds), *Sexuality in the Legal Arena* (2000), 208 for a discussion on the interaction of international human rights obligations and sexuality.
[17] Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008.
[18] A survey by the New South Wales Gay and Lesbian Rights Lobby found that having a choice of recognition options was important to most survey respondents. See New South Wales Gay and Lesbian Rights Lobby, above n 11, 22.

The contention of this thesis was reached after conducting extensive research using a wide variety of primary and secondary sources. A number of interviews were also conducted with key legal academics and lobbyists involved in the same-sex recognition debate. These interviews were conducted because very little has been written about the possibility of establishing a federal opt-in recognition system to recognise same-sex relationships. It is hoped that this thesis can accordingly contribute to the legal scholarship by engaging with the opinions of these key academics and lobbyists.[19]

Chapter I will discuss the institution of marriage and the possibility of legalising same-sex marriage within Australia. Chapter II will examine the current forms of de facto recognition that are available to same-sex couples within the state, territory and federal arenas. It will discuss the benefits and problems associated with this presumptive form of recognition, concluding that de facto recognition alone is inadequate. Chapter III will contend than an opt-in means of recognising same-sex and opposite-sex relationships must be implemented within Australia. It will consider the arguments for and against an opt-in recognition system, whilst also briefly examining the current opt-in recognition systems which exist in the Australian Capital Territory (ACT), Tasmania and Victoria. The thesis will conclude that a new alternative means of recognising relationships is needed within Australia.

[19] Ethics approval to conduct these interviews was obtained from the Australian National University Human Research Ethics Committee on 21 February 2008. A list of interviewees is attached as an appendix to this thesis. The interviewees are cited for their opinions rather than as a reference to facts unless no other factual reference could be obtained.

Chapter I: Marriage

Same-sex marriage is upheld as the ultimate yardstick of equality for many gay and lesbian couples.[20] Marriage represents acceptance by society that same-sex relationships have an 'equal' status to their heterosexual counterparts and is a symbol of adulthood and full participation in the community.[21] Until same-sex couples have the option of marrying their partner, many gay men and lesbian women will continue to feel that their relationships are less important than heterosexual relationships.[22]

Marriage power

The Commonwealth Parliament has the power to legislate with respect to marriage under section 51 (xxi) of the Constitution.[23] The *Marriage Act 1961* (Cth) (Marriage Act) defines a marriage as a "union of a man and a woman to the exclusion of all others voluntarily entered into for life".[24] This definition mirrors the definition of marriage provided by Lord Penzance in the 1866 case of *Hyde v Hyde and Woodmansee*[25] and was inserted into the Marriage Act in 2004. Consequently, the Marriage Act explicitly excludes same-sex couples from marrying and further states that unions solemnised overseas between people of the same-sex will not be recognised as valid marriages within Australia.[26] These amendments to the Marriage Act were deemed necessary by the former Federal Attorney-General Philip Ruddock because of alleged community concerns about the "possible erosion of the institution of marriage,"[27] despite the fact that courts already applied the *Hyde* definition of marriage.[28] However, in trying to protect the institution of marriage, the Government rather ironically re-directed the objectives of many same-sex lobbyists to seeking marriage.[29] Nonetheless, the current

[20] Email from Peter Furness to Kate Whitehouse, 12 April 2008; Email from Stephen Jones to Kate Whitehouse, 10 April 2008.
[21] Interview with Rodney Croome, above n 15.
[22] Thomas Stoddart, 'Why Gay People Should Seek the Right to Marry' in William Rubenstein (ed), *Lesbians, Gay Men, and the Law* (1993), 398, 401.
[23] *Australian Constitution* s51 (xxi).
[24] *Marriage Act 1961* (Cth) s5(1).
[25] *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130, 133.
[26] *Marriage Act 1961* (Cth) s88EA.
[27] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2004, 31459 (Philip Ruddock, Commonwealth Attorney-General).
[28] Reg Graycar and Jenni Millbank, 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition' (2007) 24 *Journal of Law & Policy* 121, 160.
[29] Ibid, 161, 164.

Commonwealth Government remains committed to this exclusive definition of marriage.[30]

The Commonwealth's refusal to recognise same-sex marriages solemnised overseas was instigated by the increasing legalisation of same-sex marriages in overseas jurisdictions. At present, same-sex marriages are legal in Belgium, Canada, the Netherlands, Spain, South Africa and in the State of Massachusetts in the United States of America.[31] In addition, the Californian Supreme Court recently declared that a Californian ban on same-sex marriage was unconstitutional, thereby opening the way for same-sex couples to marry in California from mid 2008.[32] The Commonwealth Government consequently feared that Australian same-sex couples would engage in 'marriage tourism' by travelling overseas, marrying and then seeking the legal recognition of their relationships in Australia.[33] Prior to the 2004 amendments to the Marriage Act, recognition of same-sex foreign marriages could be sought under the *Convention on the Celebration and Recognition of the Validity of Marriage* which required the Commonwealth to recognise all marriages validly solemnised in a foreign country.[34] This so-called 'marriage tourism' did occur and proceedings were initiated within the Family Court to have Canadian same-sex marriages recognised within Australia.[35] Although these court proceedings were thwarted with the 2004 Marriage Act amendments, hundreds of Australian same-sex couples are still solemnising their relationships in Canada;[36] it is not necessary for either party to be a Canadian resident to marry.[37]

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[30] 'No marriage in government's gay reforms', *The Age* (Melbourne), 30 April 2008 <http://news.theage.com.au/no-marriage-in-governments-gay-reforms/20080430-29fg.html> at 12 May 2008.
[31] New South Wales Parliamentary Library Research Service, above n 7, 41, 48.
[32] Maura Dolan, 'Gay Marriage Ban' *Los Angeles Times* (Los Angeles) <http://www.latimes.com/news/local/la-me-gaymarriage16-2008may16,0,3999077,full.story> at 26 May 2008.
[33] Walker, above n 14, 110.
[34] *Convention on the Celebration and Recognition of the Validity of Marriage,* opened for signature 14 March 1978, ATS 1991 No 16, art 9, (entry into force 1 May 1991).
[35] Walker, above n 14, 110.
[36] Peter Furness from Australian Marriage Equality estimates that 800 Australian same-sex couples have travelled overseas to solemnise their relationships: Email from Peter Furness to Kate Whitehouse, 12 April 2008. The author tried to verify this anecdotal evidence by contacting Statistics Canada and Statistics New Zealand. Neither of these statistical bodies collected information on the number of Australian same-sex couples travelling to Canada or New Zealand for the purposes of solemnising their relationships: Email from Lynne Mackie to Kate Whitehouse, 29 May 2008; Email from Michèle Casademont to Kate Whitehouse, 29 May 2008.
[37] Walker, above n 14, 110.

Legalising same-sex marriage at the federal level would entail repealing the 2004 amendments to the Marriage Act.[38] It would then be a matter of Constitutional interpretation as to whether the Commonwealth has the power to legislate for same-sex marriage. This issue has never been comprehensively considered by the High Court of Australia, although some High Court judges have commented upon the extent of the marriage power.[39] On the one hand, Justice Brennan, the former Chief Justice of the High Court, stated that the Commonwealth lacks the necessary power to legislate for same-sex marriage.[40] On the other hand, Justice McHugh commented, as obiter dictum, that the definition of marriage may now mean "a voluntary union for life between two people to the exclusion of others".[41] There are consequently a number of differing legal opinions as to whether or not the marriage power encompasses same-sex marriage,[42] although it seems likely that if the marriage power was interpreted to have a contemporary meaning, it would encompass same-sex marriage.[43]

Arguments for same-sex marriage

The main argument supporting same-sex marriage is the equal treatment of all couples, regardless of gender.[44] It is argued that same-sex couples should not have their relationships recognised in an alternative form to marriage because this denigrates their relationships to 'second-class' status.[45] Such equality-based arguments are predominantly raised on the premise that same-sex relationships are the 'same' as opposite-sex relationships and should therefore be recognised in the 'same' manner.[46] In this sense, Lauw argues that "the factors contributing to successful heterosexual relationships apply equally to homosexual relationships. Love, trust and commitment

[38] *Marriage Act 1961* (Cth), s 5(1), s 88EA.
[39] Alastair Nicholson, 'The Legal Regulation of Marriage' (2005) 29 *Melbourne University Law Review* 556, 563.
[40] Ibid.
[41] *Re Wakim; Ex parte McNally* [1999] HCA 27, 45 per McHugh J.
[42] See, eg, Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia' (2008) 30 *Sydney Law Review* 27; Dan Meagher, 'The times are they a-changin'? – Can the Commonwealth parliament legislate for same sex marriages?' (2003) 17(2) *Australian Journal of Family Law* 134, 134; Nicholson, above n 39, 556; Walker, above n 14.
[43] Meagher, above n 42, 153-4. See also Lindell, above n 42, 40.
[44] Email from Peter Furness to Kate Whitehouse, 12 April 2008; Stoddart, above n 22, 400.
[45] Nan Hunter, 'Marriage, Law and Gender: A Feminist Inquiry' (1991) 1 *Law & Sexuality: A Review of Gay and Lesbian Legal Issues* 9, 26; Rosie Harding, *'Dogs are "Registered", People Shouldn't Be': Legal Consciousness and Lesbian and Gay Rights* (2006) 15(4) *Social Legal Studies* 511, 524.
[46] Harding, above n 45, 520.

are integral to the success of both types of relationship."[47] This 'sameness' argument is, however, problematic because it dismisses the diversity of gay and lesbian relationships.[48]

The symbolic value of being able to publicly proclaim and celebrate one's loving relationship is often cited as a reason to seek same-sex marriage.[49] Alternative forms of relationship recognition have been criticised for their failure to incorporate a ceremony, as recognition without a ceremony provides for a hollow form of recognition.[50] Chapter III will further discuss the debate surrounding relationship recognition ceremonies.

A further benefit of same-sex marriage would be the comprehensive recognition provided to married couples under federal legislation.[51] Marriage provides couples with the widest form of recognition possible, particularly because some state and territory legislation is based upon the federal Marriage Act.[52]

The former Chief Justice of the Family Court of Australia, Alastair Nicholson, has furthermore argued that the institution of marriage should be opened up to all couples because a marriage ultimately entails the registration of a relationship.[53] The institution of marriage is nowadays a secular institution that has no religious connotations[54] and there is no legislative requirement to engage in a religious ceremony.[55] However, Nicholson acknowledges that the public perception of marriage is quite different to its legal status, as marriages still have strong cultural and religious connotations for many people.[56] Whilst this public perception should not prevent same-sex couples from being able to marry, it will raise political obstacles to the legalisation of same-sex marriage. Such difficulties mean that alternative recognition systems need to be considered.

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[47] Inge Lauw, 'Recognition of Same-Sex Marriage – Time for Change?' (1994) 1(3) *E Law - Murdoch University Electronic Journal of Law*, <http://www.murdoch.edu.au/elaw/issues/v1n3/lauw131.html> at 1 May 2005.
[48] Cossman, above n 14, 1.
[49] Australian Marriage Equality, *The Case for Equal Marriage*, <http://www.australianmarriageequality.com.case.htm> at 19 February 2008.
[50] Interview with Professor Jenni Millbank, Faculty of Law, University of Technology Sydney (Telephone interview, 19 March 2008), copy on file with the author.
[51] New South Wales Gay and Lesbian Rights Lobby, above n 11, 11.
[52] Ibid.
[53] Email from Alastair Nicholson to Kate Whitehouse, 29 April 2008.
[54] Ibid.
[55] *Marriage Act 1961* (Cth) s45(2).
[56] Nicholson, above n 2, 21. This view was also expressed in an interview with Associate Professor Juliet Behrens, Faculty of Law, Australian National University (Australian National University, 11 April 2008).

There are also several human rights obligations relevant to the same-sex marriage debate. The *Universal Declaration of Human Rights* contains a right of all men and women of full age to marry,[57] whilst the *International Covenant on Civil and Political Rights* (ICCPR) enshrines the right to marry and the right to non-discriminatory treatment on the basis of one's sex,[58] which includes discrimination on the basis of a person's sexual orientation.[59] However, these human rights obligations must also be read in conjunction with the United Nations Human Rights Committee's (UNHRC) decision in *Joslin v New Zealand*, which found that the right to marry under the ICCPR does not apply to same-sex couples.[60] This decision was based upon a strict interpretation of article 23(2), which states that "men and women" have a right to marry, rather than "all persons" or "everyone" has the right to marry.[61] As such, some commentators have argued that it will be difficult to use international law to argue that the Commonwealth's marriage power should include same-sex marriage.[62] Nonetheless, in the subsequent case of *Young v Australia*, the UNHRC stated that same-sex couples should have the same financial rights and entitlements as heterosexual couples.[63] Whilst *Young* did not question marriage rights, the case demonstrates that the UNHRC has found in favour of same-sex couples where they have been discriminated against solely on the basis of their sex. This indicates that the UNHRC may depart from its decision in *Joslin* in future cases questioning the right of same-sex couples to marry, as same-sex couples are currently only prohibited from marrying in Australia on the basis of their sexual orientation.

Arguments against same-sex marriage

It is feared that same-sex marriage will undermine both the family unit and the institution of marriage itself.[64] The Australian Christian Lobby (ACL) argues that opening up marriage to same-sex couples would dilute the concept of marriage whilst

[57] *Universal Declaration of Human Rights*, GA Res 217A (III), 3rd sess, art 16(1), U.N. Doc A/810 at 71 (1948).
[58] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, ATS 1980 No 23, art 2(1), 23(2), 26 (entry into force 13 November 1980).
[59] *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), 8.7
[60] *Joslin v New Zealand*, Communication No 902/1999, U.N. Doc CCPR/C/75/D/902/1999 (2002), 8.3. See also Paul Rishworth, 'Changing Times, Changing Minds, Changing Laws – Sexual Orientation and New Zealand Law, 1960 to 2005' (2007) 11 *The International Journal of Human Rights* 85, 95-97.
[61] *Joslin v New Zealand*, Communication No 902/1999, U.N. Doc CCPR/C/75/D/902/1999 (2002), 8.2.
[62] Walker, above n 14, 117.
[63] *Young v Australia*, Communication No. 941/2000 [10.4] U.N. Doc CCPR/C/78/D/941/2000 (2003).
[64] Interview with Jim Wallace, above n 9; New South Wales Parliamentary Library Research Service, above n 7, 58.

giving same-sex relationships an unduly elevated status in society.[65] In fact, the ACL argues that the public's heterosexist view of marriage needs to be strengthened because of current societal problems such as family break up.[66] In this sense, the ACL considers it necessary to exclude same-sex couples from the institution of marriage to preserve the institution's pre-eminence.

The idea that same-sex marriage will undermine families is problematic because it assumes that there is only one valid family form, namely a nuclear family comprising a female mother, a male father and their biological children. The assumption ignores the fact that there are a wide variety of family units within society and that the term 'family' has different meanings for different people.[67] Such a diversity of family forms has been recognised within the Family Court, with Justice Guest stating in *Re Patrick* that the term 'family' has a flexible and wide meaning and includes homo-nuclear families.[68] The idea of same-sex marriage undermining the family unit therefore has no rational basis.

Same-sex marriage is often condemned because some people consider that the function of marriage is procreation and, as same-sex couples cannot biologically conceive children, they should thereby be prevented from marrying.[69] However, this argument is discriminatory because heterosexual couples who are incapable of fulfilling this 'essential' purpose of marriage are not prevented from marrying, nor is there any requirement to have children once married.[70] In fact, the Family Court rejected the argument that the essential purpose of marriage was procreation in *Re Kevin*, in a decision which allowed a post-operative transsexual to marry.[71]

Many feminist scholars have critiqued the institution of marriage because of its normative powers that oppress women.[72] It is argued that same-sex marriage will further entrench marriage as the most appropriate form of recognition for all couples, creating a hierarchy of relationships between same-sex couples who are and who are not

[65] Interview with Jim Wallace, above n 9.
[66] Ibid.
[67] Didi Herman, 'Are We Family? Lesbian Rights and Women's Liberation' (1990) 28 *Osgoode Hall Law Journal* 789, 802.
[68] *Re Patrick* [2002] 168 FLR 6, 323 per Guest J.
[69] Cooper, above n 6, 157.
[70] Ibid.
[71] *Attorney-General for the Commonwealth v Kevin and Others* (2003) 30 Fam LR 1, 4.
[72] Duclos, above n 13, 48; Hunter, above n 45, 11.

married.[73] Instead of same-sex marriage opening up the choice of recognition options available to same-sex couples, the hierarchical nature of the institution may further pressure couples into marrying.[74] Moreover, these scholars contend that same-sex couples will inevitably try to mimic heterosexual relationships and emphasise their 'sameness', thereby ignoring differences between same-sex and opposite-sex relationships.[75] Same-sex marriage is accordingly criticised for its unquestioning acceptance and validation of the institution of marriage.[76]

Political factors

The legalisation of same-sex marriage involves wide-ranging political considerations. Although an estimated 57% of Australians support same-sex marriage,[77] there remains so much political opposition to same-sex marriage that some gay men and lesbian women believe lobbyists should concentrate their efforts on obtaining alternative forms of recognition.[78] For example, some people argue that obtaining marriage is simply a political trophy for a small minority of the population[79] and may encourage same-sex parenting.[80] A fear of offending conservative religious voters is likely to prevent the current Commonwealth Government from seriously considering the legalisation of same-sex marriage. Swinging religious voters are said to have played the most decisive role in the 2007 federal election, a factor which is likely to have a restraining effect on the Commonwealth Government.[81]

Nonetheless, it is anticipated that the political pressure to debate same-sex marriage will continue to increase because of increasing availability overseas and because hundreds of Australian same-sex couples are travelling overseas to solemnise their relationships.[82]

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[73] Cossman, above n 14, 9; Ettelbrick, above n 13, 1536; Polikoff, above n 13, 1536.
[74] Duclos, above n 13, 51.
[75] Ettelbrick, above n 13, 403; Polikoff, above n 13, 1540.
[76] Duclos, above n 13, 50; Polikoff, above n 13, 1541. Some scholars believe that same-sex marriage may change the gendered nature of the institution: see, eg, Hunter, above n 45, 12; Polikoff, above n 13, 1536.
[77] Misha Schubert, 'Public backs gay unions, equality' *The Age* (Melbourne) 21 June 2007 <http://www.theage.com.au/articles/2007/06/20/1182019204491.html> at 18 April 2008.
[78] New South Wales Gay and Lesbian Rights Lobby, above n 11, 18; Walker, above n 14, 122-3.
[79] Interview with Jim Wallace, above n 9.
[80] Ben Haywood, 'Apocalypse vow' *The Age* (Melbourne), 26 May 2008 <http://www.theage.com.au/news/education-news/apocalypse-vow/2008/05/23/1211183116787.html?page=fullpage#contentSwap2> at 26 May 2008.
[81] Christopher Pearson, 'On a swing and a prayer' *The Australian* (Sydney) 8 March 2008 <http://www.theaustralian.news.com.au/story/0,25197,23336628-7583,00.html> at 12 April 2008.
[82] Email from Peter Furness to Kate Whitehouse, 12 April 2008.

Same-sex marriage Bills have already been introduced in the Senate and in the Tasmanian and New South Wales (NSW) parliaments.[83] Although none of these Bills were passed, each Bill fostered debate about the recognition of same-sex relationships. In addition, a number of businesses, including the Commonwealth Bank, Qantas, IBM and SEEK Limited now recognise same-sex marriages of their employees, even though these marriages are not legally recognised within Australia.[84] These factors will place cumulative pressure upon the Commonwealth Government to at least engage in serious debate about same-sex marriage.

Seeking same-sex marriage may well be desired by many same-sex couples, but it has the potential to transform the nature of same-sex relationships because of marriage's inherently conservative normativity. This does not mean that same-sex couples should never marry, but it is argued that same-sex couples both need and desire alternative means of recognising their relationships, especially because same-sex marriage is not politically obtainable in the near future.

[83] Marriage (Relationships Equality) Amendment Bill 2008 (Cth); Same-Sex Marriages Bill 2006 (Cth); Same-Sex Marriage Bill 2005 (NSW); Same-Sex Marriage Bill 2005 (Tas).
[84] Sarah Price, 'Big business joins push for same-sex marriage' *Sydney Morning Herald* (Sydney), 27 April 2008 <http://www.smh.com.au/news/national/big-business-joins-push-for-samesex-marriage/2008/04/27/1208743316176.html> at 1 May 2008.

Chapter II: De facto recognition

De facto legislative provisions currently provide the most extensive form of recognition to same-sex couples.[85] This form of recognition is based upon the traditional definition of a de facto relationship as "a relationship between a man and a woman who are not legally married but live together on a genuine domestic basis as husband and wife".[86] De facto recognition was therefore originally provided to recognise 'marriage-like' relationships between couples of the opposite sex[87] but has since expanded to recognise relationships irrespective of gender, particularly within the states and territories.

De facto recognition operates on a presumptive basis and does not require the parties to the relationship to take any positive steps to have their relationships recognised.[88] It is thus praised for providing the greatest benefits to the greatest number of people.[89] However, in order to obtain de facto recognition, the couple must still be able to satisfy certain criteria. These criteria can be difficult for same-sex couples to satisfy as they are invasive and more suited towards heterosexual couples.[90] Moreover, in jurisdictions where same-sex couples have simply been 'added' on to existing definitions of a de facto relationship,[91] it is problematically assumed that same-sex relationships are the same as heterosexual relationships and can therefore be ascertained on the same criteria.[92] As a result, an increasing number of same-sex couples have reportedly felt dissatisfied with the provision of de facto recognition alone.[93] This thesis therefore argues that an alternative federal form of recognition needs to operate in conjunction with extensive federal de facto recognition of same-sex relationships.

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[85] The 2006 Australian Census recorded a total number of 24 681 same-sex de facto couples: Coalition for Equality, *Same-sex couples reported at Census* <http://www.coalitionforequality.org.au/2006census.pdf> at 28 February 2008.
[86] New South Wales Parliamentary Library Research Service, above n 7, 3.
[87] Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (2008), 136.
[88] Millbank and Sant, above n 7, 185.
[89] Interview with Professor Jenni Millbank, above n 50.
[90] See Fehlberg and Behrens, above n 87, 136.
[91] Same-sex couples were included in existing definitions of a de facto relationship in WA and the NT: Jenni Millbank, *The Changing Meaning of 'De Facto' Relationships*, Sydney Law School Research Paper No. 06/43 <http://ssrn.com/abstract=910137> at 10 May 2008, 3.
[92] Jenni Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?' (1998) 12(2) *Australian Journal of Family Law* 99, 134.
[93] Victorian Gay and Lesbian Rights Lobby, above n 15, 40.

State and territory based de facto recognition

After the enactment of recent legislative reforms in South Australia (SA), same-sex couples can now be recognised as de facto couples in all Australian states and territories.[94] The terminology used in each state and territory differs, with some jurisdictions using the terminology of 'domestic relationship'[95] or 'significant relationship'[96] rather than 'de facto' relationship.

The criteria used in each of the states and territories to determine whether a de facto relationship exists are very similar.[97] In NSW for instance, the determinative factors under the *Property (Relationships) Act 1984* (NSW) include the duration of the relationship, the nature of a common residency, any financial dependence or interdependence, the ownership and use of property, the existence of a sexual relationship, the performance of household duties and the reputation and public aspects of the relationship.[98] These factors are essentially mirrored across all state and territory legislation.[99]

Same-sex couples can have difficulty establishing these factors, especially if they are not open about their relationship or do not live together. Consequently, the NSW Law Reform Commission recently recommended that the *Property (Relationships) Act 1984* (NSW) be amended to require courts to consider possible reasons as to why a same-sex couple might not hold themselves out publicly as a couple; for example, because of a fear of discrimination or ostracism from family and friends.[100]

Broadly speaking, the rights conferred upon same-sex de facto couples are the same as the rights conferred upon opposite-sex de facto couples. However, some differences do

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[94] *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA); *Discrimination Law Amendment Act 2002* (Qld); *Domestic Relationships Act 1994* (ACT); *Property (Relationships) Act 1984* (NSW); *Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT); *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic); *Statutes Amendment (Domestic Partners) Act 2006* (SA); *Statute Law Amendment (Relationship) Act 2001* (Vic).
[95] *Domestic Relationships Act 1994* (ACT) s 3; *Relationships Act 2008* (Vic) s 35.
[96] *Relationships Act 2003* (Tas) s 4(1).
[97] Graycar and Millbank, above n 28, 135.
[98] *Property (Relationships) Act 1984* (NSW) s 4(2). Section 4(3) of this Act states that no one factor alone in s 4(2) is to be regarded as necessary for a de facto relationship to exist.
[99] *Acts Interpretation Act 1954* (Qld) s 32DA; *De Facto Relationships Act 1991* (NT) s 3A; *Family Relationships Act 1975* (SA) s 11(B)(3); *Interpretation Act 1984* (WA) s 13A(2); *Legislation Act 2001* (ACT) s 169(2); *Relationships Act 2003* (Tas) s 4(3); *Relationships Act 2008* (Vic) s 35(2).
[100] New South Wales Law Reform Commission, *Relationships*, Report 113 (2006), 49.

exist between the rights of same-sex and opposite-sex couples, particularly where parenting issues are concerned.[101] For example, most Australian jurisdictions prevent same-sex couples from adopting children.[102] Given that an estimated 10% of gay men and 20% of lesbian women currently live with children in Australia,[103] such differential treatment is a major cause of concern for many same-sex couples and lobbyists.[104]

Current forms of federal de facto recognition

The de facto recognition of same-sex relationships within the federal arena is currently much more limited than it is at the state and territory level. In 2007, a report by the Human Rights and Equal Opportunity Commission (HREOC) found that 58 federal laws concerning financial and work-related entitlements discriminate against same-sex couples and their families.[105] Areas of discrimination included aged care, employment, health care, family law, migration, social security, superannuation, taxation and veterans' affairs.[106] A further report commissioned by the current Commonwealth Government identified an additional 47 discriminatory federal laws.[107]

Most federal discrimination against same-sex couples arises from the definitions of 'family' or 'spouse' or 'couple' used in federal legislation.[108] In *Young v Australia,* for instance, a war widower's pension application was denied on the basis of his inability to qualify as a 'dependant' under the *Veterans' Entitlement Act 1986* (Cth) because he was not a partner of the opposite sex.[109] It is interesting to note however that some discriminatory terms have financially benefited same-sex couples. For example, as current social security legislation does not recognise gay men or lesbian women as

[101] See generally Jenni Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children' (2006) 34(2) *Federal Law Review* 205; Aleardo Zanghellini, 'Lesbian and Gay Identity, the Closet and Laws on Procreation and Parenting' (2007) 16 *Griffith Law Review* 107.
[102] Same-sex couples can only adopt children in the ACT and WA. Registered same-sex couples can adopt children who are related to one of the applicants in Tasmania. See *Adoption Act 1993* (ACT) s 18; *Adoption Act 1994* (WA) s 39; *Adoption Act 1988* (TAS) s 20(1).
[103] New South Wales Gay and Lesbian Rights Lobby, *And then…the brides changed nappies: lesbian mothers, gay fathers and the legal recognition of our relationships with the children we raise*, Final Report, April 2003, 5.
[104] Ibid; Victorian Gay and Lesbian Rights Lobby, *Everyday Experiments: report of a survey into same-sex domestic partnerships in Victoria*, 2001, 15.
[105] Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements*, Final Report (May 2007), 10.
[106] Ibid.
[107] Robert McClelland, 'Rudd Government Moves on Same-Sex Discrimination' (Press Release, 30 April 2008).
[108] Human Rights and Equal Opportunity Commission, above n 105, 374.
[109] *Young v Australia,* Communication No. 941/2000, [10.4] U.N. Doc CCPR/C/78/D/941/2000 (2003).

'partners' or 'members of a couple',[110] a same-sex couple may receive higher social security payments because they are classified as two independent people as opposed to a couple.[111] Despite this, the HREOC report recommended that all discriminatory terminology be amended to include same-sex couples,[112] as the positive aspects of federal legislative reform are expected to outweigh any financial losses.[113] This recommendation was also based upon the finding that Australia's current social security legislation breaches the right to non-discriminatory treatment in the ICCPR and the right to social security and non-discrimination in the *International Covenant on Economic, Social and Cultural Rights.*[114]

The Commonwealth Attorney-General recently announced that, during the 2008 Winter Sittings of Parliament, the Commonwealth Government will amend a number of federal laws which discriminate against same-sex couples.[115] The first of such amendments was introduced on the 28 May 2008 with the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008.[116] This Bill amends provisions in 14 discriminatory superannuation related Commonwealth Acts; for example, by omitting the term 'marital relationship' and replacing it with 'couple relationship'[117] in order to include same-sex couples. The Bill will also amend the *Judges' Pensions Act 1968* (Cth) to allow couples who have registered their relationship within a state or territory to use this registration as evidence of the existence of a couple relationship.[118] The passage of this Bill has been delayed by members of the Federal Coalition, who are concerned that the Bill, if passed, will undermine marriage by recognising same-sex and married couples under the one category of 'couple relationship'.[119] As a result, the Bill

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[110] *Social Security Act 1991* (Cth) s 4(1), 4(2).
[111] Human Rights and Equal Opportunity Commission, above n 105, 198.
[112] Ibid, 383.
[113] Carol Nador, 'Equality may lead to cut in payments' *The Age* (Melbourne), 1 May 2008 <http://www.theage.com.au/news/national/equality-may-lead-to-cut-in-payments/2008/04/30/1209234958384.html> at 12 May 2008.
[114] Human Rights and Equal Opportunity Commission, above n 105, 217; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, ATS 1980 No 23, art 2(2), 26 (entry into force 13 November 1980); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, ATS 1976 No 5, art 2(2), 9 (entry into force 10 March 1976).
[115] McClelland, above n 107. This announcement is consistent with a trend for same-sex legislative reforms to occur under Labor Governments: see Graycar and Millbank, above n 28, 121.
[116] Most of these reforms are expected to commence in operation as soon as the necessary legislation is passed. Some reforms will however be gradually phased in by mid 2009 to give couples time to adjust their financial affairs. See McClelland, above n 107.
[117] Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Schedule 1 [6].
[118] Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Schedule 2 [25].
[119] Misha Schubert, 'Coalition delays same-sex couple laws' *The Age* (Melbourne), 4 June 2008, 4.

is expected to be referred to a Senate Inquiry to consider whether a same-sex couple should be instead recognised in a less substantial manner as an 'interdependent' couple rather than as a 'couple relationship'.[120] If such changes are made, the new legislation will also cover other forms of interdependent relationships.[121]

It is yet unknown if all of the Commonwealth's legislative reforms will automatically recognise couples who have registered their relationship at the state or territory level as de facto couples for the purposes of Commonwealth legislation. The former Chief Justice of the Family Court, Alastair Nicholson, has urged the Commonwealth to provide registered couples at the state or territory level with "full and equal status in federal law so that same-sex couples can access federal entitlements through these schemes."[122] Nicholson argues that such access is necessary because registered couples may be unable to satisfy the definition of a de facto relationship.[123] It would be nonsensical for registered couples to be treated differently within each of the state, territory and federal arenas.[124]

However, until these new legislative reforms occur, only a minor amount of federal legislation recognises same-sex de facto couples. At present, a foreign partner of a same-sex couple can use the 'interdependency' category under the *Migration Regulations 1994* (Cth) to apply for permanent Australian residency.[125] There is also some limited recognition of same-sex relationships as 'interdependent' relationships under current superannuation legislation[126] (which the Government is in the process of amending)[127] and anti-terrorism legislation where same-sex partners can be recognised as family members.[128]

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[120] Ibid.
[121] Ibid.
[122] Coalition for Equality, 'Former Family Court Chief calls on Rudd Gov't to broaden gay reform proposal' (Press Release, 22 May 2008).
[123] Letter from Alastair Nicholson to Robert McClelland, 19 May 2008, publicly released by Nicholson, copy on file with the author.
[124] The NSW Law Reform Commission has also recommended that if a relationship registry is adopted in NSW, registered couples should qualify as de facto couples for the purposes of federal law. See New South Wales Law Reform Commission, above n 100, 87.
[125] *Migrations Regulations 1994* (Cth) Reg 1.09A.
[126] *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth), schedule 2.
[127] Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008.
[128] *Anti Terrorism Act (No 2) 2005* (Cth), Schedule 4, 105.35(3)(a).

De facto legislative powers

The Commonwealth has no express legislative powers over non-marital relationships. However, it has the power to decide who is or who is not a 'spouse', 'couple', 'partner', 'dependant' or 'family member' in areas where the Commonwealth has comprehensive legislative powers.[129] It is consequently within the Commonwealth's ambit of powers to recognise same-sex de facto couples by amending and expanding the definitions of these legislative terms. Such definitional changes to discriminatory federal laws were recommended by the 2007 HREOC report as the most straightforward and comprehensive way to federally recognise same-sex relationships.[130] The Commonwealth has recently begun to amend federal legislation in this manner.[131]

The Commonwealth can also recognise same-sex de facto relationships on the basis of referrals of power from the states and territories.[132] To date, NSW, the Northern Territory (NT), Queensland, Tasmania and Victoria have referred their powers concerning 'financial matters' for both same-sex and opposite-sex de facto relationships to the Commonwealth[133] in accordance with section 51 (xxxvii) of the Constitution.[134] SA and the ACT have not yet referred their powers to the Commonwealth,[135] whilst Western Australia (WA) has only referred its powers over the superannuation interests of de facto couples.[136] WA's referral of powers is limited because it has its own Family Court to resolve de facto relationship disputes.[137]

The powers were referred to the Commonwealth to address two problems with de facto recognition. Firstly, the referrals of power were made to allow all de facto couples to have their financial disputes and their disputes involving children resolved by the

[129] For example, the Commonwealth has extensive legislative powers over taxation, corporations and defence under the *Australian Constitution*, s 51(ii), s 51(vi), s 51(xx).
[130] Human Rights and Equal Opportunity Commission, above n 105, 61.
[131] Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008.
[132] Strictly speaking, a referral of powers from the ACT and NT is unnecessary because of the Commonwealth's territories power: *Australian Constitution*, s 122.
[133] *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic); *De Facto Relationship (Northern Territory Request) Act 2004* (NT); *Commonwealth Powers (De Facto Relationships) Act 2006 (Tas)*.
[134] *Australian Constitution* s51 (xxxvii).
[135] Fehlberg and Behrens, above n 87, 580.
[136] *Commonwealth Powers (De Facto Relationships) Act 2006* (WA).
[137] Fehlberg and Behrens, above n 87, 580.

federal Family Court.[138] At present, any disputes involving children fall within the jurisdiction of the Family Court, whilst financial and property disputes remain within the jurisdiction of the relevant state or territory courts.[139] This is problematic because de facto couples have the added expense and time of accessing both courts,[140] whilst state courts have less family law expertise[141] and cannot split the superannuation interests of parties to a dispute.[142] Moreover, the content of disputes resolved by state courts is not confidential as it would be in the Family Court.[143] Enabling all de facto couples to access the Family Court would provide them with a cheaper and confidential dispute resolution process, with access to specialist family law mediators.[144] Secondly, powers were referred to the Commonwealth to establish a national uniform system for the resolution of de facto relationship disputes.[145] A uniform system is desirable because of the inconsistencies between state and territory legislation which has led to forum shopping by some couples.[146]

The former Commonwealth Government refused to accept the referrals of power for same-sex de facto couples, but was willing to accept the referrals in relation to heterosexual de facto couples.[147] The current Commonwealth Government has not yet accepted these referrals of power for all de facto couples,[148] but has been under increasing pressure to do so by experts including Alastair Nicholson, the former Chief Justice of the Family Court.[149]

It is important to note that state and territory referrals of power to the Commonwealth will not automatically invalidate state or territory based recognition schemes. Once

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[138] Jenni Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples' (2006) 34(1) *Federal Law Review* 1, 39-40.
[139] Jenni Millbank, 'Same Sex Families' (2005) 53 *Hot Topics: Legal Issues in Plain Language*, 1, 12.
[140] Millbank, above n 139, 40.
[141] Letter from Alastair Nicholson to Robert McClelland, above n 123.
[142] Millbank, above n 139, 40.
[143] Misha Schubert, 'Family Court is for gays, too' *The Age* (Melbourne), 22 May 2008 <http://www.theage.com.au/news/national/family-court-is-for-gays-too/2008/05/21/1211182895772.html> at 22 May 2008.
[144] Letter from Alastair Nicholson to Robert McClelland, above n 123; Patricia Karvelas, 'Childless de factos in Family Court win' *The Australian* (Sydney) 23 May 2008 <http://www.theaustralian.news.com.au/story/0,25197,23744363-2702,00.html> at 24 May 2008.
[145] Lindy Willmott, Ben Mathews and Greg Shoebridge, 'Defacto relationships property adjustment law – A national direction' (2003) 17 *Australian Journal of Family Law* 37, 39.
[146] Ibid, 41.
[147] Human Rights and Equal Opportunity Commission, above n 105, 272.
[148] It is expected that the Commonwealth will allow same-sex couples to access the Family Court because of its commitment to amend federal legislation which discriminates against same-sex couples. See Karvelas, above n 144.
[149] Letter from Alastair Nicholson to Robert McClelland, above n 123.

powers are referred to and accepted by the Commonwealth, the powers are concurrently shared between the Commonwealth and the relevant state or territory.[150] State legislation can only be invalidated in accordance with section 109 of the Constitution.[151]

The Commonwealth's external affairs power provides a further way to recognise same-sex de facto relationships.[152] This power can be used to give effect to Australia's international law obligations[153] even though such obligations do not become binding within Australia until they are given that effect by statute.[154] The external affairs power has been relevant to two adverse determinations against Australia by the UNHRC concerning same-sex issues. In the first case, the external affairs power was relied upon to override Tasmanian legislation which criminalised homosexual sex after the UNHRC held that the legislation breached the right to non-interference with one's privacy in article 17(1) of the ICCPR[155] in *Toonen v Australia.*[156] In the second case, the external affairs power could have been used to address the issues raised in *Young v Australia*, when the UNHRC held that the denial of a war widower's pension on the basis of his sex breached article 26 of the ICCPR.[157] The Commonwealth could thus justify its recognition of same-sex relationships in order to prevent further breaches of its international human rights obligations.[158]

Arguments for federal de facto recognition

De facto recognition of relationships is undoubtedly valuable to all couples because of its presumptive operation. It can protect a broad range of relationships, and can protect people who do not want to or cannot otherwise formally solemnise their relationships.[159]

[150] *Graham v Paterson* [1950] HCA 9, 11.
[151] *Australian Constitution* s 109.
[152] *Australian Constitution* s 51(xxix).
[153] *The Commonwealth v Tasmania* (1983) 158 CLR 1, 258, 259.
[154] *Kioa v West* (1985) 159 CLR 550, 570.
[155] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, ATS 1980 No 23, art 17(1) (entry into force 13 November 1980).
[156] *Toonen v Australia*, Communication No. 488/1992, [9], U.N. Doc CCPR/C/50/D/488/1992 (1994). For a critical analysis of the UNHRC's decision, see Wayne Morgan, 'Identifying evil for what it is: Tasmania, sexual perversity and the United Nations' (1994) 19(3) *Melbourne University Law Review* 740.
[157] *Young v Australia*, Communication No. 941/2000, [11],U.N. Doc CCPR/C/78/D/941/2000 (2003).
[158] Interview with Professor Jenni Millbank, above n 50.
[159] New South Wales Gay and Lesbian Rights Lobby, above n 11, 10; Millbank, above n 92, 12.

Providing more extensive recognition of same-sex relationships as de facto relationships would enable Australia to meet its human rights obligations.[160] Respecting and recognising same-sex de facto relationships may also serve to eradicate homophobia and better include same-sex couples in mainstream society.

Arguments against federal de facto recognition

The central problem with de facto recognition of same-sex relationships concerns the evidentiary criteria used to prove the existence of a de facto relationship which were originally based upon the existence of a 'marriage like' relationship between a male and a female.[161] Although same-sex couples have been included in definitions of de facto relationships, legislative provisions remain more favourably orientated towards heterosexual couples. For example, in NSW, factors which can be used to prove a de facto relationship include the reputation and public aspects of the relationship, and the nature of a common residency.[162] These criteria fail to recognise the prejudice, homophobia and stigma that can surround same-sex relationships and prevent couples from being open about their relationships to the extent necessary to satisfy these criteria.[163] Although courts tend to use these evidentiary factors in an inclusive rather than a restrictive manner,[164] these provisions are problematic because they tend to assume that same-sex relationships are the same as heterosexual relationships and can thus be shown to exist using the same evidentiary criteria.[165]

De facto recognition does not provide a means to instantaneously establish the existence of a relationship.[166] Such instantaneous proof is conferred upon married heterosexual couples[167] and couples registered under state-based recognition schemes,[168] but is not available to de facto couples. This is especially problematic where the existence of a

[160] See Human Rights and Equal Opportunity Commission, above n 105, chapter 3 for a discussion on Australia's human rights obligations.
[161] Fehlberg and Behrens, above n 87, 136.
[162] *Property (Relationships) Act 1984* (NSW) s 4(2).
[163] Jenni Millbank, 'Domestic Rifts: Who is Using the *Domestic Relationships Act 1994* (ACT)? (2000) 14(3) *Australian Journal of Family Law* 163, 174. A report by the Victorian Gay and Lesbian Rights Lobby found that 75% of survey respondents had concealed their same-sex relationship in public to avoid discrimination. See Victorian Gay and Lesbian Rights Lobby, above n 15, 6.
[164] Fehlberg and Behrens, above n 87, 138. See also Millbank, above n 91, 1.
[165] Millbank, above n 92, 134.
[166] New South Wales Gay and Lesbian Rights Lobby, above n 11, 10.
[167] *Marriage Act 1961* (Cth) s 39M.
[168] See, eg, *Relationships Act 2003* (Tas) s 4(2).

relationship is questioned, for instance, in an emergency situation.[169] However, if same-sex couples were able to use a federal opt-in recognition system, they would have the practical benefit of being able to instantaneously establish the existence of their relationship.

De facto recognition is, furthermore, insufficient because it does not enable same-sex couples to enter into a new legal relationship altogether. For de facto recognition to apply, a couple needs to have been in a relationship with each other for a period long enough to satisfy the determinative factors; for example, to show a degree of financial dependence or demonstrate a period of cohabitation.[170] De facto legislation does not therefore allow couples in a new relationship to easily prove that they are in a de facto relationship.

Political factors

As a matter of political pragmatism, the federal recognition of same-sex de facto relationships is the least threatening form of recognition that the Commonwealth Government can provide to same-sex couples. Unlike same-sex marriage, de facto recognition is not perceived to threaten the family or undermine marriage.[171] Rather, de facto recognition is supported on the basis of removing discrimination and providing 'equality of treatment' for all de facto couples.[172] It is easier for the Commonwealth to justify providing de facto recognition to same-sex couples on this basis, especially to conservative constituents.

In sum, de facto recognition is, by itself, inadequate. Same-sex couples need to have a genuine choice as to how their relationships are recognised whilst also having a means to enter into new legal relationships altogether. As such, the establishment of a national opt-in recognition system is recommended. A combination of both a presumptive and opt-in form of recognition needs to operate within the federal arena in order to recognise and protect same-sex relationships.

[169] New South Wales Gay and Lesbian Rights Lobby, above n 11, 15.
[170] See, eg, *Property (Relationships) Act 1984* (NSW) s17(1).
[171] Interview with Jim Wallace, above n 9.
[172] Willmott et al, above n 145, 53; McClelland, above n 107.

Chapter III: Civil unions and relationship registries

The Commonwealth must implement an alternative means of recognising both same-sex and opposite-sex relationships. The most appropriate way to provide such recognition is through the establishment of either a relationship registry or civil union system, as these systems provide recognition to couples who undertake positive steps to have their relationships recognised. Such opt-in recognition is valuable to all couples because of the inherent problems associated with presumptive de facto recognition and marriage. This form of recognition is also widely available in overseas jurisdictions.[173]

Before examining this recognition option, it is first necessary to discuss the distinction that has been drawn within Australia between a civil union system and a relationship registry. The terms 'civil union' and 'relationship registry' essentially describe the same form of recognition; that is, the optional registration of a relationship.[174] The only actual difference between the two types of recognition concerns the ceremonial aspect associated with a civil union.[175] Nevertheless, the Commonwealth Government has drawn a distinction between the two terms in order to differentiate between the Tasmanian relationship registry[176] and the ACT's former civil union system.[177]

This distinction was drawn by the Commonwealth Government because of political pragmatism and marriage politics.[178] On the one hand, the Commonwealth has portrayed the Tasmanian relationship registry as a non-marital recognition system which only recognises existing de facto relationships,[179] when it in fact also allows couples to enter into new legal relationships altogether or register non-conjugal caring

[173] Ian Curry-Sumner, All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe (2005), 534; Victorian Gay and Lesbian Rights Lobby, above n 15, 16.
[174] Email from Kristen Walker to Kate Whitehouse, 19 March 2008; Email from Stephen Parker to Kate Whitehouse, 31 March 2008; Interview with Rodney Croome, above n 15. Some surveys by gay and lesbian rights lobbies have not drawn a distinction between a civil union and a relationships registry. See New South Wales Gay and Lesbian Rights Lobby, above n 11, 13; Victorian Gay and Lesbian Rights Lobby, above n 15, 37.
[175] Interview with Rodney Croome, above n 15; Wayne Morgan, 'Stand on same-sex unions immoral', *The Canberra Times* (Canberra), 2 May 2008, 13.
[176] *Relationships Act 2003* (Tas).
[177] *Civil Unions Act 2006* (ACT) (repealed under s 35(2) *Australian Capital Territory (Self Government) Act 1988* on 14 June 2006); Civil Unions Bill 2006 (ACT); Civil Partnerships Bill 2006 (ACT).
[178] Interview with Rodney Croome, above n 15.
[179] Australian Broadcasting Commission, 'McClelland strikes out against discrimination against same sex couples', *The 7:30 Report*, 30 April 2008 <http://www.abc.net.au/7.30/content/2007/s2232028.htm> at 24 May 2008.

relationships.[180] On the other hand, the Commonwealth depicted the ACT civil union system as a marriage-like system which constituted a direct threat to the institution of marriage and the traditional family unit.[181] By portraying the Tasmanian system as a non-marriage-like system and conversely portraying the ACT system as a marriage-like system, the Commonwealth was able to simultaneously appeal to constituents who both favour and oppose the recognition of same-sex relationships. That is, the Commonwealth appealed to those favouring recognition by stating its support of the Tasmanian registry,[182] whilst also appealing to those against same-sex relationship recognition by threatening to use its territories power to disallow the ACT civil union system in order to protect the traditional heterosexual concept of marriage.[183]

Moreover, this distinction is further confounded by the fact that, in the international arena, the terms 'civil union' and 'relationship registry' are used interchangeably and without distinction.[184] In fact, Australian couples who have registered their relationships at the state or territory level can have their relationships recognised as civil unions in New Zealand[185] and as civil partnerships in the United Kingdom.[186]

Therefore, this thesis argues that this distinction should not be maintained, as both forms of recognition are designed to register a relationship between two people. This thesis will accordingly discuss the power to implement both systems and the arguments for and against them together. The thesis will however continue to use the two terms separately because of the distinction used in the current political debate.

Relationship registry

A relationship registry essentially provides for the official registration of an existing or new relationship between two people. Relationship registries currently exist in

[180] Rodney Croome and Wayne Morgan, *Defining relationships* (2008) Online Opinion <http://www.onlineopinion.com.au/view.asp?article=7369> at 22 May 2008.
[181] Australian Broadcasting Commission, above n 179. See also Australian Broadcasting Commission, *Ruddock says no to ACT civil partnerships bill* (6 February 2007) <http://www.abc.net.au/news/newsitems/200702/s1841691.htm> at 28 February 2008.
[182] Australian Broadcasting Commission, above n 179.
[183] *Australian Constitution*, s 122; Sarah Smiles, 'Federal veto forces ACT backdown on gay unions' *The Age* (Melbourne) 5 May 2008 <http://www.theage.com.au/news/national/federal-veto-forces-act-backdown-on-gay-unions/2008/05/04/1209839456815.html> at 7 May 2008.
[184] Wayne Morgan, *Love and marriage (union/partnership/relationship)* (2008) On Line Opinion <http://www.onlineopinion.com.au/view.asp?article=7134&page=0> at 20 March 2008.
[185] *Civil Union Act 2004* (NZ) s 35(2).
[186] *Civil Partnerships Act 2004* (UK) c 33, s 215(1).

Tasmania and the ACT,[187] and will soon exist in Victoria.[188] The NSW Law Reform Commission has recommended the implementation of a relationship registry in NSW[189] and it is anticipated that a registry will soon exist in Queensland.[190] Some municipal councils also provide for the registration of same-sex relationships.[191] Registration under these local council schemes does not confer any legal rights but may help couples prove the existence of a de facto relationship.[192]

Importantly, relationship registries allow both same-sex and opposite-sex couples to register their relationships.[193] Australian state and territory based registries are open to all couples, regardless of gender.[194] If a federal relationship registry is implemented, it should likewise be open to both same-sex and opposite-sex couples in order to provide an alternative means of relationship recognition for all couples.[195]

The registration process generally involves filling out an application form, paying a small fee and lodging the application with the relevant authority; for example, with the Registrar of Births, Deaths and Marriages.[196] Upon lodging the application, a relationship will usually be registered after a period of 28 days.[197] Once registered, the couple will receive a certificate of registration which constitutes proof of the existence of their relationship.[198] There is no official ceremonial aspect involved in this form of

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[187] *Relationships Act 2003* (Tas); *Civil Partnerships Act 2008* (ACT).
[188] The Victorian registry is expected to take effect in December 2008. See *Relationships Act 2008* (Vic) s 2(2).
[189] New South Wales Law Reform Commission, above n 100, 87.
[190] Iain Clacher, *Registry tipped for Queenslanders* (2008) <http://qlp.e-p.net.au/news/registry-tipped-for-queensland-2005.html> at 2 June 2008.
[191] City of Melbourne, *Relationship Declaration Register* <http://www.melbourne.vic.gov.au/info.cfm?top=208&pg=3483> at 15 April 2008; City of Sydney, *Relationships Declaration Program* <http://www.cityofsydney.nsw.gov.au/Community/ServicesAndPrograms/RelationshipsDeclarationProgram.asp> at 28 February 2008.
[192] Ibid.
[193] The *Relationships Act 2003* (Tas) also allows for the registration of caring relationships. It is outside the scope of this thesis to examine whether or not the registration of caring relationships should also be provided in the federal arena.
[194] *Civil Partnerships Act 2008* (ACT) s 5(1); *Relationships Act 2003* (Tas) s 4; *Relationships Act 2008* (Vic) s 5.
[195] Allowing both same-sex and opposite-sex couples to opt-in to a federal recognition system may also reduce the possibility of a forced outing of one's sexuality, a concern which has been raised in the United Kingdom because only same-sex couples can enter into a civil union. See The Village Citizens Advice Bureau, *Civil Partnerships Another Year On* (2007) <http://www.citizensadvice.org.uk/civil_partnership_another_year_on.pdf> at 15 May 2008. It must, however, be noted that the majority of people who opt-in to an alternative federal recognition system will be same-sex couples because they are currently prevented from marrying.
[196] See, eg, *Relationships Act 2003* (Tas) s 11.
[197] *Relationships Act 2003* (Tas) s 13(3); *Relationships Act 2008* (Vic) s 10(2)(a).
[198] See, eg, *Relationships Act 2003* (Tas) s 4(2).

relationship recognition, although some jurisdictions allow parties to partake in ceremonies which have no legal effect.[199] For example, the ACT allows couples to partake in commitment ceremonies with the Deputy Registrar-General.[200] Parties can also arrange their own private ceremonies.

Civil union

A civil union is a mechanism to legally register a relationship between two people. This form of recognition can be open to both same-sex and opposite-sex couples, depending upon the relevant jurisdiction.[201] According to the distinction between a civil union and a relationship registry, no civil union system currently exists in Australia. Previous attempts to implement a civil union system were made in the ACT[202] but were thwarted by both the former and current Commonwealth Governments.[203] The ACT recently passed the *Civil Partnerships Act 2008* (ACT) as an alternative to its civil union Bills.

The main source of contention over the proposed ACT civil union system concerned its ceremonial aspect. The proposed ceremony required parties to partake in a legally recognised ceremony, similar to a marriage ceremony.[204] In this respect, the ceremony was criticised for attempting to mimic and undermine the institution of marriage.[205]

It is interesting to note that the term 'civil union' was initially developed in the United States when a Vermont legislature tried to give same-sex couples the same legal rights

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[199] Couples in Tasmania can choose to have a non-legal ceremony when they sign their Deed of Relationship. See Relationships Tasmania, *Ceremonies* <http://www.relationshipstasmania.org.au/ceremonies.html> at 25 May 2008.

[200] See Department of Justice and Community Safety, *Civil Partnerships* <http://www.rgo.act.gov.au/bdm/bdm_civil.html> at 25 May 2008. The first couple to enter into a civil partnership in the ACT had a commitment ceremony with the Registrar-General's delegate. See David Curry, 'Canberra's first same-sex civil union' *The Canberra Times* (Canberra) 3 June 2008 <http://canberra.yourguide.com.au/news/local/news/general/canberras-first-samesex-civil-union/781937.aspx> at 3 June 2008.

[201] New Zealand allows same-sex and opposite-sex couples to enter into a civil union whilst only same-sex couples can enter into a civil partnership in the United Kingdom: *Civil Union Act 2004* (NZ) s 4(1); *Civil Partnership Act 2004* (UK) c33, s1.

[202] *Civil Unions Act 2006* (ACT) (repealed under s 35(2) *Australian Capital Territory (Self Government) Act 1988* on 14 June 2006); Civil Unions Bill 2006 (ACT); Civil Partnerships Bill 2006 (ACT).

[203] Adam Gartrell, 'ACT forced to axe civil union laws' *The Daily Telegraph* (Sydney) 4 May 2008 <http://www.news.com.au/dailytelegraph/story/0,22049,23643294-5001028,00.html> at 5 May 2008.

[204] See Civil Unions Bill 2006, s 11.

[205] Australian Broadcasting Commission, 'ACT, Fed Govt at odds over civil union laws', 1 May 2008 <http://www.abc.net.au/news/stories/2008/05/01/2232458.htm> at 5 May 2008.

and obligations as married couples without actually permitting same-sex marriage.[206] Civil unions are thus often regarded as a second-class form of relationship recognition which essentially provides for marriage by another name.[207]

Power to implement an opt-in federal recognition system

The Constitutional issues concerning whether or not the Commonwealth Government has the necessary power to implement an opt-in federal recognition system are the same as the issues involved in de facto recognition. As such, these issues have been addressed in Chapter II.

Arguments for an opt-in federal recognition system

A federal relationship recognition system must be implemented for both same-sex and opposite-sex couples. Such a system is firstly needed because same-sex couples are prohibited from marrying.[208] It is also needed because of the intrinsic problems associated with the institution of marriage, as discussed in Chapter I. A non-hierarchical federal form of recognition is needed to enable all couples to receive the social and legal privileges associated with marriage, without having to enter into this problematic institution.

An alternative system is also required because of the limitations of de facto recognition of same-sex relationships. As discussed in Chapter II, the invasive and heterosexually orientated factors which are used to prove the existence of a de facto relationship are difficult for same-sex couples to satisfy. If an opt-in recognition system were to be adopted within the federal arena, the Commonwealth could model it upon existing state and territory based relationship registries whose broader eligibility criteria is better suited to same-sex couples. For instance, the three existing state and territory opt-in recognition systems do not require a couple to live together in order to register their

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[206] Jenni Millbank, 'When is a rose not a rose? Civil unions for same-sex couples mean different things in different places' *Sydney Star Observer* (Sydney) 12 January 2006, <http://www.ssonet.com.au/archives/display.asp?articleID=5676> at 19 March 2008.
[207] New South Wales Gay and Lesbian Rights Lobby, above n 11, 16; Harding, above n 45, 524; Sue Wilkinson and Celia Kitzinger, 'Same-Sex Marriage and Equality' (2005) 18(5) *The Psychologist* 290, 293.
[208] *Marriage Act 1961* (Cth) s 5(1).

relationship.[209] This is beneficial to same-sex couples because of the social constraints and stigma surrounding same-sex relationships which may inhibit couples from living together.[210]

Optional recognition would provide couples with the practical benefit of being able to instantaneously verify the existence of their relationship. This benefit is currently available to registered couples in Tasmania as the *Relationships Act 2003* (Tas) expressly states that proof of registration constitutes proof of a relationship.[211] De facto recognition is unable to provide such conclusive evidence and couples may therefore need to prove the existence of their relationship on multiple occasions. This evidentiary problem is furthermore problematic upon the breakdown of a relationship should one member of the couple deny the relationship altogether,[212] or in emergency situations where the relationship is challenged.[213] An alternative federal recognition system would allow couples to easily and instantaneously verify the existence of their relationship,[214] thereby providing couples with greater certainty as to their legal rights and responsibilities.[215]

The ability to choose to have a same-sex relationship federally recognised is symbolically important for many same-sex couples, even without the inclusion of an official ceremony. Federal recognition would provide acknowledgment of and respect for same-sex relationships, something which is particularly important at a time when homophobia still exists within Australia.[216] Couples who have registered their relationships in Tasmania have reportedly felt personally empowered and more respected by their families and communities as a result.[217] In this sense, the Commonwealth could do more than simply provide same-sex couples with financial benefits; it could also help eradicate homophobia and discriminatory treatment of same-sex couples by treating these couples with the respect their relationships deserve.

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[209] *Civil Partnerships Act (2008)* ACT s 6; *Relationships Act 2003* (Tas) s 4(1); *Relationships Act 2008* (Vic) s 5.
[210] New South Wales Law Reform Commission, above n 100, 6.
[211] *Relationships Act 2003* (Tas) s 4(2).
[212] Millbank, above n 91, 132.
[213] Interview with Rodney Croome, above n 15; New South Wales Gay and Lesbian Rights Lobby, above n 11, 15.
[214] Interview with Rodney Croome, above n 15.
[215] Lesbian and Gay Legal Rights Service, above n 10; New South Wales Parliamentary Library Research Service, above n 7, 5.
[216] Sarah Maddison and Emma Partridge, *How well does Australian democracy serve sexual and gender minorities?* Democratic Audit of Australia, Report No. 9 (2007), 34.
[217] Interview with Rodney Croome, above n 15.

The ability to enter into new legal relationships is another important aspect of optional recognition.[218] Couples can apply to have their relationships recognised, without needing to be in a relationship for a set period of time.[219] De facto recognition is limited in this regard because it only serves to recognise existing relationships whilst marriage, which does allow couples to enter into new relationships, is currently restricted to heterosexual couples. There is thus a legal void for same-sex and opposite-sex couples who wish to enter into a new legal relationship and have the certainty of recognition. An opt-in federal recognition system could overcome this legal shortfall for all couples.

Arguments against an opt-in federal recognition system

Civil unions and relationship registries have been criticised for providing a separate and second-class form of recognition to same-sex couples.[220] It is essentially argued that by creating an alternative means of recognising same-sex relationships, same-sex couples continue to be discriminated against because their relationships are treated differently to heterosexual relationships. This separate treatment may also perpetuate same-sex couples' sense of exclusion from mainstream society.[221] Equality based arguments are thus raised to contend that same-sex couples do not want alternative recognition systems or special rights, but rather want access to existing legal institutions.[222] The Commonwealth should consequently allow all couples, regardless of gender, to utilise any alternative relationship recognition systems. Although this does not overcome heterosexist marriage restrictions, it should at least help prevent same-sex couples from feeling as though their relationships are treated in a second-class manner.

The terminology of 'civil union' and 'relationship registry' or 'registration system' is another facet of the 'second-class' form of recognition criticism. The term 'civil union' is criticised for implying that marriages are religious rather than secular institutions because of the specific use of the word 'civil'.[223] Alternatively, the terms 'relationship registry' and 'registration system' are critiqued for their bureaucratic connotations,[224]

[218] Croome and Morgan, above n 175.
[219] *Relationships Act 2003* (Tas) s 11.
[220] New South Wales Gay and Lesbian Rights Lobby, above n 11, 16; Harding, above n 45, 524; Wilkinson and Kitzinger, above n 207, 293.
[221] Millbank, above n 139, 16.
[222] Email from Peter Furness to Kate Whitehouse, 12 April 2008; Email from Stephen Jones to Kate Whitehouse, 10 April 2008; New South Wales Gay and Lesbian Rights Lobby, above n 11, 16.
[223] Millbank, above n 206.
[224] Interview with Professor Jenni Millbank, above n 50.

especially because some people feel as though their relationships are denigrated to being registered in the same manner as one registers a pet or vehicle.[225] Whilst it is understandable how some of these terminological criticisms have been raised, one must remember that all opt-in forms of recognition (whether through marriage, a civil union or a relationship registry) ultimately achieve the official registration of a relationship.[226] It is hoped that the formation of an opt-in federal recognition system is not thwarted by a debate over semantics, when all relationships would ultimately be registered.

Recognition systems which are designed as alternatives to marriage are criticised for stalling the marriage debate, and for wasting the time and resources of same-sex lobbyists who really want access to marriage.[227] However, such arguments fail to recognise that same-sex marriage is not desired by all couples, nor does marriage provide an ideal means of recognising same-sex or opposite-sex relationships.[228] Moreover, legislative trends demonstrate that no country goes head-first into legalising same-sex marriage.[229] Waaldijk argues that a "law of small change" applies to the recognition of same-sex relationships, as legislatures tend to make smaller preparatory steps before they recognise same-sex relationships.[230] An opt-in recognition system is therefore valuable to all same-sex couples, including those who want to marry.

Opt-in recognition systems are furthermore opposed because they only protect couples who choose to have their relationships recognised in this manner, and may therefore fail to protect more vulnerable couples.[231] Yet having a choice as to how, when and if one's relationship is recognised is a central rationale behind the implementation of opt-in registration systems.[232] Those who do not wish to utilise these systems could still have their relationships protected by the presumptive de facto legislation, albeit to a lesser extent. The combination of an opt-in system and presumptive de facto recognition is needed to adequately recognise and protect same-sex relationships.

[225] Email from Stephen Jones to Kate Whitehouse, 10 April 2008; Harding, above n 45, 525.
[226] Email from Alastair Nicholson to Kate Whitehouse, 29 April 2008; Interview with Rodney Croome, above n 15; Morgan, above n 177.
[227] New South Wales Gay and Lesbian Rights Lobby, above n 11, 16.
[228] Walker, above n 14, 123-4.
[229] Kees Waaldijk, 'Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law' in Robert Wintemute and Mads Andenæs, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (2001), 638.
[230] Ibid.
[231] Graycar and Millbank, above n 28, 131; New South Wales Parliamentary Library Research Service, above n 7, 5.
[232] Interview with Rodney Croome, above n 15.

Finally, the low usage of relationship recognition systems is often cited to justify the lack of legal recognition of same-sex relationships.[233] It is essentially argued that there is no need to implement a federal recognition scheme because the majority of same-sex couples would not utilise such a system.[234] The Tasmanian registration scheme has been criticised in this respect because, to date, only 86 same-sex relationships have been registered.[235] Overseas system are said to have very low usage rates.[236] Despite this, the Commonwealth should not be permitted to discriminate against same-sex couples on the hypothetical basis that such a system may not be widely used.

Political factors

The implementation of an opt-in recognition system is more politically expedient than other forms of recognition.[237] As discussed in Chapter I, there are many political obstacles to overcome before same-sex marriage can be legalised within Australia. Whilst this thesis does not contend that same-sex couples should consequently stop lobbying for same-sex marriage, it does however argue that an alternative means of recognising same-sex relationships is needed for same-sex couples who want or need to have their relationships recognised immediately.

Despite the thesis arguing that the terms 'civil union' and 'relationship registry' essentially describe the same form of recognition, it must be acknowledged that it will be easier and more politically pragmatic for the Commonwealth to implement a non-ceremonial form of recognition. As demonstrated by the ACT's unsuccessful civil union systems, official recognition ceremonies are considered a threat to the family and to the institution of marriage.[238] This idea is particularly evoked by conservative Christian groups, some of whom fear that giving same-sex relationships any form of federal recognition will unduly endorse and elevate the status of these relationships.[239] The Commonwealth Government may therefore adopt a non-ceremonial recognition

[233] Graycar and Millbank, above n 28, 131.
[234] Ibid.
[235] Email from Kellie Wright to Kate Whitehouse, 28 May 2008.
[236] New South Wales Parliamentary Library Research Service, above n 7, 4.
[237] Email from Stephen Jones to Kate Whitehouse, 10 April 2008.
[238] Interview with Jim Wallace, above n 9.
[239] Ibid; Salt Shakers, *The Introduction of Civil Unions – the Christian Biblical response* (2006) <http://www.saltshakers.org.au/pdf/361329_REGISTRATION_-_CHRISTIAN.pdf> at 28 February 2008.

system to appease its political adversaries and conservative constituents. In fact, the Commonwealth has already indicated that it supports the idea of a federal recognition system based upon the Tasmanian relationships registry because this system does not encompass a legally recognised ceremony.[240] This position has been criticised as the Commonwealth Government is arguing that same-sex couples deserve to have their relationships recognised, but only insofar as this does not undermine marriage or seem to enable same-sex couples to enter into new legal relationships.[241]

Some lobbyists will undoubtedly contest the provision of non-ceremonial recognition because of the symbolic value of ceremonial recognition. Whilst this thesis does not want to dismiss the importance of ceremonial recognition, it does however argue that an opt-in form of recognition should be adopted with or without a legally prescribed ceremony. A non-ceremonial form of recognition may not be the preferred option, but it is valuable to all couples because it provides a genuine alternative to traditional means of recognising relationships. It will also benefit couples who do not want to be forced to partake in a prescribed ceremony.[242] In any event, nothing will prevent couples from arranging their own private ceremony should they so desire.[243]

The Commonwealth must act to provide same-sex and opposite-sex couples with an alternative means of recognising their relationships. This form of recognition may not be ideal for same-sex couples who desire to marry, but it at the very least provides for more conclusive and symbolic recognition than is currently available. Moreover, an opt-in recognition system would provide practical benefits to all couples who do not conform to traditional heterosexist family forms.

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[240] Australian Associated Press, *National register for gay couples, says Kevin Rudd* (2007) <http://www.news.com.au/story/0,23599,22932717-2,00.html> at 18 April 2008.
[241] Tim Dick, 'Gay unions accepted but don't use our symbolism' *Sydney Morning Herald* (Sydney) 8 May 2008 <http://www.smh.com.au/news/opinion/gay-unions-accepted-but-not-symbolism/2008/05/07/1210131061925.html> at 8 May 2008.
[242] Interview with Rodney Croome, above n 15.
[243] Ibid.

Conclusion

A wide range of legal scholars, same-sex lobbyists and Australian citizens believe that federal legislative reform to better recognise same-sex relationships is inevitable.[244] There is a growing impetus for the Commonwealth to provide an opt-in system to recognise same-sex and opposite-sex relationships.[245] Relationship registries currently exist at the state and territory level, whilst hundreds of Australian couples are travelling overseas to formally solemnise their relationships.[246] Until Australia implements a federal opt-in recognition system for same-sex couples, it will continue to breach its international human rights obligations whilst being further out of step with the growing number of Australian states, territories, municipal councils and other countries that now recognise same-sex relationships. Australian social values are changing and the law must necessarily reflect such changes.

Finally, it should be remembered that federally recognising same-sex relationships is not a matter of giving same-sex couples additional special rights. To quote the Former Chief Justice of the Family Court, Alastair Nicholson, recognition is "simply a case of the law having failed to provide the equal protection to which they are entitled by virtue of their essential humanity."[247] One can only hope that the Australian public and legislature wake up to this reality and afford same-sex couples the federal recognition that they deserve.

[244] Email from Alastair Nicholson to Kate Whitehouse, 29 April 2008; Email from George Williams to Kate Whitehouse, 19 March 2008; Email from Peter Furness to Kate Whitehouse, 12 April 2008; Email from Stephen Jones to Kate Whitehouse, 10 April 2008; Interview with Associate Professor Juliet Behrens, above n 56; Interview with Professor Jenni Millbank, above n 50; Interview with Rodney Croome, above n 15.
[245] Croome and Morgan, above n 180.
[246] Email from Peter Furness to Kate Whitehouse, 12 April 2008.
[247] Nicholson, above n 2, 16.

Word Count: 293.

Appendix

Interviewees:

Juliet Behrens is an Associate Professor of Law at the Australian National University. An interview was conducted with Juliet because of her family law and feminist studies expertise.

Rodney Croome is a spokesperson for the Tasmanian Gay and Lesbian Rights Group, a Board Member of the International Lesbian and Gay Law Association, a member of the Australian Coalition for Equality and a member of Australian Marriage Equality. Rodney was interviewed because of his extensive campaigning for the rights of same-sex couples.

Peter Furness is the National Convenor of Australian Marriage Equality. Peter was interviewed in relation to the lobby's perspectives on the federal recognition of same-sex relationships.

Stephen Jones is the Co-Convenor of the Victorian Gay and Lesbian Rights Lobby. Stephen was interviewed to give the Victorian Gay and Lesbian Rights Lobby's perspectives on the relationships recognition debate.

Jenni Millbank is a Professor of Law at the University of Technology, Sydney. Jenni was interviewed because of her significant literary and research contributions to studies of law and sexuality.

Alastair Nicholson is the former Chief Justice of the Family Court of Australia. His opinions concerning the federal recognition of same-sex relationships were sought because of his family law expertise and advocacy of same-sex couples.

Stephen Parker is the Vice-Chancellor and President of the University of Canberra. An interview was conducted with Professor Parker because of his family law expertise.

Kristen Walker is an Associate Professor of Law at the University of Melbourne. Kristen was interviewed because of her constitutional law and law and sexuality research interests and expertise.

Jim Wallace is the Managing Director of the Australian Christian Lobby. Jim was interviewed because of the lobby's involvement in the same-sex relationship recognition debate.

George Williams is an Anthony Mason Professor at the Faculty of Law, University of New South Wales and a Visiting Fellow at the Australian National University. George's expertise was sought as a constitutional law specialist.

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