Chapter 6
Following the Legislative Leaders: Judicial Recognition of Same Sex Couples in Australia and New Zealand

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Abstract The rights of same-sex couples in Australia and New Zealand have been progressed significantly, primarily through legislative action. The New Zealand Parliament recently legislated for same-sex marriage. Despite attempts, same-sex marriage has not been achieved in Australia, although at the time of writing there were bills before Parliaments that, if passed, would enable same-sex marriage at either the State/Territory or Federal level. This chapter describes the legal order and legislative regimes in each country. It explains the contributions of the judiciary to law reform, judicial reflection of societal attitudes and the way that judges have applied laws to same-sex couples. The judiciary have generally embraced the legislature's lead towards equality enthusiastically, although some examples of homophobia and homo-ignorance are evident. Judges have been less able or prepared to promote same-sex couples' rights where the legislature has not taken the lead.

6.1 Introduction

Australia and New Zealand have some of the most progressive and egalitarian laws regarding the recognition of non-married same-sex couple relationships. The judiciary have, for the most part, embraced legislative reforms enthusiastically through their application and interpretation of laws to same-sex couples.

The willingness of the legislature and judiciary to recognise same-sex *de facto* relationships and to treat them equally to heterosexual *de facto* relationships can be

On 22nd October 2013, as this book went to print, the Australian Capital Territory passed the *Marriage Equality Amendment Bill*. The Commonwealth Attorney-General immediately announced an intention to challenge the ACT law on constitutional grounds in the High Court of Australia. This highlights the difficulties arising from Australia's federal system and uncertainty about where power lies to legislate for same sex marriage. A High Court determination will resolve the uncertainty.

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D. Gallo et al. (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions*, DOI 10.1007/978-3-642-35434-2_6,

contrasted with their unwillingness to grant same-sex couples the opportunity to legally marry (to date).

The legal framework and culture in both countries means that the legislature rather than the judiciary must be the initial driver of law reform towards marriage equality. The New Zealand Parliament enacted legislation on 17th April 2013 that enables same-sex couples to marry. The Australian Parliament has yet to legislate for same-sex marriage. This remains a significant and symbolic barrier to equality for same-sex couples in Australia. Judicial consideration may follow legislative action, particularly in Australia, where the constitutional issues raised by same-sex marriage have yet to be tested in the High Court.

6.2 Australia

In Australia the legal rights of married and non-married couples as well as heterosexual and same-sex couples are largely equal. The residual differences are: first, non-married couples may need to prove the existence of their relationship in order to access rights and secondly, same-sex couples are excluded from the opportunity to be married. Therefore, same-sex couples may experience more difficulty accessing their legal rights than heterosexual married couples.

The role played by the judiciary in regard to same-sex couples in Australia has been partly shaped by the absence of a constitutional or legislative Bill of Rights at the National level. Reform in Australia has been led primarily by political lobbying and legislative action rather than judicial decisions.[1] Some legislative action has been a response to litigation and has had the effect of taking questions away from the judiciary. Nonetheless, the judiciary has played an important role in its interaction with same-sex couples through applying the law and comments made by judges about same-sex family relationships. Sometimes judicial officers have highlighted problems in the law explicitly, other times their decision making has generated publicity about inadequacies in the law. This has provided material for those advocating for reform. Judges have also reflected or highlighted societal prejudices. Of particular significance are decisions about the legal recognition of same-sex *de facto* relationships. Another important site of interaction between judges and same-sex couples is the interpretation and application of laws relating to legal parentage of children born into same-sex parented families through assisted reproductive technologies.

6.2.1 Background: The Australian Legal Order

Australia is a Federation of States (known as the Commonwealth of Australia). Eight legislative systems operate simultaneously. There are five Australian States

[1] Sifris (2010).

(New South Wales, South Australia, Tasmania, Victoria and Western Australia) and two mainland Territories (Australian Capital Territory and the Northern Territory). The Australian Constitution is the "supreme law" governing the Commonwealth and can only be changed by an absolute majority in both Houses of the Bicameral Federal Parliament and a *referendum* of a majority of Australian voters, with a majority in a majority of States.[2] The Commonwealth's powers are sourced from either the Australian Constitution or by referral of power from the States. The Constitution gives the Commonwealth power to make laws concerning "marriage"[3] and "matrimonial causes" including divorce, property adjustments, parental rights and custody of children of married couples.[4] These powers are held concurrently by the States.[5] A State or Territory law that is inconsistent with a Commonwealth law is invalid to the extent of the inconsistency.[6] The States (except Western Australia) have referred power to the Commonwealth over children's family matters for children born outside marriage[7] and in respect of *de facto* property and financial matters.[8] Some residual children's matters remain exclusively in the State and Territory jurisdictions, including adoption,[9] assisted reproduction (including surrogacy)[10] and registration of births, deaths and marriages.[11]

Australia is a common law jurisdiction. The most superior court is the High Court, which hears constitutional matters and appeals from the lower tier. Below the High Court there are the Federal Courts and State and Territory Courts. The Federal Courts include the Federal Court and Family Court, which have appeal divisions, and below them sits the Federal Circuit Court.[12] The Supreme Courts are the superior State and Territory courts, with some States having a middle tier of District Courts and all having Local or Magistrates Courts at the lower level. The State of Western Australia has its own Family Court, which exercises the

[2] The Constitution 1901, Chapter VIII.

[3] *Ibidem*, sect. 51(xxi).

[4] *Ibidem*, sect. 51 (xxii).

[5] *Ibidem*, sections 51 and 107.

[6] *Ibidem*, s. 109.

[7] Commonwealth Powers (Family Law) Acts 1986 (SA); 1987 (Tas); Commonwealth Powers (Family Law—Children) Acts 1986 (NSW); 1986 (Vic); 1990 (Qld).

[8] Commonwealth Powers (De facto Relationships) Acts 2003 (NSW); 2003 (Qld); 2004 (Vic); 2006 (Tas); 2009 (SA).

[9] Adoption Acts 1984 (Vic); 1988 (Tas); 1988 (SA); 1993 (ACT); 1994 (WA); 2000 (NSW); 2009 (Qld); Adoption of Children Act (NT).

[10] Status of Children Acts 1974 (Tas); 1974 (Vic); 1978 (Qld); 1996 (NSW); (NT); Family Relationships Act 1975 (SA); Artificial Conception Act 1985 (WA); Parentage Act 2004 (ACT). The Family Law Act 1975 clarifies the legal recognition of parentage of children born through assisted reproduction for the purposes of Commonwealth law.

[11] Registration of Births, Deaths and Marriages Act 1997 (ACT); Births, Deaths and Marriages Registration Acts 1995 (NSW); (NT); 1996 (SA); 1996 (Vic); 1998 (WA); 1999 (Tas); 2003 (Qld).

[12] Formerly the Federal Magistrates Court, name changed by Federal Circuit Court of Australia Legislation Amendment Act 2012.

jurisdiction of the Family Law Act as well as State jurisdiction. It is for this reason that Western Australia has not referred powers over children's and *de facto* property matters to the Commonwealth, as it already hears those matters in its own Family Court. Various tribunals exist at the State, Territory and Federal level.

There is no constitutional or legislative Bill of Rights at the Commonwealth level in Australia.[13] Consequently, a law that breaches human rights in Australia may nonetheless be valid law. It is not possible to challenge Australia's discriminatory marriage laws through the courts, as has occurred elsewhere, because the courts lack power to strike down legislation solely on the ground that it is discriminatory.[14] Nonetheless, in Australia there is a

> strong political tradition of support for principles of equality and non-discrimination, and these values have been articulated through numerous State, Territorial and some Federal statutes.[15]

Although there is no prohibition against discrimination on the basis of sexual orientation at the Federal level,[16] it is a recognised ground of discrimination in the States and Territories.[17]

There has been successful challenge to laws that breach Commonwealth laws prohibiting discrimination on the basis of marital *status*. *McBain*[18] involved a challenge to Victorian legislation preventing single women or women in a *de facto* relationship from accessing Assisted Reproductive Technology (ART) services. The High Court found this to be discriminatory under Commonwealth anti-discrimination law, thereby rendering the Victorian law invalid to the extent of its inconsistency with Commonwealth law.[19] The Commonwealth's response was to introduce a bill to enable discrimination on grounds of marital *status* in the context of access to ART.[20] The bill was abandoned after the Senate Legal and Constitutional Legislation Committee "highlighted how such an enactment would breach Australia's obligations under international treaties."[21] States that regulate ART in legislation have enabled women in lesbian relationships to access ART services.[22]

The Australian Capital Territory (ACT) and Victoria have both enacted a legislative Charter of Rights to guide the work of Parliament and the courts in those jurisdictions.[23] There is at least one example of a lost opportunity to highlight

[13] Walker (2007) noted that this is unusual for a Western democratic country.

[14] *Ibidem*, p. 122.

[15] McNamara (2007), p. 143.

[16] Discussed in Human Rights and Equal Opportunity Commission (2011). See the Exposure Draft Human Rights and Anti-Discrimination Bill 2012, in the consultation stage at the time of writing.

[17] McNamara (2007), p. 143.

[18] *Re McBain; Ex Parte Australian Bishops Conference* (2002) 209 CLR 372 ("*McBain*").

[19] *McBain*; Sifris (2010), p. 17.

[20] Sex Discrimination Amendment Bill (No 1) 2000 (Cth).

[21] Young et al. (2013), para. 7.24.

[22] *Ibidem*, para. 7.25.

[23] Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic).

discrimination against same-sex couples through the use of a Charter of Rights in judicial decision-making. Sifris and Gerber have commented on the *AB* case,[24] a County Court of Victoria decision interpreting sect. 11(3) of the Adoption Act 1984, which empowers a court to make an adoption order in favour of "one person" but not in favour of a non-married couple.[25] The applicant was a man in a long term relationship with another man (the couple were married in Canada, a marriage not recognised in Australia) who wanted to adopt their 11 year old foster child.[26] One of the men applied to adopt the child as an individual, as they were not eligible to adopt as a couple because under Australian law they were not legally married. The question before the court was whether a person in a couple relationship was eligible to adopt as an individual. Pullen J concluded that Parliament had not expressly excluded people in same-sex relationships from adopting as individuals, therefore there was no basis for a narrow interpretation of the relevant provision and the adoption application was granted.[27] Sifris and Gerber have criticised Pullen J for failing to use the Victorian Charter of Human Rights and Responsibilities[28] or to take the opportunity to "comment on whether precluding same-sex couples from adopting purely on the basis of their sexual orientation amounted to discrimination."[29] The Charter could be have been used to challenge discriminatory legislation.[30]

McBain and the *AB* cases demonstrate that anti-discrimination laws have been able to be used in the courts to progress the rights of same-sex couples, notwithstanding the absence and then under-utilisation of the Victorian Charter of Rights.

6.2.2 Same-Sex Marriage

Marriage remains a site for differential treatment of opposite and same-sex couples. Marriages entered into by people of the same-sex in other countries are not recognised as marriages in Australia.[31] Prior to 2004, these marriages could potentially have been legally valid in Australia[32]; however, in 2004 the Commonwealth

[24] As the judgment was not reported, Sifris and Gerber's report and analysis has been relied upon.

[25] Sifris and Gerber (2011b) regarding *AB and Victorian Equal Opportunity & Human Rights Commission and Department of Human Services and Separate Representatives of J* Unreported, County Court of Victoria, Case No AD-10-003, Pullen J, 6 August 2010 ("the *AB* case").

[26] Sifris and Gerber (2011b), pp. 275–276.

[27] *Ibidem*, pp. 278–280, referring to the *AB* case, paras 59–60.

[28] Charter of Human Rights and Responsibilities Act 2006 (Vic).

[29] Sifris and Gerber (2011b), pp. 281–282.

[30] *Ibidem*, p. 115.

[31] Same-sex marriages entered into in some overseas jurisdictions are recognised as significant relationships under the Relationships Act 2003 (Tas).

[32] Although some commentators argue that this was unlikely. See for example McNamara (2007), p. 151.

enacted amendments to the Marriage Act that clarified the definition of marriage to be between a man and a woman, thus explicitly preventing same-sex marriages from being recognised in Australia.[33] This legislative action was partly in response to an application to the Family Court of Australia by two same-sex couples who had married in Canada and who wanted their marriage to be legally recognised in Australia.[34] As a consequence of the legislative amendment, the case was discontinued and the Family Court did not make a determination on this point. McNamara has wondered whether the absence of a "suprapolitical human rights standard for guiding and scrutinising the policy formulation process and reform agenda" created the environment in which the 2004 amendments could be made and the prohibition of same-sex marriage continued.[35] He also suggested that the Government's legislative action characterised the judicial role as one carrying dangers and unknown qualities that needed to be controlled.[36] This reflects Australian legal culture that privileges the law making role of the legislature over that of the courts.

If a law for same-sex marriage was enacted by the Federal, a State or Territory Parliament, the validity of that law could possibly be challenged in the High Court on constitutional grounds. There is no certainty that such a challenge would be made or would be successful. It is widely acknowledged that any laws, State or Commonwealth, that propose to legalise same-sex marriages create multiple challenging and unresolved constitutional questions.[37] Essentially, these constitutional questions emerge because of the Australian Federation of States. Because no Australian legislature has exercised the marriage power in respect of same-sex couples in Australia, and the Australian High Court has not been asked to interpret the power in that context, these legal questions remain unresolved.[38] Consequently, there is little judicial commentary about the issue of same-sex marriage and same-sex relationship recognition, particularly from the High Court.

There have been multiple bills attempting to legalise same-sex marriage presented to the Federal Parliament, but none have been passed.[39] The 2012 Marriage Equality Amendment Bill went to a vote and was defeated, and another bill was presented to Parliament in February 2013. Same-sex marriage bills have been presented to Parliaments but have not been passed into law in Tasmania, New

[33] Marriage Amendment Act 2004 (Cth), inserting the definition in sect. 5(1) of the Marriage Act 1961 (Cth).

[34] Walker (2007), p. 110. McNamara (2007) has suggested that the government's move was an over-reaction, as in the absence of a superior human rights framework the applicants had little chance of success (p. 151).

[35] McNamara (2007), p. 145.

[36] *Ibidem*, p. 152.

[37] See the overviews of these issues in Griffith (2011), pp. 25–31; Walker (2007), pp. 112–119; and Tasmanian Law Reform Institute (2013).

[38] Walker (2007), p. 113.

[39] Marriage Amendment Bill 2012; Marriage Equality Amendment Bills 2013; 2012; 2010; 2009; Marriage (Relationship Equality) Amendment Bills 2008; 2007; Same-Sex Marriages Bill 2006.

South Wales, Victoria, South Australia and Western Australia.[40] The 2012 bills presented in some of these jurisdictions were responses to the defeat of the Commonwealth bills in September 2012. The Tasmanian Same-sex Marriage Bill 2012 was defeated and none of the others had gone to a vote at the time of writing. The ACT government has committed to legislating for marriage equality but so far no bill to this effect has been introduced.[41]

There have been some comments made by Australian High Court judges about the power of the Commonwealth to legislate to recognise same-sex marriage.[42] Most notably, McHugh J in *Re Wakim* speculated

> The level of abstraction for some terms of the Constitution is, however, much harder to identify than that of those set out above. Thus, in 1901 "marriage" was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the parliament of the Commonwealth the power to legislate for same sex marriages, although arguably "marriage" now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.[43]

Notwithstanding this comment and its citation by other judges,[44] the Commonwealth Parliament has not adopted a broad interpretation of the marriage power. Rather, it has specifically legislated to clarify that marriage under Federal law must only be between a man and a woman.[45]

6.2.3 Same-Sex Relationship Recognition

6.2.3.1 Non-Married Relationship Registration

Non-married relationship registration options include civil unions, civil partnerships, deed of relationships or registration of personal relationships. Such schemes

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[40] Same-sex Marriage Bills 2010 (Tas); 2008 (Tas); 2005 (Tas); State Marriage Equality Bill 2012 (NSW); same-sex Marriage Bills 2006 (NSW); 2005 (NSW); Marriage Equality Bills 2012 (Vic); 2012 (WA); 2012 (SA); 2011 (SA); Griffith (2011), pp. 23–25.

[41] Parliamentary agreement for the 8th Legislative Assembly for the Australian Capital Territory 2012, available at act.greens.org.au/sites/greens.org.au/files/2012%20parliamentary%20Agreement.pdf (accessed 8 February 2013), Schedule 1 clause 8.3.

[42] Walker (2007), p. 113 identified comments about the meaning of marriage by Brennan J in *The Queen v. L* (1991) 174 CLR 379, p. 392 and Higgins J in *Attorney-General for New South Wales v. Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 610. The Full Court of the Family Court in *Kevin and Jennifer* (2003) 30 Fam LR 1, p. 22-4 discussed High Court judicial comments on the meaning of marriage. See discussion in Nicholson (2005).

[43] *Re Wakim* (1999) 198 CLR 511, para. 45.

[44] Kirby J in *Grain Pool of WA v. Commonwealth* (2000) 202 CLR 479, para. 127, noting that the House of Lords cited McHugh J in *Fitzpatrick v. Sterling Housing Association Ltd* [1999] 3 WLR 1113.

[45] Marriage Amendment Act 2004 (Cth).

are separate and distinct from marriage.[46] These options provide couples who are excluded from marriage or who choose not to marry with a way of attracting certain legal recognition of the existence of their relationship as well as symbolic state recognition that their relationship is valued by the community.[47] There is no non-married relationship registration option at the Commonwealth level in Australia. There are schemes in Tasmania, Victoria, the Australian Capital Territory, New South Wales and Queensland.[48] All of these schemes are open to both opposite sex and same-sex couples.

6.2.3.2 *De Facto* Recognition of Same-Sex Couples

Australia has a long tradition of recognising "marriage like" relationships[49] and there has been progressive change to equalise the legal position of married and non-married couples.[50] Recognition was first extended to heterosexual non-married couples.[51] Same-sex couples now have recognition of their relationship *status* equivalent to non-married heterosexual couples in most contexts, including at Commonwealth and State/Territory level.[52] The most recent changes at the Commonwealth level in 2008 extended the jurisdiction of the Family Law Act to financial matters after the separation of *de facto* couples (defined to include both heterosexual and same-sex couples). These reforms "built upon 20 years of State based case law interpreting *de facto* relationships."[53] It was through these reforms that same-sex couples obtained access to redress in the Federal family courts upon the breakdown of their relationship (previously restricted to couples who had been married). Additionally, the 2008 Federal reforms provided for recognition of same-sex couple relationships for purposes such as pensions, superannuation, taxation

[46] Rundle (2011).

[47] *Ibidem*.

[48] Relationships Acts 2003 (Tas); 2008 (Vic); Civil Unions Act 2012 (ACT) (superseded the Civil Partnerships Act 2009 (ACT)); Relationships Register Act 2010 (NSW); Relationships Act 2011 (Qld) (renamed by the Civil Partnerships and Other Legislation Amendment Bill 2012).

[49] Walker (2007), p. 110.

[50] Graycar and Millbank (2007).

[51] See for example: Property (Relationships) Act 1984 (NSW); Property Law Act 1974 (Qld); Family Relationships Act 1975 (SA) (limited recognition); De facto Relationships Act 1996 (SA); Family Court Act 1997 (WA); De facto Relationships Act 1999 (Tas) (no longer in force); Relationships Act 2003 (Tas); Domestic Relationships Act 1994 (ACT); De facto Relationships Act 1991 (NT) (cited by Walker (2007), at note 12).

[52] Examples of amending legislation include: Property (Relationships) Legislation Amendment Act 1999 (NSW); Statute Law Amendment (Relationships) Act 2001 (Vic); Discrimination Law Amendment Act 2002 (Qld); Statutes Amendment (Domestic Partners) Act 2006 (SA); Relationships Act 2003 (Tas); Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (WA) (cited by Sifris and Gerber 2011a, p. 96).

[53] Family Law Amendment (*De facto* Financial Matters and Other Measures) Act 2008 (Cth), which came into effect on 1 March 2009; Millbank (2009), p. 193.

and social security.[54] The reforms responded in part to the Australian Human Rights and Equal Opportunity Commission's 2007 Report, which followed the UN Human Rights Committee's view in *Young v Australia* and identified 58 Commonwealth laws that discriminated against same-sex couples.[55]

There are some residual distinctions in State and Territory laws between married and non-married couples (which also means that there are distinctions between heterosexual and same-sex couples), but the general move has been towards parity rather than differential treatment.[56] In Australia, once a relationship is found to fall within the legally recognised category, the rights and responsibilities of married couples are automatically applied to that relationship. For some purposes it may be necessary to establish that the relationship was of a particular duration as well as the fact that the relationship satisfies the relevant definition.[57] There is therefore a policy presumption that people in intimate personal relationships require legal protection and ought to enjoy the same benefits as married couples. This approach has been preferred over granting same-sex couples an option to marry.

In all jurisdictions in Australia, the existence of a legally recognised non-married (but "marriage like") relationship is dependent upon whether the parties have a relationship "as a couple".[58] The various pieces of legislation contain similar non-exclusive lists of indicators which may be taken into account in determining this question of fact,[59] none of which are necessary to find that a recognised relationship exists.[60] The legislative indicators evolved from State case-law that considered the existence of *de facto* relationships,[61] which essentially reversed the

[54] Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008; Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008.

[55] See the discussion of *Young v Australia* HRC Communication No 941/2000 and the Australian response in the Chapter by Paladini in this volume.

[56] A notable exception to the trend towards equality is the Queensland government's current proposal to deny access to surrogacy by same-sex couples. See Australian Broadcasting Commission (2012), available at http://www.abc.net.au/news/2012-06-22/no-more-surrogacy-for-same-sex-couples-in-qld/4086064.

[57] See for example some provisions relating to intestacy. Administration and Probate Acts 1929 (ACT) s 45A(1)(a); 1969 (NT) Pt III cl 1(a). The Family Law Act 1975 (Cth) s. 90SB requires that *de facto* relationships be of 2 years duration before a property adjustment can be made, unless the relationship has been registered in a recognised State or Territory scheme or there is a child of the relationship.

[58] See discussion in Young et al. (2013), para. 5.95.

[59] Per Murphy J in *Jonah v. White* (2011) 45 FamLR 460, p. 467; approved by the Full Court in *Ricci & Jones* [2011] FamCAFC 222 and *Jonah & White* [2012] FamCAFC 200.

[60] Family Law Act 1975 (Cth) s. 4AA(2); Property (Relationships) Act 1984 (NSW) s. 4(2); De facto Relationships Act 1991 (NT) s . 3A(2); Acts Interpretation Act 1954 (Qld) s. 32DA(2); Relationships Act 2003 (Tas) s. 4(3); Relationships Act 2008 (Vic) s. 35(2); Interpretation Act 1984 (WA) s. 17(2).

[61] *D v. McA* (1986) 11 Fam LR 214.

criteria for assessing whether a married couple had separated.[62] The criteria include: the length of the relationship, the nature and extent of common residence, whether or not the parties have a sexual relationship, the degree of financial interdependence, arrangements for financial support, ownership, use and acquisition of property, degree of mutual commitment to a shared life, care and support of children, performance of household duties and reputation and public aspects of the relationship.[63]

6.2.3.3 Judicial Recognition of Same-Sex Couples

The judiciary's treatment of same-sex relationships in Australia occurs in a context where same-sex marriage is not recognised and the judiciary lacks the tools to address this area of discrimination. Legislative provisions treat non-married heterosexual couples and same-sex couples equally. This raises the question of whether applying the same law is equitable when the "norms" of same-sex couple relationships may differ from those of heterosexual couples. To truly achieve equality, it is necessary; first, that judges perceive same-sex relationships as being of equal worth as heterosexual relationships and secondly, that the judiciary takes account of inherent differences between same-sex and heterosexual relationships when applying the law. If true equality is to be achieved, the judiciary should not apply inappropriate hetero-normative assumptions to same-sex relationships when determining whether those relationships are "worthy" of legal recognition.

One of the first cases applying the 2008 Federal *de facto* provisions involved a female couple and stands out as a case where hetero-normative assumptions may have been applied unfairly to that relationship. *Keaton v. Aldridge*[64] concerned parentage and the question before Chief Federal Magistrate Pascoe was whether or not two women were in a *de facto* relationship at the time of the assisted conception procedure.[65]

Pascoe CFM noted that at the time of conception there was no avenue for the legal recognition of the co-mother as the child's legal parent.[66] His Honour found that the parties were not in a *de facto* relationship at that time, relying in part on their maintenance of separate dwellings (including independent responsibility for household cleaning), lack of sexual intimacy at the time of conception, financial independence and absence of shared property.[67] This was despite the fact that most

[62] As established by Watson J in *Marriage of Todd* (*No 2*) (1976) 1 FamLR 11,186 at p. 11,188 and approved and added to by the Full Court in *Marriage of Pavey* (1976) 1 FamLR 11,358.

[63] Millbank (2008), p. 9.

[64] *Keaton v Aldridge* (2009) 223 FLR 158.

[65] As required by sect. 60H(1)(a) of the Family Law Act 1975.

[66] *Keaton v Aldridge* (2009) 223 FLR 158, para. 111.

[67] *Ibidem*, para. 115; Behrens (2010), p. 355.

of their nights were spent together at one of their residences.[68] Evidence that could have supported a finding that the parties were in a relationship at the relevant time included that they had a shared social life, were mutually committed to their relationship throughout the relevant times, socialised and attended outings together and referred to one another as "my partner."[69] The parties' joint commitment to planning for and parenting the child together was also relevant. The applicant attended the ART clinic with the respondent and engaged in intake and counselling sessions, signed the consent forms for the treatment as the partner of the respondent, was present when the ART procedure took place and at the birth.[70] However, Pascoe CFM concluded that the couple had not made a decision about the role that the applicant would play in the child's life, and this was critical to his conclusion that they were not in a *de facto* relationship at the time of conception.[71] Millbank has criticised this interpretation of the evidence of "a shifting and negotiated understanding of shared parenthood between the women"[72] because it failed to take account of the context of legal non-recognition of and absence of established norms around lesbian co-parenting.[73]

Pascoe CFM appears to have applied an expectation of equal co-parenting roles on the female couple, when the traditional division of contributions in heterosexual relationships often involves one parent taking primary responsibility for parenting of the children of that relationship, sometimes also dictating the extent of involvement of the other parent.[74] Pascoe CFM also characterised the applicant's contributions of: attending pre-natal activities, being involved in the birth, sharing care of the child, and the child being given her last name as a middle name, as being "supportive" of the respondent rather than indicative of a *de facto* relationship.[75] These kinds of contributions indicated the applicant's intention to parent the child, but her legal parentage *status* depended upon whether or not she was in a *de facto* relationship with the respondent at the time of conception. Millbank has criticised the circularity of the decision, where parentage depended upon relationship *status* which was judged partly by evidence of parenting.[76]

Keaton v. Aldridge does appear to sit as an anomaly in post 2009 judicial decisions regarding same-sex couple recognition.

Despite some fears about the absence of some of the *de facto* criteria in many relationships, the application of the legislative provisions demonstrates that "judges have generally been alive to the idea of difference and been flexible and adaptive in

[68] *Ibidem*, para. 115.
[69] *Ibidem*, para. 116; Behrens (2010), pp. 355–356.
[70] Millbank (2009), pp. 185–186.
[71] *Keaton v. Aldridge* (2009) 223 FLR 158, para. 113; Behrens (2010), p. 356.
[72] Millbank (2009), p. 188.
[73] *Ibidem*, p. 188.
[74] *Ibidem*, p. 188.
[75] *Ibidem*, pp. 188–189.
[76] *Ibidem*.

their interpretation."[77] The inherent diversity in intimate human relationships has therefore generally been recognised by the judiciary. Justice Coleman in *Barry & Dalrymple*[78] explicitly commented on the application of the definition of *de facto* relationship (sect. 4AA) in the Family Law Act to same-sex couples:

> Section 4AA(5) of the Act leaves no scope for doubt that the same criteria apply to "working out if persons have a relationship as a couple" for the purposes of s 4AA, whether those persons are of the "same" or "different" sexes. Thus, no gendered assumptions or stereotyping can impact upon the determination... There is a substantial degree of consensus as to what is, and is not consistent with the existence of heterosexual de facto relationships within the meaning of s 4AA of the Act. Some of the "traditional" indicators of a heterosexual de facto relationship cannot, or usually will not apply to same sex relationships.[79]

Coleman J recognised that although the same legislative criteria were to be applied in determining whether a *de facto* relationship existed, it would be wrong to apply hetero-normative assumptions to same-sex relationships.[80]

In *Estrella v McDonald and Ors,*[81] Associate Justice Lansdowne considered whether it was significant that the alleged relationship between the applicant and the deceased was homosexual. Her Honour concluded that although the same law applied to heterosexual and homosexual relationships, the fact that the relationship was a same-sex relationship was relevant and significant for two main reasons. First, because the couple did not have the option of publicly confirming their relationship by marriage, there was no need to apply the same degree of caution as when finding whether a heterosexual *de facto* relationship existed.[82] Secondly, the legal changes regarding same-sex relationships were recent developments, which meant that community acceptance of those relationships may not have kept pace with the law:

> In particular, if indeed the relationship was a sexual and romantic one, embarrassment on the part of the deceased and the plaintiff as to its homosexual nature or consciousness that the relationship may not be accepted by their families or the community may provide explanation for their failure to openly acknowledge the relationship, the actions they took to conceal its true nature, and, in the case of the deceased, his denials that it was a sexual relationship.[83]

There is some judicial understanding of the social issues that same-sex couples face, such as the varying degrees and variable contexts in which lesbian, gay and bisexual people might publicise their relationships.

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[77] *Ibidem*, p. 10.

[78] *Barry & Dalrymple* [2010] FamCA 1271.

[79] *Ibidem*, para. 236.

[80] *Ibidem*, para. 237.

[81] *Estrella v. McDonald and Ors* [2012] VSC 62.

[82] *Ibidem*, para. 35 citing *Re the Estate of Sigg* (*deceased*) [2009] VSC 47.

[83] *Ibidem*, para. 36. This approach was also adopted by Justice McCready in *Morwood v. Dalgleish* [2007] NSWSC 32.

6.2.4 Same-Sex Parenting

In addition to the legal recognition of couple relationships, same-sex parented families are also affected by laws around parentage and care of children. There have been significant law reforms affecting the legal recognition of parentage of children born through artificial reproduction.[84] This means that where a lesbian *de facto* couple plan a child together through assisted conception, the child is regarded as a child of the non-birth mother.[85] However, it remains the case that many parents who have children in same-sex relationships are not regarded as the legal parents of children.

Laws about parenting in Australia focus upon the best interests of the child rather than a concept of parental rights. A person without legal parentage *status* may acquire parenting orders either when the same-sex relationship is ongoing or after separation. Non-parents with an interest in the care, welfare and development of a child can approach the family courts[86] for parenting orders.[87] Therefore, step-parents and other non-legal parents may seek orders for sole or shared parental responsibility, orders that a child lives with, spends time with and/or communicates with that person.[88] There are some distinctions between parents and non-parents: presumptions of equal shared parental responsibility and the child's "right" to know and be cared for by a parent do not apply to non-legal parents and the relevant factors in determining parenting order applications also distinguish between parents and non-parents.[89] However, there is a "catch all" provision in parenting matters of "any other fact or circumstance that the court thinks is relevant", and the family courts have used this provision to consider the factors that apply exclusively to parents as they apply to non-legal parents such as co-mothers, biological fathers and partners of legal or biological parents.[90]

There are two main issues affecting same-sex parented families. First, whether or not a non-biological co-parent will be recognised as a legal parent.

[84] Sect. 60H Family Law Act 1975, as amended in 2008; Status of Children Acts 1974 (Tas) sect. 10C; 1974 (Qld) sections 19B–19E; 1974 (Vic) sections 13–14; 1978 (NT) sect. 5DA; 1996 (NSW) sect. 14(1A); Family Relationships Act 1975 (SA) sect. 10C(3) and Artificial Conception Act 1985 (WA) sect. 6A.

[85] One recent example of the application of the Federal provision to a lesbian couple is *Connors & Taylor* [2012] FamCA 207.

[86] Family Court of Australia, Federal Circuit Court (formerly Federal Magistrates Court) and Family Court of Western Australia.

[87] Family Law Act 1975 (Cth), sect. 65C.

[88] *Ibidem*, sections 64B, 64C.

[89] *Donnell & Dovey* (2010) 237 FLR 53; *Aldridge & Keaton* (2009) 235 FLR 450. See Rundle and Hardy (2012), part 3.3.

[90] See for example *Aldridge & Keaton*; *Wilson and Anor & Roberts and Anor* (*No 2*) [2010] FamCA 734.

Secondly, how the courts will view homosexuality when making decisions about parenting.[91]

6.2.4.1 Judicial Recognition of Legal Parentage

Judges made comments about the inadequacy of the law to deal appropriately with same-sex parented families in *B v. J*[92] and *Re Patrick*.[93] Both of these cases involved known donors of sperm to a lesbian couple. *B v J* concerned the question of whether the donor was a parent of the child for the purposes of child support. It was concluded that he was not a parent for this purpose, and therefore was not required to support the child financially. *Re Patrick* concerned the degree to which a known sperm donor to a lesbian couple would be involved in the child's life. At the time of *Re Patrick* there was no legal recognition of the parentage of a co-mother. Both cases contributed to the political movement toward 2008 reforms to the Family Law Act, which, as well as bringing *de facto* financial matters into the jurisdiction of the Family Court, introduced some recognition of co-mothers as parents of children born through artificial conception and specified that donors should not be treated as parents.[94]

Justice Guest in *Re Patrick* took the opportunity to make a judicial plea for legislative action to improve the state of parenting laws and recognise the reality of the diverse forms of family into which children were being born.[95] In *Re Patrick*, Guest J was quite clear that he considered Patrick's family to be comprised of his mother and co-mother and that the male donor was not part of the primary family unit.[96] This was despite choosing to use the term "father" when referring to the donor in the judgment.[97] In asserting the family *status* of Patrick and his two mothers, His Honour commented:

> In my view it would stultify the necessary progress of family law in this country if society were not to recognise the applicants as a 'family' when they offer that which is consistent and parallel with heterosexual families, save for the obviousness of being a same-sex couple. The issue of their homosexuality is, in my view, irrelevant.[98]

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[91] In the Australian family law system the overall term for care of children is "parenting" (distinct from "parentage", which relates to legal *status* as a parent). Equivalent terms in international law are guardianship ("parental responsibility"), custody ("living with") and access ("spending time and/or communicating with").

[92] *B v. J* (1996) 135 FLR 472 per Fogarty J, at 483. Sifris (2010), p. 20.

[93] *Re Patrick: An application concerning contact* (2002) 168 FLR 6 ("*Re Patrick*") per Guest J, at 78. Sifris (2010), p. 20.

[94] Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008 (Cth). See discussion in Sifris (2010), pp. 21–22.

[95] *Re Patrick*, Part 9 headed "Possible Recommendations".

[96] *Ibidem*, paras 323–326.

[97] *Ibidem*, para. 2.

[98] *Ibidem*, para. 325.

There is no doubt that judicial commentary has contributed to the legal reforms in relation to same-sex parentage in Australia. Judges have raised awareness and stimulated discussion about the issues faced by same-sex parented families.

The Full Court of the Family Court commented about the new 2008 provisions in *Aldridge v Keaton*[99]

> ...the Act in its present form enables a court dealing with a parenting application the flexibility to recognise and accommodate "new" forms of family, including families with same-sex parents, when making orders which are in the best interests of a child who is part of such a family.[100]

Judicial commentary since the reforms has reinforced the intention of the legislature and the state of the law in Australia, whereby the family law framework is able to respond to the needs of diverse family forms.

6.2.4.2 Judicial Views on Parenting by Same-Sex Couples

While family court judges tend to make statements about equality and an intention to focus on parenting ability, there has been evidence of discrimination and prejudice in some judges' decisions. Family Court judges have historically and consistently stated that parenting ability rather than sexuality is relevant for decisions affecting children of gay, lesbian and bisexual parents.[101] However, past parenting decisions demonstrate that homosexuality has been raised as an issue in some cases. Parents in same-sex relationships have been subjected to scrutiny that would not be applied to parents in heterosexual relationships.[102] Some have had discriminatory conditions imposed upon them, such as not displaying affection to their partner in the presence of their children.[103] Such treatment reflected judicial prejudice against same-sex couples.

In recent years there has been a notable shift away from judicial comment about or differential treatment of homosexual parents.[104] This shift is evident not from judicial comment, but rather its absence. For example, in *Craven & Crawford-Craven*[105] a father formed a same-sex relationship after his separation from the mother. This fact was stated by the Full Court, but no further comment was made about him being in a homosexual relationship and no concerns were raised about this being of concern for the children.

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[99] *Aldridge v. Keaton* (2009) 235 FLR 450.

[100] *Ibidem*, para. 77.

[101] See discussion in Young et al. (2013), para. 9.68.

[102] *L and L* (1983) FLC 91–353; *Marriage of Doyle* (1992) 15 FamLR 274; discussed in Young et al. (2013), para. 9.68.

[103] *Marriage of Spry* (1977) 3 FamLR 11,330.

[104] Young et al. (2013), para. 9.68 citing *D v. N* [2002] FMCAfam 66 and *Craven v. Crawford-Craven*.

[105] *Craven & Crawford-Craven* [2008] FamCAFC 93.

Although concerns have been raised in the past about potential detrimental impact of prejudice against homosexuals on children of gay, lesbian or bisexual parents, in keeping with advances in law that have addressed legal discrimination, there are fewer concerns raised about this issue in more recent cases. Perhaps the judiciary have treated legislative actions as a guide to public standards and expectations. Justice Dessau emphasised in *Wilson & Roberts* (*No 2*) the diversity of family forms and the irrelevance of socio-politics about families to parenting decisions in the Family Law Act:

> This Court deals with a full spectrum of families: parents who have lived together as a unit with children for many years, parents who have met only briefly but through happenstance have parented a child together, heterosexual parents, homosexual parents, parents who have changed gender, parents from a wide range of cultures, and for example, in some medical procedure and other cases, parents who are firmly united in what they seek from the Court. It is always the particular child and his or her particular needs that must be at the centre of a decision.[106]

The family involved in the case before Dessau J was a family formed by a female couple and a male couple, whose preferences had changed when the realities and stresses of first time parenthood were experienced. Although the female couple were treated as the child's parents, the circumstances leading to the child's birth were taken into account and the male couple were accepted as being persons of significance in the child's life. They were therefore able to apply for orders regarding parental responsibility, spending of time and communicating with the child.

6.3 New Zealand

Despite the existence of a human rights framework at the national level, the role of the judiciary in respect of same-sex couples in New Zealand has been limited by the primacy of the legislature and a judicial culture of reinforcing this *status quo*. Despite the fact that there is a legal framework and culture in New Zealand that means judges have rarely directly changed laws affecting same-sex couples, there are a number of different ways in which judges have contributed to same-sex law reform. Sometimes judges have demonstrated societal (or at least, judicial) prejudices through the language that they have chosen when determining cases involving people in same-sex relationships.[107] On other occasions judges have taken the opportunity to comment about inequalities in the law, notwithstanding their inability to actually change those inequalities. The judiciary also interact with same-sex couples through identifying and applying the law to their family relationships.

[106] *Wilson and Anor & Roberts and Anor* (*No 2*), para. 330.

[107] Clark (2006).

6.3.1 Background: The New Zealand Legal Order

New Zealand has a common law tradition. Decisions of superior courts are binding on lower courts. The final appellate court in New Zealand is the Supreme Court, which hears appeals from the Court of Appeal.[108] The Court of Appeal hears appeals from the High Court as well as some specialist courts. The High Court has a broad general jurisdiction.[109] It hears serious criminal and civil matters as well as appeals from the District Court and some other courts, tribunals and authorities. The District Court divisions include the Family, Civil, Criminal and Youth Divisions.

Parliamentary sovereignty is prioritised in New Zealand and Acts of Parliament are the highest law.[110] The Acts of Parliament that are relevant to the discussion here include the New Zealand Bill of Rights Act 1990 (BORA) and the Human Rights Act 1993 (HRA). Because they are not entrenched in a higher law, these Acts can be amended or repealed by a simple majority in the unicameral New Zealand Parliament.[111]

BORA outlines the rights that citizens can expect from the State.[112] Because it lacks higher law *status*, BORA has been said to provide mere guidance to judges.[113] Judges are guided by section 6 to interpret legislation in a way that is consistent with BORA wherever possible.[114] However, there are limits to the extent to which judges can act upon inconsistencies between an enacted law and BORA. Section 4 of BORA provides that no court shall

> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective or
> (b) Decline to apply any provision of the enactment -
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

The HRA contains anti-discrimination provisions and "significantly expanded the range of grounds upon which a non-discrimination claim could be founded."[115] The HRA introduced the ground of sexual orientation, defined as "a heterosexual,

[108] The New Zealand Ministry of Justice (2013), available at http://www.justice.govt.nz/services/access-to-justice/civics-education-1/nz-court-system/the-role-of-courts-and-judges.

[109] Courts of New Zealand (2013), available at http://www.courtsofnz.govt.nz/about/system/structure/overview.

[110] McK Norrie (2011), p. 265.

[111] *Ibidem*, p. 265.

[112] *Ibidem*, p. 265.

[113] *Ibidem*, p. 266.

[114] BORA, sect. 6.

[115] Erdos (2009), p. 99.

homosexual, lesbian, or bisexual orientation."[116] Erdos has claimed that when the HRA was enacted in 1993, New Zealand became the first country to offer explicit protection in its Bill of Rights against discrimination on grounds of sexual orientation.[117] However, the way that the majority considered the non-discrimination issue in *Quilter v Attorney-General* ("*Quilter*")[118] effectively rendered the provision "legally nugatory."[119]

In 2001, legislative amendments to HRA empowered appeal courts and the Human Rights Review Tribunal to issue formal "declarations of inconsistency" where they determined that primary legislation was inconsistent with the standards of non-discrimination in BORA.[120] This provided courts with a clear mandate to make judicial comment about inconsistency with BORA, notwithstanding that it is beyond the courts' powers to invalidate legislation on the basis of inconsistency with BORA.[121] This option has not been exercised in respect of the human rights of same-sex couples.

Culturally, New Zealand judges are reluctant to interfere with Parliament's legislative function.[122] McK Norrie has observed that

> New Zealand courts do not stretch the meaning of legislative provisions to achieve consistency with the Bill of Rights Act, in the way that UK courts do in order to achieve consistency with the European Convention on Human Rights.[123]

Unlike in the UK, New Zealand Parliaments and courts have not had to respond to a body such as the European Court of Human Rights in developing and implementing human rights law.[124]

6.3.2 Same-Sex Marriage

Until August 2013, marriage was restricted to heterosexual couples in New Zealand.[125] Legislative action was necessary, because attempts to recognise same

[116] HRA, sect. 21(1)(m); Erdos (2009), p. 99; McK Norrie (2011), p. 265.

[117] Erdos (2009), p. 105.

[118] *Quilter v Attorney-General* [1998] 1 NZLR 523.

[119] Erdos (2009), p. 108, discussed further below.

[120] Human Rights Amendment Act 2001, inserting (*inter* alia) sections 92J and 92K; Erdos (2009), p. 99.

[121] Rishworth (1998) noted some uncertainty about the appropriate approach of courts, the court of appeal noted in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) that there was an implied ability to make a declaration, but the legislative action in 2001 provided a clear mandate and process for a response from the legislature (see Erdos 2009, p. 99).

[122] McNamara (2007), p. 133.

[123] McK Norrie (2011), p. 265; on UK see the Chapter by O'Neill in this volume.

[124] McNamara (2007), p. 139.

[125] Marriage Act 1955 as interpreted by *Quilter*. At the time of writing the Marriage (Definition of Marriage) Amendment Bill 2012 had passed its third reading in the New Zealand Parliament on

sex marriage through judicial action were unsuccessful. *Quilter* was an appeal from the registrar of Births, Deaths and Marriages' refusal to issue marriage licences to three lesbian couples. The applicants argued that the right to freedom from discrimination on the grounds set out in HRA,[126] which included sexual orientation,[127] meant that the traditional heterosexual definition of marriage was unjustifiably discriminatory against homosexual people. The judges of the Court of Appeal held by a majority that there was no discrimination and unanimously declined to reshape the definition of marriage to include same-sex unions, because to do so would repeal the Marriage Act and this would contravene sect. 4 of BORA.[128]

Quilter is the highest New Zealand Court decision dealing with same-sex relationships.[129] The judges in that case responded in mixed ways to the opportunity to declare the heterosexual definition of marriage to be discriminatory. Two judges (Gault and Keith JJ) concluded that there was no such discrimination in the Marriage Act. Richardson P recorded his agreement with Gault and Keith JJ's views on the issue of discrimination, but did not think that it was necessary to determine that question in the case.[130] Two judges (Thomas and Tipping JJ) concluded that

> on an impact analysis restricting marriage to opposite-sex couples was prima facie discriminatory.[131]

Tipping J did not express an opinion as to whether this *prima facie* discrimination was justifiable, because the Marriage Act legitimised the *prima facie* discrimination.[132] Thomas J alone concluded that the Marriage Act was discriminatory against same-sex couples.[133] Gault J presented the applicants' same-sex relationships as being a "choice" as opposed to a consequence of their core identities[134]

> They contend, however, that because of the choice of partner they have made the effect of the law preventing their marriages bears upon them and persons in like situations and not upon others and so is discriminatory. But denial of choice always affects only those who wish to make that choice. It is not for that reason discriminatory.[135]

17th April 2013 (New Zealand Parliament (2013), available at http://www.parliament.nz/en-NZ/PB/Legislation/Bills/2/c/4/00DBHOH_BILL11528_1-Marriage-Definition-of-Marriage-Amendment-Bill.htm). The commencement period means that the first same-sex marriages in New Zealand could occur from August 2013.

[126] BORA, sect. 19.

[127] HRA, sect. 21(1)(m).

[128] See Butler (1998); McNamara (2007), pp. 130–133; Erdos (2009), pp. 106–115 for critiques of this decision.

[129] *Quilter* was heard in the Court of Appeal. The Supreme Court has not heard any matters regarding same-sex couples.

[130] *Quilter*, p. 526.

[131] Butler (1998), p. 400.

[132] *Quilter*, pp. 575–576.

[133] *Ibidem*, p. 528.

[134] *Ibidem*, p. 527.

[135] *Ibidem*, p. 527.

Butler has highlighted that Gault J's argument about choice is unconvincing, because the choice that the law denied related directly to the prohibited ground of discrimination based on sexual orientation: "homosexuals' desire to marry a person of the same-sex is a core aspect of their sexual orientation."[136] This point was made by Thomas J in his judgment:

> Just as the sexual orientation of heterosexual men and women leads to the formation of heterosexual relationships, so too it is the sexual orientation of gays and lesbians which leads to the formation of homosexual relationships. Sexual orientation dictates their choice of partner in both cases. To a heterosexual person that sexual orientation can lead to a valid marriage relationship; to a gay or lesbian person it cannot.[137]

Another aspect of Gault J's discussion about choice was his drawing of parallels between a choice to form a same-sex relationships and a choice to form a prohibited relationship between a (homosexual) man and a child:

> Denial of the choice of marrying a child or someone already married could not be said to be discriminatory on the grounds of sex or sexual orientation just because a homosexual male wants to make such a choice.[138]

Clark has noted that judicial statements such as this reinforce societal stereotypes linking homosexuality and paedophilia.[139] He also pointed out that the *Quilter* case was brought by three lesbian couples, making the analogy even less relevant to the case.[140] Thomas J responded to these kinds of analogies in his judgment when he said:

> Any person who wishes to marry anyone within these prohibited categories, it is argued, is denied the partner of his or her choice as much as a gay or lesbian person seeking to marry a same sex partner. Apart from the fact the analogy with persons who are under age, mentally incapable, or bigamists is demeaning to gays and lesbians, I believe the proposition only has to be stated to be seen to be self-evidently untenable.[141]

Another criticism of Gault J's judgment was that he concluded that discrimination in the Marriage Act was permissible because marriage had been defined as a heterosexual union for such a long time and only the legislature should rule this discrimination to be unjustifiable.[142] As Butler has argued, longevity is not a reasonable justification for discrimination.[143]

By declining to find discrimination in the exclusion of same-sex couples from an institution that is available to heterosexual couples, Richardson P, Gault and Keith JJ sent a message that it is not discriminatory to exclude same-sex couples from

[136] Butler (1998), p. 398.
[137] *Quilter*, p. 537.
[138] *Ibidem*, p. 527.
[139] Clark (2006), p. 209.
[140] *Ibidem*, p. 209.
[141] *Quilter,* p. 538.
[142] *Ibidem*, p. 527 critiqued in Butler (1998), pp. 397–398.
[143] Butler (1998), p. 398.

opportunities that have traditionally been reserved for heterosexual couples. This message runs *contra* to the message sent by the New Zealand Parliament in recognising same-sex couples as *de facto* couples, and equalising the treatment of married and non-married couples. At the time that *Quilter* was decided, there had been a substantial degree of incremental reform towards this equalisation.[144] Further reforms have continued this process towards equality, ultimately resulting in the passing of the amendment to the Marriage Act that enables same-sex couples to marry. It should also be noted that post-*Quilter* there have been judicial findings elsewhere that heterosexual marriage is discriminatory (for example, in Canada).[145]

Furthermore, McNamara has observed that a "deference to parliamentary supremacy" was behind the majority's conclusions that the heterosexual definition of marriage was not discriminatory.[146] Therefore, the two separate questions of (a) whether or not the Marriage Act was discriminatory and (b) whether or not the Court could overturn parliamentary intention, were conflated.[147] This highlights the missed opportunity of the majority in the *Quilter* judgments, whereby some of the reasoning was circular and avoided the central question.

Following *Quilter*, despite the judgments having gone against the applicants, recognition of same-sex couples became prioritised on the New Zealand government's agenda.[148] Numerous reforms were made between 1999 and 2004, culminating in the Civil Unions Act 2004.[149] A parallel relationship category was created rather than pursuing marriage equality. Marriage equality became particularly unlikely to succeed politically after the decision of the UN Human Rights Committee in *Joslin v New Zealand,* where the Committee determined that New Zealand's refusal to enable same-sex couples to marry did not breach the International Covenant on Civil and Political Rights.[150] Consequently, international law obliges signatories to recognise heterosexual marriage, but not same-sex marriage.

McNamara has noted that the difference in outcomes on this issue in New Zealand and Canada can be explained by the different legal forms of the respective human rights frameworks

> the Canadian judiciary enjoys an interpretive supremacy over the terms and demands of the Charter, including the equality guarantee in s 15, which is simply not extended to New Zealand courts under the BORA.[151]

Erdos has argued that additional factors, including judicial culture, have also played a part.[152] *Quilter* has been said to demonstrate the New Zealand judiciary's

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[144] For an overview of the state of the law in 1998 see Keith J in *Quilter*, pp. 565–570.

[145] McNamara (2007), p. 132; on Canada see the Chapter by Mostacci in this volume.

[146] *Ibidem*, p. 131.

[147] *Ibidem*, p. 131.

[148] *Ibidem*, pp. 134–135.

[149] McNamara (2007), p. 129.

[150] *Joslin v. New Zealand*, Communication No 902/1999, 30 July 2002; see discussion in Walker (2007), pp. 116–117 and the chapter by Paladini in this volume.

[151] McNamara (2007), p. 132.

[152] Erdos (2009), pp. 106–127.

cautious approach to shaping social policy in the non-discrimination area.[153] This contrasts with New Zealand courts' willingness to stretch the requirements of BORA and interpretation of primary legislation in the criminal justice sphere.[154]

There was an attempt, through a private member's bill presented in 2005, to reinforce the heterosexual definition of marriage.[155] The bill contained amendments to the Marriage Act that would have reinforced the heterosexual definition of marriage and expressly prevented the recognition of foreign same-sex marriages in New Zealand. It was based upon the 2004 amendment to the Australian Marriage Act. It was unsuccessful, despite being presented to Parliament twice.[156] In 2012, a private member's bill to enable same-sex couples to legally marry was introduced into the New Zealand Parliament.[157] The bill passed its second reading by a vote of 77 to 44.[158] It then passed through a Committee of the whole house on 27th March 2013 and the third reading stage on 17th April 2013. New Zealand thereby became the first nation in the Asia-Pacific to extend the definition of marriage to all couples, regardless of their sex.

6.3.3 Same-Sex Relationship Recognition

6.3.3.1 Non-Married Relationships Registration

A civil union attracts essentially the same rights and entitlements as marriage.[159] Civil unions are open to both same-sex and heterosexual couples (for whom it is an alternative to marriage). The requirements for entering into a civil union are based upon the requirements for entering into a marriage.[160] Partners to a civil union cannot access adoption either as a couple or of a partner's child in the way that married persons can.[161]

[153] *Ibidem*, p. 110, citing Bigwood (2006).

[154] Erdos (2009), p. 111, contrasting *Quilter* with *Attorney-General v. Zaoui* [2005] NZSC 38.

[155] Marriage (Gender Clarification) Amendment Bill 2005.

[156] The New Zealand Parliament did not pass the Marriage (Gender Clarification) Amendment Bill 2005; see McK Norrie (2011), p. 266; McNamara (2007), p. 142.

[157] Marriage (Definition of Marriage) Amendment Bill 2012.

[158] AAP (2013), available at http://www.theage.com.au/world/nz-gay-marriage-bill-passes-second-reading-20130313-2g14k.html.

[159] Civil Union Act 2004. See discussion of some differences between marriage and civil unions in McK Norrie (2011), pp. 267–268.

[160] McK Norrie (2011), p. 266.

[161] *Ibidem*, pp. 267–268.

6.3.3.2 *De Facto* Recognition of Same-Sex Couples

The rights and responsibilities of formalised (by marriage or civil union) and non-formalised (*de facto*) couples are largely equivalent in New Zealand.[162] In 2001 the property division regime was extended from married couples to those living in *de facto* relationships (inclusive of heterosexual and same-sex partnerships).[163] In 2005 the New Zealand Parliament passed the Relationships (Statutory References) Act, which amended at least 103 existing statutes to update the references to relationships contained within them, specifying whether laws applied to married, civil union partners, *de facto* heterosexual couples and same-sex couples.[164] The policy statement that accompanied the bill made it clear that the intention was to have neutral laws on relationships that applied equally to all relationship categories.[165]

6.3.3.3 Judicial Recognition of Same-Sex Couples

Despite the failed attempts to achieve same-sex marriage equality in *Quilter*, the New Zealand judiciary have been willing in other cases to legally recognise same-sex relationships.

In 1998, Fisher J of the High Court determined in *P v. M*[166] that although *Quilter* had confirmed that same-sex partners could not marry, there was clear legislative intent to define family in a broader sense for the purposes of the Domestic Violence Act.[167] His Honour commented that:

> It would scarcely be radical for the legislature to have recognised that for present purposes live-in same sex partnerships exhibit most of the functional indicia of heterosexual marriage. Exclusive emotional commitment, a shared household, pooled financial and property resources, cooperative division of labour, sexual exclusivity, shared social and recreational activities, joint presentation as a couple and substantial duration are some of the main examples. As with heterosexual relationships, all or some may be present in any given relationship.
>
> If those features can be found in either type of relationship it is difficult to see any policy reasons for distinguishing between homosexual and heterosexual relationships for the purpose of protecting against domestic violence. Within the relationship itself one assumes that heterosexual relationships do not have a monopoly on violence.[168]

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[162] *Ibidem*, p. 278.

[163] The Property (Relationships) Amendment Act 2001 renamed the Matrimonial Property Act 1976 the Property (Relationships) Act 1976. *De facto* relationship is defined in s 2D of the Property (Relationships) Act 1976.

[164] Discussed in *In the matter of AMM and KJO* [2010] CIV 2010-485-328, paras 59–60.

[165] *Ibidem*.

[166] *P v. M* [1998] 3 NZLR 246.

[167] *Ibidem*, p. 251.

[168] *Ibidem*, p. 252.

Accordingly, the brother of a woman in a same-sex relationship was recognised as a family member of the woman's partner for the purposes of the Domestic Violence Act. It is interesting to note that it was the same-sex couple who challenged the final protection order on the basis that no family relationship should be recognised between the complainant and his sister's female partner.

Mixed judgments have been made about the interpretation of "spouse" in legislation. In a family court case, Justice Walsh interpreted the word "spouse" in the Adoption Act to mean "2 persons in a relationship in the nature of a marriage," thereby determining that *de facto* couples could apply for adoption.[169] In his judgment, reference was made to the impact that a stricter interpretation would have on same-sex couples, who are unable to legally marry. However, a subsequent High Court case which involved the question of access to adoption for heterosexual *de facto* couples was used as an opportunity to cast doubt on this interpretation of the legislation.[170] Justices Wild and Simon France explicitly restricted the question before them to whether

> "the word "spouses", which is normally used to refer to a married couple, be read to apply also to a de facto couple of the opposite sex."[171]

However, several *obiter* comments were made that reflected Their Honours' view that different issues were raised to the question of enabling adoption by same-sex couples than the issues that were raised for *de facto* heterosexual couples. For example, when considering the purposes of the Adoption Act, Their Honours said:

> . . .it must be thought that the purpose of limiting joint applications to married couples was to ensure that the applicants were a man and a woman, and that they were in a committed relationship. The traditional concept of the family unit would seem central to the limitation.
>
> Obviously extending the word "spouses" to a de facto couple is consistent with the first of these purposes. The necessary profile of the applicants, namely that they offer a mother and a father, is achieved.[172]

The family unit comprised of a mother and father was apparently seen by the court to be superior to the family unit comprised of two mothers or two fathers.

KL L-A v. EA[173] involved similar issues to the Australian case of *Keaton v. Aldridge*, namely, whether a lesbian couple were in a *de facto* relationship at the time of an artificial conception procedure. The co-mother was seeking a declaration of parentage. Justice Maude was satisfied that the parties were living in a *de facto* relationship at the time of conception. His Honour took into account: the joint planning of the insemination and birth, joint signing of consent and

[169] *In the matter of C* [*Adoption*] [2008] NZFLR 141, [77]. There were inconsistent previous judgments on the issue: Boshier J in *Re Adoption by Paul and Hauraki* [1993] NZFLR 266; von Dadelszen J in *Re TW* [*adoption*] (1998) 17 FRNZ 349; *In the matter of R* (*adoption*) [1999] NZFLR 145.

[170] *In the matter of AMM and KJO* [2010] CIV 2010-485-328.

[171] *Ibidem*, para. 4.

[172] *Ibidem*, paras 35–36.

[173] *KL L-A v. EA* [*Care of Children*] [2008] NZFLR 536.

parentage documentation, the birth mother's change of name to a hyphenated last name (which was also given to the child), joint financial decisions (including purchase of a motor vehicle and an insurance policy in joint names), sharing of a common residence (apart from times when the birth mother stayed in a women's shelter, when they worked in different locations and when they slept separately when visiting relatives in South Africa), and sharing of a sexual relationship. The relationship appeared to be a difficult one, but Maude J put the issue of allegations of family violence to one side when determining the preliminary question of whether the parties were in a *de facto* relationship at the time of conception, which was the issue that determined legal parentage.

The 2002 Court of Appeal Case of *King v. Church*[174] involved appeal from the High Court's determination of a claim in equity, for division of property between former partners. It was argued by counsel for one of the men that the court should distinguish between the societal norms that apply to opposite and same-sex couples.[175]

The Court of Appeal preferred an approach that treated same-sex and heterosexual couples equally. Anderson, Baragwanath and Potter JJ noted that the rules of equity were to be applied:

> . . .against a background of current social norms. They can now include the perception of a particular same sex relationship as closely analogous to what has in the past been seen as a stereotypical opposite sex partnership.[176]

The circumstances of the relationship in *King v. Church* were such that Mr Church could be treated in a way analogous to that of the wife whose contributions to the matrimonial home largely comprised of household duties.[177] His gender was an irrelevant difference.

The difficulty in determining whether or not a *de facto* relationship exists between two people of the same-sex is demonstrated by *TJD v. TLB*.[178] Justice von Dadelszen was faced with very conflicting accounts of whether two women, who had lived together for 12 years, were sharing a house as best friends or were in a *de facto* relationship. His Honour was reluctant to jump to conclusions:

> Before discussing the evidence itself I want to say that I am not prepared to make any assumptions at all about the way that people choose to live their lives, be they gay or heterosexual.[179]
>
> . . .I am not going to assume (as perhaps I was invited to do) that just because neither of the parties here had a relationship with another person during those 12 years, they must have been together as a gay couple.[180]

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[174] *King v. Church* [2002] NZFLR 555.

[175] *Ibidem*, at 7, counsel for King's submissions considered at 26 and 29.

[176] *Ibidem*, at 18.

[177] *Ibidem*, at 31.

[178] *TJD v. TLB* (Family Court, Napier, FAM-2005-041-591, von Dadelszen J, 17 May 2007).

[179] *Ibidem*, para. 20.

[180] *Ibidem*, para. 38.

Ultimately, von Dadelszen J was not satisfied that the applicant had discharged her onus of proof that a *de facto* relationship existed. Relevant evidence included: attendance at family and special occasions together, joint signing of greeting cards, the lack of evidence of shared finances or property ownership, lack of planned future together. There was conflicting evidence of other relevant factors including sexual and public aspects of the relationship. The applicant had not provided adequate detail to the court about the sexual relationship that she alleged she had with the respondent. Because many couples may not share finances, publicise the nature of their relationship or gather proof of their sexual encounters, this case demonstrates that same-sex couples can experience great difficulty if they are called to prove the existence of their relationship to a court.

6.3.4 Same-Sex Parented Families

6.3.4.1 Legal Parentage

Co-mothers of children born into lesbian relationships through artificial conception have been recognised as the parents of the child in New Zealand since 2004. The litigation in the case of *T*[181] illustrated some conflicted outcomes for co-mothers prior to these reforms. The co-mother could not apply for second parent adoption because she was not married to the mother. Therefore, she applied to adopt their third born child, the legal effect of which would be to extinguish the legal parentage of the biological mother.

On appeal, the High Court determined that although adoption would attract many benefits for the child, the artificial legal relationship that would be created was not in his best interests, and a guardianship order would have the same effect.[182] The parties subsequently separated, after which the co-mother had little contact with the children. The biological mother obtained orders terminating the co-mother's guardianship of the children and also applied for an order declaring the co-mother to be the step parent of the children and therefore liable to pay child support.[183] On the basis of her attempt to adopt the third child, the Family Court (Brown J) determined that the co-mother had accepted responsibility for the children through her adoption application and she was declared to be a step-parent for the purposes of the Child Support Act.[184] On appeal the High Court (Penlington and Hammond JJ) affirmed the Family Court's decision.[185] It was clear that for the

[181] *Re an Application by T* [1998] NZFLR 769 (HC); *T v. T* [1998] NZFLR 776; *A v. R* [1999] NZFLR 249.
[182] *Re an Application by T.*
[183] *T v. T*, p. 7.
[184] *Ibidem.*
[185] *A v. R.*

purposes of child support, a same-sex partnership could be treated as a relationship in the nature of a marriage, and that child support was a separate issue to time spent with a child. Clearly, there were inconsistencies in parentage *status* applied to the co-mother. She was left without the benefits of legal recognition and carrying the financial burden of parenthood.

The litigation about parentage in the decisions of *P v. K*[186] also provided an opportunity for judicial comment about same-sex parenting. In *P v. K* the child's conception was planned and negotiated between a female couple and a male couple. The disputes essentially resulted from a breakdown in the relationship between the two couples, which led to disagreement about the involvement of the men in the child's life. At the time of the 2003 High Court decision, there was a distinction in the legislative provisions applying to parentage of children born from artificial insemination of married and unmarried women.[187] This prompted Priestley J to note that the distinction between the provisions was significant, because where the woman was not married, only the rights and obligations between child and donor were extinguished, rather than the donor not being the father of the child for any purpose.[188] In analysing the distinction, Priestley J said:

> One can thus start to see an explanation for the distinction, for in the case of a marriage or a relationship between a woman and a man in the nature of a marriage there are plausible policy reasons for treating the child resulting from a medically contrived donor pregnancy as being exclusively the child of the marriage or the relationship and for totally excluding the donor. Speaking in 1987 terms, there are however in terms of s 5(2) no such policy reasons for protecting the security of the traditional nuclear family in that way where there is either no traditional nuclear family to protect (as in the present case, though I accept that there may here be a 'psychological' nuclear family) ...[189]

This commentary reflects a view that there is no policy reason to protect and secure a primary two parent family headed by two women in the way that a heterosexual two parent family ought to be "protected and secured." It was common ground that the agreement between the couples was that the women would be the primary parents of the child, with a not insignificant parenting role also played by the male couple. Priestley J commented later in his judgment that the legislative provision ensured that "a child born of an artificially inseminated unmarried woman is not fatherless"[190] and later "parliament's clear intention by enacting sect. 5(2) of the SCAA was to preserve a father for this child."[191] This view was echoed by Harrison J in the later High Court decision where he responded to an argument that

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[186] *P v. K* [2003] 2 NZLR 787; *P v. K and* M [2004] NZFLR 752; *P v. K* [2004] 2 NZLR 421; *P v. K* [2006] NZFLR 22.

[187] Status of Children Amendment Act 1987, sect. 5(1) and (2). Note: these provisions were repealed and replaced by the Status of Children Amendment Act 2004, sect. 14. See Status of Children Act 1969 as amended, Part 2.

[188] *P v K* [2003] 2 NZLR 787, p. 795.

[189] *Ibidem*, p. 795.

[190] *Ibidem*, p. 807.

[191] *Ibidem*, p. 819.

the child's need for a male role model could be satisfied by interaction with the friends of the mother and her partner:

> This informal and likely transitory arrangement could never be a substitute for a boy's right to a special and formalised relationship with his biological father or, in the reverse situation, a girl's right to a special and formalised relationship with her biological mother.[192]

It could be suggested that had the functional primary family been a heterosexual couple and the child, these policy reasons behind the legislative provision may not have been emphasised by the courts. The judges' views may have been different if the birth mother's partner (in the position of non-biological parent) would be a father figure for the child. It seems that despite the emphasis on biological connection, it was actually access to a father that was the concern behind the comments. Priestley J treated the donor as a father on a number of bases, including that he was the biological father, was named on the child's birth certificate as such and it had been agreed that he would have a parental relationship with the child.[193] His Honour referred to the UN Convention on the Rights of the Child as supportive of recognition of the child's right to have a relationship with his "parent."[194] Notwithstanding these factors, the effect of the applicable provision in the Status of Children Act was that the father could not exercise the statutory rights of a parent under that Act.[195] Priestley J closed his judgment with the observation that:

> It is undesirable that fathers and children in the situation of this father and this child should be left legally marooned. The current review of the Act should address the situation as a matter of urgency.[196]

Heath J agreed with Priestley J's reasons and added his own comments about the policy issues raised by the case.[197] His Honour raised a number of issues for consideration by Parliament, including the question as to whether a distinction should be drawn between known and unknown donors.[198] In relation to agreements between same-sex couples and donors of sperm (or eggs and gestation in the case of surrogacy), Heath J suggested that:

> In either case the law needs to recognise the need for involvement of a person of the opposite sex and to specify what will happen in the event of a dispute arising between the surrogate mother and the gay couple (on the one hand) or the donor of semen and the lesbian couple (on the other).[199]

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[192] *P v K* [2004] 2 NZLR 421, 430.

[193] *P v K* [2003] 2 NZLR 787, p. 804.

[194] *Ibidem*, p. 804. See also Harrison J in *P v. K* [2004] 2 NZLR 421.

[195] *Ibidem*, p. 808.

[196] *Ibidem*, p. 820.

[197] *Ibidem*, Heath J's decision commences at p. 820.

[198] *Ibidem*, p. 822; Although subsequent law reforms have not addressed this question, the reasoning in *P v. K* was applied to an anonymous donor when Robinson J ordered that the anonymous sperm donor be served with the co-mother's application to be appointed as a guardian in *M v. C* [2004] NZFLR 695.

[199] *Ibidem*, p. 823.

The legislature responded to concerns about the current laws of parentage. The Status of Children Amendment Act 2004 inserted a Part 2 in the Act with the stated purposes to remove uncertainty and facilitate recognition of co-mothers.[200]

The Amended Act extinguishes the parental *status* of a donor "for all purposes" regardless of whether the birth mother is partnered (married, in a civil union or a *de facto* relationship with a man or a woman) or a single woman acting alone.[201] A male or female partner of the birth mother (married, civil union or a *de facto* of either sex) who consents to the AHR procedure is, "for all purposes" the parent of the child.[202] Clearly, the exploration of the policy issues by the judges in *P v. K* contributed to the subsequent legislative reforms. The legislative response was to treat lesbian couples as the parents of children born into their relationships and to extinguish the legal parental *status* of donors, whether known or unknown, a somewhat different outcome than the stated judicial preference.

6.3.4.2 Parenting by Same-Sex Couples

Like in Australia, parenting is not tied to parentage in New Zealand. The Care of Children Act 2004 provides that any person may apply for a guardianship order, which includes a person in the position of the known donor father in *P v. K*. Judges in New Zealand appear to have, over the past 20 years, declined to view lesbian relationships as being a concern in parenting matters.[203] Sometimes this has been stated explicitly:

> There is no evidence before me to suggest that his mother is hampered in her ability to parent W by reason of her sexual orientation.[204]

Male same-sex relationships appear to have attracted more prejudicial statements. Clark examined New Zealand judicial writing to identify the way that homosexuality was constructed in judicial language.[205] He concluded that there were tendencies to: frame male homosexual sex as "indecent," view same-sex relationships as lacking longevity, prefer heterosexual rather than same-sex parented households, and reward parents in same-sex relationships for hiding

[200] Status of Children Act 1969, sect. 13, inserted by Status of Children Amendment Act 2004, sect. 14.

[201] Status of Children Act 1969, sections 19–22. The only exception is where a donor later becomes the birth mother's partner (sections 23–25).

[202] Status of Children Act 1969, sect. 18. For application see *HU v. SP* [*Parenting Order*] [2008] NZFLR 751.

[203] *Neate v. Hullen* [1992] NZFLR 314 (the mother's lesbian relationship was problematic for other reasons); *B v. P* [1992] NZFLR 545 (prejudice of the other applicants towards same-sex relationships was seen to be potentially damaging to the child, whose mother was in a lesbian relationship).

[204] *B v. P*, p. 6.

[205] Clark (2006).

their sexual orientation and/or relationship from their children.[206] However, Clark's analysis did not focus on judgments that did not portray such stereotypes and therefore cannot be relied upon as evidence of overall judicial tendency (although expressions of prejudice by the judiciary are significant).[207]

6.4 Comparison of Australia and New Zealand

There are many similarities in the treatment of same-sex couples in Australian and New Zealand law. Some differences in the human rights frameworks have affected the way that the judiciary have been able to play a role in legal developments.

6.4.1 Legal Orders and Human Rights Frameworks

Both Australia and New Zealand have a legal framework and culture of parliamentary supremacy. New Zealand has a national statutory Bill of Rights, whereas Australia has none at the Federal level.

McNamara concluded in 2007 that the absence of a Charter of Human Rights in Australia was a significant barrier to same-sex marriage and other recognition of same-sex relationships.[208]

In the absence of an overarching Bill of Rights, the judiciary have not been able to draw guidance from a human rights framework to determine whether or not the denial of marriage equality is discriminatory or breaches human rights. However, the New Zealand case of *Quilter*, which was determined within a human rights framework, does not bode well for the benefits of that legal form in any event. In Australia, an additional inhibiting factor is the complex constitutional issues raised by the Federal system, which has discouraged legislatures from exercising the marriage power to legalise same-sex marriage.

McNamara's conclusion about the impact of the absence of a Charter of Rights is less convincing when the sweeping law reforms that have occurred in relation to same-sex relationship recognition in Australia are observed. These fundamental changes occurred in the absence of an overarching human rights framework. They also occurred despite the need for legislative action by States and Territories as well as at the Federal level.

The Australian experience suggests that where there is political will, human rights can be promoted in the absence of an overarching human rights framework.

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[206] *Ibidem*, referring to cases such as: *Quilter*; *VP v. PM* (1998) 16 FRNZ 621 (FC); *K & M* (2002) FRNZ 360 (FC); *P v. K* [2003] 2 NZLR 787 (HC); *R v. Ali* HC AK CRI-2003-292-1224.

[207] *Ibidem*, p. 200.

[208] McNamara (2007), p. 148.

The New Zealand experience, where there is a human rights framework, but it is not framed in higher law, demonstrates that such a framework has limited effect where political will is lacking.[209] However, there is questionable longevity and security where human rights depend upon the whims of Parliament.

Together, the New Zealand and Australian experiences demonstrate the limitations created by the absence of a Human Rights Charter that has higher law *status*. Otherwise there is a need for political will by the legislature to promote the human rights of same-sex couples and this is susceptible to changes in government. The legislature can advance human rights for same-sex couples in dramatic and widespread ways, arguably effecting change more fundamentally and rapidly than the judiciary could. However, without a Human Rights Charter with higher law *status*, there is a limited degree to which the judiciary can or will hold the legislature to account for discrimination.

6.4.2 Marriage Inequality

In Australia, marriage is defined as a heterosexual union. The Parliaments have not acted to legalize same-sex marriage. The situation was the same until very recently in New Zealand, where the Parliament has now passed a bill for marriage equality. In both jurisdictions, lesbian couples have applied to register their same-sex marriage. In Australia the legislature intervened to reinforce marriage as a heterosexual union and thereby silenced the judiciary. In New Zealand the application went to the judiciary in *Quilter,* who said that the applicants could not enter a legal marriage. A bill replicating the Australian amendment that reinforced marriage as between a man and a woman failed to pass in New Zealand. More recently, same-sex marriage bills have been presented to various Parliaments in Australia. None have passed into law.

In both countries, the consequence of the legislative and judicial actions refusing to legalize same sex marriage were that political campaigning for same-sex marriage increased. In Australia it is a prominent topic in the public debate and there are several bills currently before Australian Parliaments. However, unresolved constitutional questions remain about the appropriate way to implement same-sex marriage law reform. Australia's Federal system itself has been a barrier to same-sex marriage. No court has been asked to determine the constitutional questions directly. In New Zealand an application was made to the UN Human Rights Committee (*Joslin* case) and this failed. The result in *Joslin* possibly reassured both governments that failing to enact same-sex marriage laws is not a breach of international human rights. In New Zealand this led to the enactment of the Civil Unions bill, a way of imparting the rights of marriage without enabling same-sex marriage. There is no national relationships registration scheme in Australia,

[209] *Ibidem*, p. 157.

although the possibility has been mooted. The Federal system may also prove to be a barrier to this proposal, as the Constitution does not grant the Commonwealth power over "family" or "relationships" but "marriage" and "marital causes". A Federal civil union scheme may require a referral of powers from the States, many of whom have already implemented their own relationship registration schemes (which are all recognized by the Commonwealth for the purposes of Commonwealth law). There are clearly limits to what the Australian and New Zealand legislatures have been prepared to do to promote equality for same-sex couples (until very recently). New Zealand has led the way by becoming the first nation in the Asia-Pacific region to legalise same-sex marriage. It is possible that Australia will legalize same-sex marriage in the foreseeable future.

6.4.3 Treatment of Same-Sex Couples

The judiciary has played a mixed part in respect of the legal treatment of same-sex couples. Historically, there are examples of judicial prejudice against same-sex couples in both jurisdictions. Judges have made statements that same-sex couples should be treated equally as compared to heterosexual *de facto* couples. In Australia, post *Keaton v. Aldridge*, there is evidence of judicial appreciation for some of the factors that make the application of hetero-normative assumptions to same-sex couples inappropriate. The Australian and New Zealand judiciary have embraced the widespread and fundamental changes to the legal treatment of same-sex couples that were introduced by the legislature.

Where the legislature has reformed the law to equalise the treatment of opposite and same-sex couples, the Australian and New Zealand judiciaries have, in most cases, embraced that reform enthusiastically. Judicial application of the law to same-sex couples has at times evidenced an appreciation that a hetero-normative lens of coupledom and family life is inappropriate for many same-sex couples. The judiciary has also appreciated that prejudice does exist against same-sex couples and that can affect the way that same-sex couples conduct and/or publicise their relationships.

6.4.4 Recognition of Same-Sex Parents

A remaining site of contention is parentage of children of same-sex parents. Both Australia and New Zealand recognize co-mothers as legal parents of children born into their relationship, provided that certain pre-conditions are met at the time of conception. This is a positive reform that provides certainty and security for lesbian parents and their children. However, judicial comments in New Zealand have reflected a preference for heterosexual parenting. Relatively recent decisions

regarding adoption[210] and parenting by known donors[211] have been taken as an opportunity by some judges to raise concerns about children's need to be parented by a mother and a father. This approach is consistent with conservative commentators who claim that the heterosexual parenting relationship is a reason to treat same-sex couples differently to heterosexual couples, particularly where it comes to the right to marry.[212]

Both jurisdictions also exclude donors from recognition as legal parents, regardless of the parenting arrangements and preferences of the adults involved. This essentially reflects an expectation of a two parent family model, which is appropriate in most circumstances. However, in some circumstances it may be more appropriate to recognize the parentage of more than two individuals, particularly where all involved intend that a biological father will co-parent the child.[213] This may be the case for a known donor to a female couple (or single woman) or a commissioning male couple (or single man) in a surrogacy arrangement, where it is anticipated that the donor or gestational mother will play a parenting role in the child's life. Judges in both Australia and New Zealand have recognized the reality of parenting arrangements in such families, despite legal parentage being limited to two parents.[214]

6.5 Conclusion

Same-sex couples in Australia and New Zealand enjoy most of the same rights as non-married heterosexual couples. The current situation has been achieved with the benefit of judicial commentary contributing to law reform. Judges have, for the most part, embraced the spirit of legislative moves toward equality. Their role has been less pro-active than in jurisdictions where there is a Bill of Rights contained in higher law.

Acknowledgements Acknowledgements and thanks to Charlotte Hunn, University of Tasmania, for her research assistance, and Associate Professor Samantha Hardy, James Cook University, for her valuable feedback.

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[210] *In the matter of AMM and KJO*.
[211] *P v. K*.
[212] See for example Scott (2010).
[213] Surtees (2011); Rundle and Hardy (2012).
[214] *Wilson & Roberts (No 2); P v. K*.

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