

How well does Australian democracy serve sexual and gender minorities?

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for the Democratic Audit
of Australia

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Abbreviations

ABC	Australian Broadcasting Corporation
ACT	Australian Capital Territory
ALP	Australian Labor Party
GLBTI	Gay, lesbian, bisexual, transgender and intersex
GLLO	Gay and Lesbian Liaison Officer
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
NGO	Non Government Organisation
NSW	New South Wales
NT	Northern Territory
Qld	Queensland
SA	South Australia
Tas	Tasmania
TGLRG	Tasmanian Gay and Lesbian Rights Group
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Committee
Vic	Victoria
WA	Western Australia

The Democratic Audit of Australia —Testing the strength of Australian democracy

Since 2002, the Democratic Audit of Australia, at the Australian National University, has been conducting an audit to assess Australia's strengths and weaknesses as a democracy.

The Audit has three specific aims:

- 1 *Contributing to methodology*: to make a major methodological contribution to the assessment of democracy—particularly through incorporating disagreements about 'democracy' into the research design;
- 2 *Benchmarking*: to provide benchmarks for monitoring and international comparisons—our data can be used, for example, to track the progress of government reforms as well as to compare Australia with other countries;
- 3 *Promoting debate*: to promote public debate about democratic issues and how Australia's democratic arrangements might be improved. The Audit website hosts lively debate and complements the production of reports like this.

Background

The Audit approach recognises that democracy is a complex notion; therefore we are applying a detailed set of Audit questions already field-tested in various overseas countries. These questions were pioneered in the United Kingdom with related studies in Sweden, then further developed under the auspices of the International Institute for Democracy and Electoral Assistance—IDEA—in Stockholm, which recently arranged testing in eight countries including New Zealand. We have devised additional questions to take account of differing

views about democracy and because Australia is the first country with a federal system to undertake an Audit.

Further Information

For further information about the Audit, please see the Audit website at:

<http://democratic.audit.anu.edu.au>

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Executive summary ¹

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The aim of this focused audit has been to consider the extent to which Australian democracy protects and advances the rights of sexual and gender minorities. This significant minority of Australians does not yet have full citizenship entitlements or democratic rights, particularly with regard to the recognition of their intimate relationships. The heteronormative assumptions that underpin the Australian public policy framework continue to obscure and/or normalise the remaining areas of discrimination against sexual and gender minorities in Australian law and society.¹

This report considers the relationship between a heteronormative socio-legal framework and the democratic claim for sexual equality firstly by drawing upon the understanding of democracy that informs the Democratic Audit of Australia. This understanding is constituted by four principles:

- popular control over public decision-making;
- political equality in exercising that control;
- the principle of deliberative democracy; and
- the principle of human rights and civil liberties.

In addressing these principles the report will focus on three key areas concerning the provision of sexual equality, specifically:

- the legislative framework that is intended to eliminate discrimination against sexual and gender minorities;

¹ The authors would like to thank Carol Johnson and Rodney Croome for reading and commenting on an earlier draft of this report; and Rodney Croome for providing research assistance during the production of this report. They would also like to thank Marian Sawyer and Catherine Strong for their excellent editorial work.

- the recognition and certification of spousal and parenting relationships in gay and lesbian couples and families; and
- the public policies and social attitudes that continue to affect the daily lives of gay, lesbian, bisexual, transsexual and intersex (GLBTI) people in Australia.

It is clear from this report that recent decades have seen significant advances in relation to the recognition of the human rights of sexual and gender minorities in Australia. Over the years, laws against homosexual sex have been reformed in every State and Territory and legislation at both the national and sub-national levels has made discrimination on the basis of sexuality illegal (with some interesting exemptions). Being openly gay is no longer an automatic barrier to a successful public life, and same-sex families are becoming increasingly common and accepted as a legitimate family form.

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However, the report also highlights the significant areas in which inequality and discrimination persist, most damningly in the area of relationship recognition in the federal sphere. Here Australia lags well behind many other comparable countries, with the current federal government demonstrating considerable political hostility towards these equality claims. This persistent antagonism to claims for equality and same-sex relationship recognition suggests that reform at the federal level is unlikely to advance any further at least until a change of government. In contrast, the States and Territories have, for the most part, been responsive to demands for legislative and policy change.

The remaining inequalities being experienced by sexual and gender minorities in Australia are an unnecessary blight on the country's democratic credentials and human rights record. For the foreseeable future, addressing these inequalities and remaining areas of discrimination will remain the work of supportive sub-national governments and activist individuals and organisations. It is hoped that Australia's future will see higher standards of human rights protection for Australia's sexual and gender minorities as a matter of political equality rather than morality.

1. Introduction: The meaning of sexual equality

Protecting the rights and status of minorities is essential in democratic societies. In Australia, as in other liberal democracies, people belonging to the sexual and gender minorities generally referred to as gay, lesbian, bisexual, transgender and intersex (GLBTI) have had to struggle to have their rights recognised. In many areas that fight continues. As gay federal senator, the West Australian Democrat Brian Greig, argued in his first speech in parliament:

As a nation, Australia maintains appalling laws against gay and lesbian people...But homosexuality is not a behaviour to be regulated. It is an identity to be respected. We are people, first and foremost. We work, we have lives, we love and have relationships. We are family.

Yet despite being citizens, voters and taxpayers, lesbian and gay Australians do not have the same rights—or in many cases have no rights—to those things in life that heterosexual people take for granted.²

Greig's argument highlights the fact that a significant minority of Australians does not share the same democratic rights or range of legal entitlements available to heterosexuals.³ Unlike other groups who have engaged in equality struggles, such as women, who have now arguably achieved *formal* (if not substantive) equality with men, GLBTI people have yet to achieve formal equality with heterosexuals, particularly with regard to relationship recognition. This situation, according to

² Brian Greig, 2004, 'Australia's first openly gay Senator speaks', in Robert B. Ridinger (ed.) *Speaking For Our Lives: Historic Speeches and Rhetoric for Gay and Lesbian Rights (1892–2000)*, New York, Harrington Park Press, p. 775.

³ Various research including Census data and data from the Australian Survey of Social Attitudes estimates the GLBTI population in Australia at around two per cent of the adult population. For a discussion of this data see Shaun Wilson, 2004, 'Gay, lesbian, bisexual and transgender identification and attitudes to same-sex relationships in Australia and the United States', *People and Place* 12 (4): pp 12–21. It is likely that these figures underestimate the GLBTI population since they rely on respondents being prepared to state their sexuality and, in the case of the census, same-sex couples being aware that the Australian Bureau of Statistics permits them to tick the box for de facto couples, even when that is not their official legal status.

Morris Kaplan, 'is part of the unfinished business of modern democracy'.⁴

History has variously constructed homosexuality as a sin, immoral, deviant, a psychiatric illness, and a lifestyle choice. Homosexuality has often been regarded as requiring medical treatment, prayer, criminal prosecution or merely self-control to be overcome—the assumption being that heterosexuality was both the normal and more desirable condition. Some of these views remain in our communities and are now grouped under the banner of 'homophobia'. Homophobia theory gave rise to an understanding of heteronormativity, or 'the assumption that all people are heterosexual until proven otherwise'.⁵ Heteronormativity, which assumes an understanding of the citizen as heterosexual,⁶ continues to hide homophobic sentiment and provides the conceptual basis for many of the remaining areas of discrimination in Australian law and society.

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This report is concerned with the relationship between a heteronormative socio-legal framework and the democratic claim for sexual equality. In simple terms, achieving sexual equality should mean that an individual's rights or opportunities, including those of democratic participation, do not depend on their sexuality. In assessing this claim, the report considers the question:

How well does Australian democracy serve sexual and gender minorities?

To answer this question, the report draws on the understanding of democracy that informs the Democratic Audit of Australia. This understanding is constituted by four principles:

- popular control over public decision-making;
- political equality in exercising that control;
- the principle of deliberative democracy; and
- the principle of human rights and civil liberties.

The fourth of these principles will receive particular attention in this report.

In addressing these principles, the report will focus on three key areas concerning the provision of sexual equality, specifically:

- the legislative framework that is intended to eliminate discrimination against sexual and gender minorities;

⁴ Morris Kaplan, 1997, *Sexual Justice: Democratic Citizenship and the Politics of Desire*, London/New York, Routledge, p. 3.

⁵ Randolph Bowers and Victor Minichiello, 2001, 'A review of homosexuality: Changes over time', in Carl Wood (ed.) *Sexual Positions: An Australian View*, Melbourne, Hill of Content Publishing, pp. 149–150.

⁶ Carol Johnson, 2003, 'Heteronormative citizenship: The Howard Government's views on gay and lesbian issues', *Australian Journal of Political Science* 38(1): 45.

- the recognition and certification of spousal and parenting relationships in gay and lesbian couples and families; and
- the public policies and social attitudes that continue to affect the daily lives of GLBTI people in Australia.

Analysing these areas is made more complicated by the wide range of identities that is often subsumed in public debates on these issues. Terms such as ‘homosexualities’, or even the more inclusive ‘GLBTI’, in reality imply a ‘complex interconnection between identity, sex, sexuality and gender’.⁷ The term ‘homosexual’ referred almost exclusively to gay men until the 1980s when it came to include lesbians as well. During the 1990s, bisexual and transgender identities also came to be included in much of the public discourse concerning sexual and gender minorities. ‘Queer theory’ also emerged during the 1990s, drawing on postmodernism in an attempt to destabilise the hetero/homo binary. It is ironic that many GLBTI people now self-identify as ‘queer’, which in some ways reconfigures that same binary as hetero/queer. Some attempts to define these groups focus on behaviour rather than identity, referring to ‘sexual orientation’ or ‘sexual preference’, both of which are problematic as the orientation or preference alluded to may or may not in fact be homosexual or bisexual.⁸

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This difficulty in relation to sexual identity is further compounded by attempts to group sexual and gender minorities together, particularly in relation to a discussion of their citizenship rights. The ‘diversity of queer Australia’⁹ is evident in events such as the Sydney Gay and Lesbian Mardi Gras and in the wealth of community organisations and other cultural events that make sexual and gender minorities visible to broader Australian society. Given the relative brevity of this report it is not possible to afford adequate weight to all aspects of this diversity. In particular, there is not scope here to properly address the complex issues facing transgender and intersex Australians—indeed these issues could constitute a report of their own. We do address the concerns of these citizens in areas of general discrimination law but we do not consider the specific issues that transgender people face with regard to, for example, relationship recognition, where our emphasis is on lesbians and gay men.

In contrast to the equality–difference paradox that complicates struggles for gender equality, for GLBTI people equal treatment—before the law, in society

⁷ Bowers and Minichiello, ‘A review of homosexuality’, p. 131.

⁸ Sue Wills, 2001, ‘The challenge of sexualities’, in Marian Sawer and Gianni Zappala (eds), *Speaking for the People: Representation in Australian Politics*, Melbourne, Melbourne University Press, p. 199. For a theoretical discussion of the complexities of GLBTI identities see Wayne Morgan, 1995, ‘Queer law: Identity, culture, diversity, law’, *Australasian Gay and Lesbian Law Journal* 5: 1–41.

⁹ Fiona Nicoll, 2001, *From Diggers to Drag Queens: Configurations of Australian National Identity*, Sydney, Pluto Press, p. 208.

and in policy—is precisely the demand. With a few exceptions, such as particular legal and police protections in relation to homosexual vilification and violent hate crimes, GLBTI people seek the same recognition, rights, and protection from discrimination that are afforded to the heterosexual majority.¹⁰ This is in no way an attempt to suggest that GLBTI people wish to conform to some ‘heterosexual norm’. Nor is it an attempt to subsume the other currents in the gay and lesbian rights movement that, over time, have ranged from a liberationist resistance to the state, to an engagement with the state in response to the HIV/AIDS crisis in the 1980s, to a ‘queer counter-discourse’ that again rejected state engagement, to the more recent equal opportunity focused re-engagement with the state since the mid-1990s.¹¹ Rather, the argument is that sexual and gender minorities in Australia seek to have the wide variety of their own relationships recognised, and to be free from any form of discrimination based on their sexuality, as is already the case for the heterosexual majority. These claims have been validated in international law as is discussed in Chapter Two.

It is impossible to argue that advances have not been made in relation to the recognition of GLBTI human rights in recent decades. Great strides have been made from the criminalisation, vilification, and discrimination that characterised relations between GLBTI people and the state in the 1950s and 1960s to the vastly more tolerant attitudes that prevail today.¹² Over the years, laws against homosexual sex have been reformed in every State and Territory; discrimination legislation now makes discrimination on the basis of sexuality illegal (with some interesting exemptions); being openly gay is no longer an automatic barrier to a successful public life; and same-sex families are becoming increasingly common and accepted as a legitimate family form. In many other areas there are no ‘technical impediments’ to full citizenship as defined in the *Australian Citizenship Act 1948*.¹³

Nevertheless, there are some notable areas where inequality and discrimination persist, most evidently in the area of relationship recognition in the federal sphere. Brian Greig makes a link between the continuing lack of political equality afforded to GLBTI people and the violence and harassment that remain a threat to their safety. Greig argues that:

¹⁰ Wills, ‘The challenge of sexualities’, pp. 199–202.

¹¹ Miranda Stewart, 1999, ‘It’s a queer thing: Campaigning for equality and social justice for lesbians and gay men’, *Alternative Law Journal* 29(2): 76.

¹² Graham Willett, 2000, *Living out Loud: A History of Gay and Lesbian Activism in Australia*, Sydney, Allen and Unwin, p. ix.

¹³ Barbara Baird, 2003, ‘Sexual citizenship in Tasmania: Stories of gay law reform’, *Journal of Media and Cultural Studies* 17(1): 3.

While parliaments continue to deny our relationships, deem us to be criminals, and render us to be second-class citizens without legal protections, then some people will take this as their cue to continue to treat us badly.

Greig believes that the hatred that fuels GLBTI hate crime is 'nurtured through a culture of invisibility and fear towards gay and lesbian people and the neglect and indifference of parliaments.'¹⁴

The prevalence of hate crime is one way to measure the status of gay and lesbian people in Australian society. Another is opinion surveys. A survey of 25 000 Australians over age 14 released by the Australia Institute in July 2005 found that 35 per cent of those surveyed agreed with the statements that 'homosexuality is immoral' and that 'homosexual couples should not be allowed to adopt children'.¹⁵ Another large-scale survey released by the Humanist Society early in 2006 found that 53 per cent of Australians support the formal recognition of same-sex relationships by the Federal Government.¹⁶ There are also surveys that examine the experiences of these groups. These include the *Writing Themselves In* surveys of gay and lesbian young people conducted by the Australian Research Centre for Sex, Health and Society at La Trobe University,¹⁷ and the Victorian Gay and Lesbian Rights Lobby's *Enough is Enough* reports on gay and lesbian discrimination and violence.¹⁸ Both sets of reports show slowly decreasing levels of isolation, fear, prejudice, discrimination and violence against lesbian and gay Australians since the late 1990s. However, they also show concerning increases in prejudice and discrimination in some key areas. These reports have themselves been important tools in lobbying for change and recognition.¹⁹

Another indicator of the status of gay and lesbian people in Australian society is the number of, and attitudes towards, openly gay and lesbian people in public life. Australia has several openly gay and lesbian politicians, senior public servants, and at least one senior judge. However, the number of such public figures is not high compared with other western democracies, and from time-to-time those who are open endure unwarranted attacks. Australia also has far fewer openly gay or lesbian senior business people, elite sportspeople or high-profile entertainers than other western countries. The sexual orientation of those major artists, writers or

¹⁴ Greig, 'Australia's first openly gay Senator speaks', p. 777.

¹⁵ Australia Institute, 2005, Mapping Homophobia in Australia, July. <<http://www.tai.org.au>>

¹⁶ Humanist Society of NSW, Commissioned opinion poll on formal relationship recognition. <<http://www.secular.org.au/articles/ChurchStatePoll020206.pdf>>

¹⁷ Lynne Hillier, Deborah Dempsey, Lyn Harrison, Lisa Beale, Lesley Matthews and Doreen Rosenthal, 1998, *Writing Themselves In: A National Report on the Sexuality, Health and Well-Being of Same-Sex Attracted Young People*, National Centre in HIV Social Research, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne.

¹⁸ Victorian Gay and Lesbian Rights Lobby, 1999 and 2005, *Enough is Enough* reports.

¹⁹ Stewart, 'It's a queer thing', p. 76.

historical figures who are known to be gay or lesbian is rarely discussed publicly, let alone celebrated. It is still considered remarkable when public figures come out. In fields of endeavour associated with national identity, such as Australian Rules Football or international cricket, there are no openly gay participants.

So while it is true that there is a fair degree of tolerance of homosexuality in Australian society, this tolerance often manifests as a studious disinterest in the plight and the contribution of GLBTI people. This attitude of tolerance certainly has not led to an active commitment to do all that is possible to protect the human rights of sexual minorities. The lack of federal anti-discrimination law, and the current resistance to relationship recognition are just two examples that show how Australia continues to lag behind comparable countries in this area. With a highly conservative federal government, led by Prime Minister John Howard, now in office for over a decade, GLBTI citizens have seen a renewal of political hostility towards their equality claims. In light of this hostility, the other jurisdictions of Australia's federal system have taken on a renewed significance in the struggle to achieve sexuality equality. All States and Territories are currently governed by Labor and these governments have, for the most part, been responsive to demands for legislative and policy change.

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But the key is that demands must still be made. Australian States and Territories have not acted to ameliorate discrimination against GLBTI people because it was simply the right thing to do. Australian activists have lobbied and campaigned for, among other things, the decriminalisation of homosexuality, equality in age of consent laws, and relationship recognition. As the following chapters make clear, such struggles are still necessary.

2. Legislative frameworks

Introduction

Homosexuality per se is no longer illegal in Australia²⁰ (unlike in over 80 other countries). Furthermore, all Australian States and Territories have anti-discrimination laws designed to protect people from discrimination (and in some cases also vilification) on the grounds of their sexuality. However, in contrast to comparable countries, this progressive shift has occurred relatively recently. Legislative protection was only secured after extremely hard-fought campaigns, and in the case of Tasmania, only after unprecedented legal appeals. Further, there remain several areas of law in Australia that still impinge on the equal treatment, human rights and citizenship status of gay men and lesbians. Most obviously, these include the lack of federal anti-discrimination and equal opportunity laws, and laws recognising spousal rights and intimate relationships.

This chapter examines the legislation covering age of consent, anti-discrimination and equal opportunity. The legal issues relating to relationship recognition are dealt with separately in Chapter 3.

Criminal law

In Australia, criminal law is generally, but not exclusively, a matter of State and Territory jurisdiction. Until 1972, all Australian States and Territories had laws that criminalised all sexual activity between men, including consenting adult men in

²⁰ Two States (Queensland and Tasmania) still have discriminatory aspects to their criminal laws that relate to the age of consent for anal sex.

private.²¹ These laws were variations on Westminster statutes from the second half of the nineteenth century, although much harsher penalties were attached to the Australian laws than to their British equivalents. For example, sexual activity between men in Western Australia could be punished with 14 years imprisonment and whipping. In Tasmania, such activity was punishable with up to 21 years in jail.

Beginning in 1972, with those Territories then under direct federal control (the Australian Capital Territory and the Northern Territory), each of Australia's sub-national jurisdictions repealed its blanket ban on gay male sex.

Table 2.1 Decriminalisation of gay male sex by Australian States and Territories

State / Territory	Year gay male sex decriminalised
ACT	1972
NT	1972
South Australia	1975
Victoria	1983
NSW	1984
WA	1990 ²²
Queensland	1991
Tasmania	1997

As can be seen from Table 2.1, the decriminalisation of gay male sex in Australia occurred relatively recently, with the last criminal laws (in Tasmania) being repealed less than a decade ago. This change also happened much later than in some comparable jurisdictions, as Table 2.2 below shows.

Table 2.2 Decriminalisation of gay male sex: International comparison

Country	Year gay male sex decriminalised
Sweden	1944
England and Wales	1967
Canada	1968
Scotland	1980
Northern Ireland	1982
New Zealand	1985
USA	2003 (by judicial decision)

²¹ It is interesting to note that sexual activity between women has never been criminalised nor subject to age of consent laws. In fact, before the law, lesbian sex does not appear to exist at all.

²² At the same time that it decriminalised gay male sex, Western Australia introduced legislation prohibiting the promotion and encouragement of homosexuality. This legislation was used to censor legitimate educational activity by, and on behalf of, that State's gay and lesbian community until it was repealed in 2003.

Case study: The struggle for Tasmanian law reform

The campaign to force Tasmania, the last Australian jurisdiction where gay male sex was a criminal offence, to reform these laws is an example of how difficult law reform in this area has been. The campaign was initiated with the formation of the Tasmanian Gay and Lesbian Rights Group (TGLRG) in 1988 (following a number of previous unsuccessful attempts at gay law reform in the 1970s). It was to take nine years and the involvement of Amnesty International, the United Nations, the Federal Government and the High Court before Tasmania made sex between men a legal activity.

What was initially planned as a low-key campaign for law reform was transformed into a major, high profile campaign when, in October 1988, nine members of the TGLRG were arrested for holding an information stall at Hobart's Salamanca markets, in defiance of a local Council ban. In the following weeks, members and supporters set up the market stall again, and the arrests continued. In little over a month, 130 people (including other market stallholders who displayed the TGLRG petition) were arrested and charged with trespass on Council property.

These events generated enormous media coverage and galvanised supporters, leading to massive overnight increases in the membership of the TGLRG. The group's persistent campaigning in the face of widespread and blatant homophobia by those opposing law reform also appeared to be having an impact on public opinion. Opinion polls in October 1989 showed a rise in support for law reform from 31 to 43 per cent in the previous twelve months.

In 1991, following the failure of a compromised Tasmanian government law reform bill,²³ the TGLRG decided to appeal to the United Nations. Earlier that year the federal government had ratified the UN International Covenant on Civil and Political Rights, allowing an individual whose civil rights had been violated to appeal to the UN Human Rights Committee (UNHRC). On 25 December 1991, the day the ratification took effect, TGLRG founding member Nick Toonen lodged not only the first Australian appeal, but the first appeal anywhere on the basis of sexuality.²⁴

Support for the campaign continued to grow. In 1992, members of the TGLRG tested the enforcement of the Tasmanian laws by presenting statutory declarations to Hobart police stating that they had committed sodomy and daring police to arrest them. Activists in other States continued their pickets of Tasmanian Tourist Bureaus, and in 1994 initiated a high-profile boycott of Tasmanian goods.

Almost two and a half years after it was lodged, Toonen's appeal to the UN succeeded, with an April 1994 UNHRC finding that Tasmania's laws violated the international Covenant to which Australia was a signatory.²⁵

When the Tasmanian government failed to act on the UN ruling, the federal government used its external affairs power to pass the *Human Rights (Sexual Conduct) Act*, in a somewhat half-hearted attempt to override Tasmania's laws. Rather than directly invalidating the Tasmanian law and inviting a battle over States' rights, the federal Act merely stated that the right to sexual privacy should not be subject to 'arbitrary interference'. To establish that this federal legislation did indeed apply to the Tasmanian laws, however, would require a High Court ruling. So again, the TGLRG appealed, this time to the Australian High Court. The High Court agreed to hear the appeal, ruling that although no charges had been laid under the Tasmanian law, members of the TGLRG had sufficient legal interest in the matter to bring a challenge to the validity of Tasmania's laws.²⁶ Had the case proceeded, it is likely that the Tasmanian laws would have been found unconstitutional, because they conflicted with Commonwealth legislation. However, the challenge was rendered unnecessary when the Tasmanian Parliament finally repealed the offending provisions of its Criminal Code on 1 May 1997.

²³ The bill linked decriminalisation to the government's HIV/AIDS strategy, and included a preamble stating that the Parliament did not endorse or support the promotion of homosexuality. For these reasons, the TGLRG opposed the bill.

²⁴ Willett, *Living out Loud*, p. 235.

²⁵ Toonen v Australia, HRC Communication No. 488/1992

²⁶ Croome v Tasmania (1997) 71 ALJR 430

Age of consent

The decriminalisation of gay male sex did not create legal equality, however, as for many years a number of States and Territories had unequal ages of consent for homosexual and heterosexual sex. For example, NSW and the Northern Territory enacted an age of consent of 18 years for gay men, compared with 16 for everyone else. The most extreme difference was found in Western Australia—when that State decriminalised gay male sex in 1990, it enacted an age of consent for gay men of 21.

The higher age of consent for gay male sex in the Northern Territory was equalised in 2002, and in NSW and Western Australia in 2003. Age of consent reform followed in the wake of vigorous local campaigning and an equivalent British reform in 2000, and the changes came much more quickly than with the decriminalisation of gay male sex.

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With the exception of Queensland and Tasmania, all Australian States and Territories now have equal age of consent laws. In Queensland it is an offence to have ‘carnal knowledge’ with a person under the age of 16, but the criminal code specifies that carnal knowledge does not include ‘sodomy’. Sodomy is not permitted with any person under the age of 18. While this law distinguishes between the activity rather than the gender of the participants, it effectively discriminates against young gay men. The Tasmanian Criminal Code contains various defences to the charge of ‘sexual intercourse with a person under the age of 17’—based on limited age differences between the parties (for example, it is a defence if the younger person was 12 years or older and the older person was no more than 15 years old), however these defences apply only ‘if no anal sex occurs’, a qualification that, as in Queensland, effectively creates an unequal age of consent for Tasmanian gay men.

Anti-discrimination and equal opportunity laws

The Australian Constitution allows States and Territories to enact laws protecting individuals and groups from discrimination and ensuring they have equal opportunity. The federal government may enact similar legislation in certain circumstances, including if that legislation is mandated by Australia’s international human rights obligations.²⁷

However, an assessment of the Australian legislative framework for protecting people from discrimination on the grounds of sexuality comes to a mixed

²⁷ Australian Constitution, Section 51 (xxix)

conclusion. On the one hand, there are anti-discrimination laws in place in all States and Territories, but on the other, these laws are inconsistent, often containing significant exemptions, meaning that individuals are provided with varying levels of legal protection based on their geographic location. Furthermore, with the exception of the very narrow circumstances covered by the Workplace Relations Act (see Table 2.3 below) there is still no legislation at the federal level that outlaws discrimination on the grounds of sexuality.

States and Territories

All Australian States and both self-governing Territories have enacted legislation prohibiting discrimination against gay and lesbian people in employment, education, accommodation and the provision of goods and services.

The terms used to define the grounds on which the legislation offers protection vary between jurisdictions, as shown in Table 2.3 below. For example, South Australian legislation prohibits discrimination on the grounds of ‘sexuality’,²⁸ Tasmania uses the term ‘sexual orientation’²⁹ and NSW legislation refers to ‘homosexuality’.³⁰ When the relevant provisions of the Queensland Anti-Discrimination Act³¹ and the Victorian Equal Opportunity Act³² were enacted they protected vulnerable sexual minorities with the narrow term ‘lawful sexual activity’. Queensland has since added the more robust term ‘sexuality’, and Victoria has added ‘sexual orientation’. This variance in terminology adds to the inconsistency in Australia’s legislative framework discussed above.

Table 2.3 Protection from discrimination across jurisdictions			
Jurisdiction	Legislation	Grounds for discrimination protection	Vilification protection?
Commonwealth	<i>Workplace Relations Act 1996</i>	Sexual preference, <i>but only in the case of employment termination in a workplace with more than 100 employees.</i>	No
NSW	<i>Anti Discrimination Act 1977</i>	Homosexuality	Yes
Victoria	<i>Equal Opportunity Act 1995</i>	Lawful sexual activity, sexual orientation	No

²⁸ *South Australian Equal Opportunity Act 1984*, Section 5

²⁹ *Tasmanian Anti-Discrimination Act 1998*, Section 3

³⁰ *NSW Anti-Discrimination Act 1977*, Section 4

³¹ *Queensland Anti-Discrimination Act 1991*, Section 4

³² *Victorian Equal Opportunity Act 1995*, Section 4

Table 2.3 Continued

Jurisdiction	Legislation	Grounds for discrimination protection	Vilification protection?
Queensland	<i>Anti Discrimination Act 1991</i>	Lawful sexual activity, sexuality	Yes
Western Australia	<i>Equal Opportunity Act 1984</i>	Sexual orientation	No
South Australia	<i>Equal Opportunity Act 1984</i>	Sexuality	No
Tasmania	<i>Anti Discrimination Act 1998</i>	Sexual orientation, lawful sexual activity	Yes
ACT	<i>Discrimination Act 1991</i>	Sexuality	Yes
Northern Territory	<i>Anti Discrimination Act 1992</i>	Sexuality	No

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More significant than the inconsistent terminology, however, is the fact that State and Territory anti-discrimination and equal opportunity laws are littered with numerous complex exemptions which mean that sexuality discrimination is not unlawful in certain circumstances or for certain bodies.³³ For example, people who care for, or have responsibility for, children have no protection from discrimination in employment on the grounds of sexuality in Queensland or on the grounds of lawful sexual activity in the ACT. Employees of religious or religious-based institutions have no protection in NSW, Victoria, the Northern Territory or WA. In NSW, the prohibition against discrimination in employment on the grounds of homosexuality does not apply to private schools and colleges, or to employers who employ five or fewer employees. In Victoria, health services are exempted from anti-discrimination laws in the provision of assisted reproductive services to single heterosexual women and lesbians, making it more difficult for lesbians to create families.³⁴ These numerous exemptions considerably weaken the legislation.

State and Territory anti-discrimination laws also vary in the extent to which they protect sexual minorities from vilification, as can be seen from Table 2.3 above. In NSW, the ACT, Queensland and Tasmania, vilification on the grounds of sexuality is prohibited (although all except Tasmania provide exemptions for religious institutions). While Western Australia and Victoria prohibit racial and/or religious vilification they provide no protection from vilification on the grounds of sexuality. The Northern Territory and South Australia do not have vilification laws.

³³ The exception to this is Tasmania—the only jurisdiction with no exemptions for sexuality discrimination.

³⁴ This exemption was the subject of Victorian Supreme Court action in the McBain case, later challenged in the High Court by the Catholic Bishops' Conference, and also prompted yet-to-be passed federal government amendments to the Sex Discrimination Act that would allow this exemption.

The federal level

It might be expected that the current inconsistency in State and Territory laws would prompt federal legislators to establish a national standard. However, this has not occurred. Although the external affairs power of the Australian Constitution gives the federal government a clear legal mandate to enact national laws prohibiting discrimination and vilification and guaranteeing equal opportunity on the grounds of sexuality, it has failed to do so.

There have been attempts to introduce comprehensive national sexuality anti-discrimination laws into federal parliament, most notably by the Australian Democrats in 1995. At the time of writing, the ALP is drafting a Sexuality Discrimination Bill that Shadow Attorney General Nicola Roxon intends to introduce as a private member's bill. The draft bill seeks to protect people from discrimination, harassment and incitement to violence on the grounds of sexual orientation and gender identity in the workplace, clubs, accommodation, education and the provision of goods, facilities and services. Although it is a compromise bill, the provisions it contains represent a significant advance in the federal ALP's position on these issues. Nevertheless, some gay and lesbian rights groups have criticised the draft bill for offering less protection than some current State and Territory laws, and for containing numerous exemptions.³⁵ In any case, it is unlikely that the Coalition Government would allow such a bill to be debated, let alone passed.

While the proposed bill would not cover the issue of same sex relationships, Liberal backbench MP Warren Entsch is preparing to introduce a private member's bill to remove discrimination against same-sex couples from federal law—this issue is discussed in more detail in Chapter Three.

Australia has an obligation under International Labour Organisation Convention No.111 to implement the principle of non-discrimination in employment and occupation. As a result of this, the Human Rights and Equal Opportunities Commission Act empowers the Human Rights and Equal Opportunities Commission (HREOC) to investigate complaints of employment discrimination on the grounds of sexual preference. HREOC can attempt to conciliate such complaints, and has the power to report them to Parliament. However, such discrimination is *not* rendered unlawful under the Act, and as no federal law offers protection on these grounds, no remedies apply. This arrangement is a very unsatisfactory interpretation of Australia's obligations under Convention 111.

³⁵ Myles Wearing, 2006, 'Labor bill leaves gays unhappy', *Sydney Star Observer*, 13 July, p.3

The ongoing lack of protection from discrimination at the federal level leaves Australia well behind comparable jurisdictions like New Zealand, Sweden, Canada and the UK, which have had such laws for between ten and twenty years. A federal standard would also avoid the current situation in which the degree of legal protection available to GLBTI people varies across sub-national jurisdictions, perpetuating geographic inequities that are subject to the vagaries of the State and Territory electoral cycles.

Protection of transgender people from discrimination

The States and Territories approach extending anti-discrimination legislation to transgender, transsexual and intersex people very differently. Jurisdictions variously include in their list of relevant grounds for the application of discrimination legislation such terms as transsexuality (either as a separate ground, or included in the definition of ‘sexuality’ or ‘sexual orientation’), transgender, gender identity and gender history. This variation can be seen in Table 2. 4 below. Whether State and Territory legislation protects transgender people from vilification is also shown.

Table 2.4 Transgender and transsexual discrimination protection across jurisdictions

Jurisdiction	Grounds for discrimination protection	Relevant legislation	Vilification protection?
Commonwealth			
NSW	Transgender	<i>Anti Discrimination Act 1977</i>	Yes
Victoria	Gender identity	<i>Equal Opportunity Act 1995</i>	No
Queensland	Gender identity	<i>Anti Discrimination Act 1991</i>	Yes
Western Australia	Gender history	<i>Equal Opportunity Act 1984</i>	No
South Australia	Sexuality defined to include transsexuality	<i>Equal Opportunity Act 1984</i>	No
Tasmania	Sexual orientation defined to include transsexuality	<i>Anti Discrimination Act 1998</i>	Yes
ACT	Transsexuality	<i>Discrimination Act 1991</i>	Yes
NT	Sexuality defined to include transsexuality	<i>Anti Discrimination Act 1992</i>	No

At the Commonwealth level, transgender people are also subject to a confusing and inconsistent array of laws relating to the recognition of their identity. As one submission to the 1997 Senate Legal and Constitutional Committee Inquiry into Sexuality Discrimination put it:

... the current ... Commonwealth legal position that reassigned persons are sometimes of their sex (for purposes of Social Security) and sometimes not (for purposes of marriage) and sometimes in a legal limbo (for purposes of passports we are administratively but not legally of our reassigned sex), subjects such people to discrimination of the worst kind.³⁶

International law

The Universal Declaration of Human Rights (UDHR) was adopted and proclaimed by the General Assembly of the United Nations in 1948. The UDHR sets out the principles which, together with the two International Covenants (the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights), form the International Bill of Human Rights. In addition, some states, including Australia, have ratified the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). It was this Protocol, which allows an individual whose civil rights have been violated to appeal to the UN Human Rights Committee (UNHRC), that Nick Toonen relied on when he lodged his appeal against Tasmania's criminal laws with the UN in 1991.

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The relevant articles in these international provisions include Article 2 of the Universal Declaration of Human Rights, which provides:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

Also relevant is Article 2 of the ICCPR, which provides:

Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³⁶ Gender Council of Australia (WA), 1997, Submission to the Senate Legal and Constitutional Committee Inquiry into Sexuality Discrimination, Vol. 6.

Where not already provided for by existing legislation or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with other provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protective against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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The UNHRC established by the ICCPR reviews periodic reports submitted by States Parties to the Covenant in accordance with Article 40. The UNHRC thus considers allegations of discrimination on any grounds, including the ground of sexual orientation, in relation to the rights provided in the Covenant. On occasion the Committee raises the issue of discrimination on the ground of sexual orientation when considering States Parties' periodic reports, however the Committee has no systematic policy in this regard.³⁷

While the UDHR and subsequent international human rights documents do not explicitly mention sexual orientation or gender identity, evolving conceptions of international human rights law include the protection of the rights of GLBTI people around the world.³⁸ The Toonen decision was a key step in this process, as the committee noted that in its view the reference to 'sex', in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation as discrimination against homosexuals can only operate with reference to the sex of individuals and the sex of the people they desire. The idea that discrimination on the basis of sexual orientation is a form of discrimination on the basis of sex had not been widely accepted before the Toonen decision.³⁹ As a result of this type of progress, the United Nations system is today considered 'partly open and partly closed' in relation to discrimination against GLBTI people.⁴⁰

³⁷ David Patterson, 1993, *International Legal Principles Relating to Sexual Orientation—Some Implications for the USA*. <<http://www.qrd.org/qrd/world/misc/intl.law.and.sexual.orientation>>

³⁸ Amnesty International USA, *Human Rights and the Rights of Lesbian, Gay, Bisexual and Transgendered People*. <http://www.amnestyusa.org/outfront/LGBT_human_rights.html>

³⁹ *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992 (8 April 1994). <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5_>

For details of this case, see Tim Tenbenschel, 1996, 'International Human Rights Conventions and Australian Political Debates: Issues raised by the 'Toonen Case'', *Australian Journal of Political Science* 31(1): 7–24.

⁴⁰ Douglas Sanders, *Human Rights and Sexual Orientation in International Law*, International Lesbian and Gay Association website. <http://www.igla.org/news_results.asp?LanguageID=1&FileCategory=44&ZonelD=7&FileID=577>

Conclusion

There has been a slow but steady improvement in the legislative frameworks designed to provide GLBTI people in Australia with protection from discrimination and vilification. However, there remains considerable inconsistency in the protections offered across the sub-national jurisdictions and a distinct lack of protection at the federal level, which leaves Australia well behind comparable jurisdictions. There is now a well-established basis in international law that would justify further extension and entrenchment of federal anti-discrimination provisions.

However, as has been noted, the improvements in legislative protection for GLBTI people in Australia have only come about as the result of lobbying and other activism at the sub-national, national and international levels. The current focus for activists involved in these struggles is on demands for the recognition and certification of their personal and parenting relationships. These issues are considered in the next chapter.

STRENGTHS

- Homosexuality per se is no longer illegal in Australia, unlike in over 80 other countries.
- There are anti-discrimination laws in all Australian States and Territories designed to protect people from discrimination (and in some cases also vilification) on the grounds of their sexuality.
- There are equal age of consent laws in almost all jurisdictions.

WEAKNESSES

- Decriminalisation of gay male sex happened later in Australia than in some comparable democracies.
- It took the involvement of Amnesty International, the United Nations, the Federal Government and the High Court before Tasmania made sex between men a legal activity in 1997.
- There are no federal anti-discrimination or equal opportunity laws relating to sexuality.
- There is a lack of consistency in anti-discrimination laws across the States and Territories and there are significant exemptions.
- There is no anti-vilification provision at the federal level, or in four of the eight sub-national jurisdictions.
- Laws in Queensland and Tasmania contain elements of inequality with regard to age of consent.
- Commonwealth, State and Territory laws relating to transgender people are confusing and inconsistent.

3. Spousal rights and the legal recognition of intimate relationships

Introduction

Heterosexual couples have their relationships recognised in both national and sub-national legislation, whether they are married or in defacto relationships. A campaign to achieve this same degree of recognition for same-sex couples has been growing in strength and intensity in recent years. Activists struggling to achieve legal recognition for same-sex relationships argue that legal rights are human rights and that the failure to recognise these relationships is 'serious and damaging.'⁴¹ This situation, in which lesbians and gay men are forced to 'argue their relationships into the law' through lobbying and advocacy activities, is 'costly and invasive' for those involved.⁴²

Not all lesbians and gay men want relationship reform that equates their relationships with heterosexual relationships. For many, the diversity of non-heterosexual families and relationships is something to be protected, allowing people the full expression of their love and identities without the constraints of an institution like marriage. As activist Gary Dowsett asks:

...how much are we renovating the family, opening it up to variety and flexibility, and how much are we rendering ourselves into a barely reconstructed corner of the same old edifice?⁴³

Beyond this critique, however, are the very real areas of discrimination that persist as long as same-sex relationships go unrecognised in the federal sphere.

⁴¹ Lesbian and Gay Legal Rights Service, 1993, 'The bride wore pink: Legal recognition of our relationships', *Australian Gay and Lesbian Law Journal*, 3: 6–103.

⁴² Lesbian and Gay Legal Rights Service, 'The bride wore pink', p. 71

⁴³ Gary Dowsett quoted in Miranda Stewart, 'It's a queer thing', p. 76.

As former Chief Justice of the Family Court, Alastair Nicholson, points out, the current situation ‘smacks of society punishing otherwise law-abiding members for a sexual orientation that is, in and of itself, lawful.’⁴⁴

In recognition of the discrimination that occurs through the failure to recognise same-sex relationships, in April 2006 the Human Rights and Equal Opportunities Commission announced an inquiry into the financial and work-related entitlements currently denied to same sex-couples in Australia.⁴⁵ In launching the inquiry, the president of HREOC, John von Doussa, claimed that

It is quite incredible that in this day and age Australia has laws which include a definition of ‘partner’ that explicitly states that a person must be of the opposite sex to be entitled to basic financial benefits like tax concessions ... and the Medicare safety net ... This simply does not reflect reality— it never did.⁴⁶

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A second discussion paper, released by the Human Rights Commissioner in September 2006, outlined the inquiry’s preliminary findings of key areas of discrimination in many central aspects of life governed by the Commonwealth, including employment conditions, health entitlements, social security, tax, insurance, superannuation, family law, aged care and migration.⁴⁷ However, in the interim it had been revealed that Federal Government ministers had instructed federal departments and agencies not to make submissions to the HREOC inquiry.⁴⁸

At the time of writing the inquiry had concluded, having held public hearings and forums across Australia, and received 685 submissions from organisations and individuals. HREOC expects to deliver its written report to the federal Attorney-General in June 2007.

In Australia, the federal, and State and Territory governments share responsibility for the recognition, certification and protection of intimate relationships. The Australian Constitution gives the national government the power to define marriage; however, the States and Territories are free to recognise and protect other forms of intimate personal relationships in whatever laws they wish. Family law is administered federally, while other aspects of relationship recognition, such

⁴⁴ Alastair Nicholson, 1997, ‘The changing concept of family: The significance of recognition and protection’, *Australasian Gay and Lesbian Law Journal*, 6: 13–29

⁴⁵ For detail on this inquiry see the HREOC ‘Same-Sex: same entitlements’ website: <<http://www.hreoc.gov.au/samesex/index.html>>, and HREOC, 2006, *Same-sex: Same Entitlements, National Inquiry into Discrimination Against People in Same-sex Relationships: Financial and Work-related Entitlements and Benefits*, Discussion paper, Sydney, HREOC, April.

⁴⁶ John von Doussa quoted in Ruth Pollard, 2006, ‘Give us a break: Same-sex couples step up fight for entitlements’, *Sydney Morning Herald*, 4 April.

⁴⁷ The summary discussion paper is available at <http://www.humanrights.gov.au/samesex/discussion_paper2.html> and a full research paper is available at <http://www.humanrights.gov.au/samesex/research_paper.html>

⁴⁸ Laura Tingle, 2006, ‘Federal ban on aiding same-sex rights inquiry’, *Australian Financial Review*, 22 June.

as the recognition of (same-sex and heterosexual) defacto relationships (called common law marriages in some comparable jurisdictions) are administered at the sub-national level.

Therefore, on the one hand, while the federal government has ensured that same sex relationships cannot be recognised through marriage (see case study later in this chapter), there are varying degrees of recognition and protection afforded by the States and Territories. The result is inconsistent legal recognition and protection at both the national and sub-national levels, such that the legal status of same-sex relationships varies significantly across the country.

Relationship recognition and certification in the States and Territories

Amendment of key relationship laws in the States and Territories began in 1994. In that year, the ACT became the first jurisdiction to recognise same-sex relationships, on the same basis as heterosexual de facto relationships, for the purposes of property division and intestacy. Since that time same-sex relationships have been given the same status as de facto heterosexual couples in an ever-wider range of laws in an ever-larger number of States and Territories.

Table 3.1 Most recent year of advances in the recognition or expansion of same-sex defacto relationships in State and Territory law

Jurisdiction	Year
New South Wales	1999 ⁴⁹
Victoria	2001 ⁵⁰
Queensland	2003 ⁵¹
Western Australia	2002 ⁵²
South Australia	2006 ⁵³
Tasmania	2003 ⁵⁴
Australian Capital Territory	2003 ⁵⁵
Northern Territory	2003 ⁵⁶

⁴⁹ *NSW Property (Relationships) Act 1994*

⁵⁰ *Vic Statute Law Amendment (Relationships) Act 2001*

⁵¹ *Queensland De Facto Relationships Act*

⁵² *WA Acts Amendment (Lesbian and Gay Law Reform) Act 2002*

⁵³ *Statutes Amendment (Domestic Partners) Act 2006*. GLBTI activists in SA were happy with the model of relationship recognition contained in the Act but disappointed with what they considered a relatively conservative piece of legislation in relation to parenting recognition.

⁵⁴ *Tasmanian Relationships Act (2003)*

⁵⁵ *ACT Legislation (Gay, Lesbian & Transgender) Amendments Act, 2003*

⁵⁶ *NT De Facto Relationships Act*

Sub-national legislation includes same-sex relationships in areas such as property division, wills, workplace benefits, license fees, statutory compensation schemes, and State superannuation schemes. South Australia is the most recent State to have recognised same-sex partnerships for the purposes outlined above, with legislation being amended in December 2006 after years of campaigning by groups such as 'Let's Get Equal'. In 2003, Tasmania passed a new Relationships Act abolishing the legal categories of marriage and de facto relationships. Under the new categories of conjugal significant relationships and non-conjugal caring relationships, same-sex and different sex relationships were given virtually equal status.

The States and Territories have also been slow to formally certify same-sex relationships. In 2004, Tasmania became the first State or Territory to allow partners in same-sex and other significant or caring relationships to register their relationships with the State Registry of Births, Deaths and Marriages. The ACT attempted similar legislation in May 2006 (see boxed case study below) and similar legislation is being discussed in Victoria and WA.

Case study: Failed attempts at relationship recognition in the ACT

On 11 May 2006 the Australian Capital Territory, under Chief Minister Jon Stanhope, passed legislation designed to provide a legal basis to same sex relationships 'in the same way that heterosexual couples have either through de-facto relationship or marriage'.⁵⁷ The legislation, known as the Civil Unions Act, also covered heterosexual couples and further aimed to remove references in other ACT law that discriminated against people in same sex relationships. Upon the release of the draft legislation, however, the federal government expressed concerns that the Bill created a provision for same sex 'marriage' in everything but name, and as such contravened the Commonwealth Marriage Act. Federal Attorney-General Philip Ruddock called the Act 'a cynical attempt...to undermine the institution of marriage'.⁵⁸ Despite the ACT Government making 63 amendments to the Bill in response to these concerns, on 13 June the Governor-General, acting on the advice of the Federal Government, overrode the new legislation under the powers available to him under the Australian Capital Territory (Self-Government) Act.⁵⁹

Six months after the quashing of the Civil Unions Act, the ACT Government tabled a revised bill—the Civil Partnerships Bill—that removed references to marriage, replaced the term 'civil union' with 'civil partnerships' and referred to 'notaries' rather than 'celebrants'. In introducing the Bill, ACT Attorney-General Simon Corbell emphasised his government's continued commitment to removing discrimination, saying 'The Government does not accept that it is somehow satisfactory to discriminate against one part of society... There are no defensible grounds ... for refusing recognition to same-sex relationships'.⁶⁰

⁵⁷ ACT Attorney-General Simon Corbell, quoted in Claire Aird, 2006, 'Australian Values: Dividing a nation,' *New Matilda*, 12 July. <www.newmatilda.com>

⁵⁸ 'Commonwealth to defend marriage against Territory laws', Attorney-General's Department Media Release 6 June 2006.

⁵⁹ This was in fact the first ever instance of those powers being used.

⁶⁰ 'ACT tables gay partnerships bill', ABC News Online, 12 December 2006 <<http://www.abc.net.au/news/newsitems/200612/s1809878.htm>>

Case study continued

In February 2007 (before the Bill was even debated in the ACT Assembly) Philip Ruddock informed the ACT that if it were to pass, the Commonwealth would again recommend that the Governor-General disallow it, because it was too similar to the previous Act and "would still in its amended form be likely to undermine the institution of marriage".⁶¹

There has been an angry response to the Federal Government's actions, including from some unexpected sources. Liberal Senator and former ACT Chief Minister and Attorney-General, Gary Humphries, became the first Liberal Senator in a decade to cross the floor and vote against the Government's intervention in the Civil Union Act. For Humphries, however, the issue was primarily one of democratic process and Territory independence rather than same-sex equality.

Same-sex couples and the NGOs that represent them responded to the Federal Government's actions with anger, hurt and bewilderment. Rod Swift, of the Australian Coalition for Equity, argued that John Howard and his government were playing 'mean-spirited politics' designed to win religious-conservative votes.⁶² Other commentators also observed that the federal intervention was in part designed to 'wedge' the ALP, which is split over the issue of same-sex relationship recognition.

However, whether motivated more by electoral politics or a genuine—if deeply homophobic—moral concern, the Coalition Government has used the ACT case to underscore its fundamental opposition to the legal recognition of same-sex relationships, and its willingness to go to extraordinary lengths to prevent it.

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Federal relationship recognition

Through actions such as overriding the ACT Civil Unions Act (discussed above) and amending the federal Marriage Act (discussed below), the Howard federal government has made its hostility towards the recognition of same-sex relationships clear. Political scientist Carol Johnson sums up the Coalition Government's contrasting attitudes to same-sex and heterosexual relationships:

...heterosexual relationships are constructed as normal, desirable and socially beneficial. They are to be publicly endorsed by government while same-sex relationships should remain a 'private' matter. Same-sex relationships are constructed as a (tolerated but disappointing) choice that some people make, in the apparent knowledge that their relationships will not be given government support or entitlements; that they will not be given the same superannuation protection as other couples and that their relationships preclude having children. Having made that choice, people should accept the consequences and not ask parliament ... to in any way 'normalise' their relationships and thereby encourage others to choose the same 'lifestyle'.⁶³

⁶¹ 'ACT Civil Partnerships Bill does not remove concerns', Attorney-General's Department Media Release, 6 February 2007.

⁶² Rod Swift, quoted in Aird, 'Australian values', p.2.

⁶³ Johnson, 'Heteronormative citizenship: The Howard Government's views on gay and lesbian issues', p. 59.

As a result of these attitudes federal law contains little recognition for same-sex relationships. Some areas of limited recognition include:

- Non-citizens will be assessed for permanent residency in Australia on the basis of their same-sex relationship with an Australian citizen. However, applications can only be made under the category of non-familial, emotional-interdependency, not under the spousal category.
- Contributors to private superannuation schemes can nominate their same-sex partner as a beneficiary for lump sum death payments. However, this does not extend to pension payments or to public sector schemes and there is still not full equality even in relation to private schemes.⁶⁴
- The Department of Foreign Affairs and Trade, the Australian Federal Police and the Australian Defence Force treat same and opposite sex partners of defence personnel equally for the purposes of relocation expenses, accommodation and educational entitlements. However this does not extend to accident or death compensation, pensions or superannuation (see previous paragraph). Neither does it extend to any other Federal Government agency.
- Partners in same-sex relationships are exempt from giving evidence against each other in court proceedings under Australia's recently enacted anti-terror laws.

In all other areas of federal law people in same-sex relationships have no rights, protections or entitlements, including in relation to taxation, social security and health care entitlements. The effects are an odd mixture of disadvantage and unintended advantage. In relation to Medicare, for example, same-sex couples are disadvantaged by their inability to register as a family for the Medicare Safety Net. They have to attain two single Safety Net thresholds before becoming entitled to Safety Net coverage. In relation to taxation, however, although same-sex couples are disadvantaged by their inability to claim a dependent spouse rebate, one member of a couple with children is automatically entitled to the full amount of Family Tax Benefit Part B (only paid to single income families). He or she is assumed to be single, and can claim the Parenting Allowance (Single) as the relationship is not recognised under the relevant federal legislation. For most activists in this area, however, relinquishing the benefits gained by their

⁶⁴ Miranda Stewart, submission to the HREOC inquiry, *Same-sex: Same Entitlements, National Inquiry into Discrimination Against People in Same-sex Relationships: Financial and Work-related Entitlements and Benefits*, <<http://www.hreoc.gov.au/samesex/submissions/266.doc>>

exemption from some forms of means-testing for some welfare benefits would be a small price to pay for legal equality.⁶⁵

The federal government has further refused to act upon the power referred to it by the States and Territories in relation to same-sex de facto relationships. This means that while the federally-governed Family Court judges property disputes between people in different-sex de facto relationships that have broken down, the Court is barred from judging property disputes between same-sex former partners who must litigate in the far more expensive and adversarial State Supreme Courts (except in WA, which has a State Family Court).

On the issue of the certification of same-sex relationships, federal law is even worse. In 2004, the Federal Parliament amended the Marriage Act to explicitly define marriage as the union of a man and a woman, and to preclude Australian courts from interpreting Australia's foreign marriage recognition laws in a way that would permit the recognition of same-sex marriages solemnised overseas.

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Case study: Amending the Marriage Act

In August 2004 the Australian federal government, with the support of the Australian Labor Party in opposition, succeeded in amending the *Marriage Act 1961* to exclude any possibility for the recognition of same-sex unions. The amendment, a surprise move introduced in May that year, added the phrase 'a man and a woman' to the relevant section of the Act, which now reads:

marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

The amendment bill also made changes to the *Family Law Act 1975*, specifying that:

A union solemnised in a foreign country between:

- (a) a man and another man; or
- (b) a woman and another woman; must not be recognised as a marriage in Australia.

Public debate surrounding the amendment was ferocious. The ALP justified their support by claiming that the amendment did not affect the legal situation of same-sex relationships, but put what was already common law into statute law. The Government argued that the bill was necessary to 'protect the institution of marriage' against what they viewed as the 'threat' of same-sex marriage.

⁶⁵ There are, however, class issues here. Many same-sex couples rely on the income from social security benefits, and an equality-based argument that would result in the loss of these benefits would exacerbate existing class inequalities among GLBTI people. For a discussion of this, see Claire Young and Susan B Boyd, 2006, 'Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada', *Feminist Legal Studies* 14(2) and Kristen Walker, 2001, 'United Nations Human Rights Law and Same-Sex Relationships: Where to from here?' in Robert Wintemute and Mads Andenaes (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, Oxford, Hart Publishing, pp.743–757.

Case study continued

Prime Minister Howard offered his personal support for the amendment arguing that:

Traditional marriage is one of the bedrock institutions of our society and I don't want anything to occur that further weakens it. Marriage, as we understand it in our society, is about children, having children, raising them, providing for the survival of the species.⁶⁶

An eloquent illustration of the personal hurt the amendment caused came from Tasmanian Greens Senator, Bob Brown, an openly gay man. Speaking in the Senate, Brown argued:

This legislation is about hate. In any liberal society it is important that we try to minimise this negative human expression ... corral it where we can and in any way possible remove it. Today the government of this country and the alternative government, the Labor Party, are promoting hate, the most negative of human values, over love, the most positive and wonderful of human values.⁶⁷

For many Australian lesbians and gay men, the overriding of the ACT Civil Unions Act in 2006 confirmed their sense of being hated by the federal government. Certainly, these actions made plain that same-sex relationships continue to be treated as a matter of morality (a personal judgment) rather than equality (as defined in domestic and international law).

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Apparently on the basis of the amended Marriage Act, the federal authorities have developed a policy of denying Australians seeking to marry a same-sex partner overseas with the documentation they require to allow this marriage to occur. Critics have pointed out that there is nothing in the amended Act that requires this new intervention, claiming it is another move by the federal government to enforce what has been described as a 'Straight Australia' policy.⁶⁸

The ALP continues to support the 2004 amendments made to the Marriage Act. However, at the 2007 ALP National Conference, the party voted to amend the human rights chapter of its platform to support a nationally consistent domestic partner registry for same-sex couples, similar to that currently in place in Tasmania. The scheme would aim to provide legal recognition for same-sex couples in relation to issues such as superannuation and property rights, however, it would not permit marriage or civil unions.⁶⁹ While the ALP describes the policy as one that would provide 'nationally consistent' legislation, the party does not propose to give same-sex relationships legal standing at the federal level, but rather to pursue consistency in state-based legislation. This approach would rely not only on ALP governments holding power in all jurisdictions, but also on the willingness and ability of each state attorney-general to introduce similar legislation.⁷⁰

⁶⁶ Matt Wade, 2003, 'PM joins opposition to gay marriage as cleric's election stalls', *Sydney Morning Herald*, 6 August.

⁶⁷ Parliamentary Debates, Senate, Marriage Amendment Bill Second Reading, 12 August 2004.

⁶⁸ Geoffrey Williams, 2006, 'Straight Australia policy', *The Pink Board*, 13, 24 January.

⁶⁹ Mark Davis, 2007, 'Labor backs legal rights for same-sex couples', *Sydney Morning Herald*, April 28.

⁷⁰ The inherently challenging and uncertain nature of this approach was illustrated immediately when the NSW Attorney-General, John Hatzistergos, told the ALP conference that the NSW Government would not introduce such a scheme.

Recognition of parenting

Equal protections and rights in laws governing parenting have proven harder for sub-national jurisdictions to provide than relationship recognition. For example, in NSW,⁷¹ Victoria, Queensland and the Northern Territory it is impossible for same-sex couples to adopt children, including children they already care for. In Tasmania same-sex couples can be assessed as adoptive parents only for the children they already care for. In WA and the ACT it is possible for same-sex couples to be assessed as potential adoptive parents for children relinquished by other people and for children they already care for. In the ACT, WA and NT a lesbian can be presumed to be the legal parent (for some limited purposes) of a child born to her partner as a result of a donor conception procedure. The current federal government has consistently indicated its hostility towards the recognition or protection of same-sex parents, linking questions of marriage to heterosexual procreation (as in debate surrounding the amendment of the Marriage Act in 2004, discussed above) in a conservative, heteronormative framework. In 2004, the Howard government tried to ban any state agency from providing intercountry adoption to a same-sex couple as part of the original bill to amend the Marriage Act. The adoption ban was dropped after opposition parties said they would block it in the Senate. If reintroduced and passed the bill would mean that lesbians and gay men in Australia could not adopt a child from overseas even as individual applicants.⁷²

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It is estimated that up to 10 per cent of gay men and 20 per cent of lesbians are parents and that up to half of these parents have had children in the context of a previous heterosexual relationship.⁷³ However, this latter proportion is gradually declining due to the so-called 'lesbian baby boom', which is seeing an unprecedented number of lesbian women, primarily in couples (an estimated 85 per cent), giving birth. The vast majority of these are doing so through donor insemination with either known donors (around 50–70 per cent) or anonymous donors. Most, but not all, known donors are gay men and of these, between half to two thirds have some contact with the child. Up to 25 per cent of children born to lesbian mothers have regular contact with their biological father. Up to 10 per

⁷¹ The NSW Government has recently investigated legislative change, with a review of that State's Adoption Act. Following the review, in October 2006 the government tabled a report in the NSW Parliament that recommended against immediate reform, citing the need for more research and referring the issue to a ministerial advisory committee that will report back in July 2007.

⁷² Jenni Millbank, 2005, 'Can I adopt or foster a child?', *Sydney Star Observer*, Issue 793, 1 December.

⁷³ Jenni Millbank, 2002, *And Then... The Brides Changed Nappies: Lesbian Mothers, Gay Fathers and the Legal Recognition of Our Relationships with the Children We Raise*, A Community Law Reform Document, The New South Wales Gay and Lesbian Rights Lobby, p. 3. <<http://www.glr.org.au>> A survey by the Victorian Gay and Lesbian Rights Lobby supports this estimate of the proportion of parents in the GLBTI community—of 652 respondents to an independent survey of community members (of whom two thirds were women and one third men), 19 per cent reported having children. VGLRL, 2005, *Not Yet Equal*. <<http://www.vgirl.org.au>>

cent of known donors act as co-parents with the child/ren's mother/s, having regular contact and some degree of responsibility in the child's life.⁷⁴

A report prepared for the NSW Gay and Lesbian Rights Lobby found that: 'In virtually all families the lesbian mothers were the 'primary parents', having residence of the child, giving primary care and exercising parental responsibility by making all important decisions about the child (where they lived, went to school, medical care etc).' However, the data in the report also suggest the emerging variety and complexity of family arrangements outside of the two-parent heterosexual norm, with disputes over issues such as contact, residence and child support becoming more common.⁷⁵ Yet in the context of this growing complexity there is little in the way of clear-cut legal protection for non-heterosexual parents or their children. Areas of ongoing concern include inheritance, child support, contact and residence, and parental authority, for example over schools, medical care and so on.⁷⁶ It would seem a matter of political and legal equality, not to mention a matter of human rights protection, that these legal questions be addressed as a matter of priority.

Under the Family Law Act (Cth) there are few legal options available to parents wanting to formalise their relationship with their children, although the Family Court jurisprudence does remain blind to parental sexual orientation during child custody disputes. One option available to gay and lesbian parents is the granting of a parenting order that can be made regardless of the biological or legal relationship between the parties or between the parties and the child. In this scenario a mother and co-mother can jointly apply for parenting orders by consent covering issues such as residence and contact as well as other specific issues. If there is no legal father, or if the father consents, this is a fairly simple process and it has been used on numerous occasions to confirm that the child legally resides with the co (non-biological) mother as well as confirming her authority to make medical and educational decisions about the child. Such orders can also set out what contact a known and involved donor is to have with the child, or establish that residence is to be shared between the donor-dad and the mothers. While this process has the advantage of being relatively simple, flexible and able to cover multi-parent families, it does not provide the comprehensive clarity or protection offered by legal adoption. It also requires proving to the court that the family form in question is in 'the child's best interests' whereas for heterosexual families this is already assumed. As the Gay and Lesbian Rights Lobby report

⁷⁴ All statistics from Millbank, *And Then...The Brides Changed Nappies*, pp. 3–4.

⁷⁵ Millbank, *And Then...The Brides Changed Nappies*, p. 3–4.

⁷⁶ *Ibid.*, p. 5.

points out, 'Even at its simplest [the parenting order process] requires money, access to lawyers and a lot of effort, including coming out to a court'.⁷⁷

Conclusion

The recognition of same-sex spouses in Australian federal law falls well behind comparable jurisdictions, with the exception of the US, where Massachusetts is the only State where same-sex couples have the right to get married. There is comprehensive recognition of same-sex de facto or common law relationships in Canada, the UK, New Zealand and South Africa. Canada solemnises same-sex marriages, and so will South Africa from 2007. Meanwhile, Britain and New Zealand solemnise functionally equivalent civil unions for same-sex couples. The fact that similar laws apply in all Western European, and several East European and Latin American, countries only highlights the inadequacies of Australian law.

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Table 3.2: Legal recognition of same-sex couples internationally

Countries with equal marriage	
Netherlands (2001)	Canada (2005)
Belgium (2003)	Spain (2005)
Recognising civil unions	
Denmark (1989)	Switzerland (2001)
Norway (1993)	Finland (2002)
Sweden (1995)—equal marriage likely	Argentina (2002)
Luxembourg (1996)	Croatia (2003)
Iceland (1996)	Poland (2003)
Hungary (1996)	Scotland (2004)
France (1999)	United Kingdom (2005)
South Africa (1999)—equal marriage from 2007	New Zealand (2005)
Germany (2001)	Czech Republic (2006)
Portugal (2001)	Slovenia (2006)

⁷⁷ *Ibid.*, p. 6. It should be noted that in some jurisdictions the process may not be quite so difficult. The Melbourne Registry has established a process whereby the application can be submitted by mail.

Considering civil unions

Israel

Countries not considering either same-sex marriage or civil unions

Australia (*Marriage Act 1961* [2004 amendment enshrines marriage between a woman and a man])

United States (*Defence of Marriage Act 1996* enshrines marriage between a woman and a man) ⁷⁸

Uganda (2005 constitutional amendment to ban same sex marriage)

Latvia (2005 constitutional amendment to ban same sex marriage)

Source: Wilson, 2004,⁷⁹ updated by the authors October 2006

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The federal Government's continued resistance in this area appears to contradict opinion polls that suggest the majority of Australians support the formalised recognition of same-sex relationships in federal law. The Newspoll survey, commissioned by the Humanist Society of New South Wales, polled 1200 respondents and found that 52.5 per cent of respondents were in favour of formal legal recognition compared with 36.6 per cent who opposed. These statistics also suggest that this issue should not be understood as a political 'wedge', as the federal ALP has argued when justifying their support of the amendment to the Marriage Act in 2004. The current situation leaves Australia out of step with both international best practice and anti-discrimination provisions in international law.

⁷⁸ US State constitutional bans on gay marriage: Hawaii, Nebraska, Alaska, Nevada, Montana, Louisiana, Oregon, Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Utah and Texas.

⁷⁹ Shaun Wilson, 2004, 'Gay, lesbian, bisexual and transgender identification and attitudes to same-sex relationships in Australia and the United States' *People and Place*, 12 (4): 12–21.

STRENGTHS

- Same-sex relationships have the same status as de facto heterosexual relationships in most State and Territory laws.
- In April 2006, the Human Rights and Equal Opportunities Commission began an inquiry into the financial and work-related entitlements currently denied to same sex-couples in Australia.

WEAKNESSES

- There is extremely limited recognition of same-sex relationships in federal legislation.
- The recognition of same-sex relationships in Australian federal law falls well behind Canada, New Zealand and the UK.
- There have been continued and determined actions on the part of the current federal government to prevent relationship law reform.
- There is inconsistent legal recognition and protection of same-sex relationships at sub-national level, producing variation in legal status across the country.
- There is no legal recognition in Australia of same-sex marriages solemnised overseas (as a result of the 2004 changes to the Marriage Act).
- It is impossible for same-sex couples to adopt children in NSW, Victoria, Queensland and the Northern Territory.
- There is limited legal protection for non-heterosexual parents or their children in areas such as inheritance, child support, contact and residence, and parental authority.

4. Public policy and attitudes

Introduction

Many areas of government policy have a significant impact on the human rights and wellbeing of GLBTI people. Sue Wills has argued that it is in the development, formulation and implementation, delivery, evaluation and monitoring of public policy that sexual minorities can best challenge continuing discrimination and heteronormativity. With little chance of a significant presence in parliaments it is through extra-parliamentary policy activism that GLBTI people are most able to effect change.⁸⁰ This chapter will briefly consider three important policy areas, namely education, health and policing in order to provide examples of current policy approaches. It will consider both State and federal policy approaches.

This chapter also considers the question of public opinion about issues relating to GLBTI people, and looks at the heteronormative assumptions that underpin common community, political and media attitudes towards sexual minorities in Australia.

Public policy in education, health and policing

In the areas of education, health and policing, governments have a responsibility to remove discriminatory policies, practices and attitudes that impede access to, and equal treatment in, basic services. Governments also have a responsibility to ensure that relevant institutions and agencies play a positive and constructive role in ensuring broad social and cultural acceptance of sexual diversity. Australia's record in this area is patchy, at best.

⁸⁰ Wills, 'The challenge of sexualities', p. 206

State and Territory policy responsibilities

Australia's States and Territories have primary responsibility for compulsory education, hospitals and health care, and policing and public safety. In regards to education, given that Australian research has found schools to be the institution in which gay and lesbian people experience more discrimination than any other,⁸¹ it is clear that sub-national governments have a particular responsibility to tackle homophobic prejudice in the classroom. Some State and Territory educational authorities (including Tasmania, NSW, Queensland and the ACT) have begun to do this by adopting policies against homophobic abuse, and encouraging the use of curriculum materials that affirm sexual diversity.

However, implementation remains in the hands of individual school communities. While State and Territory government agencies adopt various policies and encourage various programs, these are not systematically or comprehensively implemented in schools. This is in contrast to parallel policies and curricula relating to gender issues, or cultural diversity, which are far more widely implemented. Furthermore, there are no systematic programs and accreditation standards in any of the States or Territories for teacher training in the areas of anti-homophobia and sexual diversity.

In regards to health care, some State government health agencies, including those in Tasmania and Victoria, have begun to address their responsibilities to the GLBTI population by conducting research into the health needs of these communities. Credit must also be given to State and Territory governments for funding gay and lesbian health and support services, which occurs to varying degrees in the different jurisdictions. However, much less effort has been made to educate government health care workers in the health needs of GLBTI people, or to establish standard policies, procedures and training for delivering health care to gay and lesbian clients.

In regards to policy relating to policing and public safety, Australian research has found that gay and lesbian people experience higher than average levels of violence. Up to 70 per cent of GLBTI people in one survey reported experiencing physical abuse, threats of violence or verbal abuse in a public place.⁸² The majority of this type of violence and harassment is hate-motivated. State and Territory governments have a responsibility to ensure the safety of gay and lesbian citizens.

⁸¹ Hillier, Lynne, et al, 2006, *Writing Themselves In Again: A National Report on the Sexuality, Health and Well-Being of Same-Sex Attracted Young People*, National Centre in HIV Social Research, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne.

⁸² NSW Police Service, 1995, *Out of the Blue: A Police Survey of Violence and Harassment Against Gay Men and Lesbians*; Gail Mason, 1993 'Violence against lesbians and gay men', *Violence Prevention Today*, No. 2, November, Canberra: Australian Institute of Criminology.

Most Australian States and Territories have a program that sees trained part or full-time commissioned Gay and Lesbian Liaison Officers (GLLOs) stationed in (some) police stations. The GLLO's responsibility is to be a contact point for members of the gay and lesbian community. The rationale for these positions is that violent crime against GLBTI people is underreported. Many gay and lesbian people are wary about reporting such crimes, fearing that they will not be taken seriously, or may in some way be blamed for the violence perpetrated against them. In this context, the GLLO program has the potential to provide a critical service to GLBTI citizens. However, the number, distribution, training and resourcing of these liaison officers varies widely between the States and Territories. For example, while Queensland has approximately 150 GLLOs stationed in rural and metropolitan areas of the State, South Australia only implemented the GLLO system in 2007, and in Western Australia restructuring in late 2006 has seen the GLLO role dissolved entirely.

The commitment to these services also varies over time within jurisdictions. For example, NSW was originally a leader in this field, as the first state to introduce GLLOs in 1980. However, by 2006 the NSW GLLO program had fallen into what ACON⁸³ President Adrian Lovney called 'complete disrepair'.⁸⁴ The appointment of a new program officer in late 2006 has seen the beginnings of a revival of the program; however, this recommitment on the part of the NSW Government came about only after years of pressure from activists and community groups. The varying commitment to GLLO programs is an example of the way in which the effective protection of GLBTI people's human rights is not guaranteed or entrenched—but rather is subject to great change and variation, and dependent on active pressure from the community.

Federal policy responsibilities

Despite its role as the primary disburser of funds for compulsory education, the Federal Government has thus far failed to establish national standards for anti-homophobia policies, programs or teacher training. Although it is a major funding source for independent schools, the Federal Government has also failed to set minimum standards in these areas for these schools.

⁸³ ACON is a health promotion organisation based in the gay, lesbian, bisexual and transgender communities.

⁸⁴ Myles Wearing, 2006, 'GLLO program revived', *Sydney Star Observer*, Issue 829, 17 August.
< <http://www.ssonet.com.au/display.asp?ArticleID=5654> >

These are omissions that can have serious consequences. As Federal Senator Brian Greig has said:

Schools ignore their gay and lesbian students for fear of being seen to promote homosexuality...As a consequence of this conspiracy of silence, gay and lesbian youth live in an environment of denial and rejection, with no support, counselling, validation, or role models. And then we wonder why it is that up to one third of all young people who attempt suicide do so because of the anguish or uncertainty over their sexuality.⁸⁵

The same problems exist in relation to the funding, accreditation and establishment of training standards for health care services, including in those areas where the Federal Government has direct control such as aged care.

One area in which the federal government has a better record is policing. The Australian Federal Police has a relatively good record of liaison with and protection of the gay and lesbian community in those areas where it provides direct policing services to Australian citizens, including in the Australian Capital Territory.

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Public opinion and attitudes

The extent of homophobia in Australia is difficult to measure. Clearly, public opinion about homosexuality has shifted dramatically in the last few decades, and attitudes towards GLBTI people are far more positive than they have been in the past. However, while it is less widespread than previously, homophobia is still fairly common in Australia, and homophobic attitudes are strongly held among certain demographic groups. A recent survey has found that one-quarter of Australians would not want to have homosexual people as their neighbours.⁸⁶ Furthermore, recent analysis of attitudinal data⁸⁷ suggests that 35 per cent of Australians aged 14 and above believe that homosexuality is 'immoral'. While this is a minority, it is perhaps surprising that the figure is so high and one in three Australians still sees homosexuality as an issue of morality rather than human rights.

The trend in Australia for an increase in the proportion of people holding more positive attitudes towards homosexuality over time appears to be similar to that in comparable countries. This is a difficult comparison to make – surveys undertaken in different contexts are often not directly comparable, and in any case attitudinal survey research is a fairly crude indicator of the complexity of

⁸⁵ Brian Greig, 'Australia's first openly gay Senator speaks', p. 774.

⁸⁶ Vani Boorah and John Mangan, 2007, 'Love thy neighbour: How much bigotry is there in Western countries?', paper presented at Public Choice World Meeting, Amsterdam. <<http://www.creedexperiment.nl/pc2007/index.html>>

⁸⁷ Michael Flood and Clive Hamilton, 2005, *Mapping Homophobia in Australia*, Australia Institute, July. This paper analyses demographic and attitudinal data compiled by Roy Morgan Research in 2003–2004, from interviews with 24 718 respondents aged 14 and over.

people's beliefs, opinions, values and attitudes. Furthermore, in common with the Australian research discussed above, many surveys continue to frame the issue of homosexuality as a question of morality or 'right and wrong', rather than one of human rights.

Nevertheless, such attitudinal research does provide a useful indicator, at least at the impressionistic level. Relevant surveys in both Europe and the USA have shown homophobia gradually decreasing over the last two decades. However, a recent study of bigotry in 23 Western countries found that homophobia is currently the most prevalent form of bigotry in these countries.⁸⁸ Public opinion in Australia appears to be roughly in line with that in countries such as Great Britain and the USA, where around one third of the population disapprove of homosexuality,⁸⁹ and 24 per cent and 23 per cent respectively would not like to have a homosexual person as their neighbour (compared to 25 per cent of Australians).⁹⁰ However, Australia is still well behind other countries such as Sweden, where in 1999 only eight per cent of the population thought that homosexuality is 'never justifiable',⁹¹ and only six per cent would not like to have homosexuals as neighbours.⁹² Similarly, in the Netherlands support for homosexual marriage is at 82 per cent,⁹³ and only six per cent would not like a homosexual neighbour.⁹⁴

In Australia, homophobic attitudes are more prevalent among certain groups than others. Australian men are more likely to be homophobic than women (43 per cent of men believe homosexuality is immoral compared to 27 per cent of women). This gender difference is consistent across age, socio-economic and regional groupings. Older Australians are more likely to be homophobic than younger age groups; 53 per cent of people over 65 believe homosexuality is immoral, compared to 26 per cent of 18 to 24 year olds. However, homophobia is notoriously prevalent among young males, with 43 per cent of young men aged 14 to 17 believing homosexuality to be immoral (compared with 23 per cent of young women).

The extent of homophobic attitudes also varies across the country. People in cities are generally less homophobic than those in country areas, although there are exceptions to this, and there is substantial variation within cities. Homophobic attitudes also correlate with levels of education—25 per cent of tertiary educated

⁸⁸ Boorah and Mangan, 'Love thy neighbour: How much bigotry is there in Western countries?'

⁸⁹ In the 1999 World Values Survey, 31 per cent of respondents in the USA agreed that homosexuality is 'never justifiable'; in the 2003 British Social Attitudes Survey, 31 per cent of respondents agreed that sexual relations between two adults of the same sex is 'always wrong'.

⁹⁰ Boorah and Mangan, 'Love thy neighbour: How much bigotry is there in Western countries?'

⁹¹ World Values Survey, 1999. <<http://www.worldvaluessurvey.org>>

⁹² Boorah and Mangan, 'Love thy neighbour: How much bigotry is there in Western countries?'

⁹³ Eurobarometer, 2006. <http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_highlights_en->

⁹⁴ Boorah and Mangan, 'Love thy neighbour: How much bigotry is there in Western countries?'

Australians hold homophobic views compared with between 40 and 50 per cent of those who did not complete high school. Religious affiliation is also a determining factor—while only 19 per cent of Australians with no religion consider homosexuality immoral, among those with a religious affiliation the figure ranges from 34 to 68 per cent. It is Catholics who are the least homophobic of religious Australians (although the figures for Anglican and Uniting Church members are similar), with the highest rates of homophobia found among Baptists and evangelical Christians.

It must be acknowledged that the majority of Australians no longer see homosexuality as ‘immoral’, (indeed the lens of morality is itself perhaps a somewhat outdated way of framing any question about social attitudes). However, neither do they necessarily see it as an issue of citizenship. This becomes clear when the question is framed as one of rights, law or policy. For example, 63 per cent of Australians do not agree that same sex couples should be able to adopt children. Even among those Australians who do not believe that homosexuality is ‘immoral’, only 56 per cent think that same sex couples should be allowed to adopt children.

Public opinion over same-sex marriage or relationship recognition is divided, although there is evidence that support for same-sex couples’ relationship rights is growing, and that it may now even be the majority view. In a 2003 poll, just 34 per cent of Australians were in favour of legal recognition for same-sex couples.⁹⁵ A poll a year later found 38 per cent of Australians in favour of same-sex marriage rights and 44 per cent opposed.⁹⁶ By February 2006, 53 per cent of Australians thought the government should introduce laws recognising same-sex relationships, while 37 per cent were opposed.⁹⁷ The exact type of relationship being discussed is also relevant. A 2005 poll showed that while only 35 per cent of Australians were in favour of marriage for same-sex couples, almost half (48 per cent) were in favour of same-sex civil unions, and only eight per cent disagreed that gay and lesbian couples should be able to live together as a couple.⁹⁸ Where applicable, all these polls found more women than men in favour of relationship rights, as well as a significant generation gap—most people aged under 50

⁹⁵ Ann Evans and Edith Gray, 2005, ‘What makes an Australian family?’, in Shaun Wilson, Gabrielle Meagher, Rachel Gibson, David Denmark and Mark Western (eds) *Australian Social Attitudes: The First Report*, UNSW Press. Poll results cited are from the 2003 Australian Survey of Social Attitudes. The relevant question asked whether the respondent agreed that ‘the law should recognise same sex couples’.

⁹⁶ Newspan survey for SBS World News, 2004. <<http://www9.sbs.com.au/theworldnews/regionphp?id=86834®ion=7>>. The question asked was ‘Are you in favour or against same sex couples being given the same rights to marry as couples consisting of a man and a woman?’

⁹⁷ Newspan Market Research, 2006, ‘Church and State’, telephone poll conducted for the Humanist Society of New South Wales, February. <<http://www.secular.org.au/articles/ChurchStatePoll020206.pdf>>. The survey question did not specify the type of relationship (whether marriage or civil union).

⁹⁸ Shaun Wilson, Rachel Gibson, Gabrielle Meagher, David Denmark, and Mark Western, 2005, *Australian Survey of Social Attitudes*, The Australian National University: ACSPRI Centre for Social Research. <<http://aussa.anu.edu.au>>

support relationship rights and most aged over 50 oppose such a change.

The 2006 poll found support for same-sex relationship recognition was very high among those aged 25–34, with nearly three quarters of this age group supporting same-sex law reform. There were also high levels of support among married people (55 per cent in favour and 35 per cent opposed) and people with children (58 per cent in favour, 32 per cent opposed), suggesting that the majority of heterosexual couples and families think that the rights they enjoy should also be available to same-sex couples and their families. Roughly half of those with a religious affiliation supported law reform to recognize same sex relationships, including 52 per cent of those of non-Christian faiths, 49 per cent of Catholics, and 46 per cent of other Christians.

As the attitudinal surveys mentioned above show, a significant minority of Australians still view the issue of homosexuality as one of immorality and display correspondingly negative attitudes. However, the majority of Australians display more positive attitudes, and it appears that this proportion is increasing over time. Nevertheless, even among this larger group there are many whose attitudes towards GLBTI people can be characterised as a minimal kind of ‘acceptance’ or ‘tolerance’. This can be seen for example, in the difference between the proportion who, in 2003, agreed that ‘a same-sex couple with children is a family’ (42 per cent) and the smaller proportion who think that ‘the law should recognise same-sex couples’ (34 per cent).⁹⁹ The former view is essentially an ‘acceptance’ that same-sex families exist, while the latter requires the respondent to agree that this issue is one of legal rights, where people in same-sex relationships have the same rights as citizens as in heterosexual relationships.

Tolerant or accepting attitudes do not necessarily translate into recognition of GLBTI people’s rights as citizens to legal recognition, protection and equal treatment in all areas of life.

Heteronormative constructions of family

As can be seen above, the area of life which perhaps best demonstrates the ‘limits to tolerance’ is that of parenting. Analysis of the 2003 Australian Survey of Social Attitudes found that, when it comes to the question of ‘what makes a family’, opinion in Australia is ‘much more divided on same-sex relationships than on other household arrangements’.¹⁰⁰ Again and again, it is the issues of same-sex parents adopting or raising children, lesbians accessing fertility treatment

⁹⁹ Evans and Gray, ‘What makes an Australian family?’

¹⁰⁰ Evans and Gray, ‘What makes an Australian family?’, p.18.

or donor sperm, or even educational material representing same-sex parented families that cause the most debate and controversy. Two recent incidents are illustrative of the limits to many people's 'tolerance' of homosexuality, and of the way that some sections of the Australian media continue to seek to stir controversy about this issue.

Case study: 'Gaycare revolt: family fury at teaching of toddlers'

In May 2006, Sydney's *Daily Telegraph* newspaper ran reports over several days concerning a Council-run childcare centre in the city's inner-west using the 'Learn to Include' children's books. These books are early childhood readers, written by a lesbian mother and her young daughter, that include same-sex parent families, and which had been approved by the NSW State Government. The paper's editorial accused the Council of being 'guilty of virtual child abuse in treating a community-funded centre as a venue for gay education', suggested that the centre was on a 'perverse crusade to promote the gay lifestyle to toddlers', and sounded 'more like a cult than a childcare centre'. It also called for the centre's funding to be cut.

The story was picked up by numerous other media outlets, and prompted a range of negative comments—predictably from conservative State and Federal politicians but also from NSW Labor Premier Morris Iemma who said that it was not appropriate 'for two-year-olds to be dragged into the gay rights debate'. He argued that parents who wanted to educate their children about 'these issues' should 'do so at home where they run no risk of offending other parents'.

Comments such as this demonstrate how even those on the less conservative side of politics continue to draw on heteronormative assumptions that construct the citizen as heterosexual. Within this heteronormative view, citizen identities, entitlements, rights and responsibilities are constructed in ways that privilege heterosexual relationships. Thus the underlying assumption in both the *Telegraph* editorial and Premier Iemma's comments are that heterosexual relationships are the norm, the gay rights debate has nothing to do with children, a childcare centre is a heterosexual space, and 'other' family forms should not be allowed to offend this norm.

Despite the controversy stirred up by the *Telegraph* story, it appears that it was something of a media fabrication. The paper had quoted a woman with a daughter about to start at the centre, who allegedly objected to the books. However, the local Council reported that there was no parent of this name on its childcare waiting lists. The Mayor was reported to be considering a complaint to the Australian Press Council about the *Telegraph's* story.

The incident also demonstrated how many Australians are resisting heteronormative assumptions. None of the print or television journalists who subsequently followed up the *Telegraph* story could find a single parent with a child attending the centre who opposed the use of the books. One lesbian parent at the centre was quoted as saying 'The TV crews turned up yesterday and stood out the front of the centre interviewing every parent who walked in and they couldn't find one person who had anything negative to say. It was wonderful! The story prompted a flood of emails and letters to the Council's Mayor, who reported that 90 per cent of them were supportive of the Council and the centre. These included many from heterosexual parents who expressed support for a policy that sought to teach their children about diversity.'

Case study continued

This case study illustrates how heteronormative assumptions are alive and well, particularly in relation to issues involving families and children, but it also demonstrates how they are increasingly being challenged—not just by same-sex parents but also by many others in the community.

A similar flurry of negative media and political attention followed a 2004 episode of the ABC children's television show *Play School* that included a story of a child who visits an amusement park with her lesbian mothers. Prime Minister John Howard issued the familiar judgement that 'this issue' is one for adults only—that it is wrong for a children's show to even acknowledge the existence of same-sex parents; 'If people want to debate that issue, do it on a program like *Lateline*, but not on *Play School*' he said. Howard would not accept the ABC's claim that the segment simply reflected the variety of families in the contemporary world; 'That doesn't wash with me' he said, 'You're talking about a very, very small number and to intrude that into a children's program is just being politically correct and I think is an example of the ABC running an agenda.' Again, this comment shows that it is only when heteronormative constructions of society are challenged that there is seen to be 'an agenda'. There is no 'agenda', it seems, in asking a children's television program to only portray heterosexual families.

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Conclusion

Public policy and public opinion are closely related. Both draw on heteronormative constructions that are mutually reinforcing. As the case study above shows, the prevailing heteronormativity of both media and political discourse has the effect of marginalising or excluding different experiences of citizenship, and particularly of family, childhood and parenting. At the same time, a great many Australians continue to adhere to this heteronormative view, whether explicitly or implicitly. Opinion polls do show that over time some sections of the Australian community are becoming more liberal on this issue. However, in the main they are a reminder that a large number of Australians either still believe homosexuality to be 'immoral', and think that GLBTI people should be accorded human rights that are somehow limited, rather than equal to those of heterosexual Australians.

STRENGTHS

- Various State and Territory governments have made genuine attempts to address the rights of the GLBTI population.
- Public opinion appears to be changing, with homophobia less widespread than previously. Support for same-sex couples' right to marry is growing.
- Numerous non-government organisations are actively and visibly campaigning for the removal of barriers to full citizenship for GLBTI Australians.

WEAKNESSES

- The *application* of public policy intended to remove discriminatory practices and attitudes is not systematic or comprehensive.
- Schools remain the institutions in which GLBTI people are most likely to experience discrimination and there are no systematic programs and accreditation standards for teacher training in the areas of anti-homophobia and sexual diversity.
- Gay and lesbian people experience higher than average levels of violence, including hate-motivated physical and verbal abuse and threats of violence in public places.
- Homophobia is still common in Australia, particularly among certain demographic groups, and many people still consider homosexuality to be an issue of 'morality' rather than citizenship or human rights.

5. Conclusion: Barriers to equal citizenship

Despite considerable progress in recent decades, GLBTI people have yet to achieve formal equality with heterosexual Australians. The remaining barriers to equal citizenship, particularly in the area of same-sex relationship and parenting recognition, are held in place by the combination of a dominant and heteronormative worldview that marginalises GLBTI citizens and their concerns and the persistence of sexuality as an issue of ‘morality’ rather than ‘equality’ in public and political discourse.

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This report has considered the equal citizenship of GLBTI people in Australia with regard to legislative protections, relationship recognition and public policy and attitudes. In each of these areas, although progress has been made, substantial inequalities remain. The examples of discrimination provided in this report are likely to be only a few of the many forms of discrimination that occur in federal legislation given how many pieces of federal legislation involve legal recognition of heterosexual relationships, married or de facto. A full assessment remains difficult given that the current federal government has repeatedly ignored calls for a thorough audit of federal legislation. These inequalities are an unnecessary blight on Australia’s democratic credentials and human rights record.

For the foreseeable future, addressing these inequalities and remaining areas of discrimination will remain the work of activist individuals and organisations. Some of these individuals may be found in our parliaments, among the small numbers of openly gay or lesbian politicians in this country. In Australia, there are no formal, legal or regulatory bars on gay and lesbian people’s access to state institutions. All three arms of government are open to all Australians regardless of sexual orientation, and there are examples of senior members of each branch who are gay or lesbian. These include Senator Penny Wong, the

Federal Opposition spokesperson on Employment and Workplace Participation, His Excellency Stephen Brady, Australia's Ambassador to the Netherlands and the Holy See, and Justice Michael Kirby of the Australian High Court. Kirby, for example, has often used his position to speak publicly and eloquently about the need to address continuing areas of discrimination in Australian society:

An important lesson of my life has been to derive from discrimination against particular groups, the general lesson of the need to avoid discrimination upon any irrational ground. To discriminate against people on such a basis (whether it be race, skin colour, gender, homosexual orientation, handicap, age, or any other indelible feature of humanity) is not only irrational. It is immoral. The law should provide protection from and redress against it.¹⁰¹

Despite such appeals, however, there are legitimate concerns about the low numbers of lesbian and gay Australians who feel able to be open about their sexual orientation when in positions of authority. In such small numbers these individuals are unlikely to achieve substantive policy or legislative reform, proving more effective in providing a degree of visibility for sexual minorities and ensuring that issues of GLBTI equality remain on the political agenda.

More successful, particularly at the State and Territory level, are the various organisations involved in consultation, liaison and other forms of extra-parliamentary representation regarding issues of GLBTI equality. In NSW, there is formal liaison between the gay and lesbian community and the Office of the Justice Minister. Similar links exist between the gay and lesbian community and both the Office of the Minister for Health and the Attorney General in Victoria. Most States and Territories have had, at various stages, formal liaison between police services and the lesbian and gay community.

The State where such liaison is most advanced is Tasmania. Formal liaison committees between the gay and lesbian community exist within five government agencies: education, health, police, tourism and the Premier's Department. Tasmania is unique in having developed a whole-of-government framework for the gay and lesbian community, as well as including commitments to the elimination of verbal and physical abuse on the grounds of sexual orientation in its social, economic and environmental plan, Tasmania Together.¹⁰² This plan also includes provision for the training of teachers in sexuality issues, and benchmarks for this training are currently being established. No equivalent liaison committees, frameworks, or social targets exist at a federal level.

¹⁰¹ Michael Kirby, 1997, 'Homosexual law reform: The road of enlightenment', *Australasian Gay and Lesbian Law Journal*, 6: 1-2.

¹⁰² Tasmania Together, <<http://www.tasmaniattogether.tas.gov.au/>>

Around the country, non-government organisations such as the New South Wales Gay and Lesbian Rights Lobby, the South Australian lobby group Let's Get Equal and the West Australian organisation Gay and Lesbian Equality continue their work to ensure that the barriers to full citizenship for GLBTI Australians are eventually removed. Achieving federal recognition for same-sex relationships remains a key focus for many of these groups.

In considering these persistent barriers to full citizenship it may be useful to conclude with a consideration of other barriers to marriage now thankfully consigned to history. Although race analogies are often questionable in this case they may bring home the seriousness of the forms of discrimination that are occurring in Australia in 2006. In the United States context, Evan Gerstmann¹⁰³ has analysed the US Supreme Court's arguments in the late sixties when the Court overturned the bans on mixed race marriage in some US States. Gerstmann points out that the Supreme Court repeatedly argued that the right to marry the person of one's choice was a fundamental human right.

Federal Labor Senator, Penny Wong has made similar arguments here, also likening the government's bans on gay marriage to the 1960s United States bans on interracial marriage. Wong has also argued against Prime Minister Howard's attempts to ban adoption by gay parents, suggesting that since 'we accept now in Australia that we don't discriminate against people on the basis of their race or their class', so should any form of discrimination against people on the grounds of their sexuality be removed.¹⁰⁴ Indeed, it seems highly unlikely that Australians would today accept bans on mixed-race marriage. Why, then, are they prepared to accept bans on same-sex marriage?

One answer lies in the current federal government's overt and extraordinary hostility towards same-sex relationship recognition in Australia. The actions and statements—both those documented in this report and many others on the public record—from senior members of the government, including the current Prime Minister and Attorney General, suggest a disregard for international human rights standards and obligations that should be unacceptable in any liberal democracy.

As a final example, consider the federal government response to the findings of the UNHRC in *Young v Australia*. That case involved the same-sex partner of a deceased war veteran who applied for a pension as a veteran's dependant. The Veteran's Entitlement Act provided for pensions to a veteran's partner only if that person was in an opposite-sex marital or de facto relationship with the relevant

¹⁰³ Evan Gerstmann, 2004, *Same-Sex Marriage and the Constitution*, Cambridge, Cambridge University Press.

¹⁰⁴ Penny Wong, quoted in Carol Johnson, 2004, 'The Politics of Signs: Gay and Lesbian issues in Comparative Perspective'. Refereed paper presented to the Australasian Political Studies Association Conference, University of Adelaide, 29 Sept.–1 Oct. <<http://www.adelaide.edu.au/apsa/papers/>>

veteran. The complainant, Edward Young, argued that this violated article 26 of the ICCPR because, in failing to recognise his 38-year relationship with his deceased partner, and therefore, to recognise his status as a dependant, the Act discriminated against him on the grounds of his sexuality. The UNHRC agreed with the complainant, stating:

The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.¹⁰⁵

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The UNHRC further found that Australia was under an obligation to remedy this discrimination through an amendment of the law if necessary. Not only has Australia has not made such an amendment, it failed to publicise the decision by media release or on any departmental website, finally responding seven months after the deadline with a blanket rejection of the committee's finding.¹⁰⁶

This persistent antagonism to claims for GLBTI equality and same-sex relationship recognition suggests that reform at the federal level is unlikely, at least until a change of government. This puts the onus both on State and Territory governments, and on the federal Labor Opposition, to continue to advance higher standards of human rights protection for Australia's sexual and gender minorities as a matter of political equality rather than morality.

¹⁰⁵ United Nations Human Rights Committee, *Young v Australia*, (941/2000) 6 August 2003, UN Doc. CCPR/C/78/D/941/2000 (2003), paragraph 10.4. Recently an almost identical case has emerged – that of Jiro Takamisawa, partner of 20 years of a World War II veteran. Takamisawa cared for his partner in the final years of his war-related disease, only to have his application for a pension as the dependent of a war veteran rejected by the federal government. Takamisawa also intends to take his case to the UNHRC. Erik Jensen, 2007, 'Denied a pension after 20 years, gay man heads to UN', *Sydney Morning Herald*, 24 April. <<http://www.smh.com.au/news/national/denied-a-pension-after-20-years-gay-man-heads-to-un/2007/04/23/1177180569512.html>>

¹⁰⁶ Hilary Charlesworth, 2006, 'Human rights: Australia versus the UN', Democratic Audit of Australia, Discussion paper 22/06, August. <http://www.democratic.audit.anu.edu.au/papers/20060809_charlesworth_aust_un.pdf>

Further reading

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Sue Wills, 2001, 'The challenge of sexualities', in Marian Sawer and Gianni Zappala (eds), *Speaking for the People: Representation in Australian Politics*, Melbourne, Melbourne University Press.

On gay and lesbian activism in Australia

Miranda Stewart, 1999, 'It's a queer thing: Campaigning for equality and social justice for lesbians and gay men,' *Alternative Law Journal* 29(2).

Graham Willett, 2000, *Living out Loud: A History of Gay and Lesbian Activism in Australia*, Sydney, Allen and Unwin.

On relationship recognition and parenting

Lesbian and Gay Legal Rights Service, 1993, 'The bride wore pink: Legal recognition of our relationships', *Australian Gay and Lesbian Law Journal*, 3.

Jenni Millbank, '*And Then...The Brides Changed Nappies: Lesbian Mothers, Gay Fathers and the Legal Recognition of Our Relationships with the Children We Raise*', A Community Law Reform Document, The New South Wales Gay and Lesbian Rights Lobby. <<http://www.girl.org.au>>

Useful websites

Human Rights and Equal Opportunities Commission Same Sex: Same Entitlements Inquiry: <<http://www.hreoc.gov.au/samesex/>>

Rodney Croome Gay Advocate: <<http://www.rodneycroome.id.au/weblog>>

New South Wales Gay and Lesbian Rights Lobby: <<http://www.girl.org.au/>>

Victorian Gay and Lesbian Rights Lobby: <<http://www.vgirl.org.au/>>

Gay and Lesbian Equality (WA): <<http://www.galewa.asn.au/>>

Let's Get Equal: <<http://www.letsgetequal.org.au/>>

Tasmanian Gay and Lesbian Rights Group: <<http://www.tglrg.org/>>

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