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# From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition

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## INTRODUCTION

Marriage has been the central focus of the struggle for same-sex relationship rights in the United States for many years now. Arguably, marriage has come to occupy a central place in the collective imagination; indeed, “gay marriage” is often used as a short-hand in popular discourse to stand for any and every form of same-sex relationship recognition. Yet even in some jurisdictions that have now opened marriage to same-sex couples, marriage was not first, and is not the primary, form of relationship recognition.<sup>1</sup> Same-sex relationship rights are in a state of enormous flux with considerable variation apparent among the models, strategies, and substantive effects of recognition around the world.

This Article reflects on the approaches that Australia, and to a lesser extent New Zealand, have taken to relationship recognition, focusing in particular on the ways in which they have differed profoundly from what has happened in the United States. Specifically, the relationship recognition debate in Australia through

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1. For instance, Canada and the Netherlands. For an excellent overview of the situation in Europe, see MORE OR LESS TOGETHER: LEVELS OF LEGAL CONSEQUENCES OF MARRIAGE, COHABITATION AND REGISTERED PARTNERSHIPS FOR DIFFERENT-SEX AND SAME-SEX PARTNERS (Kees Waaldijk ed., 2005).

the 1990s was characterized by the absence of any real interest in marriage and instead focused on developing more functional and adaptive models of relationship recognition, primarily through presumption-based models (for example, the ascription of relationship status).<sup>2</sup>

In the space of just seven years, Australia went from having virtually no recognition of same-sex partnerships to broad-ranging recognition across all of the Australian states and territories. In all jurisdictions, same-sex and heterosexual couples are now on an equal footing under legislation in areas such as inheritance of a partner's property, workers' and accident compensation, consent to a partner's medical treatment, and property division upon relationship breakdown.<sup>3</sup> In 1999 the largest state, New South Wales, first introduced legislation providing comprehensive presumption-based recognition for same-sex relationships.<sup>4</sup> This built on a long standing model of "de facto" relationship status (known in Europe as "informal cohabitation"), available to heterosexual unmarried couples since the early 1980s. From 2001 to 2006 all other Australian states and territories also introduced comprehensive de facto relationship status for same-sex couples.<sup>5</sup> These trends are in stark contrast to the federal arena where there is no explicit recognition of same-sex couples.<sup>6</sup>

The aim of this discussion is to locate these developments in their political and legal context. This context helps to explain the wide divergence in approaches between relationship recognition law

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2. Note that while we use the term "ascription," as does the Law Commission of Canada, Marsha Garrison has referred to the imposition of such a status, in the context of the American Law Institute (ALI) principles, as "conscriptive." Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 715, 818 (2005).

3. See Jenni Millbank, *Recognition of Lesbian and Gay Families in Australian Law—Part One: Couples*, 34 FED. L. REV. 1, 27 (2006).

4. See Reg Graycar & Jenni Millbank, *The Bride Wore Pink . . . to the Property (Relationships) Legislation Amendment Act 1999: Relationships Law Reform in New South Wales*, 17 CAN. J. FAM. L. 227 (2000).

5. See Millbank, *supra* note 3, at 9–32; *infra* note 60 for more recent developments in South Australia.

6. The few rights available to same-sex couples at federal level are through the limited non-couple "interdependent" category in a small number of areas. See JENNI MILLBANK, AREAS OF FEDERAL LAW THAT EXCLUDE SAME-SEX COUPLES AND THEIR CHILDREN (2006), available at [http://www.hreoc.gov.au/samesex/docs/Same\\_Sex\\_Research\\_Paper200609.pdf](http://www.hreoc.gov.au/samesex/docs/Same_Sex_Research_Paper200609.pdf).

reform debates in Australia (mainly focusing on presumption-based approaches), and the opt-in forms of recognition, ranging from marriage, civil unions, or registered partnerships, that seem to have been far more popular in other jurisdictions. More recently, however, following the opening of marriage to same-sex couples in some European jurisdictions and in Canada and Massachusetts, along with the introduction of a formal bar on same-sex marriage in Australia in 2004,<sup>7</sup> we have seen an increased focus on marriage as an institution that symbolizes inequality.

Our near neighbor, New Zealand is a fascinating comparator, as it introduced presumptive recognition for same-sex couples (to a limited extent) in 2001 and followed this a few years later with extensive presumptive recognition in conjunction with opt-in civil unions, both of which are available to same-sex and heterosexual couples.<sup>8</sup> The ongoing influence of the presumptive or “functional family” model<sup>9</sup> is also apparent in Australia and New Zealand through the more recent development of automatic presumptions that grant parental status to lesbian mothers having children through assisted reproductive means.<sup>10</sup> This stands in contrast to the more common use of opt-in models, such as second parent adoption, used to gain parental rights for the non-biological parent in lesbian families elsewhere in the world.<sup>11</sup>

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7. Marriage Amendment Act, 2004 (Austl.).

8. See Civil Union Act 2004, 2004 S.N.Z. No. 102; Relationships (Statutory References) Act, 2005 (N.Z.).

9. For an early United States illustration of this approach, see *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989). This approach was adopted with much greater alacrity in a series of Canadian Charter challenges, many of them relying on the work of sociologist Margrit Eichler. See, e.g., *Canada v. Mossop*, [1993] 1 S.C.R. 554 (especially the dissent of Judge L'Heureux-Dubé); *Re K*, [1995] 15 R.F.L. (4th) 129 (Can.); *M. v. H.*, [1999] 2 S.C.R. 3 (Can.); MARGRIT EICHLER, *FAMILIES IN CANADA TODAY* (2d ed. 1988); MARGRIT EICHLER, *FAMILY SHIFTS: FAMILIES, POLICIES, AND GENDER EQUALITY* (1997); see also *Ghaidan v. Godin-Mendoza*, [2004] 2 A.C. 557 (H.L.) (U.K.) (where the House of Lords extended its *Fitzpatrick* decision by holding that a gay surviving partner was also a “spouse” for the purpose of the Rents Act; the House of Lords attributed this change in such a short period of time to the adoption by England of the Human Rights Act 1998); *Fitzpatrick v. Sterling Hous. Ass'n*, [2001] 1 A.C. 27 (H.L.) (U.K.) (where the House of Lords held that a deceased gay man's surviving partner was a “member his family” for the purposes of succeeding to his tenancy).

10. See Jenni Millbank, *Recognition of Lesbian and Gay Families in Australian Law—Part Two: Children*, 34 *FED. L. REV.* 205 (2006).

11. For discussions of second parent adoption in the United States, see Nancy Polikoff,

We suggest that two key factors are responsible for the distinctive approach to law reform that has been taken in much of Australia. The first of these is the pre-existing legal terrain upon which same-sex relationship recognition was built. Australian law has treated people in cohabiting (though unregistered) heterosexual relationships in ways almost identical to married couples for a considerable period. This legal framework, of according presumptive status by way of recognizing de facto relationships, was then built upon in the relationship recognition debates, at least within the lesbian and gay communities in New South Wales (and more broadly, in Australia). This context provides a new twist to conservative arguments for the “special-ness” of civil marriage in Australia, since marriage makes little or no difference to the legal status of heterosexual couples. The other significant factor is the absence in Australia of a Bill of Rights, a Charter of Rights, or other form of constitutional guarantee of equality.<sup>12</sup> Although New Zealand has a Bill of Rights with an equality guarantee, it is statutory only and does not have constitutional status (for which reason it does not provide an effective avenue for legislative challenges).<sup>13</sup> This means that legal reforms in both countries have emanated from the legislature, rather than originating in or being influenced by judicial decisions. While this may have meant slow and piecemeal developments in many cases, it has also meant greater opportunity for gay and lesbian community groups to initiate and consult about reform options and to develop more diverse reform models. This is in marked contrast to the United

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*The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375 (1996); Ruthann Robson, *Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15 (2000); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17 (1999).

12. See TOWARDS AN AUSTRALIAN BILL OF RIGHTS (Philip Alston ed., 1994); see also HILARY CHARLESWORTH, WRITING IN RIGHTS: AUSTRALIA AND THE PROTECTION OF HUMAN RIGHTS (2001); GEORGE WILLIAMS, THE CASE FOR AN AUSTRALIAN BILL OF RIGHTS (2004). Recently, the Australian Capital Territory and the state of Victoria have both enacted limited statutory bills of rights: Human Rights Act, 2004 (Austl. Cap. Terr.); Charter of Human Rights and Responsibilities Act, 2006 (Vict.). Neither of these will have much if any impact on these issues since both statutes are very limited (for example, they cannot be used to strike down or vary inconsistent legislation) and have no power to affect federal law.

13. See Bill of Rights Act 1990, 1990 S.N.Z. No. 109, §§ 4, 6.

States, Canada, and South Africa where litigation has been critical to legal developments.<sup>14</sup>

In this discussion we start, by way of background, with an explanation of the development of widespread legal recognition of heterosexual non-marital cohabiting relationships (“de facto relationships”) in Australia. We then briefly outline the first same-sex relationship law reforms in Australia in 1999 in the state of New South Wales before touching on areas of similarity and difference in other Australian states and territories. We then critically analyze this history, highlighting the features that are distinctive to Australia, such as the emphasis on presumptive recognition, the move to recognize non-couple relationships, and, until recently, the lack of focus on marriage. Since 2004, marriage has come to be an increasingly popular equality goal in Australia and we consider possible reasons for this. We also examine the ways in which the open-ended “interdependency” relationship model, originally promoted by progressive functional family advocates has, arguably, been co-opted and subverted by conservatives. We conclude with some reflections on how these very different approaches might be explained.

#### I. SOME LEGISLATIVE HISTORY IN NEW SOUTH WALES: THE 1983 LAW REFORM COMMISSION REPORT AND THE DE FACTO RELATIONSHIPS ACT 1984

The starting point for comprehensive recognition of heterosexual cohabiting relationships in Australian law was the reference to the New South Wales Law Reform Commission of an inquiry into de facto relationships in 1981.<sup>15</sup> Before then, a small number of state

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14. See, e.g., *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); Reference *re Same Sex Marriage*, [2004] 3 S.C.R. 698 (Can.); *Minister of Home Affairs and Another v Fourie and Another* 2005 (60) SA 1 (CC) (S. Afr.). Surprisingly, given remarks in the decision in *Fourie* about the harm of symbolic exclusion, the South African government reacted with a separate Civil Union Act rather than any amendment to the Marriage Act. While the Civil Union Act allows for a “civil union” to be solemnized either as a “marriage” or as a “civil partnership” this status is still separate from that under the Marriage Act 25 of 1961 (S. Afr.), although the rights accorded to each are expressly equated. See Civil Union Act 17 of 2006, §§ 2, 8, 13 (S. Afr.).

15. See N.S.W. LAW REFORM COMM’N, DE FACTO RELATIONSHIPS (Report 36), at ch. 1 (1983) [hereinafter DE FACTO RELATIONSHIPS].

(and federal) laws had recognized de facto relationships for very limited purposes.<sup>16</sup> While the terms of reference of the inquiry referred to “the law relating to family and domestic relationships,” and specifically to de facto relationships, the Law Reform Commission decided at a preliminary stage to focus exclusively upon heterosexual de facto relationships and not to extend its recommendations to “other domestic or household relationships, such as those constituted by parents and adult children, siblings, homosexual couples, or larger groups living in a common household.”<sup>17</sup>

The main recommendation of the 1983 report was the introduction of a new legislative property division regime for heterosexual de facto couples (excluded from federal family law for constitutional reasons)<sup>18</sup>

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16. Some examples are discussed by the New South Wales Law Reform Commission. *Id.* at ch. 4. This report was the outcome of the first Australian broad-ranging, public and government initiated law reform project. Interestingly, the Law Commission of England and Wales commenced an inquiry into similar issues in 2006, *after* the government enacted legislation enabling same-sex couples to register civil unions. LAW COMM’N OF ENG. & WALES, COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN (2006), available at <http://www.lawcom.gov.uk/docs/cp179.pdf>; see Anne Bottomley, *From Mrs. Burns to Mrs. Oxley: Do Co-Habiting Women (Still) Need Marriage Law?*, 14 FEMINIST LEGAL STUD. 181 (2006); Simone Wong, *Cohabitation and the Law Commission’s Project*, 14 FEMINIST LEGAL STUD. 145 (2006).

17. See DE FACTO RELATIONSHIPS, *supra* note 15, § 1.3. The Commission noted:

The distinction drawn by the law accepts that de facto relationships resemble marriage to a certain extent, although not in all respects. It is this partial resemblance which has prompted legislators and policy makers specifically to confer rights and impose obligations on de facto partners in certain situations. Other domestic relationships bear less resemblance to marriage.

*Id.* § 1.4.

18. See Commonwealth of Australia Constitution at section 51(xxii), which provides the federal government with power to legislate with respect to marriage, while section 51(xxii) refers to “divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.” See also Marriage Act, 1961 (Austl.). There have been two significant shifts in the federal/state balance with regard to “family law.” First, while children’s issues involving ex-nuptial children used to be “state” matters, now (with the exception of child welfare and adoption) all other children’s issues (particularly residence and contact) fall within the jurisdiction of the federal Family Law Act, 1975 (Austl.), irrespective of the marital status of the child’s parents. This is because between 1986–1990 all states (other than Western Australia) transferred some of their powers over children to the Commonwealth. The terms and limitations of these transfers of power are recognized in the Family Law Act, 1975, § 69ZE (Austl.). Western Australia did not do so, as it has a complementary family law system. See Family Court Act, 1997 (W. Austl.). More recently, the states and territories (except Western Australia) agreed to refer their powers over the property disputes of all

as well as the inclusion of heterosexual de facto relationships in a small number of other New South Wales Acts.<sup>19</sup> The report was implemented in 1984 with the enactment of the De Facto Relationships Act.<sup>20</sup>

A de facto couple was defined as two people living together as husband and wife on a “bona fide domestic basis.”<sup>21</sup> In subsequent years, cohabiting heterosexual couples gradually came to be included as “spouses” for many different purposes in a wide range of laws, and the difference between marriage and “de facto marriage” narrowed significantly.<sup>22</sup>

Since the enactment of this legislation in 1984, the ascription of “de facto” status has been presumption-based, that is, it applies to all those who meet the statutory criteria, rather than only those who opt in or register their relationship.<sup>23</sup> The premise of the legislation is that such

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unmarried couples to the Commonwealth. Thus far, four states and territories have done so. *See* Commonwealth Powers (De Facto Relationships) Act, 2003 (N.S.W.); Commonwealth Powers (De Facto Relationships) Act, 2003 (Queensl.); Commonwealth Powers (De Facto Relationships) Act, 2004 (Vict.); De Facto Relationships (Northern Territory Request) Act, 2003 (N. Terr.). However, the Commonwealth has indicated that it will only legislate for heterosexual couples and not accept the reference for same-sex couples. *See* MILLBANK, *supra* note 6, at 48–49.

19. *See* Graycar & Millbank, *supra* note 4, at 232.

20. *See* the De Facto Relationships Act, 1984 (N.S.W.). The Property (Relationships) Legislation Amendment Act, 1999 (N.S.W.), inserted a new definition of de facto relationship into what had been the De Facto Relationships Act, 1984 (N.S.W.), and renamed it as the Property (Relationships) Act, 1984 (N.S.W.). For details of the changes made in 1999, see Graycar & Millbank, *supra* note 4.

21. New South Wales’ 1984 De Facto Relationships Act defined a de facto relationship as:

(a) in relation to a man, a woman who is living or has lived with a man as his wife on a bona fide domestic basis although not married to him, and (b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.

De Facto Relationships Act, 1984, § 4 (N.S.W.).

22. Ironically, the only lasting difference in New South Wales relates to the regime for dividing property upon the break down of the relationship. This was the first aspect of the reforms and is the one major difference in treatment between married and unmarried couples whose relationships ends. *See id.* § 20; *see also* Graycar & Millbank, *supra* note 4, at 233–34. States and territories that reformed their laws later tended to do so by reference to the Family Law Act, 1975 (Austl.) (the law that governs divorce and property adjustment for those ending marriages), which provides a much broader power to adjust property interests when a marriage breaks down. At least for heterosexual couples, once the reference of powers comes into effect, that difference will disappear. *See supra* note 18.

23. When enacted, the De Facto Relationships Act, 1984, §§ 44–47, provided for the

couples are married in fact if not in law; hence, de facto spouses and de facto relationships quickly became accepted legal and social concepts in Australia.<sup>24</sup>

## II. THE BRIDE WORE PINK: COMMUNITY-INITIATED LAW REFORM

Although the Law Reform Commission in its 1983 report on de facto relationships suggested that a broader inquiry into relationship law reform might be appropriate, no such inquiry was forthcoming.<sup>25</sup> Nor was there any formal review of the operation of the 1984 De Facto Relationships legislation in its first fifteen years of operation.<sup>26</sup>

However, community groups concerned about the lack of recognition for same-sex relationships developed their own discussion papers, carried out consultations, and, eventually, drafted legislation. In 1993 the Gay and Lesbian Rights Lobby of New South Wales (GLRL)<sup>27</sup> published a draft discussion paper titled *The Bride Wore Pink*, which set out a number of tentative proposals that then formed the basis of consultation in the gay and lesbian communities.<sup>28</sup> In summary, it proposed that a number of New South Wales laws should be amended to enable people to nominate a person as someone with whom they have a “significant personal relationship” for particular purposes.<sup>29</sup> The paper raised questions about the connection between couple relationships and legal rights and obligations, and specifically proposed that different people might

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making of binding cohabitation and separation agreements; in effect, the scheme allowed people to *opt out* of the property division regime, whereas some of the registration schemes discussed below only apply to those who opt in.

24. The term has come to be widely used and accepted in Australia, but strictly speaking, the “de facto relationship” is something of a misnomer; the more appropriate term might be “de facto marriage.”

25. DE FACTO RELATIONSHIPS, *supra* note 15, §§ 1.3–1.4.

26. In 1999 the New South Wales government referred the Act to the New South Wales Law Reform Commission, shortly after passing the Property (Relationships) Legislation Amendment Act, 1999 (N.S.W.). N.S.W. LAW REFORM COMM’N, RELATIONSHIPS AND THE LAW: REVIEW OF THE PROPERTY (RELATIONSHIPS) ACT 1984 (2000), available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/digest.101> [hereinafter RELATIONSHIPS].

27. See The Gay & Lesbian Rights Lobby, <http://www.glr.org.au> (last visited May 17, 2007).

28. *The Bride Wore Pink: Legal Recognition of Our Relationships*, 3 AUSTRALASIAN GAY & LESBIAN L.J. 67 (1993).

29. *Id.* at 83–86.

be nominated as the person with whom one had a significant personal relationship for different purposes.<sup>30</sup> Even though the GLRL proposed an opt-in system, the ability to nominate different people for different purposes would have distinguished it significantly from registered partnership approaches in Europe and the United States. This model was presented to the lesbian and gay communities via a series of consultations and, as a result, the GLRL produced a revised version of *The Bride Wore Pink* in 1994.<sup>31</sup> This final report abandoned the idea of allowing people to nominate more than one significant personal relationship as being too difficult to implement but recommended instead that legal recognition should *simultaneously but distinctly* be accorded to same-sex couple relationships and to people in other forms of interdependent relationships.<sup>32</sup>

The dual model, recognizing couples and others, flowed from a concern referred to in both versions of the discussion paper that seeking recognition of gay and lesbian live-in couple relationships should not exclude many other people not living in couples, or couples who were not living together (whether or not gay or lesbian).<sup>33</sup> In many ways the paper was influenced by the experience of the AIDS crisis in Sydney through the late 1980s and early 1990s.<sup>34</sup> This brought a heightened awareness of legal issues associated with illness and death, but also a greater concern for non-couple relationships that involved caregiving or other forms of emotional or financial interdependence. For many lesbians and gay men (then and now), coming out led to a breach with families of origin and the formation of relationships with other lesbians and gay men.

From the very first version of *The Bride Wore Pink*, the authors sought to go back to first principles, raising questions about marriage and, in particular, why certain rights and obligations were

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30. *Id.* at 86–87.

31. GAY & LESBIAN RIGHTS LOBBY, *THE BRIDE WORE PINK: LEGAL REGOGNITION OF OUR RELATIONSHIPS* (2d ed. 1994), available at [http://www.glr.org.au/publications/major\\_reports/bride\\_wore\\_pink.pdf](http://www.glr.org.au/publications/major_reports/bride_wore_pink.pdf).

32. *Id.* at 2–3.

33. See *id.* at 25–26; *The Bride Wore Pink*, *supra* note 28, at 83–84, 86–87.

34. GAY & LESBIAN RIGHTS LOBBY, *supra* note 31, at 14.

automatically assumed to flow from marriage (and in some cases, other conjugal or “marriage-like” relationships).<sup>35</sup> In other words, how had marriage become the original entitlement or benchmark?<sup>36</sup> In both editions, the GLRL called for “disaggregation,” for government policies to treat people as individuals for purposes such as social security (welfare) rather than as members of a couple.<sup>37</sup> The discussion paper aired a number of significant policy concerns, critically evaluating the advantages as well as the disadvantages of relationship recognition. These included the issue of “who’s in/who’s out,” that is, assessing a concern that a group that has historically been marginalized ought not to replicate and reinforce other exclusions.<sup>38</sup> It also expressed concern about the privatization of economic responsibility in an era of a shrinking welfare state, an acknowledgment that relationship recognition is often welcomed by governments (or courts) only insofar as it shifts financial burdens away from the public and toward private obligations.<sup>39</sup> The GLRL

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35. Paula Ettelbrick argued that, “The problem in this area is not so much that lesbian and gay couples cannot marry. Rather, it is that all of the legal and social benefits and privileges constructed for families are available only to those families joined by marriage and biology.” Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL’Y 107, 122 (1996). The Law Commission of Canada raised similar questions about the assumption that marriage is the determinant of legal and social benefits in its research report, CANADIAN MINISTRY OF JUSTICE, LAW COMM’N OF CAN., *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (2001) [hereinafter *BEYOND CONJUGALITY*]; see also Susan B. Boyd & Claire F.L. Young, “From Same-Sex to No Sex”?: *Trends Towards Recognition of (Same-Sex) Relationships in Canada*, 1 SEATTLE J. SOC. JUST. 757 (2003); Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201 (2003).

36. Cf. Reg Graycar, *Law Reform by Frozen Chook: Family Law Reform for the New Millennium?*, 24 MELB. U. L. REV. 737 (2000).

37. The main financial issue flowing from “disaggregation” is the payment of social security payments (which in Australia are more comparable to “welfare payments” since they are not contribution based). The Australian Social Security system treats people in heterosexual couples as married for a variety of purposes. By contrast, with some exceptions, Australia’s tax system is based on an individual unit of assessment, although in the past decade heterosexual household income has increasingly been used to determine eligibility for a number of health, child and family related payments. See MILLBANK, *supra* note 6 (in particular the sections on Medicare, the pharmaceutical benefits scheme, the child care rebate, and the family tax benefit).

38. *The Bride Wore Pink*, *supra* note 28, at 72–73.

39. See Jenni Millbank, *An Implied Promise to Parent: Lesbian Families, Litigation and W v. G*, 10 AUSTL. J. FAM. L. 112 (1996); Claire Young & Susan B. Boyd, *Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada*, 10 FEMINIST LEGAL STUD. 213 (2006).

recognized the possibility that relationship recognition might most benefit the already-privileged, while at the same time it could exacerbate the disadvantages of impoverished people through the imposition of responsibility in areas such as welfare.<sup>40</sup> Indeed, a version of this concern led to a shift toward a presumptive approach, away from an opt-in approach as had been proposed in the first draft. This preference for a presumption-based approach recognized that those most vulnerable are also those least likely to formally register their relationships and legal affairs, no matter what the system of recognition.<sup>41</sup> There were also concerns that registration would reinforce a tiered approach to relationships, relegating same-sex relationships to a third tier (after marriage and heterosexual cohabitation).<sup>42</sup> A further underlying theme of the discussion paper is a suspicion, clearly grounded in feminism, of marriage as the benchmark upon which other forms of relationships should be modeled,<sup>43</sup> which led to a real attempt to use the consultation process to rethink some of the presumptions that have been so readily adopted in earlier debates.

By the final report, the GLRL had a clear reform platform: seek immediate law reform on de facto relationships and domestic partners and ask a body such as the Law Reform Commission to consider in more detail fundamental questions concerning the focus of the law on “monogamy, exclusivity and blood relations,” and the need to recognize a broader concept of relationships.<sup>44</sup>

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40. GAY & LESBIAN RIGHTS LOBBY, *supra* note 31, at 45–46.

41. Compare the ALI’s preference for a presumptive status to attach to cohabitants, which is explained as reflecting: “a judgment that it is usually just to apply to [cohabitants] . . . the property and support rules applicable to divorcing spouses, that individualized inquiries are usually impractical or unduly burdensome, and that it therefore makes more sense to require parties to contract out of these property and support rules than to contract into them.” PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (2002).

42. GAY & LESBIAN RIGHTS LOBBY, *supra* note 31, at 8.

43. *Id.* at 34, 44.

44. *Id.* at 44–45.

### III. WHY THE DUAL RECOGNITION MODEL?

The overarching principle guiding *The Bride Wore Pink* was that the kinds of relationships that laws should regulate ought to depend upon the purpose of the law in question. As these purposes vary, so should the type of recognition or obligation. For example, some laws that recognize relationships do so because of financial dependence or interdependence between the partners (such as property division and inheritance laws) while others are more concerned with emotional connection (such as decision-making in the event of incapacity or death, including issues such as medical care or organ donation). Live-in sexual relationships are not the only ones to give rise to such ties, but they are the relationships that are most likely to give rise to all of them. Therefore, the GLRL proposed that live-in partner relationship recognition should be broad-based and presumptive.<sup>45</sup> While other forms of close relationships may give rise to emotional or financial ties in certain circumstances, those situations may not be so predictable or widespread. For that reason, they recommended a more limited strategy of recognizing other relationships for a smaller number of purposes. However, the GLRL considered it important to maintain the focus on couple relationships since, during the consultation process on *The Bride Wore Pink*, it became apparent that while members of the lesbian and gay communities were anxious to avoid excluding various kinds of relationships, they did not wish to see their own partner relationships identified by law as “other” partner relationships.

### IV. LEGISLATIVE REFORMS RECOGNIZING COHABITING COUPLES: 1999–2005

The GLRL’s proposals were adopted in a modified form in 1999, and since then New South Wales law recognizes same-sex couples in the same way as married and heterosexual unmarried couples for most legal purposes.<sup>46</sup> Others who are not couples, but are in

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45. *Id.* at 29–33.

46. The Property (Relationships) Legislation Amendment Act, 1999 (N.S.W.), inserted a new definition of de facto relationship into what had been the De Facto Relationships Act, 1984

(narrowly defined) “close personal relationships,” have some rights and obligations, though only under a very limited number of New South Wales laws.<sup>47</sup> To this extent, it seems fair to assert that *The Bride Wore Pink* functioned as the key law reform document that guided the approach of the government.<sup>48</sup> Though limited in scope, it was the first such reform in Australia,<sup>49</sup> and later reforms built on and expanded it.

The New South Wales reforms redefined a de facto relationship as “two adult persons” who “live together as a couple” and “are not married to one another or related by family.”<sup>50</sup> The Act lists factors for determining whether a couple is in a de facto relationship.<sup>51</sup> While a couple needs to be cohabiting to be recognized as a de facto couple under New South Wales law, only legislation relating to property division and inheritance sets a time period for that cohabitation.<sup>52</sup>

Victoria became the next state to enact such legislation in 2001,<sup>53</sup> followed by Queensland in 2002,<sup>54</sup> Western Australia in 2002 and

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(N.S.W.), now renamed the Property (Relationships) Act, 1984 (N.S.W.), and applied the new definition to numerous other pieces of legislation concerning matters such as guardianship, inheritance, accident compensation, stamp duty and decision-making in illness and after death.

47. The Property (Relationships) Act defines a “domestic relationship” as a de facto relationship or “a close personal relationship . . . between two adult persons whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.” Property (Relationships) Act, 1984, § 5(1)(b).

48. Then-Attorney-General Jeff Shaw acknowledged this and also referred to the work of the Anti-Discrimination Board and the AIDS Council of New South Wales. See Jeff Shaw, *Law Reform Happens*, 24 ALTERNATIVE L.J. 247 (1999). Since the introduction of the 1999 legislation, a broader inquiry into relationships law reform has been languishing at the New South Wales Law Reform Commission (NSWLRC). The NSWLRC published a discussion paper in 2002, and we await a final report. See [http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/pages/lrc\\_cref101](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/lrc_cref101) (last visited June 22, 2007).

49. Note, however, that in 1994, the Australian Capital Territory enacted the Domestic Relations Act, 1994, § 3(1) (Austl. Cap. Terr.), which defined a “domestic relationship” as including non-cohabitants, and indeed, non-conjugal couples. See Jenni Millbank, *Domestic Rifts: Who Is Using the Domestic Relationships Act 1994 (ACT)?*, 14 AUSTL. J. FAM. L. 163 (2000). However, as will be discussed, later Australian Capital Territory reforms abandoned this broad approach.

50. Property (Relationships) Act, § 4(1).

51. *Id.* § 4(2). The criteria were drawn from *D v. McA*, (1986) 11 Fam. L. Rev. 214, 227 (N.S.W.).

52. There is no time requirement for property division if the parties have a child, and there is also broad discretion to waive the time requirement if it would impose undue hardship on an applicant. Property (Relationships) Act, § 17(2).

53. Together, the Statute Law Amendment (Relationships) Act, 2001 (Vict.), and (a few months later) the Statute Law Further Amendment (Relationships) Act, 2001 (Vict.), changed

2003,<sup>55</sup> the Northern Territory in 2003,<sup>56</sup> Tasmania in 2003,<sup>57</sup> and the Australian Capital Territory in 2003 and 2004.<sup>58</sup> South Australia had bills before Parliament in 2004<sup>59</sup> and 2005, but it was not until 2006 that the reforms were finally enacted in that state.<sup>60</sup>

The various states and territories employ a range of different terminology. New South Wales, Queensland, Western Australia, and the Northern Territory use the terms “de facto relationship” and “de

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over sixty pieces of law in Victoria to include cohabiting same-sex couples as “domestic partners” on the same basis as unmarried heterosexual couples.

54. In 2002 Queensland passed the Discrimination Law Amendment Act, 2002 (Queensl.), which amended forty-five statutes to include same-sex couples as “de facto partners.” The Acts Interpretation Act, 1954, § 32DA(6) (Queensl.), now provides that any reference to a spouse in all Queensland-state legislation is taken to include a de facto partner unless the substantive act expressly provides to the contrary.

55. The Acts Amendment (Lesbian and Gay Law Reform) Act, 2002 (W. Austl.), and Acts Amendment (Equality of Status) Act, 2003 (W. Austl.), amended over seventy statutes in Western Australia to include same-sex couples as de facto relationships. Western Australia is unique among Australian states in that it has its own family court. So, unlike reforms in other states, which left the federal family law regime untouched, Western Australia was able to absorb same-sex couples into its family law system both in relation to property disputes and as legal parents in relation to disputes over children. *See* Family Court Amendment Act, 2002 (W. Austl.).

56. The Law Reform (Gender, Sexuality and De Facto Relationships) Act, 2003 (N. Terr.), amended fifty-four pieces of territory legislation to include same-sex couples as de facto relationships. The amendments also included aboriginal customary marriages within the definition of “spouse” across a range of territory laws.

57. The Relationships Act, 2003 (Tas.), and Relationships (Consequential Amendments) Act, 2003 (Tas.), amended seventy-three statutes to include same-sex partners as “significant relationships.” The legislation also recognizes non-couples in more limited circumstances and allows for a form of registration for both couple and non-couple relationships. *Id.*

58. The Legislation (Gay, Lesbian and Transgender) Amendment Act, 2003 (Austl. Cap. Terr.), and the Sexuality Discrimination Legislation Amendment Act, 2004 (Austl. Cap. Terr.), together amended forty-one pieces of territory law to include same-sex couples as “domestic partnerships.”

59. In 2004 the Statutes Amendment (Relationships) Bill, 2004 (S. Austl.), proposed amendments to eighty-two state laws to include same-sex couples as “domestic partners.”

60. Statutes Amendment (Domestic Partners) Act, 2006 (S. Austl.). In South Australia the opposition blocked the government’s 2004 and 2005 bills to extend de facto relationship status to same-sex couples. The opposition introduced its own bill, proposing that all “other” or non-heterosexual relationships could “opt-in” to a limited form of recognition. Relationships Bill, 2005 (S. Austl.). In March 2006 the Labor Party won the state election and gained control of the upper house. In that year another piece of legislation was introduced, and on December 14, 2006, the Statutes Amendment (Domestic Partners) Act, 2006 was enacted. This final version dropped the opt-in provisions and dual categories, and created one presumptive category of “domestic partner” that, although using the word “couple” in the definition, expressly includes non-sexual relationships in addition to couples. Statutes Amendment (Domestic Partners) Act, 2006, § 74 (S. Austl.).

facto partner.” Victoria, the Australian Capital Territory, and South Australia use “domestic relationship” and “domestic partner,” while Tasmania uses the term “significant relationship.”<sup>61</sup> These differences in terminology are not of any real significance, as each jurisdiction has adopted a common set of criteria for determining the existence of such relationships in case of dispute. Generally speaking, there is now a far higher degree of consistency, both within and between states, in the rights granted to unmarried heterosexual and same-sex couples, and the definitions used to characterize them.

#### V. IS COHABITATION REQUIRED?

The most important substantive difference in the couple-based categories is in whether recognition as a couple requires cohabitation. Tasmanian law does not require that the couple live together, and Victoria has two definitions of a “domestic” relationship, one of which requires the couple to live together (this applies to laws that relate to financial rights or economic dependence) and another that does not require cohabitation (used in mostly health related areas and laws that concern emotional interdependence).<sup>62</sup> Of the remaining jurisdictions that do require cohabitation, very few laws in each jurisdiction, principally those concerning inheritance and property division, include a requirement that the relationship be of a specific length to qualify (usually two years).<sup>63</sup>

#### VI. THE ROLE OF PROGRESSIVE GOVERNMENTS

A significant trend evident in Australia is that Labor Party governments, many of them in their first term of office, introduced all major statutory reforms. This is consistent with worldwide trends, where it has been overwhelmingly center-left and leftist governments

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61. See Millbank, *supra* note 3.

62. *Id.*

63. The South Australian reforms are the exception to this trend, setting a three-year cohabitation requirement for all state law (previously there was a five-year time requirement for heterosexual de facto couples under South Australian law). Statutes Amendment (Domestic Partners) Act, 2006, § 11A.

that have pursued same-sex relationship reforms.<sup>64</sup> Perhaps unusually, Australian reforms have faced relatively little parliamentary opposition,<sup>65</sup> with the Liberal (conservative) opposition often offering either no opposition or permitting its members to exercise a conscience vote.<sup>66</sup> Only in Western Australia and South Australia has the opposition seriously attempted to prevent reform.<sup>67</sup> At the time of writing, Western Australia is the only state with an opposition committed to the repeal of laws recognizing same-sex relationships.<sup>68</sup>

## VII. THE IMPORTANCE OF COMMUNITY INVOLVEMENT

There was considerable variation in the involvement of the gay and lesbian community groups in the reform processes, both in initiating the proposed reforms and in the context of public consultation. In New South Wales and Tasmania,<sup>69</sup> gay and lesbian community groups first developed the models that formed the basis of legislation,<sup>70</sup> while in the Northern Territory, a community legal

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64. See Robert Wintemute, *Conclusion, in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 759 (Robert Wintemute & Mads Andenæs eds., 2001).

65. For a discussion of the parliamentary debates in New South Wales, see Jenni Millbank & Wayne Morgan, *Let Them Eat Cake, and Ice Cream: Wanting Something "More" from the Relationship Recognition Menu*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 64, at 295

66. See Millbank, *supra* note 3, at 14, 17, 18.

67. *Id.* at 24, 32–35.

68. See Western Australia, Legislative Assembly *Hansard* 11 Dec. 2001, at 6914 (statement of Colin Barnett), available at <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Hansard+-+Advanced+Search> (in "Date Is On:" field, type 11/12/2001). This was also a Western Australian Liberal Party policy in the 2005 state election, but the Liberal Party did not prevail. See also Stacy Farrar, *Gay Rights Rollback; West Australian Liberals Call for the First Rollback of Gay and Lesbian Rights*, SYDNEY STAR OBSERVER (Sydney, Austl.), Dec. 9, 2004, available at <http://www.ssonet.com.au/archives/display.asp?articleID=4632> (last visited June 22, 2007).

69. In 1997 the Tasmanian Gay and Lesbian Rights Group proposed a model in which both couples and non-couples could be recognized through a presumptive status as well as registration, neither of which required cohabitation. See Rodney Croome, *Relationship Law Reform in Tasmania*, WORD IS OUT, June 2003, at 1, available at <http://www.arts.usyd.edu.au/publications/wordisout/archive/07croome.pdf> (however, note that the remarks on adoption do not reflect the final Act, which was far more restrictive).

70. See LET'S GET EQUAL CAMPAIGN WORKING PARTY, POSITION STATEMENT: LEGAL RECOGNITION OF SAME SEX RELATIONSHIPS IN SOUTH AUSTRALIA (2001), <http://www.>

center initiated the law reform.<sup>71</sup> In other jurisdictions, such as the Australian Capital Territory, community groups formed in response to government initiated proposals, rather than themselves developing reform models.<sup>72</sup> In Victoria<sup>73</sup> and Western Australia,<sup>74</sup> representatives of gay and lesbian community groups participated in governmental advisory committees that formulated the platform for legislative action.

As for the consultation processes, the Queensland and Northern Territory governments did not engage in any real form of public consultative process. By contrast, the Australian Capital Territory held open consultation processes for all stages of the reform process,<sup>75</sup> while Tasmania and South Australia accepted limited public input through the parliamentary committee process.<sup>76</sup> In New South Wales, as noted above, the reforms followed the work of the GLRL, but when the government introduced its own legislation, there was no further public consultation with affected communities.

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letsgetequal.org.au/LetsGetEqual\_PositionStatem.pdf. For a discussion of the early years of the South Australian process, see Matthew Loader, *Recognising Same Sex Relationships: Ideas and an Update from South Australia*, WORD IS OUT, June 2003, at 8, available at <http://www.arts.usyd.edu.au/publications/wordisout/archive/07loader.pdf>.

71. DARWIN CMTY. LEGAL SERV., EQUALITY BEFORE THE LAW: GAY AND LESBIAN LAW REFORM IN THE NT (2002), available at <http://www.dcls.org.au/GayLesbianLawReform.htm> (last visited June 22, 2007). This document was prompted by a community forum rather than any government-initiated inquiry, and drew heavily on the Western Australian Ministerial Advisory Committee Report.

72. See Millbank, *supra* note 3, at 30.

73. See Victoria Attorney-General's Advisory Committee on Gay, Lesbian and Transgender Issues, *Reducing Discrimination Against Same Sex Couples* (2000). For a discussion of the Victorian process, see Miranda Stewart, *It's a Queer Thing: Campaigning for Equality and Social Justice for Lesbians and Gay Men*, 29 ALTERNATIVE L.J. 75 (2004).

74. See DARWIN CMTY. LEGAL SERV., *supra* note 71.

75. ACT DEP'T OF JUSTICE & CMTY. SAFETY, *Gay, Lesbian, Bisexual, Transgender and Intersex People in the ACT: An Issues Paper* (2002), available at [http://www.jcs.act.gov.au/elibrary/papers/same\\_sex\\_%20issues\\_paper.pdf](http://www.jcs.act.gov.au/elibrary/papers/same_sex_%20issues_paper.pdf) (last visited June 22, 2007).

76. See JOINT STANDING COMM. ON CMTY. DEV., INQUIRY INTO THE LEGAL RECOGNITION OF SIGNIFICANT RELATIONSHIPS 6–7 (2001); REMOVING LEGISLATIVE DISCRIMINATION AGAINST SAME-SEX COUPLES (2003), available at [www.sapo.org.au/binary282/Same.pdf](http://www.sapo.org.au/binary282/Same.pdf). No recommendations were published, and the government moved directly to legislation. However, the legislation was then referred by the opposition to Parliamentary Committee.

## VIII. THE “LAW OF SMALL CHANGE”

Once New South Wales had passed its legislation in 1999, the other states and territories built upon and, in almost all cases, extended the reach of earlier reforms. This is consistent with a general global trend in same-sex relationship recognition described by Dutch expert Kees Waaldijk as “the law of small change.”<sup>77</sup> Waaldijk argues that across Europe there is a clear pattern of “steady progress” across “standard sequences” in each country, beginning with decriminalization of gay sex, setting an equal age of consent, the introduction of anti-discrimination protections for individuals, and then various incremental legislative changes recognizing same-sex partnerships and parenting.<sup>78</sup> While such progress is not necessarily linear (for example, with backlash measures sometimes occurring simultaneously)<sup>79</sup> and not always in the sequence identified by Waaldijk, in a federation such as Australia we can discern a similar overall trend. It is appropriate to consider the various state and territory jurisdictions in a cumulative sense as having built upon each others’ small changes to produce, in a remarkably short space of time, significant national change.

New Zealand provides an interesting contrast to Australia in that it does *not* have the same context of historical broad-ranging recognition of unmarried heterosexual couples.<sup>80</sup> While there were a range of recommendations for the introduction of a property division regime for unmarried heterosexual couples in New Zealand in the 1980s and early 1990s, none was implemented.<sup>81</sup> By the 1990s

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77. Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 64, at 437.

78. *Id.* at 439–42.

79. Indeed, it is arguable that no law reform processes are linear. For some discussion, see Margaret Davies, *Legal Theory and Law Reform: Some Mainstream and Critical Approaches*, 28 ALTERNATIVE L.J. 168 (2003); Reg Graycar & Jenny Morgan, *Law Reform: What’s in It for Women?*, 23 WINDSOR Y.B. ACCESS JUST. 393 (2005); Carol Smart, *Feminism and Law: Some Problems of Analysis and Strategy*, 14 INT’L J. SOC. L. 109 (1986); Margaret Thornton, *Feminism and the Contradictions of Law Reform*, 19 INT’L J. SOC. L. 453 (1991).

80. See Virginia Grainer, *What’s Yours Is Mine: Reform of the Property Division Regime for Unmarried Couples in New Zealand*, 11 PAC. RIM L. & POL’Y J. 285, 297–98 (2002).

81. See Bill Atkin, *The Challenge of Unmarried Cohabitation—The New Zealand Response*, 37 FAM. L.Q. 303, 311 (2003) [hereinafter Atkin, *Challenge*]; Bill Atkin, *Reforming*

reform proposals came to address the situation of both heterosexual and same-sex couples, with a clear shift away from heterosexual unmarried couples to focus far more attention instead upon the legal position of same-sex couples.<sup>82</sup> This is attributable, at least in part, to the government's desire to ensure that legislation was consistent with the non-discrimination provisions in the Bill of Rights Act of 1990 (which specifically recognizes sexual orientation, but which does not, as mentioned earlier, provide the ability to strike down inconsistent legislation).<sup>83</sup> In the late 1990s a series of public discussion papers by the Ministry of Justice, augmented by the work of the Law Commission, placed on the agenda for discussion both an opt-in registration model and the extension of presumptive recognition for same-sex couples.<sup>84</sup>

In 2001 New Zealand enacted a small set of reforms which granted rights, for the first time, to both same-sex and heterosexual de facto couples in the areas of property division and inheritance.<sup>85</sup>

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*Property Division in New Zealand: From Marriage to Relationships*, 3 EUR. J.L. REFORM 349, 353–54 (2001) [hereinafter Atkin, *Reforming*].

82. Indeed, the Law Commission argued openly that recognition of same-sex couples should take precedence:

[T]here is a clear distinction between the position of same-sex partners on the one hand and opposite-sex de facto partners on the other. The latter (absent impediments to marriage such as an existing spouse) are unmarried as a matter of choice. The case for helping the former is much stronger because, as the law now stands, they have no such choice.

LAW COMM'N OF N.Z., RECOGNISING SAME SEX RELATIONSHIPS, STUDY PAPER 4, at para. 19 (1999), available at [http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_108\\_277\\_SP4.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_108_277_SP4.pdf).

83. This project was called, somewhat disarmingly, Consistency 2000. See MINISTRY OF JUSTICE, SAME-SEX COUPLES AND THE LAW 1 (1999), available at [http://www.justice.govt.nz/pubs/reports/1999/same\\_sex/discussion.pdf](http://www.justice.govt.nz/pubs/reports/1999/same_sex/discussion.pdf); Atkin, *Challenge*, *supra* note 81, at 314.

84. See Loader, *supra* note 70; MINISTRY OF JUSTICE, SAME-SEX COUPLES AND THE LAW—BACKGROUNDING THE ISSUES (1999), available at <http://www.justice.govt.nz/pubs/reports/1999/same-sex/samesex.pdf>; MINISTRY OF JUSTICE, *supra* note 83; In fact, presumptive status appears something of an afterthought in the latter report, with the last paragraph stating:

Just as some heterosexual couples live in de facto relationships in preference to marrying so also some homosexual couples will prefer not to enter into registered partnerships. To the extent that the law regulates the affairs of those who abstain from formal relationships in this way the same rules should apply to same-sex as to opposite-sex couples.

*Id.* § 33.4.

85. Property (Relationships) Amendment Act, 2001 (N.Z.). In 1999 harmonious rules for

While these measures were closely modeled on the 1999 New South Wales reforms,<sup>86</sup> they provide a striking contrast with Australia in that the property division law was not a distinct regime separate from the “family law” system used for married couples; rather, it was unified with the marital regime, using principles of prima facie equal division.<sup>87</sup> Equally notable is that this process was undertaken with two separate parliamentary votes: the first on the absorption of heterosexual de facto couples into the marital property regime, and the second on the extension of this reform to same-sex couples.<sup>88</sup> While the first vote was extremely close, the second passed with ease.<sup>89</sup> This suggests that, unlike in Australia, opponents of the introduction of de facto status in New Zealand *did* view the abolition of distinctions between married and unmarried heterosexual couples as “downgrading” marriage.<sup>90</sup> It is not clear why, but it is possible that because New Zealand is a unitary system, this change appeared to be much more dramatic and sudden (though it had been discussed for a long time), in contrast with Australia where the recognition of heterosexual de facto couples proceeded on a state-by-state basis over many years. Whatever the reason for the opposition to establishing de facto rights for heterosexual couples, once this had been achieved, there was little parliamentary opposition to the extension of that status to same-sex couples.<sup>91</sup>

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heterosexual and same-sex couples were introduced in immigration, which previously permitted same-sex partners of New Zealanders to apply, but on a different and more onerous basis than heterosexual partners. See David Ryken, *Immigration Rights for Cohabitees in New Zealand*, I.F.L. 18 (2004).

86. Similar or identical elements include: the definition of de facto relationships, the criteria to be used for determining the existence of a relationship, and the renaming of earlier legislation which used “marital” language, as the “Property (Relationships) Act.” See Atkin, *Challenge*, *supra* note 81, at 314–16; Grainer, *supra* note 80, at 303–04.

87. Grainer, *supra* note 80, at 304–08.

88. See Atkin, *Reforming*, *supra* note 81, at 354.

89. *Id.*

90. *Id.*

91. Note that although this extension of status in New Zealand was instantaneous, it took fifteen years in New South Wales, and longer elsewhere. For the history of de facto legislative reform of all Australian states and territories, see Millbank, *supra* note 3. The lack of a time lag in New Zealand is perhaps explained by the fact that the first reforms were occurring much later than heterosexual de facto status in Australia, and indeed at the same time as same-sex relationship recognition in Australia. As mentioned earlier, the 2001 New Zealand reforms drew upon the 1999 New South Wales reforms.

## IX. OPT-IN RECOGNITION FOR COUPLES

At the same time as Australian states and territories were creating presumption-based recognition models (from which it is possible to opt out by agreement),<sup>92</sup> interest was also developing in the use of opt-in registration schemes in addition to, but not instead of, those models. Tasmania provides the clearest example: in 2003 it introduced a presumptive couple-based category and simultaneously introduced a registration system for couples.<sup>93</sup> Registration is open to both same-sex and heterosexual couples.<sup>94</sup> The differences in status for couples who register compared to those who do not are minimal,<sup>95</sup> with the major substantive difference being in eligibility to apply for second-parent adoption.<sup>96</sup> Since registration opened on January 1, 2004, only around sixty same-sex couples have registered.<sup>97</sup>

In 2004 New Zealand extended its initial limited *de facto* relationship status to same-sex couples and heterosexual couples in all areas of law and simultaneously introduced a new form of civil union open to all couples.<sup>98</sup> The express aim of these reforms was to

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92. The De Facto Relationships Act of 1984 in New South Wales contained the first Australian legislative endorsement of cohabitation and separation agreements. *See* De Facto Relationships Act, 1984, §§ 44–47 (N.S.W.). Clearly, the intention was to allow people covered by ascription of status to opt out. These agreements were provided for considerably earlier than federal law rendered agreements made in contemplation of or during marriage enforceable. *See* Family Law Act, 1975 (Austl.).

93. Relationships Act, 2003, § 4(2) (Tas.). At the same time, Tasmania also introduced both forms of recognition for non-couples. After registration, a twenty-eight day “cooling off” period applies, in which either party may withdraw their consent to the registration. *Id.* § 13(1).

94. *Id.* § 4(1).

95. However, registration itself is proof of the existence of the relationship. *Id.* § 4(2). The other difference is that registering a relationship, like entering a marriage, automatically revokes one’s will. *See* Wills Act, 1992, § 20(2) (Tas).

96. Unregistered couples remain ineligible to apply to adopt children as a couple. Registered couples are eligible to apply, but only to a limited extent, as they may only adopt children who are related to one member of the couple. *See* Adoption Act, 1988, § 20(1), (2A) (Tas).

97. Telephone Interview with Tasmanian Registry of Births, Deaths, and Marriages (Jan. 31, 2007). Registration started on January 1, 2004, and as of January 31, 2007, a total of seventy-nine significant relationships were registered. Of these, eighteen were heterosexual couples and sixty-one were same-sex couples. There was a relatively even gender breakdown, with thirty-two gay male couples and twenty-nine lesbian couples.

98. The first unions were celebrated on April 29, 2005. By January 31, 2007, civil union registrations totalled 721. These comprised 586 same-sex unions (268 male and 318 female), 132 heterosexual unions, and three transfers of status for heterosexual couples from marriage to

treat all three forms of relationship status (de facto, civil unions, and marriages) as equal across New Zealand.<sup>99</sup> Unlike the United Kingdom, but like the Netherlands, civil unions in New Zealand can be entered into by both heterosexual and same-sex couples, and heterosexual couples are able to convert a marriage into a union if they wish.<sup>100</sup> This inclusiveness is premised on the idea that unions are not a “separate” or lesser status, but rather provide a choice of form of status (although the full range of choice is open only to heterosexual couples). The remaining difference in status in New Zealand is that all unmarried couples, whether parties of a civil union or de facto, remain ineligible to adopt children jointly.<sup>101</sup>

Like three of the Australian jurisdictions (Western Australia, the Northern Territory, and the Australian Capital Territory), New Zealand also extended presumptive parental status to the consenting female partners of women who have children through any form of assisted reproductive technology.<sup>102</sup> These reforms were retrospective in operation, granting a wide range of parental rights to the second parent in lesbian couples.<sup>103</sup>

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unions. Telephone Interview with New Zealand Department of Internal Affairs, Registry of Births, Deaths, and Marriages (Jan. 31, 2007).

99. The New Zealand Ministry of Justice explained that the government’s objective was “to have neutral laws on relationships that apply across the board, whether those relationships are marriages, civil unions or de facto relationships.” New Zealand Ministry of Justice, Civil Union Bill & Relationships (Statutory References) Bill, <http://www.justice.govt.nz/pubs/reports/2004/civil-union-bill/index-relationship.html> (last visited June 7, 2007); see also Cabinet Social Equity Committee, Legal Recognition of Same-Sex Couples: Process and Legislative Options, <http://www.justice.govt.nz/pubs/reports/2004/civil-union-bill/cab-paper-4.html> (last visited June 7, 2007).

100. For the Netherlands, see Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569, 572–81 (2004); for the United Kingdom, see Carl Stychin, *Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004*, 14 FEMINIST LEGAL STUD. 79 (2006).

101. For background regarding unmarried couples and adoption, see N.Z. LAW COMM’N, ADOPTION AND ITS ALTERNATIVES: A DIFFERENT APPROACH AND A NEW FRAMEWORK, REPORT 65 (2000). The report recommended that eligibility to apply for adoption not depend upon relationship status of any kind. *Id.* at ch. 13, para. 335. In the United Kingdom, all unmarried couples are eligible to adopt since December 30, 2005. Adoption and Children Act, 2002, c. 38, § 144(4) (Eng.).

102. In New Zealand this model was first raised in MINISTRY OF JUSTICE, *supra* note 83, and passed as part of the 2004 reforms, amending the Status of Children Act, 1969, § 18 (N.Z.).

103. See the discussion in Millbank, *supra* note 10.

Returning to Australia, in March 2006 the Australian Capital Territory government introduced a bill to enact a civil union regime, closely modeled on the New Zealand system, which would have been open to both same-sex and heterosexual couples.<sup>104</sup> The territory's Civil Unions Act never came into effect because, shortly after it was passed, the federal government disallowed it.<sup>105</sup> While both the Northern Territory and the Australian Capital Territory have self-government powers, enactments of either territory are vulnerable to being disallowed or overturned by the federal government.<sup>106</sup> However, this has occurred only rarely since the territories achieved self-government, once to overturn voluntary euthanasia legislation in the Northern Territory,<sup>107</sup> and then to disallow civil unions.

At the time of the Civil Union Act, the Australian Capital Territory had already passed comprehensive legislation treating same-sex couples as de facto partners<sup>108</sup> and had gone further than states such as New South Wales and Victoria in securing parenting rights for same-sex families in a second raft of reforms.<sup>109</sup> This round of reforms introduced, in addition to ascribed status for second parents in lesbian families formed through assisted conception, access to all forms of adoption for same-sex couples, and a regime to alter the legal parentage of children born through surrogacy.<sup>110</sup> It is very striking indeed that the federal government chose to overrule the only element of the same-sex reforms that had virtually no legal effect. The sole additional legal right granted by civil unions in comparison with de facto status was that upon formalizing the

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104. Civil Unions Act, 2006 (Austl. Cap. Terr.).

105. Under section 35 of the Australian Capital Territory (Self-Government) Act, 1988 (Austl.), the Governor-General (acting on instructions from the cabinet) may disallow any territory law six months after its enactment. The Act was disallowed on June 14, 2006. *See* Special Notice Gazette, S. 93 (June 14, 2006).

106. *See* the Commonwealth of Australia Constitution at section 122, which gives the federal parliament power to legislate for the territories.

107. *See* Rights of the Terminally Ill Act, 1995 (N. Terr.), invalidated by the Euthanasia Laws Bill, 1996 (Austl.), amending the Northern Territory (Self-Government) Act, 1978 (Austl.), by adding Item 1 of Schedule.

108. *See supra* note 49.

109. Note that Western Australia also included wide-ranging parenting rights. *See* Millbank, *supra* note 10.

110. *See* Parentage Act, 2004, § 24 (Austl. Cap. Terr.). For discussion, *see* Millbank, *supra* note 10.

relationship any earlier will of the parties was automatically invalidated.<sup>111</sup> While the Act stated that civil unions were to be treated in the “same way” as marriage,<sup>112</sup> this was only for the purposes of the law of the Australian Capital Territory (a small territory of around 300,000 people)<sup>113</sup>; it had no effect on the laws of other states or on federal law. Symbolism, rather than substantive rights, was the issue. The federal government’s objection was that the Act “said” that same-sex and heterosexual unions were the “same thing.”<sup>114</sup> What the Act actually did was irrelevant; the important political point was to repudiate any claim to “sameness.”

This suggests a further trend that mirrors international developments; a shift away from substantive legal rights as the main issue, toward a focus on naming, symbolism, and the “special-ness” of marriage. We discuss this emphasis on terminology and discourse further below.

## X. MARRIAGE AS THE COMPARATOR

Even though marriage was not explicitly a focus of the Australian reform campaigns of the 1990s, it is interesting to reflect on the extent to which marriage still appeared as a comparator to be emulated, avoided, or distinguished as “special.” These concerns emerge from the choice of language used to denote and define couple relationships in the reform legislation (for example, the use of terms

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111. Civil Unions Act, 2006, sched. 1, pt. 1.29 (Austl. Cap. Terr.).

112. The original Civil Unions Bill, 2006, § 5(2) (Austl. Cap. Terr.), stated: “A civil union is to be treated for all purposes under territory law in the same way as a marriage.” This was altered in an attempt to appease the federal government, so the Civil Unions Act, 2006, §5(2) (Austl. Cap. Terr.), stated: “A civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as a marriage.”

113. Australian Bureau of Statistics, Population by Age and Sex, Australian Capital Territory (2005), <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3235.8.55.001Main+Features1Jun%202005?OpenDocument> (last visited June 22, 2007) (estimating a population of 325,000).

114. “[T]he Bill is plainly an attempt to mimic marriage under the misleading title of civil unions.” ABC Radio Interview with Prime Minister Howard, June 7, 2006, <http://www.pm.gov.au/media/Interview/2006/Interview1967.cfm> (last visited June 22, 2007). “[T]he legislation by its own admission is an attempt to equate civil unions with marriage and we don’t find that acceptable.” Prime Minister Howard, Press Conference (June 6, 2006), *available at* <http://www.pm.gov.au/media/Interview/2006/Interview1966.cfm> (last visited June 22, 2007).

such as “marriage-like relationship”).<sup>115</sup> While these choices of terminology can, on one level, be characterized as semantic, on another level they are extremely revealing about the ongoing symbolic place of marriage in a legal context in which, for all practical purposes, marriage is legally irrelevant.

At the time of the various same-sex law reform debates in Australia the existing law contained a multitude of definitions of “spouse” in the context of defining heterosexual unmarried couples. Various forms of words were used to denote couples, such as living together “in a marriage-like relationship,” or living “as the husband or wife of that person.” In these formulations, “marriage” was the express comparator, while “spouse” remained the central category for “a member of a couple,” albeit one that included a *de facto* spouse. To what extent, then, did the coverage of same-sex couples in these regimes involve reinforcing marriage as a comparator?

The 1999 New South Wales amendments dropped the term “spouse” which was previously used (i.e. “*de facto* spouse”) and replaced it with “partner” or “relationship” to emphasize semantically the difference between marriage and same-sex partnerships. There are two very different ways to view this. On the one hand, avoiding the word “spouse” was an open attempt to appease opponents of reform who argued that it was, in effect, “same-sex marriage.”<sup>116</sup> The New South Wales law expressly proceeded on the basis that this was a form of recognition that was “Not Marriage”.<sup>117</sup> A number of other jurisdictions followed this trend, removing the word “spouse” from the term “*de facto* spouse.”<sup>118</sup> Heterosexual unmarried relationships are accorded legal recognition because they are “like” married

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115. See, for example, the definition of a *de facto* relationship in Western Australia as “a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.” Interpretation Act, 1984, § 13A(1) (W. Austl.). The definition of a *de facto* relationship in the Northern Territory also includes the terminology of “marriage-like.” *De Facto Relationships Act*, 1991, § 3A(1)-(3) (N. Terr.).

116. See Jenni Millbank & Kathy Sant, *A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW*, 22 SYDNEY L. REV. 181 (2000).

117. See Property (Relationships) Act, 1984, § 62 (N.S.W.) (“Nothing in the *Property (Relationships) Legislation Amendment Act 1999* is to be taken to approve, endorse or initiate any change in the marriage relationship, which by law must be between persons of the opposite sex, nor entitle any person to seek to adopt a child unless otherwise entitled to by law.”).

118. Millbank, *supra* note 3, at 11, 19, 22.

relationships, same-sex relationships are then granted rights because they are “like” heterosexual unmarried relationships, but through a discursive sleight of hand (via the disappearance of the word “spouse”), same-sex relationships are *not* “like” marriage.

However, there is another way to read some of these choices of terminology, independently of the desire to appease conservative opponents. Victoria and the Australian Capital Territory did not simply distance same-sex couples from marriage, but actually *removed* the category of spouse as the central relationship category in all of its laws.<sup>119</sup> They instead used the term “domestic partner” as the universal category, of which spouse (including married couples) became a subset.<sup>120</sup> This marks a shift in the traditional hierarchical construction of relationships in law. Marriage is removed from the literal and metaphorical center and is no longer the benchmark against which other relationships must be compared and be deemed similar in order to be included. Rather, married spouses become just one example of a number of different options under the larger entity of couples.<sup>121</sup> This was considered subversive, as evidenced by the express opposition of some conservative legislators who, while not opposing the substantive reforms in their own jurisdictions, vigorously opposed the changes in terminology that removed married spouses from being a separately named category of relationship.<sup>122</sup>

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119. *Id.* at 15, 31.

120. The original South Australian Bill also did so. *See* Statutes Amendment (Relationships) Bill, 2004, § 66(2) (S. Austl.).

121. This is not to suggest that the government necessarily intended such a subversive interpretative or that more regressive interpretations are not open. In the second reading speech for the Victorian reforms, the Attorney-General appeared to reaffirm the “special-ness” of marriage:

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

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

Victoria, Legislative Assembly *Hansard* 23 Nov. 2000, at 1911 (Rob Hulls).

122. In speaking on the 2003 reforms in the Australian Capital Territory, the Liberal Party stated that they supported the main aim of “removing discrimination,” but objected to the use of “domestic partner” as the generic term for all couple relationships, believing that to do so would

By contrast, both Western Australia and the Northern Territory continued to center marriage as the core relationship category, but at the same time did not retreat from equating same-sex couples to married couples, at least linguistically. Those jurisdictions retained the original form of words for a de facto relationship as “between [two] persons who live together in a marriage-like relationship,” including same-sex couples.<sup>123</sup> Although continuing to center marriage, this, too, had its own subversive element, through dissolving the discursive barrier between same-sex couples and the “special” status of marriage that had been so carefully preserved elsewhere.

#### XI. “BEYOND CONJUGALITY”<sup>124</sup>: RELATIONSHIP RIGHTS FOR NON-COUPLES

As mentioned above, there has been considerable interest in a form of recognition of “non-conjugal” relationships in Australia. However, from the time the GLRL raised these concerns, based largely on the idea of relationships of “significant emotional interdependence” and “chosen family” within a marginalized community,<sup>125</sup> this form of recognition, and the groups to whom it might be accorded, has changed dramatically.

Although the GLRL proposed a form of non-couple recognition in New South Wales in 1993, the Australian Capital Territory was the first to introduce this category into Australian law.<sup>126</sup> The Australian

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“lump marriage in with other forms of relationship” and not “acknowledge the special status of marriage.” See Australian Capital Territory, Legislative Assembly *Hansard* 11 Mar. 2003, 839 (Brendan Smyth).

123. Interpretation Act, 1984, § 13A(1) (W. Austl.); De Facto Relationships Act, 1991, § 3A(1) (N. Terr.).

124. This was the title used by the Law Commission of Canada (LCC) for its 2001 report on “close personal relationships.” See BEYOND CONJUGALITY, *supra* note 35. Note that relatively recently, U.S. scholars such as Nancy Polikoff have written about the LCC’s approach. See, e.g., Polikoff, *supra* note 35. In July 2006 the Beyond Marriage Coalition cited that report with approval in their official statement. BEYOND MARRIAGE BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS (2006), [www.beyondmarriage.org/BeyondMarriage.pdf](http://www.beyondmarriage.org/BeyondMarriage.pdf).

125. See GAY & LESBIAN RIGHTS LOBBY, *supra* note 31, at 22–29. Note that this original proposal was also intended to cover non-biological children.

126. Domestic Relationships Act, 1994 (Austl. Cap. Terr.).

Capital Territory broke new ground when, in 1994, it enacted the Domestic Relationships Act, which introduced a category of domestic relationship that did not require parties to be in a sexual relationship or to cohabit.<sup>127</sup> The definition was of a “personal relationship between [two] adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other.”<sup>128</sup> Ultimately, this definition was used only in a single Act. While this Act remains in force, later legislation in the Australian Capital Territory retreated from this broad approach. The 2003 same-sex reforms use the category “domestic partner,” but the definition in that legislation expressly requires the parties to be a cohabiting couple.<sup>129</sup>

The 1999 New South Wales amendments created a new category of “close personal relationship.”<sup>130</sup> This was intended to cover close cohabiting relationships of interdependence across a small number of laws.<sup>131</sup> The amendments define this category of relationship as “a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.”<sup>132</sup>

Unlike the Australian Capital Territory’s Domestic Relationships Act, the New South Wales category requires cohabitation.<sup>133</sup> The last aspect of the definition, “personal care,” soon came to be seen as a means of narrowing the application of the category. In most of the

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127. *Id.* § 3(1)

128. *Id.*

129. Legislation Act, 2001, § 169(2) (Austl. Cap. Terr.).

130. Property (Relationships) Act, 1984, § 5(1)(b) (N.S.W.).

131. Bail Act, 1978 (N.S.W.); Coroners Act, 1980 (N.S.W.); Duties Act, 1997 (N.S.W.); Family Provision Act, 1982 (N.S.W.); Trustee Act, 1925 (N.S.W.).

132. Property (Relationships) Act, 1984, § 5(1)(b). Section 5(2) clarifies that:

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

(a) for fee or reward, or

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

*Id.* § 5.2.

133. Property (Relationships) Act, 1984, § 5(1)(b).

small number of cases in which it has been at issue, New South Wales courts have held that “personal care” requires “assistance with mobility, personal hygiene and physical comfort.”<sup>134</sup> Few able-bodied adults would require such assistance, effectively turning the category into one addressing only (unpaid) live-in caregivers.

In 2003 Tasmania also passed legislation that created a non-couple category of “caring relationship,” but this category does not require cohabitation.<sup>135</sup> Both couples and those in non-couple “caring relationships” may register their relationships.<sup>136</sup> Unregistered caring relationships are legally recognized only in a very limited number of Acts.<sup>137</sup> Once registered, caring relationships give rise to a slightly wider range of entitlements, but still far fewer than those to which registered couples are entitled.<sup>138</sup> Registration started on January 1, 2004, and as of January 31, 2007, there were no caring relationships

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134. *Dridi v. Fillmore* (2001) N.S.W.S.C. 319, at para. 108 (unreported). The Master in *Dridi* repeated this holding in a family provision case. See *Devonshire v. Hyde* (2002) N.S.W.S.C. 30 (unreported). This approach was approved in *Hinde v. Bush*, (2002) N.S.W.S.C. 828 (unreported), but was not referred to in the family provision case of *Przewoznik v. Scott*, (2005) N.S.W.S.C. 74 (unreported), where the Master held that a heterosexual relationship that did not manifest sufficient mutual commitment to satisfy the requirements of the de facto relationship category was in fact sufficient to qualify as a close personal relationship. In a marked departure from the earlier cases that suggest the category is still ill-defined, the court held that the “dividing point” between de facto and close personal relationships lay in “the degree of mutual commitment and interdependence.” *Id.* at para. 18.

135. Relationships Act, 2003, § 5 (Tas.). “A caring relationship is a relationship other than a marriage or significant relationship between two adult persons whether or not related by family, one or each of whom provides the other with domestic support and personal care.” *Id.* The New South Wales criteria for determining the existence of a couple relationship were also adopted for this category, with three variations. The criteria of “whether or not a sexual relationship exists” and “care and support of children” were dropped from the list, and the additional criterion of “the level of personal care and domestic support provided by one or each of the parties to each other” was inserted. *Id.* § 5(5)(h).

136. *Id.* § 11.

137. Unregistered caring relationships are recognized only in five acts and regulations: Criminal Justice (Mental Impairment) Act, 1999 (Tas.); Motor Accidents (Liabilities and Compensation) Regulations, 2000 (Tas.); State Service Regulations, 2001 (Tas.); War Service Land Settlement Act, 1950 (Tas.); and the Workers’ (Occupational Diseases) Relief Fund Act, 1954 (Tas.).

138. So, for instance, someone in a registered caring relationship is eligible to inherit under intestacy provisions and apply for property and maintenance settlements at the end of a relationship, while someone who is unregistered is not. Before registration of a caring relationship, each party must have received independent legal advice. See Millbank, *supra* note 3, at 27.

registered in Tasmania.<sup>139</sup> The lack of popularity of this option raises the possibility that such rights are not needed, although this lack of use may also point to other possibilities, such as insufficient public knowledge.<sup>140</sup>

## XII. FROM BREAKING DOWN HETERONORMATIVITY TO VALORIZING “SPINSTER SISTERS”<sup>141</sup>

The original conception of a non-couple category was intended as a progressive gesture, to make a break from a hierarchical pattern of relationship rights with marriage at the top.<sup>142</sup> In doing so, it arguably had the potential to destabilize heteronormativity and the heteronuclear family itself. However, in recent years, the use of and discourse around non-couple recognition has changed dramatically in Australia. Indeed, it has been, arguably, completely “captured” by conservative opponents of gay and lesbian equality movements who now promote it—in a very different light—as their own reform agenda.

The opposition in South Australia denied that its vigorous pursuit of a non-couple alternative was a “smoke screen” or “road block”.<sup>143</sup> Yet it is notable that the two jurisdictions most resistant to same-sex relationship recognition reforms, South Australia and the federal parliament, have been the ones to most firmly center a (desexed and gendered) category of “interdependence” in recent years.<sup>144</sup>

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139. Telephone Interview with the Tasmanian Registry of Births, Deaths, and Marriages (Jan. 31, 2007).

140. See Millbank, *supra* note 49 (arguing that, especially when it comes to property related laws, non-couples are far less likely than couples to need, and to seek, legal interventions).

141. Note that Stychin refers, in the context of the United Kingdom debates, to the “increasingly famous” spinster sisters. Stychin, *supra* note 100, at 84. This reference was made some years prior to the European Court of Human Rights claim brought by an actual pair of spinster sisters, discussed below.

142. See *The Bride Wore Pink*, *supra* note 28; GAY & LESBIAN RIGHTS LOBBY, *supra* note 31.

143. South Australia, Legislative Council *Hansard* 29 June 2005, at 2226 (T.G. Cameron).

144. In their analysis of the parliamentary debates leading to the legalization of “same sex marriage” in Canada, Young & Boyd also note the divergence between the original progressive arguments for moving away from “prioritizing relationships with a sexual tie” and the more recent arguments of conservatives who have attempted to “desex and render invisible lesbian

In 1995 the category of “interdependent relationship” was first introduced in federal law in the area of immigration, but only for the limited purpose of partner reunification.<sup>145</sup> While this does not expressly apply to couples, the category requires “a mutual commitment to a shared life to the exclusion of any spouse relationships or any other interdependent relationships,”<sup>146</sup> and includes criteria that largely reflect those used in state laws to determine the existence of a de facto relationship.<sup>147</sup>

In 2004, after nearly a decade of pressure to change the law governing pensions to recognize same-sex couples so that surviving partners are able to receive death benefits, federal law was amended to include the new and separate category of “interdependent relationship.”<sup>148</sup> There are mixed messages in the legislation as to whether this is a couple-based category. While the definition mirrors the New South Wales non-couple category of “close personal relationship,” the list of mandatory criteria for determining the existence of any relationship essentially reflects the criteria used in New South Wales for de facto couples.<sup>149</sup> It seems clear that the interdependent category in federal law was intended to cover, but pointedly not to name as such, same-sex couples. This move reflects what Gail Mason has called the “social and political hush that has historically enveloped the subject of same-sex sexuality.”<sup>150</sup>

What is noteworthy is that these reforms, while extending rights to same-sex couples, went to considerable lengths to pass them off as for or about someone else,<sup>151</sup> in a similar way that lesbians and gay

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and gay relationships by conflating relationships based on sexual intimacy with other non-sexual familial relationships.” See Boyd & Young, *supra* note 35, at 19.

145. Migration Regulations, 1994, § 1.09A (Austl.). By 2006 the operation of this category was extended to only one other kind of visa, a temporary skilled migrant visa. MILLBANK, *supra* note 6, at 74–75.

146. Migration Regulations, 1994, § 1.09A(2)(c)(i).

147. *Id.* § 1.09A(5), (6); see MILLBANK, *supra* note 6.

148. Miranda Stewart, ‘Are You Two Interdependent?’ *Family, Property and Same-Sex Couples in Australia’s Superannuation Regime*, 28 SYDNEY L. REV. 437 (2006).

149. Superannuation Industry (Supervision) Regulations, 1994, § 1.04AAAA (Austl.).

150. GAIL MASON, *THE SPECTACLE OF VIOLENCE: HOMOPHOBIA, GENDER, AND KNOWLEDGE* 78–79 (2002).

151. See, for example, comments made by Attorney-General Philip Ruddock:

[T]here has been almost a preoccupation on the part of some in relation to one element of the package that the government announced. I would simply make this point: the

men may be accepted if they “pass” for straight, or if they are acknowledged but nonetheless “discreet” about their identity.<sup>152</sup> Writing on the phenomenon of “passing,” Mason asserts: “Cumulatively, these kinds of engagements with homosexuality produce not so much a ubiquitous or universal exclusion, but a pervasive atmosphere of inarticulation or silence.”<sup>153</sup> The same could be said of federal law reform in Australia to date.

In contrast, South Australia’s use of a non-couple category, rather than being a smokescreen for “discreet” same-sex couple recognition, was instead promoted as an active and alternative project of the conservative opposition.<sup>154</sup> This trend echoes developments in Canada and the United Kingdom. Boyd and Young have noted that the Law Commission of Canada’s progressively motivated proposal to move away from granting rights on the basis of spousal status toward emotional and economic interdependence was quickly taken up by religious and conservative opponents as an argument to *deny* spousal status to same-sex couples, because such rights could then be tagged as “unfair” to others.<sup>155</sup> Likewise, in the United Kingdom, conservative opponents of civil partnership legislation attempted to amend the legislation to cover “family members and carers.”<sup>156</sup> What these debates reveal is the way in which the non-couple category has been co-opted by opponents of equality using formal equality rhetoric and false comparators (same-sex couples with same-sex non-couples)<sup>157</sup> in order to position themselves as the ultimate equality

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amendment to the legislation that the government is proposing is not about same-sex couples; it is about interdependent relationships.

Australia, House of Representatives *Hansard* 17 June 2004, at 30,758 (Philip Ruddock).

152. Peter Dutton, Minister for Revenue, stated that “amending the definition of ‘dependent’ will not alter the definition of ‘spouse’ and will not specifically recognize same-sex relationships.” Australia, House of Representatives *Hansard* 16 June 2004, at 30,557 (Peter Dutton).

153. See MASON, *supra* note 150, at 81.

154. For discussion, see *supra* note 63.

155. See Boyd & Young, *supra* note 35, at 225–26.

156. See Stychin, *supra* note 100, at 80–81.

157. Note that in the first reported Australian case to deal with sexuality discrimination, the claim that exclusion of two gay couples from a work roster open to married and unmarried heterosexual couples was dismissed on the basis that the sexuality of the complainants was irrelevant to the conduct. The tribunal held that the partners “may have been brothers each conducting separate heterosexual relationships . . . [or] golfing buddies wishing to play golf in

seekers. While it is typical of opponents of same-sex relationship recognition to characterize any form of legal change as “social engineering”<sup>158</sup> and as an “attack” on marriage,<sup>159</sup> what is remarkable about this particular strategy is that it reconfigures same-sex relationship reforms as actually *worsening* rather than alleviating inequality and discrimination, through the construction of another (more) deserving and unrecognized group, the “domestic co-dependants.”

Despite there being no empirical evidence to demonstrate an unmet legal need for broadly based recognition of non-couple relationships, nor any form of political or social mobilizing by non-couples, this group has been constructed as a key figure of need and exclusion in the debates. In parliamentary debates across a variety of jurisdictions, this group has come to be represented as fantasy figures of asexual altruism. Whether they were the real or imagined constituents of Members of Parliament who spoke on the topic in Australia, domestic co-dependants were usually elderly and almost always either unmarried daughters caring for elderly fathers, or two women who had lived together for “twenty years.”<sup>160</sup> In each of these

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an overseas port—nevertheless they would not have been permitted to join the scheme.” *Wilson & Anor v. Qantas Airways* (1985) E.O.C. 92–141, at 76,398. This argument was again made in *Hope v. NIB*, where a health fund contended that there had been no discrimination by virtue of a “comparison of the treatment of the [complainants] with that of a hypothetical ‘three males living together sharing expenses’.” *Hope v. NIB Health Fund Ltd.* (1995) E.O.C. 92-716, at 76,021. The Equal Opportunity Tribunal (and subsequently the New South Wales Supreme Court) although “doubting” *Wilson*, did not directly overrule it. The Supreme Court did so indirectly however by holding:

[T]he requisite comparison is not one between the actual treatment of the [complainants], a homosexual couple living in a domestic relationship, and their hypothetical treatment if they were not homosexual, namely if they were two heterosexual men living together. To undertake such a comparison would simply be to ignore the statutory requirement of the “the same or not materially different circumstances” and, indeed, in my opinion, subvert the purpose and object of the Act:

*NIB Health Funds Ltd. v. Hope & Anor*, 1996 NSW LEXIS 3962 (N.S.W.S.C. Nov. 15, 1996).

158. This is also a feature of the New Zealand debates on civil unions. See Nan Seuffert, *Sexual Citizenship and the Civil Union Act 2004*, 37 VICTORY UNIV. WELLINGTON L. REV. 281 (2006).

159. See, for example, the federal government’s decision to overturn the Civil Unions Act, 2006 (Austl. Cap. Terr.), presented in a press release by the Attorney-General entitled “Commonwealth to Defend Marriage Against Territory Laws.” (June 6, 2006).

160. See Millbank & Morgan, *supra* note 65.

stories the figures of need were women who were carefully desexualized; they were elderly sisters,<sup>161</sup> or they worked for religious organizations, or knew each other through church. One member of Parliament went as far as to state: “It is unfortunate and probably best described as the dark side of the human condition that some people will always be tempted to murmur about the status of a relationship of two persons of the same sex.”<sup>162</sup>

Once these “spinster sisters” are placed alongside same-sex couples as the “rightful” comparator, it is then but a small step to argue that reforms granting same-sex couple rights in fact privilege sexual licentiousness over love and loyalty: “[T]o confuse one’s sexuality and sexual peccadilloes with dependence is a nonsense.”<sup>163</sup> This allows opposition members to characterize relationship reforms as granting “special rights” to same-sex couples, *rewarding* them for having sex, while the charity-minded spinsters miss out.<sup>164</sup>

The discursive centering of the non-couple category also serves to reconfigure gay men and lesbians as not just a privileged group, but as themselves the cause of discrimination. One South Australian member of Parliament claimed that it is “hypocritical that a group can push and obtain their rights at the expense of other people’s rights.”<sup>165</sup>

It is particularly ironic, given the invention of the hypothetical morally deserving aged and sexless spinster sisters in these debates, that a claim was actually brought against the United Kingdom in the

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161. See, e.g., John Howard, Prime Minister, Press Conference (May 27, 2004), <http://www.pm.gov.au/media/Interview/2004/Interview889.cfm> (last visited June 22, 2007); Australia, House of Representatives *Hansard* 16 June 2004, at 30,557 (Peter Dutton). In the English debates, the sisters also featured heavily. See, e.g., House of Commons *Hansard* 9 Nov. 2004, at 15.

162. South Australia, House of Assembly *Hansard* 1 Dec. 2005, at 4399 (Joe Scalzi). Similarly, in the 1999 New South Wales reforms, an opposition member of Parliament struggled for an example of a non-couple relationship, and produced, “two female deaconesses who are living together” (and who, he stressed, after laughter from the public gallery, have a relationship with “no sexual element”). New South Wales, Legislative Assembly *Hansard* 6 June 1999, at 742 (Malcolm Kerr); see Millbank & Sant, *supra* note 116.

163. South Australia, House of Assembly *Hansard* 21 Aug. 2002, at 1212 (Mitch Williams).

164. South Australia, House of Assembly *Hansard* 6 July 2005, at 3137 (Joe Scalzi); South Australia, House of Assembly *Hansard* 28 Oct. 2004, at 690 (Joe Scalzi); South Australia, Legislative Council *Hansard* 2 Apr. 2003, at 2076 (Andrew Evans).

165. South Australia, House of Assembly *Hansard* 16 Oct. 2002, at 1566 (Joe Scalzi).

European Court of Human Rights by two such elderly sisters.<sup>166</sup> Their claim was based upon their exclusion from the new civil partnerships regime in the United Kingdom, making them ineligible for inheritance tax exemptions available to civil partners.<sup>167</sup> The claim was narrowly rejected by the court, which decided (in a four to three decision) that there was no discrimination against them as their situation was not analogous to that of a married couple or of civil partners.<sup>168</sup> However, just as in the discussion above, the claim itself and the minority judgments of the court obliterate from view the ubiquity of legal privilege that has long been accorded to heterosexual coupledness at the expense of other forms of relationships.<sup>169</sup>

Both openly and subconsciously, conservative opponents of same-sex equality claims have used the interdependency category as a way of “othering” lesbian and gay couple relationships, while simultaneously capturing the discourse of non-discrimination.<sup>170</sup>

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166. Unusually, the Court accepted the case although no domestic litigation had been undertaken. The sisters had written to the Chancellor before the Budget every year for thirty years asking for reform of the inheritance tax laws to recognize siblings on the same basis as married couples. See Joanna Bale, *Sisters Begin Battle over Inheritance Tax Rights*, TIMES (London), Sept. 4, 2006, available at <http://business.timesonline.co.uk/tol/business/money/tax/article627513.ece> (last visited June 22, 2007). They “decided to act” after the Civil Partnerships Act was passed. *Id.*

167. *Id.*

168. *Burden & Burden v. United Kingdom*, App. No. 13378/05, 2006 Eur. Ct. H.R. 1064. The court said: “The State cannot be criticised for pursuing, though its taxation system, policies designed to promote marriage; nor can it be criticised for making available the fiscal advantages attendant on marriage to committed homosexual couples.” *Id.* at para. 59.

169. In an echo of many of the themes discussed above, numerous news articles refer to the fact that the sisters were altruistic caregivers for other family members, and that their father (the original purchaser of the house in question), worked his entire life in the church. See, e.g., *id.*; Claire Marshall, ‘Why Must We Lose Our Home?’, BBC NEWS, Sept. 12, 2006, available at <http://news.bbc.co.uk/1/hi/uk/5336760.stm> (last visited June 22, 2007); Janet Daley, *The Evil of Inheritance Tax Lies in Punishing the Thrifty*, TELEGRAPH (London), Sept. 4, 2006, available at <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2006/09/04/do0401.xml> (last visited June 22, 2007).

Joyce Burden said she thought people like her were deliberately excluded from the recent Civil Partnership Act because there were so many homosexuals in Parliament. “I don’t have the status of a lesbian,” she said. “This is an insult to single people who have looked after elderly parents. I don’t call that justice.”

Joshua Rozenberg, *Sisters Go to Court Over ‘Gay Bias’ in Tax Laws*, TELEGRAPH (London), Sept. 2, 2006, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/09/02/nherit02.xml> (last visited June 22, 2007).

170. See Boyd & Young, *supra* note 35. A South Australian member of Parliament stated:

Equality-deniers are able to claim that they are “strongly in favour of removing any property and other discrimination that exists against people who have same-sex relationships”<sup>171</sup> without specifically according same-sex couples any rights at all.

### XIII. BEYOND FORMAL EQUALITY?

As noted above, unlike the laws that have developed in jurisdictions such as Massachusetts, Canada, and South Africa,<sup>172</sup> the Australian legislation was not prompted by litigation. Australia is now the only western democratic nation that does not have some form of a Bill of Rights, either in a constitutional form or even as a non-entrenched statutory version such as that in New Zealand.<sup>173</sup> The absence of a constitutional equality guarantee<sup>174</sup> has meant that, unlike in the United States and Canada in particular, litigation in Australia and New Zealand has not been a favored, or even particularly useful, strategy for effecting relationship recognition for same-sex couples. The few attempts at litigation in Australia, usually claims to family and spousal benefits brought under anti-discrimination laws, have had mixed results, while challenges to the statutes that confer rights

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Of the three relationship types under discussion—namely, heterosexual de facto, same-sex and domestic co-dependant—same-sex and domestic co-dependant are the most similar. In fact, removing the sexual activity dimension, they are virtually identical. . . . The characteristics of [same-sex] relationships have far more in common with domestic co-dependants and are, by definition, *a subset of this grouping*.

South Australia, House of Assembly *Hansard* 1 Dec. 2005, at 4399 (Joe Scalzi) (emphasis added).

171. John Howard, Prime Minister, Press Conference, Commonwealth Parliamentary Offices, Sydney (Dec. 22, 2005), *available at* <http://www.pm.gov.au/media/Interview/2005/Interview1735.cfm> (last visited June 22, 2007).

172. *See supra* note 14.

173. For critical discussion see, for example, CHARLESWORTH, *supra* note 12. In recent years this has provoked some state and territory governments to enact their own local versions. *See supra* note 12. However, they are very limited in operation and, moreover, have no impact on national law.

174. *See* Reg Graycar & Jenny Morgan, *Feminist Legal Theory and Understandings of Equality: One Step Forward or Two Steps Back?*, 28 T. JEFFERSON L. REV. 399 (2005); Jenny Morgan, *Equality Rights in the Australian Context: A Feminist Assessment*, in TOWARDS AN AUSTRALIAN BILL OF RIGHTS, *supra* note 12, at 123; *cf.* *Kruger v. Commonwealth* (1997) 190 C.L.R. 1 (Austl.); *Kable v. Dir. of Pub. Prosecutions for N.S.W.* (1996) 189 C.L.R. 51; *Leeth v. Commonwealth* (1992) 174 C.L.R. 455 (Austl.).

or benefits based upon “spousal” status have universally failed.<sup>175</sup> In New Zealand a challenge to the exclusivity of the Marriage Act was unanimously dismissed.<sup>176</sup> The limited ability to strike down statutes on constitutional grounds,<sup>177</sup> the frequent use of gendered definitions within statutes (such as the terms “husband,” “wife,” and the narrow interpretation of “spouse”),<sup>178</sup> and a general tendency to be cautious about “law-making,”<sup>179</sup> have all tempered judicial creativity in statutory interpretation and, in turn, discouraged court challenges.

It could be suggested, perhaps somewhat controversially, or perhaps even heretically, that the absence of a constitutional guarantee of equality in Australia has enabled the debate in that country to bypass, and indeed transcend, some of the limits of the language of equality, or at least the language of formal equality, leaving the legislature a clean slate upon which to draw recognition regimes.<sup>180</sup> For example, the Supreme Court of Canada’s remedy in the 1999 lesbian spousal support case, *M v. H*,<sup>181</sup> (directing the

175. See *Harman v. Sec’y, Dep’t of Soc. Sec.* (1998) 3 S.S.R. 19 (Austl.); *Rohner & Anor v. Scanlan & Minister for Immigration & Multicultural Affairs* (1998) 1006 F.C.A. (Austl.); *Commonwealth v. Human Rights & Equal Opportunity Comm’n* (1998) E.O.C. 92-932 (Austl.); *Brown v. Comm’r for Superannuation* (1995) 38 A.L.D. 344 (Austl.).

176. *Quilter v. Attorney-Gen.*, [1998] 1 N.Z.L.R. 523 (C.A.); see also Andrew Butler, *Same-Sex Marriage and Freedom from Discrimination in New Zealand*, 1998 PUB. LAW 396; Janet McLean, *Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act*, 4 N.Z. L. REV. 421 (2001); Paul Rishworth, *Reflections on the Bill of Rights after Quilter v. Attorney-General*, N.Z. U. L. REV. 683 (1998).

177. Note that under section 109 of the Commonwealth Constitution, when there is a conflict between state legislation and federal legislation, the latter prevails. So state acts inconsistent with federal discrimination legislation are, to the extent of any inconsistency, invalid or inoperative under section 109 of the Constitution. On this basis, the refusal by the state of Victoria to allow single women and lesbians access to assisted reproductive services was held to be inconsistent with the federal Sex Discrimination Act, 1984 (Austl.), which prohibits discrimination on the basis of marital status. See *McBain v. Victoria* (2000) 99 F.C.R. 116 (Austl.). The High Court of Australia refused to review the decision on the grounds of standing. *Ex Parte Australian Catholic Bishops Conference* (2002) 209 C.L.R. 372 (Austl.).

178. See, e.g., *Commonwealth v. HREOC & Muller* (1998) E.O.C. 92-931, at 78, 207 (Austl.); *Brown*, 38 A.L.D. 344.

179. See, for example, the extra curial discussions by two current High Court judges. Dyson Heydon, *Judicial Activism and the Death of the Rule of Law*, 47 QUADRANT 9 (2003); Michael Kirby, *Beyond the Judicial Fairy Tales*, 48 QUADRANT 26 (2004) (responding to Heydon).

180. For an argument that legislative processes are equally susceptible to formal equality discourses, see Boyd & Young, *supra* note 35, at 767–70.

181. [1999] 2 S.C.R. 3 (Can.).

province of Ontario to change as many statutes as necessary in order to comply with the Charter of Rights and Freedoms' equality guarantee), is more far reaching than anything with which we are familiar in Australia's constitutional repertoire. It is unlikely that a court-initiated or litigation-based approach would ever have resulted in legislation such as the Australian laws that accord rights to people in non-cohabiting or non-conjugal relationships. Specifically, a formal equality model may well have resulted in the first arm of the New South Wales reforms (the extension of de facto relationship status to same-sex couples), but it is unlikely ever to have resulted in simultaneous recognition of non-couple relationships.

Because equality challenges are premised upon a comparator, they will always to some degree be limited by that comparator.<sup>182</sup> This seems to be the case even in jurisdictions such as Canada, where equality jurisprudence has embraced a more substantive than formal approach to equality.<sup>183</sup> Currently, the enshrined model of relationship recognition is marriage, and, in some jurisdictions, "marriage-like" cohabiting heterosexual relationships. Since it is unlikely that different treatment of relationships that are not like marital relationships (such as non-sexual or non-cohabiting relationships) would be seen as a breach of equality guarantees, legislation that recognizes those relationships would not form part of any legislation that is enacted in response to constitutional litigation.<sup>184</sup>

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182. For a persuasive discussion of the limits of the "sameness" and "difference" approaches to "equality" which require the choice of comparators, see CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32–45 (1987).

183. For some recent critiques of the Supreme Court of Canada's equality jurisprudence, suggesting that despite the rhetoric of substantive equality, the court has not moved much beyond formal equality, see Hester Lessard, *Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and Trociuk v. British Columbia (Attorney-General)*, 16 CAN. J. WOMEN & L. 165 (2004); Diana Majury, *The Charter, Equality Rights, and Women: Equivocation and Celebration*, 40 OSGOODE HALL L.J. 297 (2002); Margot Young, *Blissed Out: Section 15 at Twenty*, 33 SUP. CT. L. REV. 45 (2006); see also Boyd & Young, *supra* note 35, at 767–70 (suggesting that formal equality discourses have dominated parliamentary discussions as well). For a more general discussion of some of the debates about "equality," see Graycar & Morgan, *supra* note 174.

184. Though there is of course nothing to stop a legislature from adding such provisions to those required to be enacted.

Similarly, although equality litigation could lead to the extension of ascribed parental status to co-mothers in lesbian families formed through assisted reproductive means,<sup>185</sup> it is highly unlikely that it could generate a more adaptive form of family recognition to accommodate the diverse needs of multi-parent families. On occasions when lesbian families have an involved biological father (often a gay man and possibly his partner as well), it may be the case that all adults intend to be equal parent-figures from the outset—a situation that really defies any heterosexual comparator.<sup>186</sup> It is notable that both the Law Commission of New Zealand<sup>187</sup> and the Victorian Law Reform Commission<sup>188</sup> have recently proposed models that allow for more than two legal parents in lesbian and gay families (suggesting presumed status for the second female parent in lesbian families formed through assisted conception, with an additional form of opt-in status available for any male parent(s)).<sup>189</sup>

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185. This has happened in South Africa. *See J. v. Dir.-Gen., Dep't of Home Affairs* 2003 (5) BCLR 463 (CC) (S. Afr.). More recently such litigation has also occurred in Canada. *See M.D.R. v Ontario* (Deputy Registrar General), [2006] O.J. No. 2268 (S.C.J.).

186. Although this is not the most common family form in gay and lesbian families, such multi-parent families do exist and have unmet legal needs. *See Jenni Millbank, From Here to Maternity: A Review of the Research on Lesbian and Gay Families*, 38 AUSTL. J. SOC. ISSUES 541 (2003); JENNI MILLBANK, GAY & LESBIAN RIGHTS LOBBY, AND THEN . . . THE BRIDES CHANGED NAPPIES (2003), available at [http://www.girl.org.au/pdf/major\\_reports/NappiesApril2003.pdf](http://www.girl.org.au/pdf/major_reports/NappiesApril2003.pdf).

187. N.Z. LAW COMM'N, NEW ISSUES IN LEGAL PARENTHOOD 83–85 (2004) (particularly recommendations 10–12).

188. VICTORIAN LAW REFORM COMM'N, ASSISTED REPRODUCTIVE TECHNOLOGIES & ADOPTION, POSITION PAPER TWO (2005) suggested automatic parental status for both mothers and a method of multi-parent adoption with the consent of both mothers in the post-birth period. However, the latter aspect of the proposal was dropped in the final report on the basis that it was unwieldy and may not be actually needed by gay and lesbian families because of the generally non-residential role of biological fathers. *See ASSISTED REPRODUCTIVE TECHNOLOGY & ADOPTION, FINAL REPORT* 138–39 (2007).

189. Note that in the recent Ontario Court of Appeal decision in *A.A. v. B.B.*, [2007] Ont. C.A. 2, the court creatively used its *parens patriae* jurisdiction to accord parental status to the second mother in a lesbian family. The biological father already had legal status (it is unclear in the decision why this was the case). The mothers did not wish to sever the father's legal status through a joint adoption order in their favor. In such a situation it is hard to see how an equality challenge could proceed due to the lack of any obvious comparator.

#### XIV. THE MARRIAGE BAN AND THE RESURRECTION OF MARRIAGE AS THE “GOLD STANDARD”<sup>190</sup>

In 2004 the Australian federal government passed amendments to the Marriage Act of 1961 that were expressed as giving effect “to the Government’s commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same-sex relationships cannot be equated with marriage.”<sup>191</sup> The amendments inserted a statutory definition of marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”<sup>192</sup> into the Act, which had not previously contained any such definition. The amendments also included a provision that prevents Australian courts from making a declaration of validity concerning a same-sex marriage contracted overseas.<sup>193</sup> Notably, no claim for a declaration had actually been heard by any court at the time of the amendments.

Significantly, there was no need to protect against the “erosion”<sup>194</sup> of marriage in domestic law since courts universally had applied the common law definition of marriage which requires “one man and one woman.”<sup>195</sup> There was no prospect of change to the common law definition, and no ability to bring a constitutional equality challenge to the Marriage Act itself. Apart from the foreign marriage provision, this amendment, then, was a purely rhetorical exercise, aimed at reaffirming the “special-ness” of marriage and singling out lesbians and gay men as objects of exclusion. Unsurprisingly, this maneuver

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190. See Young & Boyd, *supra* note 39 (discussing civil unions in Canada and their role in configuring marriage as the “Gold Standard”); see also Seuffert, *supra* note 158, at 284–88, 304.

191. Explanatory Memorandum, Marriage Amendment Bill, 2004 (Austl.); see also Australia, House of Representatives *Hansard* 24 June 2004, at 31,459 (Philip Ruddock).

192. Marriage Amendment Act, 2004, sched. 1 (Austl.).

193. Marriage Act, 1961, § 88EA (Austl.).

194. Australia, House of Representatives, *supra* note 191, at 31,459.

195. Drawn from *Hyde v. Hyde*, (1866) 1 L.R.P. & D. 130 (U.K.). Note particularly that in those jurisdictions that have introduced same-sex marriage through court-based challenges, not one has done so through the alteration of the common law meaning of marriage. Rather, courts have affirmed the common law meaning of marriage as exclusively heterosexual, but have held that this definition is unconstitutional. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Halpern v. Canada (Attorney-General)*, [2003] 225 D.L.R. (4th) 529; *Reference re Same Sex Marriage*, [2004] S.C.R. 698 (Can.).

was made just prior to a federal election, as a timely “wedge issue.” Framing the issue as the “protection” of marriage was not a novel approach,<sup>196</sup> but it effectively cornered the opposition, which had proposed comprehensive status as *de facto* couples for same-sex relationships in federal law and yet still supported the marriage ban.

Another consequence of the Marriage Act was to capture discussion of the possibilities for relationship reform within very narrow parameters—marriage or marriage ban—and to render these synonymous with equality and inequality. In the months following the ban many described marriage as the only way of achieving “full,” “real,” or “legal” equality for lesbians and gay men, and marriage became the articulated goal of a number of Australian gay and lesbian rights groups for the first time.<sup>197</sup> Somewhat ironically, given the vehemence of socialist feminist critiques of marriage in previous decades,<sup>198</sup> marriage became the *cause celebre* of socialist<sup>199</sup> and green groups.<sup>200</sup> In essence, same-sex marriage became an instant equality goal because it had been expressly denied, rather than having actively been sought.<sup>201</sup>

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196. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). For an up-to-date list of the states that have adopted similar measures (“Baby Domas”), see The Marriage Map, [http://www.thetaskforce.org/downloads/MarriageMap\\_06.pdf](http://www.thetaskforce.org/downloads/MarriageMap_06.pdf) (last visited June 22, 2007). As of January 2007, more than half of the states had passed either a constitutional amendment or a statute banning marriage between same-sex partners. Only Massachusetts allows same-sex partners to marry, as a result of the decision in *Goodridge*.

197. See, for example, statements on the Australian Marriage Equality website, <http://www.australianmarriageequality.com>. This was also a feature of the New Zealand debates on civil unions. See Seuffert, *supra* note 158, at 285.

198. See, e.g., MICHELE BARRETT & MARY MCINTOSH, *THE ANTI-SOCIAL FAMILY* (2d ed. 1991).

199. The socialist groups Socialist Alliance, Community Action Against Homophobia, and “Resistance” have all publicly called for same-sex marriage as their prime equality goal for lesbians and gay men, and have, for instance, recently linked homophobic violence to the denial of marriage. Rachel Evans & Farida Iqbal, *Equal Love Rights Protests a Huge Success*, GREEN LEFT WEEKLY (N.S.W., Austl.) Aug. 23, 2006, available at <http://www.greenleft.org.au/2006/680/7839>.

200. Interestingly, the Labor government’s introduction of civil unions in New Zealand led the New Zealand Greens to call for marriage. See Seuffert, *supra* note 158, at 285. The Tasmanian Greens went so far as to introduce a bill for same-sex marriage into Tasmanian Parliament, which would not have had the effect of marriage, being limited only to Tasmania. See Same Sex Marriage Bill, 2005 (Tas.), available at [http://tas.greens.org.au/publications/legislation/Same\\_Sex\\_Marriage\\_Bill\\_2005.pdf](http://tas.greens.org.au/publications/legislation/Same_Sex_Marriage_Bill_2005.pdf).

201. It is also possible that interest in marriage increased as a consequence of the wide implementation of presumptive forms of recognition, raising marriage as the “next” horizon.

Small scale surveys conducted by a gay and lesbian rights group in Victoria found that support for marriage doubled between 2001 and 2005, which the authors attributed to “generational change in the value placed on the different forms of recognition.”<sup>202</sup> However, it is notable that in the 2005 survey a significantly smaller proportion actually wanted marriage for their current relationship (45%) compared to those who wanted it to be “available” (80%).<sup>203</sup> Likewise, when a larger health survey in 2006 did not ask whether parties wanted marriage or civil unions as an abstract right, but whether they would formalize their current relationship through a state-sanctioned avenue if available, 52% of men and 39% of women indicated no intention or wish to formalize their current relationship.<sup>204</sup> This suggests that a desire for marriage as a symbolic equality goal, and the desire actually to marry may not be just slightly but *markedly* different things.<sup>205</sup>

## CONCLUSION

The path of relationship recognition law reform in Australia contrasts dramatically with legal developments and campaigns in the United States, primarily because of the centrality of marriage to the latter. In Australia marriage has had little significance for the legal rights of heterosexual couples for some time, and same-sex relationships have largely been legally assimilated within that framework of ascribing presumptive status to couples across most of Australia. The recent moves to developing forms of opt-in status are

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202. RUTH MCNAIR & NIKOS THOMACOS, VICTORIAN GAY & LESBIAN RIGHTS LOBBY, NOT YET EQUAL: REPORT OF THE VGLRL SAME SEX RELATIONSHIPS SURVEY 2005, at 38 (2005), available at <http://www.vglrl.org.au/files/VGLRL%202005%20-%20SSRS%20Report.pdf>.

203. When asked for a preferred method of relationship recognition for their current relationship, 23% of respondents nominated marriage in 2001, while 45% nominated it in 2005. *Id.* at 39–40. A much higher proportion of respondents, 79.8%, wanted marriage to be available. *Id.* at 38.

204. MARIAN PITTS ET AL., AUSTRALIAN RESEARCH CTR. IN SEX, HEALTH & SOC’Y, PRIVATE LIVES: A REPORT ON THE HEALTH AND WELLBEING OF GLBTI AUSTRALIANS 26 (2006), available at [http://www.glhv.org.au/files/private\\_lives\\_report\\_1.pdf](http://www.glhv.org.au/files/private_lives_report_1.pdf).

205. For a fascinating exploration of attitudes to relationship rights among lesbians and gay men, see Rosie Harding, *Dogs are “Registered,” People Shouldn’t Be: Legal Consciousness and Lesbian and Gay Rights*, 15 SOC. & LEGAL STUD. 511 (2006).

interesting because they come in addition to, not instead of, ascriptive status. This clearly separates the issues of legal rights on the one hand and of symbolic status on the other.

The piecemeal and legislative nature of reforms necessitated by Australia's federal system, and the absence of a Bill of Rights may be viewed as both beneficial and problematic. So, for example, while New South Wales became the first state to recognize same-sex relationships (as it was the first to legislate for extensive recognition of heterosexual non-marital relationships), it is clear that the reforms that followed in the other states and territories were broader in their impact. Specifically, later reforming states were more likely to amend a wider range of laws to accord parity to heterosexual and same-sex couples and to include parenting rights in the reform package. It is fair to infer that jurisdictions have taken courage from each others' reforms.

Problematically, there are now widespread rights for same-sex couples at the state and territory level, while at the federal level the picture remains one of widespread exclusion with little prospect of de facto rights under a hostile federal government.<sup>206</sup> This is likely to cause particular difficulty in the area of parenting rights, where federal and state law both govern parental status and a schism has been generated between the new presumptive parental status granted to co-mothers by some state and territory laws, and federal law which does not recognize this status.<sup>207</sup>

The legislative origins of reform also permit reform models that are not strictly comparative, as have been those that resulted from equality litigation. Rather, some of the Australian reforms have been *sui generis*, such as those covering non-couples and also those proposed for multi-parent lesbian and gay families.

Yet, relationship rights for non-couples, at first proposed as a radical, even subversive, move away from couple recognition toward legal acknowledgment of interdependency, have recently been co-

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206. And no prospect of marriage given that both government and opposition supported the Marriage Amendments in 2004. However, see the proposals in HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *SAME-SEX: SAME ENTITLEMENTS* (2007), available at [http://www.hreoc.gov.au/human\\_rights/samesex/report/pdf/SSSE\\_Report.pdf](http://www.hreoc.gov.au/human_rights/samesex/report/pdf/SSSE_Report.pdf).

207. See Millbank, *supra* note 10; H & J (2006) F.M.C.A. Fam. 514 (Austl.).

opted by anti-equality activists who have sought to take the “sex” out of relationship law reform. An additional irony is that while marriage was rarely on the table in Australia during a period of intense legal change, the introduction of a marriage ban in 2004 seems to have generated a groundswell of support among lesbian and gay communities for marriage. These developments suggest that, in all reform movements, comparators are never far away and that standards are not universal, but rather form shifting sands in the context of ongoing debate.