This article will outline the ways in which same-sex relationships are legally recognised in Australia and will document the debate around the issue of same-sex marriage which occurred in Australia in 2006 and 2007 when the ACT government attempted to introduce legislation which came closer than any other legal scheme to introducing same sex-marriage in Australia.

Why Marriage?
Legal Recognition for same-sex relationships can occur in different ways. On the one hand individual pieces of legislation can make provision for same-sex relationships and treat them in an equal or similar fashion to other legally recognised intimate relationships. This is the model which the Rudd federal government has adopted and is currently implementing. This will ensure that same-sex couples receive legal entitlements under individual laws such as taxation, social security, superannuation and so on. This will not however provide conclusive proof of an intimate relationship for all purposes and at all times. To achieve this recognition some Australian jurisdictions have adopted a registration model. (See details below)

Marriage is a desirable goal for many in the gay, lesbian, bisexual, transgender and intersex community (GLBTI) because it not only creates an across the board recognition of same-sex intimate relationships but it is also seen as creating equality between all people regardless of sexual identity.

STUDENT ACTIVITIES
1. Broadly, what are the two ways in which same-sex marriages can occur?
2. What is the legal significance of having a recognised same-sex marriage when compared to a couple that do not have the benefit of a recognised marriage?
3. Why is legal recognition important for those in same-sex relationships?

The Marriage Act 1961
In May 2004 Phillip Ruddock, then Attorney General, presented to the Commonwealth Parliament the Marriage Legislation Amendment Bill 2004. This bill introduced into the Marriage Act a definition of marriage as the voluntary union between one man and one woman.1

In the second reading speech the Attorney-General explained that the bill was needed because there was considerable community concern about the erosion of the institution of marriage. He explained that,

… the government has consistently reiterated the fundamental importance of the place of marriage in our society ... It is a central and fundamental institution. … It is vital to the stability of our society and provides the best environment for the raising of children. The government has taken steps to reinforce the basis of this fundamental institution.2

Whilst the 1961 Marriage Act did not define marriage, section 46 required a marriage celebrant to state that ‘marriage according to Australian law, is ‘the union of a man and a woman to the exclusion of others, voluntarily entered into for life.’3 Similarly to date the common law definition of marriage has consistently stated that marriage is ‘the voluntary union of one man and one woman to the exclusion of all others’, as per the definition given by Lord Penzance in Hyde v Hyde.4 However further debate on the 2004 amendment bill showed a considerable distrust by many in parliament about the direction that courts would take in defining marriage. Liberal MP Guy Barnett was explicit in his concerns:

the issue of marriage has been raised in Australia recently in a number of ways, including in the Family Court case of Kevin and Jennifer.5 The Full Family Court said that the words marriage and man in the Marriage Act have a contemporary everyday meaning. Are we going to allow the longstanding definition of marriage to be interpreted out of the context in which it is written? 6

The amendment to the Marriage Act was enacted therefore to ensure that courts could not interpret marriage as including same-sex marriage.

STUDENT ACTIVITIES
4. State the definition of marriage that was introduced by the 2004 amendment to the Marriage Act.
5. How is the common law definition of marriage different to what appears in the Marriage Act?
6. What was the significance of the case Hyde v Hyde in relation to marriage?
7. Liberal MP Guy Barnett raises some debatable concerns about the role of courts in interpreting legislation. He asks, ‘are we going to allow the longstanding definition of marriage to be interpreted out of the context in which it is written?’ His statement seems to suggest that once legislation is written, it must be interpreted as at the time it was written.
   (a) Present one argument in support of this approach and one argument against.
   (b) Which approach do you think should be taken and why?
   (c) Can you foresee any problems if your approach was adopted by courts in the interpretation of legislation?

Registration Models
As stated previously marriage is not a desirable goal for all in the Australian gay and lesbian community. Many activists take the view that marriage is a patriarchal institution which gay and lesbians should have nothing to do with.7 As Judith Butler puts it agitating for marriage is problematic for a group of people who have identified themselves as part of a radical sexual culture. She says,
[I]for a progressive sexual movement, even one that may want to produce marriage as an option for non-heterosexuals, the proposition that marriage should become the only way to sanction or legitimate sexuality is unacceptably conservative.8 Jenni Millbank has stated on many occasions that reform should proceed according to what is needed to remove discrimination in specific contexts rather than the ‘one-stop comprehensive’ formal equality that would be achieved through marriage. She says,

relationship recognition for lesbian and gay families should proceed on the basis of what is needed by such families rather than by simply assuming that formal equality is the only, or most desirable, goal. . . . while marriage might be legitimately desired by some lesbians and gay men for personal, social or symbolic reasons, it cannot be the only yardstick of legal equality and should not be the only discourse of reform.9

Relationship registration models are therefore seen as desirable for many because it provides necessary legal entitlement to same-sex couples and their families whilst at the same time ‘de-centering’ marriage.10 Tasmania was the first Australian jurisdiction to pass relevant legislation. The Relationships Act 2003 enables personal relationships that are ‘significant’ or ‘caring’ to be registered (s11). A significant relationship is one between two adult persons who are in a relationship as a couple, who are not married or related to one another (s4(1)). Once registered, proof of registration is proof of the relationship (s4(2)).

The Australian Capital Territory (Civil Partnership Act 2008), and Victoria (Relationship Act 2008) are the other two jurisdictions to have passed legislation which allows for the registration of same-sex relationships.

**STUDENT ACTIVITIES**

8. Explain how the relationship registration model for couples differs from the legislative form of recognition of marriage.
9. What is the essential purpose of relationship registration model and the recognition of marriage?
10. (a) Which Australian states have enacted relationship acts protecting same sex couples?
   (b) How are relationships defined in these acts?

**The Act Struggle**

**The First Bill**

On the 28th of March 2006 Chief Minister John Stanhope introduced into the ACT legislative assembly the Civil Union Bill 2006. Chief minister John Stanhope described the content of the bill in the following way,

[a] civil union will be treated in the same way as marriage under territory law. A civil union is not a marriage but, will, so far as the law of the ACT is concerned, be treated in the same way. The government is of the view that this is preferable to providing an alternative form of marriage that would not have equal recognition to Commonwealth marriage. The civil union is a new concept that can be used by anybody, regardless of gender. It will give couples functional equality under the ACT law with married couples but does not replace or duplicate marriage.11

This bill was quickly met with opposition. On May 3, 2006 the ACT liberal leader Bill Stephaniek introduced into the legislative assembly an alternative bill based on the Tasmanian registration model, the Registration of Relationships Bill 2006, which he argued did not undermine the values of marriage. One week later he tabled into parliament a petition gathered by the Australian Christian Lobby, and signed by 1710 people who opposed the government’s Civil Union Bill. The petitioners said, ‘[w]e the undersigned believe that this [bill] creates a marriage like relationship which so mimics marriage as to confuse and diminish it.’12

Opposition to this bill also came from the Liberal federal government who argued that on the one hand the ACT government did not have the constitutional power to legislate for marriage, and on the other, that marriage as an institution was to be preserved as a union between one man and one woman. The ACT Civil Unions Bill was seen to be creating a relationship between same-sex couples which was too close to that marriage model, and therefore eroded the idea that it takes a man and woman to have a marriage. 13

The Civil Union Bill passed into law but it never became effective. On the 13th of June the then Governor-General Michael Jeffery on the advice of the federal government disallowed the Civil Union Act 2006 under section 35 of the Australian Capital Territory (Self-Government) Act 1988. The federal government’s disallowance was described as ‘autocratic,’14 as ‘very unusual’15 and as ‘homophobia dressed up as an argument about state rights’.16

**STUDENT ACTIVITIES**

11. What was the aim of the Civil Union Bill 2006 (ACT)?
12. What were the main reasons for stopping the Civil Union Bill 2006 (ACT) as argued by the then Liberal Federal Government?
13. How was the Civil Union Bill 2006 (ACT) stopped from becoming law?

**The Second Bill**

The ACT government persevered. On the 12th of December 2006 it presented into the ACT parliament the Civil Partnership Bill 2006. This new bill made the following changes in the hope of addressing the concerns of the federal government.

- The new bill did not use the word union. This would remove any confusion as the word union is more closely associated with marriage because it is used to describe marriage in the Marriage Act 1961.
- The new bill did not specify that a civil partnership is to be treated like a marriage.
- A civil partnership could be entered into by any two people whether they were same-sex or not.
- The ceremony associated with a civil partnership would not be performed by marriage celebrants but rather by civil partnership notaries.17

The new bill was still not considered acceptable to the federal government, and the federal Attorney-General announced that his government would not rule out using the
Governor-General’s disallowance power to override the act a second time. The ACT government left the bill on the books, but waited until after the 2007 federal election to make their next move. In November 2007 the Rudd Labor government was elected. The ACT announced it would revive the legislation but in May 2008 negotiations between the ACT government and the federal government came to a clear understanding that the federal government would not allow the ACT to pass legislation which in any way mimics marriage. Politically the ACT labor government felt it had no choice but to scrap all previous plans and introduce legislation which instead mimicked the Tasmanian Registration model.

CONCLUSION

The current legislative direction for the recognition of same-sex relationships is therefore towards recognition either according to registration models or as acknowledgement under specific pieces of legislation which ensure that same-sex couples receive similar treatment as married couples. The status of marriage remains available only to heterosexual couples.

STUDENT ACTIVITIES

14. In what significant ways did the Civil Partnership Bill 2006 (ACT) try to address concerns held by the Federal Government?
15. Why did the newly elected Rudd Federal Labor Government argue that it would not allow the ACT to pass its redrafted bill?
16. What legal options remain at the present time for same-sex couples to have their relationships recognised?

Extended Activities
1. Define each of the following terms:
   - Bill
   - Legislation
   - Marriage
   - Common law
   - Amendment
   - Act
   - Registration model
   - Same-sex relationship
2. Complete the following table indicating the particular strengths and weaknesses associated with each method of recognising same-sex relationships.

<table>
<thead>
<tr>
<th>Method of recognition</th>
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<th>Weaknesses</th>
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<td>Legislation</td>
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<tr>
<td>Registration model</td>
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Debate topics
1. Those in same-sex relationships should be recognised by making appropriate amendments to the Marriage Act.
2. The Federal Government should allow states and territories to develop the laws they want without interference.
3. Australians would be better served if the Commonwealth Parliament had sole responsibility for laws relating to marriage.

Essay topics
1. The struggle to develop same-sex laws illustrates the problems posed by Australia’s shared law-making rules established under the Commonwealth Constitution.
2. The courts should be able to interpret legislation according to contemporary needs.

Notes
1. The Bill also prevented Australian courts from recognising same sex marriages that had occurred in other countries, and originally prevented same sex couples from adopting children from overseas. This provision was later removed as same sex couples were already excluded from overseas adoption legislation.
3. s46 Marriage Act (1961)
5. The case of RE Kevin recognised as valid a marriage between a woman and a woman to man transsexual. This case was challenged by the attorney general but upheld by the full family court. Re Kevin (Validity of Marriage of Transsexual) (2001) Fam CA 1074 and Re Kevin (Validity of Marriage of Transsexual) (No2) (2003) Fam CA 94
7. See Jenni Millbank and Wayne Morgan in Let Them Eat Cake and Ice Cream: wanting something more from the relationship recognition menu in Robert Wintemute and Mads Andenæs (eds) Legal Recognition of Same Sex Partnerships, Hart Publishing Oxford 2002
10. Wayne Morgan quoted in B Fehlberg, Kaspiew R & J Behrens Australian Family Law in the Contemporary Context Oxford University Press p142
11. Chief Minister John Stanhope MLA (ALP) introducing the Civil Union Bill 2006 ACT Hansard 28 March 2006
12. Petition presented by Bill Stephaniak MLA (LP) May 11 2006 ACT Hansard
13. The World Today ‘ACT, commonwealth battle over same sex marriage laws’ ABC Online <http://www.abc.net.au/worldtoday/content/2006/s1604857.htm> accessed 02/05/2008
14. Simon Corbell MLA (ALP) ACT Legislative Assembly ACT Hansard Dec 12, 2006
16. Senator Rachael Siewert, (AG) Senate Hansard 15th June 2006,
17. Simon Corbell MLA (ALP) ACT legislative assembly ACT Hansard Dec 12 , 2006
