

2009

Same-sex immigration: domestication and homonormativity

Nan Seuffert

University of Wollongong, nseuffer@uow.edu.au

Follow this and additional works at: <https://ro.uow.edu.au/lawpapers>



Part of the [Law Commons](#)

Recommended Citation

Seuffert, Nan: Same-sex immigration: domestication and homonormativity 2009, 131-149.
<https://ro.uow.edu.au/lawpapers/585>

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library: research-pubs@uow.edu.au

Same-sex immigration: domestication and homonormativity

Abstract

LAW- AND POLICY-MAKERS in New Zealand have taken what might be seen, from a conservative/liberal divide, as two contradictory stances on aspects of border control over the past decade. In one move, they have progressively tightened and whitened immigration policy generally, making the criteria and process for gaining residency more restrictive. At the same time, they have progressively opened the borders in relation to the immigration of same-sex couples, aligning immigration requirements for these couples with those of heterosexual couples. I argue that New Zealand's recent liberalisation of immigration law and policy for gays and lesbians aligns with, rather than contradicts, notions of neoliberal politics, progressive modernity and the current tightening and whitening of immigration.

Keywords

immigration, homonormativity, sex, domestication, same

Disciplines

Law

Publication Details

N. Seuffert, 'Same-sex immigration: domestication and homonormativity' in A. Bottomley & S. Wong(ed), *Changing Contours of Domestic life, Family and Law: Caring and Sharing* (2009) 131-149.

Chapter 8

Same Sex Immigration: Domestication and Homonormativity

NAN SEUFFERT

INTRODUCTION

Law and policy-makers in New Zealand have taken what might be seen, from a conservative/liberal divide, as two contradictory stances on aspects of border control over the past decade. In one move they have progressively tightened and whitened immigration policy generally, making the process for gaining residency in the country more restrictive. On the other hand, they have progressively opened the borders in relation to the immigration of same sex couples, aligning immigration requirements for these couples with those of heterosexual couples. I argue that New Zealand's recent liberalisation of immigration law and policy for gays and lesbians aligns with, rather than contradicts, notions of neo-liberal politics, progressive modernity and the current tightening and whitening of immigration. Same sex couples who most easily fit the immigration criteria will be those from developed 'Western' democracies that also tolerate and recognise same sex relationships according to an assimilative model, and who live together in long term stable, monogamous, property owning relationships sharing domestic chores. These criteria mean that immigration of same sex couples is likely to favour properly homonormatised¹ lesbians and gay men, who

¹ Duggan, L, 'The new homonormativity: the sexual politics of neo-liberalism' in R Castronovo & DD Nelson (eds), *Materializing Democracy: Toward a Revitalized Cultural Politics* (Durham, Duke University Press, 2002) at 175-194.

are white, middle class and part of the 'new neo-liberal sexual politics' of a domesticated, depoliticised, privatised gay constituency.²

HOMONORMATIVITY, NATION AND DOMESTICATION

In recent decades 'queer theory' has arisen from critiques of 'heteronormativity',³ or the assumption that humans are divided into the categories of 'man' and 'woman', that these two categories represent opposite sexes that are natural and biological, that certain masculine and feminine traits, characteristics and actions flow from the fact of each biological sex, and that it is normal for the two sexes to enter into heterosexual intimate relationships. Disrupting and displacing heteronormativity has required recognising the biological diversity of bodies and the existence of culturally marginal sexual identifications, including lesbian, gay, transgender, transsexual, bisexual, intersex, crossdresser and others. In part in resistance to the historically fixed and entrenched categories of sex and sexuality, these identifications tend to be more fluid; some people identify only as 'queer', while others refuse any specific identification. Queer theory, which itself resists categorisation, might be seen as 'resistance to regimes of the normal.'⁴ It radically challenges the use of fixed, reified categories, assumptions about what is natural and normal, and hierarchies of sexual identification. Indeed, it has been said that to categorise it as a school of thought 'is to risk domesticating it, and to fixing it in ways that queer theory resists fixing itself.'⁵ I will return to the idea of domestication.

The term 'homonormativity' has been coined by Lisa Duggan to represent the normalisation of particular types of intimate homosexual relationships that reflect social hierarchies, including race, gender, class and other configurations of privilege.⁶ Duggan argues that a gay politics has emerged in the United States that positions

² *Ibid*, at 179.

³ Warner, M, 'Introduction: Fear of a Queer Planet' (1991) 29 *Social Text* 3.

⁴ *Ibid*, at 16.

⁵ Jagose, A, *Queer Theory* (Dunedin: University of Otago Press, 1996) at 2.

⁶ Duggan, n 1, at 175-176.

itself as mainstream, between the 'extremists' on the far left and the far right.⁷ This gay politics seeks only formal equality rights.⁸ It focuses on gay marriage and access to the military, embracing the idea that sexuality beyond formal marriage is a private matter. Duggan argues that the focus on the privatisation of lesbian and gay relationships of this politics embraces neoliberal economic policy, with its pro-business calls for downsizing government with the privatisation of many goods and services, in favour of the self-regulation of 'free markets'.⁹ It is a:

[P]olitics that does not contest dominant heteronormative assumptions and institutions but upholds and sustains them while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption.¹⁰

Duggan is careful to acknowledge that her identification of homonormativity does not create a category that parallels and reflects heteronormativity, as there are no gay structures parallel to those supporting and sustaining heterosexuality: her project is the identification and naming of an emerging politics in order that it may be analysed and critiqued.¹¹

While Duggan's analysis is specifically centred in the United States, similar ideas have emerged elsewhere. In Canada it has been argued that in the written and oral submissions on the legislation to expand rights of same-sex partners and to allow same sex marriage 'feminist voices are marginalised' and 'conservative and heteronormative discourses on marriage and family are reinforced'.¹² An analysis of legal submissions made as part of the fight for same sex marriage in Canada

⁷ *Ibid*, at 175-176.

⁸ Davies, M, *Asking the Law Question* (Sydney, Law Book Co, 1994) at 179-82.

⁹ Duggan, n 1, at 177-79.

¹⁰ *Ibid*, at 179.

¹¹ *Ibid*, fn 9 at 191.

¹² Young, CL and Boyd, SB, 'Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada' (2006) 14 *Feminist Legal Studies* 213 at 214.

demonstrates that they are predicated on the normalisation of whiteness in the gay subject, masking racial privilege.¹³ In South Africa it has been argued that lesbian and gay politics that ignore the ways in which class, race and gender intersect with sexuality tend to reproduce rather than redress these hierarchies, producing a homonormativity in the process.¹⁴ To the extent that homonormativity is about reproducing and rewriting race and gender hierarchy in gay rights claims and struggles, these analyses suggest that homonormativity may be emerging in particularly local forms elsewhere. What is important, in my view, is destabilising the progressive narrative of the modern liberal state in achieving 'gay' rights,¹⁵ making visible the ways in which 'gay' is raced, classed and gendered, and highlighting the limitations of the rights.

The idea of homonormativity has been extended to homo-nationalism in an analysis of the nation as producing collusion between homosexuality and American nationalism; attention to race-sexuality reveals the 'idealization of the US as a properly multicultural heteronormative but nevertheless gay friendly, tolerant, and sexually liberated society.'¹⁶ The argument is that the images and rhetoric that emerged post September 11 encompassed a reinvigoration of white, heterosexual norms through contrast with portrayals of terrorists as effeminate, emasculated, and 'perversely racialized.'¹⁷ At the same time a progressive sexuality was championed as a 'hallmark of US modernity.'¹⁸ Tributes to 'gay heroes' contrasted with the Taliban's treatment of Afghani women, and emphasis on the safety of the US for

¹³ Lenon, SJ, 'Marrying Citizens! Raced Subjects/ Re-thinking the Terrain of Equal Marriage Discourse' (2005) 17 *Canadian journal of Women and Law* 405 at 408.

¹⁴ Oswin, N, 'Producing Homonormativity in Neoliberal South Africa: Recognition, Redistribution and the Equality Project' (2007) 32 *Signs: Journal of Women in Culture and Society* 650 at 666.

¹⁵ Eaton, M, 'Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis' (1994) 17 *Dalhousie Law Journal* 130 at 133 (critically analysing the idea of law's steady progress from repression to enlightenment).

¹⁶ Puar, JK, 'Mapping US Homonormativities' (Feb 2006) 13 *Gender, Place and Culture* 67 at 68.

¹⁷ *Ibid.*, at 67.

¹⁸ *Ibid.*, at 69-70.

gays compared favourably to the 'Middle East'.¹⁹ These dynamics produced images of gays and lesbians acceptable within the nation, as part of a patriotic nationality. Rather than a strict heterosexual/homosexual divide, gays and lesbians would be divided through more complex images, raced, gendered, classed and aligned with nationalism, into those who were acceptable and those who were not; some queers were clearly better than others.²⁰ In the post September 11 production of stories of national identity, it is the queers who most closely conformed to the images of heroes who were the 'good' queers.

These types of analyses use the idea of nations as imagined political communities²¹ told in stories that proliferate at times of national crisis. Nations are *imagined* because no member can ever know all of those who make up the nation, and therefore each carries a fictional image or story of the nation, and are imagined *communities* in the sense that all members of the nation are imagined as part of this fiction.²² As imagined political communities, nations are the stories that are told about collective political identities.²³ These stories of collective identities produce identities that are acceptable and even heroic within the community, and also typically mask various forms of inequality, exclusion and exploitation.²⁴ The inclusion of some identities occurs at the expense of the exclusion of others, and identifying particular national identities serves to repress other possibilities for both national and individual identities, as well as collective and individual differences within the

¹⁹ *Ibid.*, at 69-70.

²⁰ *Ibid.*, at 71.

²¹ Anderson, B, *Imagined Communities: Reflections of the Origins and Spread of Nationalism* (London, Verso, 1991). The nation is also imagined as a sovereign state, territorially limited, internally united and free of interference from other nation-states.

²² *Ibid.*

²³ *Ibid.*, at 6; Stychin, C, *A Nation by Rights* (Philadelphia, Temple University Press, 1998) 1; Bhaba, H, 'Introduction: narrating the nation' in H Bhaba (ed), *Nation and Narration* (Routledge, London, 1990) at 1; See Harris, AP, 'Comment: Seductions of Modern Culture' (1996) 8 *Yale Journal of Law and Humanities* 213 at 213 (the philosophy of the Enlightenment and the Romantic opposition 'shape not only the stories we tell about our individual identities, but also the stories we tell about collective identities').

²⁴ Anderson, n 21, at 7.

nation.²⁵ Stories of national identity may also produce internal and external enemies to the nation, and may shift over time, or spring up in response to major events, such as the September 11 bombings.

Questions of the boundaries of nations, and internal and external demarcation, intersect with analyses of domestic law and domestication in lesbian and gay lives. Domestic laws are the laws internal to a sovereign state, including its immigration law. The domestic sphere is typically thought of as the home, or the private sphere, traditionally thought of as a place where the law does not intrude. The domestic sphere can be a place for domination along gender lines. Feminists and other critical scholars have critiqued the public/private distinction, the supposedly natural gendering of the two spheres along a male/female divide, and the idea that the law does not intrude into the home.²⁶ In critical theory domestication may also mean relegation to the domestic sphere, or more generally bringing one group of people under the power or control of another, or the internalisation of the views of the dominant culture as 'common sense'.²⁷ Using these analyses gays and lesbians might be said to be domesticated when they conform to heteronormative ideas about relationships, such as engaging in long term monogamous relationships in which they live or aspire to a middle class lifestyle, and in which they perform their sexuality only or mainly in the private, domestic realm of the household.²⁸ Katherine Franke argues that the United States Supreme Court decision in *Lawrence v Texas*²⁹ has domesticated sexual liberty, creating a legal landscape that is likely to render

²⁵ Davies, M, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (Pluto Press, London, 1996) at 74.

²⁶ See Davies, n 8, at 186-172; Boyd, S (ed), *Challenging the Public/Private Divide: Feminism, Law & Public Policy* (Toronto, University of Toronto press, 1997); Thornton, M (ed), *Public and Private: Feminist Legal Debates* (Melbourne, Oxford University Press, 1995).

²⁷ Robson, R, 'Mother: The Legal Domestication of Lesbian Existence' (1992) 7 *Hypatia* 172 at 172.

²⁸ Riggs, DW, 'Reassessing the Foster-Care System: Examining the Impact of Heterosexism on Lesbian and Gay Applicants' (2007) 22 *Hypatia* 132 at 134.

²⁹ 123 S. Ct. 2472 (2003).

'different legal treatment to those who express their sexuality in domesticated ways and those who don't – regardless of orientation.'³⁰

Using the idea of nations as stories told about national identity, I have argued that the recognition of lesbian and gay relationships in the parliamentary debates on the *Civil Union Act 2004* (CUA) in New Zealand shifts the heterosexual/homosexual divide to include those same-sex partners willing to embrace heteronormative models of relationships.³¹ The stories of national identity told in these debates are in part stories of the progressive (partial) recognition of human rights in a nation moving to realise the promise of modernity, equal treatment of the law. Both those for and against recognition of same sex relationships told stories of New Zealanders as tolerant and fair, as forwarding-looking progressives who value stable long-term, committed relationships, warm loving communities for children, and strong families and family relationships. To the extent that lesbian and gay relationships can fit into these moulds, these are stories of the homonormatising of lesbian and gay relationships through (partial) inclusion in the collective identity of the nation. In the process of normalising these relationships, the family is reinscribed as the cornerstone of society, and the position of marriage as the 'gold standard' of relationships is reinforced.³²

IMMIGRATION POLICY IN NEW ZEALAND:

FROM 'WHITER THAN WHITE' TO TIGHTENING AND WHITENING

Immigration and national identity are closely linked. Immigration is domestic law that determines who may enter into the nation, policing the boundaries of the nation. National identity is literally embodied in those who enter the country. Some are

³⁰ Franke, K, 'The Domesticated Liberty of *Lawrence v Texas*' (2004) 104 *Columbia Law Review* 1399 at 1416.

³¹ Seuffert, S, 'Sexual Citizenship and the *Civil Union Act 2004*' (2006) 37 *Victoria University of Wellington Law Review* 281.

³² *Ibid*, at 283; Young, n 12, at 230-235 (arguing that demands by gay rights groups for marriage rather than registered domestic partnerships reinforced the symbolic importance of marriage as a 'gold standard'.)

easily absorbed into the dominant stories of national identity, while others represent the boundary of that identity.³³ I have identified two trends in New Zealand's immigration law and policy since September 11; its 'whitening and tightening', and the opening of borders to those in same sex lesbian and gay relationships. A brief discussion of immigration and New Zealand's national identity is necessary to my analysis of the convergence of these trends.

New Zealand's immigration policy historically focussed on creating a 'better Britain', a homogenous white settler society. This policy has been labelled 'whiter than white' to indicate that it was even more restrictive than Australia's 'white only' policy.³⁴ The informal and unwritten policy, in which government officials had far-reaching discretion, was implemented through tactics such as informing shipping companies confidentially of the types of people who would not be granted an entry permit upon arrival in the country.³⁵ Other tactics included 'secrecy, a public avoidance of the issue of discrimination and, if necessary, a denial of its existence.'³⁶ Even during a shortage of labour from the 1940s to the late 1960s, immigration policy was broadened only reluctantly to include immigrants from Northern Europe; 'Southern and Eastern Europeans were not considered to offer the same potential [for assimilation], and the possibility of non-European migration was dismissed out of hand.'³⁷

New Zealand managed to maintain its unwritten discriminatory immigration policy longer than North America and Australia. In part this was the result of the widely held perception that New Zealand had harmonious relations with Maori and an

³³ Seuffert, N, *Jurisprudence of National Identity* (Aldershot, Ashgate, 2006) at 117.

³⁴ McKinnon, M, *Immigrants and Citizens: New Zealanders and Asian Immigration in Historical Context* (Wellington, Victoria University Institute of Policy Studies, 1996) at 1, 12, 22; Brooking, T and Rabel, R, 'Neither British Nor Polynesian: A Brief History of New Zealand's Other Immigrants' in S Grief (ed), *Immigration and National Identity in New Zealand* (Palmerston North, Dunmore, 1995) at 23.

³⁵ Brawley, S, "'No 'White Policy' in New Zealand": Fact and Fiction in New Zealand's Asian Immigration record, 1946-1978' (April 1993) 27 *New Zealand Journal of History* 16 at 18-19.

³⁶ *Ibid*, at 20.

³⁷ Brooking, n 34, at 38-39.

egalitarian society. In fact, colonisation of indigenous people in New Zealand was perpetrated with many of the tactics used by the British government elsewhere, and 'relations with Maori' were often fraught as a result. Although New Zealand at times embraced more socialist style politics and policies than some other liberal democracies, these were also raced and gendered, tending to disproportionately benefit white men and nuclear families. Nevertheless, it was difficult for the white international community to believe New Zealand discriminated in immigration along racial lines.³⁸ As a result New Zealand's settler population developed into a particularly homogenous white society, which underpinned national identities such as 'better Britain'.

This 'whiter than white' policy persisted in different forms, with only minor exceptions when labourers were needed, until 1986.³⁹ It was dropped in favour of policies specifically intended to align immigration with New Zealand's whirlwind implementation of radical neo-liberal economic policy, and a corresponding shift in national identity from a caring welfare society to an enterprise society.⁴⁰ The new laws and policies resulted in more diversity in immigration, and a group of countries including China, India and South Korea, identified as 'Asia' became the leading source of immigrants. The proportion of immigration approvals granted to 'Asians' between 1991 and 1994 grew dramatically to 54.2 per cent of the total. In the years between the 1986 and 1996 census the number of people from Asian and Southeast Asian countries more than tripled, from 48,855 to 160,683. While the population percentage of Asians also more than tripled from 1.45 per cent in 1986 to 4.45 per cent in 1996, the numbers and percentage were still small.⁴¹

³⁸ Brawley, n 35, at 29.

³⁹ Seuffert, n 33, at 49-70, 117-132.

⁴⁰ Burke, Hon K, 'Review of Immigration Policy 1986' (Wellington, Government Printer, 1986) at 15-16, 19-21; McKinnon, n 34, at 42; Kasper, W, 'Populate or Languish? Rethinking New Zealand's Immigration Policy' (Auckland, New Zealand Business Roundtable, 1990); for an analysis of New Zealand's shift in national identity see Seuffert, n 33, at 71-84.

⁴¹ Statistics New Zealand, '1996 Census of Populations and Dwellings: Ethnic Groups' (Wellington, 1996) Table 1a.

In the increasing panic post-September 11 the New Zealand government implemented successive changes to immigration criteria, tightening and whitening it over several years. One change came in November of 2002, significantly increasing the English language requirements for those not from English language backgrounds only.⁴² In 2003 there was a switch from the old general skills category, where approval was granted to immigrants who met the required number of points, to a new skilled migrant category, with more emphasis on job offers and criteria that allow more bureaucratic discretion.⁴³ As a result of these two changes applications in the general skills/skilled migrant categories declined in the year ending in mid-2004, and the total approved applications fell almost 6,000 short of the target.⁴⁴ The United Kingdom replaced India and China as the largest source of migrants,⁴⁵ echoing pre-1986 'whiter than white' policies. This trend snowballed between 2003 and 2005, with approvals of residency applications from the United Kingdom increasing from 14% of the total in the year ending June 2003, to 21% in the year ending June 2004, to 31% in the year ending June 2005.⁴⁶ In the same period approvals from China decreased from 16% to 10% and approvals from India decreased from 16% to 7%.⁴⁷ Immigration application approvals from India, China and South Korea combined dropped from 37% to 21% while those from the United Kingdom increased from 14% to 31% in the same period, and the United States began to feature statistically in 2005 with 3%.⁴⁸ These figures dramatically illustrate the tightening and whitening of immigration policy in New Zealand.

⁴² New Zealand Department of Labour, 'Trends in Residence Approvals 2002/2003' (Wellington, Sept 2003) at 50-51.

⁴³ New Zealand Immigration Service, 'Operation Manual: Residence' (Wellington, Department of Labour, 2005) at chapter 84-3, para SM3.15-3.25.

⁴⁴ New Zealand Department of Labour, 'Migration Trends 2003/2004' (Wellington, Immigration Service, Immigration Research Programme, 2004) at 1.

⁴⁵ *Ibid*, at 1.

⁴⁶ Department of Labour, 'Immigration Trends 2004/2005' (Wellington, December 2005) at 18.

⁴⁷ *Ibid*, at 18.

⁴⁸ *Ibid*, at 18.

SAME SEX IMMIGRATION:

A STORY OF PROGRESSIVE MODERNITY?

During the same period in which immigration law and policy has been whitened and tightened, a story of legal recognition within New Zealand, and the relaxing of national boundaries into the country, can be told in relation to sexual minorities, and in particular, same sex couples. It is sometimes told as a story of progressive modernity. The familiar idea is that liberal states, over time, take steps to recognise, and confer rights on, more and more marginalised groups, making progress towards full equality. It is a story in which legal recognition of same sex relationships in civil unions in New Zealand, and legal equality with married and de facto couples in most other areas, including immigration, at least on one telling, has been achieved with surprising rapidity subsequent to the challenge to the exclusion of lesbians and gay men from marriage on the grounds of discrimination in 1996. This story has parallels in the United Kingdom and Canada. In Canada, once courts began to recognise discrimination on the basis of sexual orientation under the Canadian Charter of Rights and Freedoms in 1995, the legal system's embrace of non-normative spousal relationships, and the right to marry, occurred with 'startling rapidity.'⁴⁹ The *Civil Marriage Act*, legalising civil same sex marriage across Canada, was passed on 20 July 2005.⁵⁰ In the United Kingdom, same sex relationships were recognised with civil partnerships in the *Civil Partnership Act 2004*, which became effective on 5 December 2005, and immigration was liberalised at the same time. Each of these developments have their own trajectory of human rights struggles, the funnelling and construction of political claims into socially acceptable paths and categories, critiques of assimilation and, in New Zealand and the UK, failure to provide full legal equality.⁵¹

⁴⁹ Young, n 12, at 216.

⁵⁰ *Ibid*, at 216.

⁵¹ See Seuffert, n 33; Auchmuty, R, 'Same-sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14 *Feminism & Psychology* 101.

Nevertheless, they represent significant shifts in legal recognition of same sex relationships.

This move towards legal recognition of relationships is reflected in immigration law in New Zealand. The *Human Rights Act 1993* (HRA) recognised sexual orientation as a prohibited ground of discrimination.⁵² In 1993 the *Immigration Act 1987* (IA) gave 'enormous discretion' to the Minister of Immigration and immigration officers.⁵³ The policy promulgated under the IA provided that the criteria for immigration of de facto partners in heterosexual relationships with New Zealand citizens or residents included that the couple had been 'living together in a genuine and stable relationship for 2 or more years.'⁵⁴ The same criteria applied to those in same sex relationships with New Zealand citizens or residents, except that the relationships had to be '4 years or more' rather than 2 years or more.⁵⁵ It was argued in 1994 that this discrepancy constituted discrimination on the basis of sexual orientation.⁵⁶ However, whether the prohibition on discrimination applied to immigration law and policy in 1994 was an open question, in part because the HRA prohibitions did not override other legislation until the end of 1999.⁵⁷ Not surprisingly then, in December 1998 Cabinet decided to amend the Government Residence Policy to treat same sex couples the same as de facto couples under family immigration policy, and this change was made in 1999.⁵⁸ However, de facto couples were still treated differently to married couples, and heterosexual couples had the choice of marriage while same sex couples did not.

⁵² *Human Rights Act 1993* (NZ), s 21(1); see Chauvel, C, 'New Zealand's Unlawful Immigration Policy' (1994) 4 *Australasian Gay and Lesbian Law Journal* 73 at 75.

⁵³ Stewart, B, 'New Zealand Immigration Law and Gay and Lesbian Couples' (1993) 3 *Australasian Gay and Lesbian Journal* 30 at 33.

⁵⁴ Department of Labour (NZ), 'New Zealand Immigration Instructions' (Wellington: 1991) Ch 7-F-16; the *Immigration Act 1987* s 2(1), 131.

⁵⁵ *Ibid*, at Ch 7-F-16.

⁵⁶ Chauvel, n 52.

⁵⁷ *Ibid*, at 79.

⁵⁸ Ministry of Justice (NZ), 'Same-Sex Couples and the Law: Backgrounding the Issues' (Wellington, 1999) 19, available at <http://www.justice.govt.nz/pubs/reports/1999> (last accessed 1 Nov 2007).

In 2003, just after the English language requirement was significantly increased for those emigrating from non-English speaking countries, a 'Partnership policy' was introduced that aimed to treat those married and those in an 'interdependent partnership akin to marriage', whether opposite sex or same sex couples, on the same basis when applying for residency.⁵⁹ With the passage of the *Civil Union Act 2004* and the accompanying *Relationships (Statutory References) Act 2005* the IA and Immigration Regulations 1999 were further amended to implement the current 'Partnership policy' aligning civil unions with marriages, whether of the same or opposite sex couples.⁶⁰ This trajectory appears to present a story of progressive modernity. However, as I argue below, aligning the criteria for same sex couples with the existing criteria for heterosexual couples without amending or reshaping the criteria in any way ensures that homonormatised and domesticated same sex couples, those properly raced and classed, who have mirrored heteronormatised relationships, will benefit disproportionately from the changes.

SAME SEX IMMIGRATION: THE NUTS AND BOLTS

Immigration law and policy relevant to entry for same sex couples and same sex partners of New Zealand citizens and residents is contained in the *Immigration Act 1987* (IA), the *Immigration Regulations 1999* and the *New Zealand Immigration Service Operational Manual*.⁶¹ The IA provides that grants of residence and other permits and visas are matters of discretion for the Minister of Immigration (Minister), and the Minister has broad powers to delegate under the IA to any immigration or visa officer.⁶² The Minister certifies policy that is then set out in the *Operational*

⁵⁹ Immigration Amendment Regulations (No 3) 2003 (NZ), amending Regulation 20 of the Immigration Regulations 1999 (NZ), effective 29 Sept 2003 to 7 April 2005.

⁶⁰ *Relationships (Statutory References) Act 2005*(NZ), s 7, Schedule 1; s 12, Schedule 4.

⁶¹ New Zealand Immigration Service, *Operational Manual* (30 July 2007) available at <http://www.immigration.govt.nz/nzis> (last accessed 1 Nov 2007).

⁶² *Immigration Act 1987*(NZ), s 2, 8-10A, 13(A), 131.

Manual, which is required to be published and available to the public.⁶³ However, many of the applicable provisions in the *Operational Manual* require the satisfaction of a visa or immigration officer that the criteria are met; the burden of proving that the criteria are met is on the applicant and the partner.⁶⁴ Clearly, the 'enormous discretion' of immigration officers referred to in 1993 still exists.

The 'Partnership policy' provides entry for partners of New Zealand citizens and residents, and for partners of principal applicants in other categories. Under this policy couples must provide evidence to satisfy an immigration officer that they have been living together for 12 months or more in a partnership that is genuine and stable.⁶⁵ The criteria for immigration are therefore a partnership that must be 'genuine and stable'.

'Partnership' is defined as a legal marriage, a civil union (whether opposite or same sex), or a de facto relationship (whether opposite or same sex), and 'partner' is defined as one of the parties to one of these relationships.⁶⁶ In New Zealand marriage is between opposite sex partners only.⁶⁷ The term civil union is not defined for purposes of immigration. However, the *Civil Union Act 2004* (CUA) provides reference to a civil union entered into in accordance with the CUA, and includes relationships entered into overseas recognised by regulations under the CUA.⁶⁸ As of this writing, the regulations identify only five overseas relationships recognised as civil unions: Finland's registered partnerships; the United Kingdom's civil partnerships; Germany's life partnerships; New Jersey's domestic partnerships; and Vermont's civil unions.⁶⁹ Civil unions therefore include only those relationships entered into under the CUA or relationships legally recognised in one of these other

⁶³ *Immigration Act 1987*(NZ), s 13A.

⁶⁴ New Zealand Immigration Service, n 61, at ch. 69, F2.5c.

⁶⁵ *Ibid*, at ch 69, F2.5a.

⁶⁶ *Ibid*, at ch 69, F2.5b

⁶⁷ *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA). New Zealand does not recognise overseas same sex marriages.

⁶⁸ *Civil Union Act 2004* (NZ), s 5.

⁶⁹ Civil Unions (Recognised Overseas Relationships) Regulations 2005, SR 2005/125, s 3.

five jurisdictions. Same sex couples who have legally recognised relationships in other jurisdictions, including those married in jurisdictions such as Canada that allow same sex marriages, or those whose relationships have been recognised in various ways in India,⁷⁰ have to come into New Zealand under the de facto relationship category.

'De facto relationship', which was added to the regulations in 2005, is not defined in the IA or regulations; it is defined in the *Interpretation Act* 1999 to mean a relationship between two people, whether the same or opposite sex, who live together as a couple in a relationship in the nature of marriage or civil union.⁷¹ While there does not seem to be any definitive authority on this point, the *Interpretation Act* 1999 may import the further criteria of 'living together as a couple' and 'in a relationship in the nature of marriage' into the immigration regulation interpretation of partnership. These terms may be interpreted differently from the regulation requirement of a genuine and stable partnership. This result would be unfortunate, and probably discriminatory, as it could result in different criteria and treatment for, for example, same and opposite sex couples married in Canada.

A partnership is considered to be genuine and stable if it has been entered into with the intention of being maintained on a long-term exclusive basis and is likely to endure.⁷² Factors that have a bearing on whether the two people are living together in a partnership that is *genuine and stable* include the duration of the relationship, the existence, nature and extent of the partners' common residence, the degree of financial dependence or interdependence, the common ownership, use and acquisition of property, the degree of commitment of the partners to a shared life, children, the performance of common household duties by the partners, and the

⁷⁰ Vanita, R, *Love's Rite: Same Sex Marriage in India and the West* (Gordonville, VA, Palgrave MacMillan, 2005).

⁷¹ *Interpretation Act* 1999 (NZ), s 29A(1).

⁷² New Zealand Immigration Service, n 61, at ch 69, F2.10.1.

reputation and public aspects of the relationship.⁷³ *Evidence* that the partners are *living together* may include documents showing shared accommodation such as joint ownership of residential property, joint tenancy agreements, and correspondence addressed to both of the partners at the same address.⁷⁴ *Evidence* that the partnership is *genuine and stable* may include a marriage certificate, a civil union certificate, birth certificates of children, evidence of communication between the partners, photographs of the parties together, documents indicating public recognition of the partnership and other evidence that the parties are committed to each other emotionally and exclusively.⁷⁵ This final type of evidence of exclusive emotional commitment may include evidence of joint decision making and plans together, sharing of parental obligations, sharing of household activities, companionship and spare time, leisure and social activities and presentation to outsiders as a couple.⁷⁶

New Zealand's alignment of immigration criteria for same sex couples with those of opposite sex couples makes it one of the most 'gay friendly' countries for immigration. Ad hoc reports from (middle class, white) New Zealanders with partners immigrating to the country suggest that the criteria are often sensitively and fairly applied. Nevertheless, in the next section I want to trouble this progressive narrative of formal equality using the ideas of homonormativity and domestication that I have discussed.

HOMONORMATIVITY AND DOMESTICATION

The border control function involves making determinations about the embodiment of national identity, producing both national and individual identities in the process. The immigration law and policy criteria, and the implementation of the criteria, determine

⁷³ *Ibid*, at ch 69, F2.20b.

⁷⁴ *Ibid*, at ch 69, F2.20.15a.

⁷⁵ *Ibid*, at ch 69, F2.20.15c.

⁷⁶ *Ibid*, at ch 69, F2.20.15c.

who will be included in and who will be excluded from the nation. The criteria for inclusion tell stories of New Zealand's aspirations for national identity, for its imagined political community. These stories may be multiple, shifting, and even contradictory. Those admitted may be differently positioned in the stories, buttressing certain stories by inclusion or by contrast. Further, the implementation of immigration law and policy produces subjects through regulation:

[T]o become subject to regulation is also to become subjectivated by it, that is, to be brought into being as a subject precisely through being regulated.⁷⁷

The subject is literally brought into the nation through regulation, producing an identity through the performance of meeting the criteria to the satisfaction of the officials.

In this section I want to make two points about the regulatory process for same sex immigration in New Zealand. First, I want to consider the dynamics of opening the country's borders to lesbian and gay couples while simultaneously tightening and whitening immigration policy. Second, I want to consider the implications of including same sex couples in the category of de facto and aligning that category with the categories of marriage and civil union, so that the criteria applied to same sex couples is the criteria developed to determine which heterosexual couples ought to be included in the nation.⁷⁸ I want to analyse the heteronormativity and homonormativity⁷⁹ of the criteria. Heteronormativity includes the norms of heterosexuality as well as the failure to recognise any differences in same sex relationships. Following on from the discussion earlier in the chapter, homonormativity includes depoliticisation as well as domesticity and privatisation. It includes the ways in which entry into the area of domestic law requires proof of

⁷⁷ Butler, J, *Undoing Gender* (New York, Routledge, 2004) at 41.

⁷⁸ See Lenon, n 13, at 408.

⁷⁹ See Duggan, n 1, at 179

domesticity, or taming, and the relegation of sexual identity and practices to the private realm.

The implications of aligning criteria for immigration of same sex couples to existing criteria for heterosexual couples foregrounds sexuality as the only difference that is recognised. Lesbian and gay couples have to prove to the satisfaction of immigration officers that they are just like the types of heterosexual couples who meet the criteria except for their sexuality; 'an intelligible legal subject is produced solely against heterosexuality and hence, is "just gay."⁸⁰ This binary approach to difference fails to address other possible differences, such as class, gender and race. The result is likely to be that those lesbians and gay men admitted to the country will differ from heterosexual couples admitted only in their sexuality; they will tend to be privileged along in race, class and gender, and that privilege will be occluded in part by the focus on sexuality.⁸¹ To the extent that the criteria privilege middle class white men, then middle class white gay men will be privileged by this approach to same sex immigration.⁸² As discussed above, New Zealand's historical 'whiter than white' immigration policy has been reinscribed in the recent tightening and whitening of immigration law and policy. The new, more stringent English language requirements were adopted about the same time as the same sex immigration criteria were opened. The language requirements apply to the partnership policy, and each partner must separately meet the criteria.⁸³ These criteria are likely to ensure that same sex immigration approvals are aligned with the overall trend, discussed above, of favouring those from English speaking, predominantly white, countries.

As discussed above, the CUA regulations recognise only five types of overseas same sex relationships as civil unions: Finland's registered partnerships;

⁸⁰ Lenon, n 13, at 408.

⁸¹ Crenshaw, K, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color' (1991) 43 *Stanford Law Review* 1241.

⁸² See, eg Naffine, N, *Law and the sexes: explorations in feminist jurisprudence* (Sydney, Allen & Unwin, 1990); Davies, n 8, at 181-182.

⁸³ New Zealand Immigration Service, n 61, at ch. 69, F2.15.

the United Kingdom's civil partnerships; Germany's life partnerships; New Jersey's domestic partnerships; and Vermont's civil unions. All five of these are developed countries that are predominantly white. This means that same sex couples from other countries, even where they have a legally recognised relationship, will be in the de facto relationship category, and may therefore have to meet a different, and potentially more stringent, criteria. Interestingly, in the United Kingdom, the legally recognised relationships in 25 overseas countries and states in the United States will be recognised as civil partnerships in a non-exhaustive list.⁸⁴ With one possible exception, this is also a list of developed, predominantly white countries.⁸⁵ Further, the website of the UK Gay and Lesbian Immigration Group notes that the most common reason given for refusal in the proposed civil partner category is that the relationship is not genuine, and this is particularly true where the foreign applicant is from a developing country.⁸⁶ Unfortunately, this type of information is not available for New Zealand. However, the short New Zealand list of recognised relationships, combined with the possibility of different criteria for de facto relationships, and the UK experience, suggest that this is an area for concern, and that it may well be more difficult for those lesbians and gay men from developing countries to migrate. Combined with the alignment of criteria for same sex immigration with that of heterosexuals, which I will discuss next, this analysis suggests that the idea of a 'national heterosexuality' that is sanitised and deracialised (white) may fit here.⁸⁷

The existing criteria embrace heteronormativity, or norms of heterosexuality, and as a result tend to call for the production of homonormatised lesbian and gay

⁸⁴ UK Diplomatic Service Procedures, 'Entry Clearance' Volume 1 General Instructions, Schedule 20, A List of Recognised Overseas Same Sex Relationships, includes 24 overseas relationships including Massachusetts, Vermont and California.

⁸⁵ Mexico is the exception.

⁸⁶ UK Gay and Lesbian Immigration Group, 'Civil Partnership—Immigration Guide' <http://www.uklgig.org.uk> (last accessed 4 Nov 2007). The 2006 version of this guide noted that evidence was emerging that civil partnership applications were being denied on the basis that the relationship was not genuine, and that this was particularly the case where the applicant was from a developing country. UK Gay and Lesbian Immigration Group, 'A Guide to Civil Partnership' (last accessed Nov 30 2006).

⁸⁷ Berlant, L and Warner, M, 'Sex in Public' (1998) 24 *Critical Inquiry* 547 at 549.

identities aligned with heteronormativity. Heteronormativity includes norms about what relationships should look like. These norms may be submerged, and difficult to decontextualise,⁸⁸ they 'construct and continually reinforce (even if only in the background) our idea of "the normal."⁸⁹ The immigration criteria requires proof of genuine and stable relationships that are entered into with the intention of continuation on a long-term exclusive basis and are likely to endure.⁹⁰ These are criteria that embrace heterosexual norms:

Living together, having joint finances, and publicly demonstrating an exclusive and committed bond, are criteria derived from dominant notions of what it means to be in a relationship, ... derived from the idealized model of a heterosexual relationship.⁹¹

Heteronormative models may also set the standard to which lesbian and gay couples have to perform their relationships, in producing a narrative, and therefore their identities, for immigration officials: 'I ... found it frustrating that in order to fulfil the requirements of my visa application [to Australia] it was implied that I should produce a narrative of my relationship with Nigel to show how "marriage-like" it is.'⁹²

Lesbian and gay couples who may be in long term relationships but consciously opt out of heteronormative relationship practices for political reasons, as a result of embracing feminist critiques of heterosexual norms, or for other reasons,⁹³ may be less likely to gain entry to the country. For example, Sue Wilkinson and Celia

⁸⁸ Butler, n 77, at 41.

⁸⁹ Chambers, SA, 'Heteronormativity and the L Word' in K Akass and J McCabe (eds), *Reading the L word: outing contemporary television* (London, I.B.Tauris, 2006) at 84.

⁹⁰ New Zealand Immigration Service, n 55, Section F2.10.1.

⁹¹ Holt, M, 'Marriage-like' or Married? Lesbian and gay Marriage, Partnership and Migration' (2004) 14 *Feminism & Psychology* 30 at 32.

⁹² Holt, n 90, at 33.

⁹³ *Ibid*, at 33: 'lesbians and gay men have been among those challenging the idea that a commitment to another person necessarily entails sexual exclusivity, living together, or fixed gender roles for each partner.'

Kitzinger have written of their relationship that they had both previously come out of long-term 'marriage-like' relationships and were committed, both personally and politically, to having a relationship with more autonomy, freedom and openness.⁹⁴ They found the idea of making an ostentatious ceremony of their private commitment embarrassing, and they did not want to promise each other 'unconditional love, lifelong commitment and sexual monogamy.'⁹⁵ They chose not to live together; they had individual mortgages, separate houses, separate finances, were on different electoral roles, paid different utility bills and owned nothing in common.⁹⁶ As a result of these choices, they note that they would not have met United Kingdom same sex immigration requirements of two years cohabitation or Canadian immigration requirements of one year of cohabiting in a conjugal relationship.⁹⁷ Given the way they chose to structure their relationship, they may have had a struggle entering New Zealand even under its current gay friendly criteria. They would have been unlikely to have evidence to show that they had been living together for 12 months or more in a partnership that was genuine and stable, and nor would they be likely to satisfy the criteria that there 'were genuine and compelling reasons for any period of separation.'⁹⁸

Wilkinson and Kitzinger's relationship may have been inspired by their politics, and in that sense they were politicised rather than depoliticised in Duggan's terms. Lesbians and gay men who live their politics in their relationships may therefore be less likely to be admitted under the immigration criteria, and those who are 'depoliticised', not questioning of heteronormative relationship models and happy to adopt them, may be more likely to meet the criteria for immigration. Those who chose to 'make a queer world' by engaging in 'kinds of intimacy that bear no

⁹⁴ Kitzinger, C and Wilkinson, S, 'The Re-branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership' (2004) 14 *Feminism and Psychology* 127 at 129.

⁹⁵ *Ibid*, at 129.

⁹⁶ *Ibid*, at 129.

⁹⁷ *Ibid*, at 130-31. These were immigration criteria in 2004, when Kitzinger and Wilkinson wrote their article.

⁹⁸ New Zealand Immigration Service, n 61, ch. 69, F2.5a, F2.30.1.

necessary relation to domestic space, to kinship, to the couple form, to property, or to the nation' are less likely to be fit subjects for immigration.⁹⁹

The reputation and public aspects of the relationship are also factors that indicate a genuine and stable relationship. To the extent that lesbians and gay men who live their politics in public are less likely to be accepted in mainstream society, or more likely to disrupt dominant notions of commitment, the reputational and public aspects of their relationships may count against them. The reputational aspects of the relationship may also be judged by the couple's reputation with extended family, and non-normative, political behaviour may also impact here. Those lesbian and gay couples whose families are not accepting of their relationships, who may also be less likely to be 'out' in other contexts, will also be disadvantaged by these criteria.

Lesbians and gay men who are not 'out' for any reason, including that the countries in which they live are homophobic or persecute lesbians and gays, will be disadvantaged by all of the criteria as it will be more difficult to live with partners, own property with partners and establish a reputation or public aspects of the relationship.¹⁰⁰ These people may have to resort to the refugee or asylum processes, which are time-consuming, costly, and may have erratic results.¹⁰¹ Further, the treatment of lesbians and gay men in some countries may fall into a gap between persecution meeting the refugee criteria and difficulty living, or being out, without any specific state persecution. For example, in one refugee appeal the Refugee Status Appeal Authority (RSAA) accepted that the appellant, a 28 year old Nigerian man, would be shunned by his family and ostracised by his church, that his

⁹⁹ Berlant, n 83, at 558.

¹⁰⁰ For stories of asylum seekers in the UK see UK Lesbian and Gay Immigration Group, 'Annual Report 2007' 17-18, available at www.uklgig.org.uk (last accessed 2 Nov 2007).

¹⁰¹ See *Re GJ*, Refugee Appeal No 1312/93, Auckland, Refugee Status Appeals Authority New Zealand (30 August 1995); Tennant, D, 'The Contribution of the New Zealand Refugee Status Appeals Authority to International Refugee Jurisprudence' (undated manuscript on file with the author). In Australia see Millbank, J, and Dauverge, C, 'Burdened by Proof: How the Australian Refugee Review Tribunal has failed lesbian and gay asylum seekers' (2003) 31 *Federal Law Review* 299; Millbank, J, 'Gender, Sex and Visibility in Refugee Decisions on Sexual Orientation' (2003) 18 *Georgetown Immigration Law Journal* 71.

life would be far from ideal and that there was a climate of intolerance towards non-heterosexual relationships in his home country.¹⁰² Nevertheless, refugee status was denied on the basis that, although homosexual acts are a criminal offence in Nigeria, there was no evidence of prosecutions.¹⁰³ If the RSAA assessment of homophobia and the law in Nigeria is correct, lesbian and gay couples living in Nigeria might be likely not be out to family and friends, and not live together and build up the indicia of a genuine and stable relationship required by the immigration criteria, making immigration as partners much more difficult, if not impossible.

The basis of the criteria in the dominant heterosexual paradigm and norms also means that there is no recognition of the difficulties that may be associated with realising that one is a sexual minority. For example, a Fijian Muslim man aged 22 originally came to New Zealand to marry a woman chosen by his family.¹⁰⁴ It appears that about nine months later he fell out with his and his wife's family and made friends with a gay man, with whom he later entered into a relationship.¹⁰⁵ At this time he continued to pursue immigration based on his marriage, and it was not until more than a year later that he told immigration authorities that he was in a same sex relationship.¹⁰⁶ In considering whether the man was living in a stable and genuine relationship with his new partner, the Residence Review Board (RRB) stated that doubt arose as to whether the relationship was genuine due to the fact that the man continued to state that he was committed to his marriage and to trying to make it work after moving in with his same sex partner.¹⁰⁷ Not surprisingly, it was submitted on the appellant's behalf that 'at the time he was confused with his life and unsure where he was heading.'¹⁰⁸ There is nothing in the criteria that addresses, or provides

¹⁰² Refugee Appeal No 75250, Refugee Status Appeals Authority New Zealand (28 January 2005).

¹⁰³ *Ibid.*

¹⁰⁴ Residence Appeal No 14690, Residence Review Board (28 February 2006), 2-3

¹⁰⁵ *Ibid.*, at 11.

¹⁰⁶ *Ibid.*, at 9.

¹⁰⁷ *Ibid.*, at 11.

¹⁰⁸ *Ibid.*, at 12.

guidance to officials to respond to these types of situations. Indeed, the RRB decision confirming the denial of his residence application makes no attempt at all to place the man's actions in the context of homophobia; it appears to hold the fact that the man did not reveal his gay relationship earlier in the process against him.¹⁰⁹

Finally, the immigration criteria also embrace concepts of domesticity in a number of forms. Most obviously, factors such as the performance of household duties and evidence such as sharing parental obligations, household activities and joint decision making evoke images of domesticity as home, as the realm gendered female. The fact that these criteria are integral to the determination of a genuine and stable relationship suggests that lesbians and gay men have to prove that they are domesticated along gendered, heterosexual lines.

To the extent that the criteria are focused on economic criteria and ownership of property those with money and middle class domestic aspirations are privileged. The factors bearing on whether couples are living together in a genuine and stable partnership include the nature and extent of the common residence, the common ownership, use and acquisition of property and financial dependence or interdependence. Those who cannot afford to own property must prove joint tenancy agreements.

The heteronormativity of the criteria as a whole overlaps with other aspects of domesticity; lesbians and gay men have to prove that they are 'just like' heterosexuals and that their sexuality is private and does not make any real difference. The assumption is that same sex couples set up house, own property together, participate in child raising and family gatherings, jointly communicate, socialise with their families and friends and generally live their lives just like heterosexuals. The reality that they are doing so in heteronormative, homophobic societies that may not recognise and validate their relationships, or that may treat them as second class, in the context of family reactions that may vary from

¹⁰⁹ *Ibid*, at 12-13.

persecution to disassociation to *mild disapproval*, and that they may be struggling with their own sexual identities, is all rendered invisible by the criteria and determinations to be made. This is not to say that there are no immigration officials who understand heteronormativity or homophobia, and respond sensitively to the situations of lesbian and gay couples, but rather that the criteria mean that when that happens, those individuals will bring it to the process, rather than having that understanding integrally incorporated into the process.

CONCLUSION

This chapter started with the identification of two recent trends in New Zealand's immigration law and policy: the general tightening and whitening post September 11, and the opening of the nation's boundaries to lesbian and gay partners. It has suggested that attention to the particularities of sexuality, race, class and gender in the immigration criteria for same sex partners reveals that these two trends are not as contradictory as they might at first appear. The lesbian and gay couples most likely to gain entry to the country easily are likely to be those homonormatised couples who are willing to adopt heterosexual models for their relationships, who do not politicise their sexuality, and who are properly domesticated. Those most likely to fit this model are likely to be from predominantly white liberal democracies, the very places targeted for immigration more generally post September 11.