



Gay and Lesbian
Rights Lobby Inc

The Need for Recognition of
Same Sex and
Domestic Relationships

Submission to the Social Issues Committee Inquiry
into the De Facto Relationships Amendment Bill 1998

"(The) current state of the law smacks of society punishing otherwise law-abiding members for a sexual orientation that is, in and of itself, lawful.

"And to what gain? Legal denial and intolerance achieve nothing but an insult to the dignity of recognition that every family treasures and has the right to expect in a country which supposedly supports tolerance for peaceful differences among its members."ⁱⁱⁱ

**Hon Justice Nicholson
Chief Justice of the Family Court of Australia**

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EXECUTIVE SUMMARY

- The law currently discriminates against same sex couples in a range of every day situations where the law assists heterosexual de factos.
- This discrimination has profound practical consequences which can disrupt lives and relationships and lead to impoverishment of lesbians, gay men and their families. Its effect is especially severe in times of crisis such as when a relationship breaks down or a partner dies.
- Key areas of discrimination include inheritance, property division on relationship breakdown, workers' compensation, stamp duty, employment rights and decisionmaking in case of illness or death.
- Difficult and expensive procedures are currently the only option available to same sex partners to pursue basic rights. This situation most affects those with little money or access to legal advice who are unable to use these procedures.
- These procedures use higher courts which are slow and expensive to run. This is a burden on those courts and an impost on taxpayers.
- The *De Facto Relationships Amendment Bill* broadens the definition of 'de facto partners' to include same sex couples in order to give them the same legal protections currently given heterosexual de factos. It does not give any new or special rights.
- There is no change to marriage. Same sex couples will not be able to get married and the rights of married couples are unaffected.
- There is no change to adoption.
- The Bill also includes a new category of 'domestic relationship' to increase access to justice in some limited areas for people in other close relationships where there is financial and emotional interdependence. For example, where a couple do not live together but own property together it will assist them to disentangle their finances.

INTRODUCTION

Discrimination on the grounds of homosexuality has been illegal in New South Wales since 1982 – at least in theory. But the reality is that lesbians and gay men continue to suffer from discrimination in many areas of daily life. Even sadder is the fact that this discrimination is sanctioned and, in many cases, enforced by the law of New South Wales.

The 1982 amendments to the *Anti-Discrimination Act* were hailed by the lesbian and gay community as a significant achievement, but 16 years down the track the spirit of those amendments is yet to be fulfilled. To recognise homosexuality but deny the existence of gay and lesbian relationships is a legal contradiction.

Gay men and lesbians are active members of the community – we live, work and play alongside our heterosexual neighbours, colleagues and friends. And like our ‘straight’ friends, we form relationships, buy property together and raise families. Yet the law continues to deny this reality.

Anti-discrimination laws were passed in recognition that discrimination has a harmful affect on individuals and communities. The failure to recognise our relationships causes emotional and financial pain in countless areas of life – and death. Many of us continue to suffer legally-sanctioned discrimination in the workplace; if we fall ill, the law fails to recognise the importance of our partners in our lives; if we want to transfer property into joint names, we are subject to a tax on our sexuality because we do not have access to the same stamp duty concessions as heterosexual couples; and if a partner dies without a will we are often forced to seek recourse in the Supreme Court to gain even partial recognition of our property rights.

This failure is a blot on the proud legislative history of NSW. The real importance of this failure is not symbolic or academic, it is the effect that it has on the lives of lesbians and gay men. The reforms we seek are not about moral values or ideology. They offer basic human rights in basic human situations. The Social Issues Committee inquiry comes at a time when government around Australian and the world are recognising the importance of recognising same sex relationships. We seek the support of the Committee for the sensible, practical reforms proposed in the *De Facto Relationships Amendment Bill 1998*.

Why we need de facto recognition

In 1984, the Wran government introduced the *De Facto Relationships Act*. This legislation was introduced in recognition of the fact that couples who live together but do not marry may own property together and have joint finances, assets and obligations. Since then (heterosexual) de facto couples have been included in nearly every piece of legislation where being in a relationship is relevant. This is because most of this legislation gives practical rights. De factos have mortgages and raise families together; they become emotionally interdependent and they sometimes need the help of the legal system. The *De Facto Relationships Act* and the legislation which has followed have given legal recognition to this reality and ensured that this help is available. Previously, the lack of a legal mechanism to recognise non-marital relationships had left many people unprotected when something went wrong.

The reasons for which de facto relationships legislation was introduced are very similar to the reasons for which we now seek the extension of this legislation to our relationships.

The other reason for which we seek recognition under de facto relationships legislation is our fundamental commitment to equality. While gay and lesbian relationships – like heterosexual relationships – take many forms, we believe that the legal mechanism for recognition of our relationships should be the same as that which exists for heterosexual relationships. In fundamental areas such as inheritance, property division, guardianship, compensation, stamp duty and employment rights, there is no justification for granting us anything other than the rights accorded to heterosexual couples. The *De Facto Relationships Amendment Bill* would extend these rights in most areas of the law in which de facto relationships are recognised in NSW.

Why we need recognition of domestic relationships

Sexual relationships in which we live with our partners are clearly not the only important relationships to us and to others in the community. Many people do not live in de facto relationships at all. Most have other important relationships with friends and relatives. Some people have partners with whom they share a close relationship but not a house.

Yet a relationship which is not a de facto relationship may give rise to some of the same problems. People may own property together or otherwise entangle their finances. One may be dependant on the other and therefore impoverished in the event of death.

In short, de facto relationships are not the only relationships which give rise to ties of emotional and financial interdependence.

The law fails to give recognition to a whole range of relationships. Consequently, people who are not in de facto relationships are generally unable to utilise the law. Also people who are in de facto relationships but would like to benefit a person other than their de facto spouse may be unable to do so. The aim of amending specific legislation to include recognition of a significant person is to make it accessible to people in close relationships in a limited number of areas.

Why the De Facto Relationships Amendment Bill is our preferred model

The main alternative to the De Facto Relationships Amendment Bill is the *Significant Personal Relationships Bill*, proposed by Clover Moore MP. The *Significant Personal Relationships Bill* has two key elements: the introduction of ‘registered relationships’ and the recognition of ‘significant personal relationships’ where those relationships are not registered.

Systems of registration do not necessarily address the practical problems which lack of recognition creates. Heterosexual couples already had access to civil marriage prior to the introduction of de facto relationships legislation, yet de facto legislation was still needed to ensure the protection of unmarried couples.

The reality is that people do not always plan ahead. This is evidenced by the fact large numbers of people, both within and outside the gay and lesbian community, do not make wills. In Denmark, which has a system of national registration, few have taken up the option. And those who have are mainly well-off males – the most in need of protection are not registering (see John Eeklaar, “Registered Same Sex Partnerships and Marriages – A Statistical Comparison” (1998) 28 *Family Law* 561). Nor does everyone have access to legal advice. Requiring registration in order to protect basic rights assumes that everyone understands the consequences of non registration and has the time, money and foresight to protect themselves and their partners. This is unrealistic.

Registration is particularly problematic for lesbians and gay men. It requires a public declaration of sexuality on the part of any couple which wishes to register their relationship. This can be a dangerous or frightening thing to do for many gay men and lesbians. Levels of discrimination and violence against gays and lesbians remain high. Few will be prepared to take a step which may cost them their jobs and expose them to violence and harassment. This is particularly so in non metropolitan areas. A system which requires registration may be one which in effect excludes rural couples.

De facto recognition does not share this problem. It makes legal procedures available when it is needed but does not require a declaration of sexuality beforehand.

The concept of 'registered relationships' is also problematic because it fails to deliver equality for lesbians and gay men. The rights accorded to people in registered relationships would not be the same as the rights of heterosexual de facto couples. While the registration system would be available for use by heterosexual couples, it is unlikely that they would make use of this system in large numbers as they already have access to civil marriage, which affords greater protection. This means that in practice, 'registered relationships' would be a special category for gay and lesbian couples. We oppose the idea of a different legal category, with different rights, for gay men and lesbians.

Under the *Significant Personal Relationships Bill*, people in unregistered 'significant personal relationships' would still be subject to the rights and responsibilities set out in the Bill. The definition of 'significant personal relationships' is extremely broad. It does not require cohabitation, sexual relations or financial interdependence. Essentially for a relationship to be a significant personal one all that is needed is emotional interdependence or that one person provides fellowship and support to the other. The only additional requirement is that the parties either live together or "otherwise share their lives". The breadth of the definitions in the Bill means that a very large range of relationships could be included. In many cases, the fact that the relationship was one subject to an array of legal consequences would come as a complete surprise to those in the relationship. One person might have numerous 'significant personal relationships' simultaneously.

This is a novel provision that is quite unlike, and much broader than, the provisions operating in the ACT. Comprehensive change utilising this type of loose definition has not been attempted anywhere in the world. For this reason, it is very difficult to know exactly how the courts will interpret a concept of this nature and it will take a great deal of litigation to find out.

While the *De Facto Relationships Amendment Bill* introduces the concept of 'domestic relationships' as an adjunct to the extension of de facto rights, this concept can be sharply distinguished from similar concepts in the *Significant Personal Relationships Bill*. The definition of 'domestic relationships' proposed in the *De Facto Relationships Amendment Bill* is based on definitions currently used in Commonwealth social security law and immigration law. This definition requires consideration of all of the circumstances of the relationship, with specific reference to the nature of the persons' commitment to each other, the social aspects of the relationship, the nature of the household and the financial aspects of the relationship. In immigration law, these are the factors used to establish a same sex relationship for the purposes of an 'interdependency' permanent visa. This class of visa was introduced by the Keating government and has operated for some years without any noticeable problems. While the relevant section of the *Social Security Act 1991* only applies to heterosexual couples, what is important is that the definition has been in operation for some years without any evidence of difficulties with regard to interpretation or application. The definition also closely resembles that used in the ACT since 1994 although the NSW *De Facto Relationships Bill* does use a somewhat tighter definition (*a fuller discussion of the ACT reforms is below in the section, "Other Australian Jurisdictions"*).

While we do not support the *Significant Personal Relationships Bill*, we believe that it raises many issues which require further consideration. GLRL supports the idea of a separate Law Reform Commission inquiry into all areas of the law governing relationships. But we also realise that this would be a large inquiry, involving many areas of law and affecting every part of the community. Past experience shows that this could delay law reform for five to ten years. In the mean time, many more gay men and lesbians would suffer emotional, personal and financial damage as a result of discriminatory laws in areas such as inheritance, hospital visitation rights, property division and stamp duty. This is why our rights deserve immediate recognition under existing law, through the extension of the *De Facto Relationships Act*.

AREAS IN NEED OF REFORM

Because relationships between people of the same sex are not generally recognised by law, lesbian and gay couples are denied legal rights and protections that are given to heterosexual couples, whether married or living in de facto relationships.

The law protects and confers rights and obligations on individuals in relationships in varying ways. These range from determining who has authority to make decisions about medical treatment to working out entitlements to property which is jointly owned or accessing compensation for the death of a partner.

This inequity results in many practical injustices, especially at the time of death, injury or other crisis. Important areas where same sex partnerships are excluded from access to justice in NSW include but are not limited to:

- *Property Division in Relationship Breakdown*
- *Inheritance*
- *Other Issues When a Partner Dies*
- *Duties Act*
- *Compensation*
- *Guardianship*
- *Employment/Industrial Rights*
- *Anti-Discrimination Act*
- *Public Protection*

Property Division in Relationship Breakdown

In NSW since 1984 opposite sex couples who have lived together for more than two years have been able to use the *De Facto Relationships Act* to divide shared property upon relationship breakdown. Essentially this helps couples who are unable to reach an agreement as to how their finances should be divided to access a relatively cheap and simple procedure to assist them. This is essential as finances almost inevitably become intertwined when a couple has been together for many years. Frequently couples own their most substantial asset – their home - together. Property

of immense emotional value such as a personal belongings, photos and other keepsakes may also be owned together and subject to dispute. The same situation applies to property of great financial value such as businesses.

At a time of great stress and with so much at stake, it is not surprising that couples may need court assistance.

Same sex couples can currently make a claim to shared property to which they have made a financial contribution. However, this can only be done by using the difficult and costly procedure of making a claim in the Equity Division of the Supreme Court. In contrast, claims under the *De Facto Relationships Act* can be brought in lower courts.

The current situation puts all same sex couples at risk and makes the resolution of disputes more expensive for all lesbians or gay men. However, by far its greatest impact is on those who cannot afford the higher courts and do not have access to good legal advice. They may be at risk of losing their livelihood if a business is owned or may be unable to claim a share of a home that they have put money and work into.

Needless to say this situation only benefits lawyers and those who have greater power in relationships.

The use of the Supreme Court also has an adverse effect on the court system. Taxpayers must fund the use of higher courts to resolve disputes. The continuing need to use the Supreme Court flies in the face of other reforms which have moved court work to the District Court in order to decrease court delays and save costs.

The inclusion of same sex couples in the *De Facto Relationship Act* would not create new rights, but it would simplify procedures and make pre-existing rights to shared property more accessible.

Inheritance

Glaring inequalities exist in the area of inheritance.

When a person dies without a will, their estate is distributed among relatives as set down in the *Wills, Probate and Administration Act*. Heterosexual partners who have lived together automatically inherit in this situation, followed in priority by an extensive list of relatives, including quite remote relations. There is no requirement that the relative have a relationship with the deceased person.

Same sex de facto partners do not have any such right of inheritance. Aunts and uncles (including those 'of the half-blood') who have never met the deceased may inherit but a partner who has lived with the deceased for many years and cared for him or her through illness cannot – at least not if s/he is gay or lesbian.

Similarly, others who have been close to the person who has died cannot inherit under the *Wills Probate and Administration Act* even where they have been financially dependent or have cared for the person.

The regime by which the *Wills, Probate and Administration Act* distributes property is designed to approximate the way in which the person who has died might have distributed it if s/he had made a will. It recognises that most people leave their property to partners and/or children and that these people may be financially dependent. However, in the case of gay men and lesbians, the attempt to distribute property as the deceased would most likely have wanted goes seriously wrong. It ignores our partners and others we have cared about.

The failure to recognise other important relationships also results in injustice to others in the community. Children who have known a woman as their mother all their lives following the death of their biological mother and her marriage to their father, for example, do not inherit under the current system.

To gain any part of the inheritance in the absence of a will, a lesbian or gay partner or other person who is close to the deceased must make an application under the *Family Provisions Act*.

To succeed they will have to:

- have been a member of the deceased's household;
- have been dependant on him or her; and
- show that inadequate provision for their proper maintenance, education and advancement in life had been made.

Again in most cases, they will need to be able to afford to take action in the Equity Division of the Supreme Court with its attendant difficulties and delays.

Even then, the same sex partner might be overlooked by the court in favour of someone far less close to the deceased (*see "Case Studies", below*).

Other Issues When a Partner Dies

As well as decisions about distributing a person's property, there are a number of other legal decisions that need to be made. These include (but are not limited to):

- the manner in which the deceased is buried;
- whether or not there is an inquest into the death; and
- whether or not organ transplants can take place.

Various laws provide for 'next of kin' and 'close relatives' to control such decisions, and the ability of lesbian and gay partners (and parties to other relationships of choice) to participate in making these types of decisions is often limited as they are not included in definitions of close relatives or next of kin.

If a person has left instructions regarding organ donation, the hospital to receive this donation must nevertheless contact and seek consent from the opposite sex partner or 'senior available next of kin' who has the right to veto the donation. Next of kin are blood relatives such as parents, children or siblings. Their wishes are upheld over those of long term same sex partners and those of the person who has died. A partner is most affected by any emotional consequences of the decision to donate and best able to protect the wishes of the person who had died.

If a deceased has left no will, decisions about funerals are made by the opposite sex partner of the deceased or the 'next of kin.' The law ignores the wishes of a same sex partner. In the most extreme cases this can lead to a situation where she or he is excluded from the funeral service altogether. Again a partner is the person most affected by the death and best able to ensure the funeral is in keeping with the wishes of the deceased.

Duties Act

Heterosexual couples are currently exempt from stamp duty on property when it is transferred in some circumstances.

For example, where a heterosexual de facto couple lives in a home which one of them bought before the relationship and they wish to transfer it into the name of both partners, they do not need to pay stamp duty if they have lived together for 2 years. However, same sex partners who have lived together for many years will have to pay duty on such transfers. This can amount to a tax on their homosexuality of many thousands of dollars.

Of course, many couples cannot afford to pay this extra tax. The result is that the property stays in the name of one partner leaving the other one vulnerable. S/he may continue to make financial contributions and to do work on their home but the title will remain solely that of the person who bought it initially. If the couple break up this makes it more difficult for him/her to get his/her share – a problem compounded by their exclusion from the assistance offered to others by the *De Facto Relationships Act*.

Another situation in which heterosexual de factos are able to transfer property without paying duty is when their relationship breaks down and they divide their property under the *De Facto Relationships Act* or make a separation agreement. This allows property that is in one name to be easily and cheaply transferred to the other (or to their children).

This exemption recognises the need to facilitate the process of disentangling finances in this situation and to minimise the negative financial impact of separation on members of the family. However, again the exemption is not available to lesbians and gay men who are in the same situation. The time of relationship breakdown is a time of stress which may be accompanied by conflict and acrimony. The financial impact of exclusion from the *De Facto Relationships Act*,

the need to use higher courts and the need to pay large amounts of stamp duty compound this stress and can lead to impoverishment of one or both members of the couple.

Compensation

The exclusion of same sex partners under accident compensation laws is complete, and may leave a surviving partner severely impoverished.

Accident compensation laws mean that the dependants of a person wrongfully killed (for example by negligence) have a cause of action against the person responsible for the death. This law applies to situations such as car accidents. Dependants are defined by various categories which include married and heterosexual de facto partners but exclude same sex partners. Even where it can be shown the same sex partner was completely financially dependent on deceased, s/he will not be compensated.

Until recently, this was also the case under workers' compensation legislation. The *Workers' Compensation (Dust Diseases and Other Matters) Act 1998* amended the relevant legislation to recognise same sex de facto partners. This creates significant anomalies, because the precise circumstances of a person's death will determine whether s/he falls under accident compensation legislation or workers' compensation legislation and, therefore whether his/her partner has access to compensation. This means that people in similar, but not identical circumstances, may have substantially different rights due to legal technicalities.

If someone dies as the result of a criminal act, victims' compensation laws provide for compensation to be available to 'close relatives' of the deceased. Since 1997 a same sex partner who has cohabited with the deceased is on the same footing as a heterosexual de facto partner in the definition of 'close relatives'.

As NSW already includes same sex couples in victims' compensation law and workers' compensation law, consistency in all areas of compensation law would be fairer and more logical.

Guardianship

People may lose the capacity to care and make decisions for themselves for a variety of reasons, such as an accident inducing a coma or dementia resulting from an illness or age. When this happens vital medical and personal decisions must be made by someone else, who may also need to take over the management of the incapacitated person's financial affairs.

Where a patient lacks the capacity to make their own decisions, doctors and other health professionals seek the consent of a relative or carer. This is usually done without a guardianship order. Under the *Guardianship Act* the consent of a (heterosexual) spouse must be sought unless a guardian has been appointed. This is in recognition that partners are usually in the best position to look after a person's best interests and to ensure that their wishes are taken into account. Additionally, it is likely that they will be involved any future care of the person which is needed (and indeed have often been caring for him/her already). This is true of a close partner whether s/he is of the same or opposite sex. However, the definition of spouse in the *Guardianship Act* excludes same sex partners.

Where there is no partner or carer, a range of other relatives and friends may give consent for medical treatment. Parents and other relatives are frequently favoured in the consent process over same sex partners. This can happen even if they do not have a close relationship and are unlikely to be familiar with the sick person's wishes. It may happen even if there has been no family contact for many years. The result is that gays and lesbians are excluded from getting information about sick loved ones and from participating in vital decisions concerning their health.

This is particularly problematic given that the underlying rationale is to protect the best interests of patients and ensure that their wishes are taken into account as much as possible. Lesbians and gay men may have no effective mechanism for the protection of their best interests and wishes when they are ill because the practical benefits of looking to the person closest to them are not recognised.

These problems become even more serious when there are conflicts between lesbian and gay partners and other relatives. Unfortunately it is the experience of health professionals that such conflicts occur frequently at the time of illness.

Employment and Industrial Rights

A related area in need of reform is the provision of employment benefits of partners and other work arrangements that recognise that workers belong to families.

Many employees receive benefits for their spouse or other family members as part of their employment package.

In many cases these 'benefits' merely recognise the impact that work can have on family life. For example, where an employee is required to relocate by his/her work or to travel a great deal other members of the immediate family may be able to accompany him/her. This provides some continuity in the relationship which would not otherwise be possible and prevents the employee from incurring extra costs. It also has benefits to the employer, who is able to achieve a degree of flexibility in his/her workforce which may not otherwise be possible. The categories of family members who are able to benefit vary but invariably include opposite sex partners and usually include children.

However, these benefits are not always available to lesbians and gay men and their families. This includes their partners and children of their partner. A lesbian (nonbiological) mother, for example, may not be able to take her child with her when travelling, even where she is the primary carer and the child is very young. This is in contrast to the usual recognition of such dependency.

This can lead to disruption of the family or the workplace if some employees are not able to travel or relocate as freely as they might otherwise.

The provision of family related leave (unpaid as well as paid) is a major area in which employers have recognised that employees work lives cannot always be divorced from their home lives.

The fact that employees may need to care for family members when they are ill has been recognised by Federal and state awards, which have been changed to allow them to take sick leave for this purpose. A 1995 decision of the NSW Industrial Relations Commission allowing employees to use sick leave to care for family members explicitly included same sex partners among the family members covered. However, where employment conditions are negotiated

outside the award system, employers may continue to discriminate by allowing heterosexuals but not gays and lesbians to have leave to care for sick partners.

A number of changes have occurred in leave relating to parenting in the last few years. Originally maternity leave was introduced in recognition that mothers often needed or wished to take time off from paid work after the birth of a child. More recently unpaid parenting leave has also become available to fathers who may stay at home with a baby in the 12 months after its birth. Currently biological and adoptive mothers and fathers may take a total of 12 months of unpaid leave between them and are able to return to their previous employment. However, the changes did not contemplate a situation where the other parent was not a biological parent and was also unable to adopt his/her child. When a lesbian woman has a child she is able to have 12 months unpaid leave. However, her partner is not entitled to any leave and the unpaid leave cannot be shared. The range of parenting options is thus decreased for lesbian couples. If the nonbiological parent takes time off work to care for the child, she is likely to lose her job – the very situation that the provision of parenting leave was designed to avoid.

In other cases, benefits take the form of discounts to family members or family health insurance and may be seen to form part of the employment package. In these cases gays and lesbians are not being paid the same as their heterosexual colleagues although they are doing the same work. This is in defiance of the proscription on discrimination in the *Anti-Discrimination Act* which is designed to prevent, among other things, different rates of pay on the basis of homosexuality.

It is worth noting that many employers and unions are ahead of legislative change and are implementing workplace agreements that provide equal benefits for same sex partners. However, changes to the Anti-Discrimination Act are necessary to ensure this process continues and that gay men and lesbians are not disadvantaged in their workplace in ways that undermine the Anti-Discrimination Act.

The Anti-Discrimination Act

The *Anti-Discrimination Act* was amended in 1982 to prohibit discrimination on the basis of homosexuality in response to a series of inquiries that established that such discrimination was a huge social problem.

The Act also prohibits discrimination on the basis of marital status which is broadly defined. This was in recognition that women, in particular, frequently suffered discrimination which while sexist was said to be more firmly based on the fact that they were married or not married.

When the Act was amended to include homosexuality it was thought that it would prevent all discrimination on that basis, including discrimination on the basis of being in a gay or lesbian relationship or discriminatory work conditions such as those described above (*see section "Employment/Industrial Rights"*).

However, employers continued to discriminate. For example, a gay couple who were both Qantas flight attendants applied to be put on the "married roster" together which would enable them to be rostered together and thus see more of each other. They were being rostered separately and spending much of their lives on opposite sides of the world. Despite the fact that the roster was open to heterosexual de factos and the measure was a cost-neutral one, Qantas refused. The employees made a complaint to the Equal Opportunity Tribunal, which held there was no discrimination. It held rather farcically that Qantas had not refused to roster them together on the basis of marital status (being married, single, de facto) but because they were not a married or de facto (as defined) couple both working for Qantas.

This has led to a great deal of legal criticism of the EOT decision as lacking logic. However, its effect continues to undermine the objects of the *Anti-Discrimination Act*.

Discrimination of this type is not limited to employment situations. For example, gays and lesbians are sometimes denied visiting rights or access to information when their partner is in hospital.

Until the *Anti-Discrimination Act* is amended, lesbians and gay men will continue to be vulnerable to discrimination on the basis that they are in a gay or lesbian relationship in a range of contexts.

Public Protection

The failure of the law to acknowledge that same sex relationships exist means gays and lesbians may be excluded from some obligations as well as rights.

A large number of statutes require that people on boards of statutory bodies and in other positions of authority disclose their own financial interests and those of their “spouses” (and sometimes other relatives). Examples are *Albury-Wodonga Development Act 1974*, *Co-operatives Act 1992*, *Financial Institutions Commission Act 1992*, *Friendly Societies (NSW) Act 1997*, *Growth Centres (Development Corporations) Act 1974*, *Local Government Act 1993* and the *Sydney Cricket and Sports Ground Act 1978*. However, spouse is defined in each of these acts so that same sex partners are excluded and their interests do not need to be disclosed.

Similarly, the *Legal Profession Act 1987* includes heterosexual partners in the definition of “associate” for some purposes, mainly dealing with failure to account, but same sex partners are excluded.

In the interests of public protection, these acts should be amended to ensure that all relevant information is disclosed. While same sex partners are not included, the aim of protecting the public by ensuring that interests are disclosed may not be fulfilled.

REAL EXAMPLES OF DISCRIMINATION

The following are actual cases which have been the result of court decisions or complaints to the Gay and Lesbian Rights Lobby. They are presented here because they are illustrative of the injustice that results from the inequality in the law. Inheritance and stamp duty are frequent causes of complaint. Although the GLRL has received many complaints, we have not sought to cover all of the areas in which couples experience discrimination but have left this for individuals and legal services to cover in their submissions.

Case Study 1: Inheritance

Jan had lived with her partner Diane for 16 years at the time of Diane's death. The women owned property and other items jointly, and had joint finances, but much of the property was in Diane's name. As there was no valid will and because Jan was excluded by automatic inheritance provisions, she was forced to spend over 2 years in the legal system arguing for a half share in the property under equity rules, and bringing a family provision claim. Her claim was contested by her deceased partner's parents (who also denied that the relationship existed.) Despite the length of the relationship and the couple's financial interdependence, Jan was granted only just over half of the estate in total.

Heterosexual de facto partners in similar circumstances automatically inherit the whole estate.

Case Study 2: Inheritance

Matthew was in a similar position when Maurice, his partner of 14 years, died in 1996. Maurice's brother automatically inherited the estate as 'next of kin' forcing Matthew to apply to the Supreme Court to make provision for him from the estate. At a time of loss, the case would have been extremely traumatic for Matthew, who still did not receive all that would have been automatically due to him had his partner been of the opposite sex.

Matthew is now facing an appeal against the amount given to him by the Supreme Court. He feels that the ongoing legal disputes have denied him the chance to grieve for his partner's loss.

These cases illustrate the procedural and financial burden placed on lesbian and gay partners by succession laws, and the inequality resulting when inheritance law is considered as a whole.

Case Study 3: Stamp duty

Susan and Liz* have been in a relationship and living together for 15 years. Prior to their relationship, Susan brought a rural property not far from Sydney in her name. At the time of purchase the property did not have a residential dwelling on it.

A few years ago, they built a home together on the property. They both contributed to building the house and to maintenance of the property. They would like to put it into both names to ensure that Liz's interest's are protected in the event of relationship breakdown or Susan's death and that the contribution that both have made is recognised. At the time that the couple contacted GLRL Susan did not have a will. Susan's adult children would have automatically inherited in the event of her death without a will. Susan now intends to make a will but her children would still be eligible to make a family provisions claim and do not accept the relationship. Because of this Susan became concerned about Liz's future should something happen to her.

Although the couple have been together for 15 years and built their home together, they are not entitled to an exemption from stamp duty.

Susan and Liz visited a local lawyer who advised that the cost of putting the title of their home into both names would be about \$20,000 for stamp duty and legal expenses. They were not able to afford to change the title.

A heterosexual de facto in the same situation would be able to transfer the property simply and cheaply. They would not pay stamp duty.

Case Study 4: Hospital Visiting Rights

Pam** is a young woman who was admitted to hospital in a city in NSW. The hospital in which she was staying had short visiting hours during which her female partner could visit her. During

* Not her real name.

her visits and at other times, the nurses made it clear that they did not approve of her or her partner.

Pam shared a room with heterosexual patients. Their partners were always made to feel welcome and were given information and involved in decisions. And they were allowed to visit at any time during the day. Pam's partner was confined to the one or two hours when friends could visit.

This was due to a policy which allowed (heterosexual) spouses different visiting rights to others. The policy was prominently displayed.

A doctor from the area advises that the area health service has policies relating to discrimination. These are based on *Anti-Discrimination Act* and prohibit discrimination on each of the grounds covered in the Act. There is one exception – discrimination on the basis of homosexuality has been removed in each case.

Pam discharged herself before the time recommended by her doctor.

OTHER ADVANTAGES OF THE PROPOSED BILL

Furthering the Objects of Anti-Discrimination Law

While discrimination on the basis of homosexuality is unlawful in NSW and most other states of Australia, the objects of the *Anti-Discrimination Act* are being undermined by discriminatory laws in the area of relationships. Gays and lesbians are protected from discrimination in many areas but not from discrimination in legislation. Nor are they protected from discrimination if it is on the basis of being in a gay or lesbian relationship. The passage of the *De Facto Relationships Amendment Bill* will be a huge step forward in ending discrimination in NSW.

Consistency

The proposed change would ensure consistency between and across NSW laws and enable those laws to achieve their legislative purpose.

Currently same sex relationships are explicitly included in some laws and regulations, such as the *Protection of the Environment Administration (Disclosure by Board Members) Regulations 1992* (NSW), *Criminal Procedure Act 1986* (NSW) and *Victims Compensation Act 1996* (NSW), as well as in awards such as the *Family Leave Test Case* (1994). Same sex couples are also covered in some situations by laws which use non-exclusive categories (eg “dependent”), such as the *Family Provision Act 1982* (NSW). Same sex couples are also able to use the equitable procedures of the Supreme Court in property and child support disputes.

Same sex couples are therefore legally recognised for some limited purposes in NSW but not for others. This causes considerable confusion. It also means that couples are often unsure of their legal rights and obligations. The Bill provides a measure of clarity and consistency by extending the same criteria of recognition across most NSW law.

Recognising partners of the opposite but not the same sex also leads to inconsistency and confusion. The basis of the rule of law and our legal system is that like cases be treated alike. Under the current system, heterosexual and homosexual couples in similar circumstances are governed by completely different law. In other words, like cases are treated differently. This would be rectified by the *De Facto Relationships Amendment Bill*.

Perhaps most importantly, the failure to recognise same sex relationships creates an inconsistency between the way in which laws operate and their purpose. The purpose of many NSW laws is being thwarted by restrictive terminology or judicial interpretation. The consistent application of these pieces of legislation is undermined by the exclusion of gays and lesbians who would otherwise be eligible and whose inclusion would fit the purpose of each Act. Several examples have been given above where the purpose of legislation is undermined by the lack of recognition of gays and lesbians: intestacy law does not distribute our estates as we would wish; family provisions law does not ensure provision is made for those who need it; couples are unable to transfer title to property easily; dependants are not compensated upon death...the list goes on. This is true in every area of law which would be reformed by the *De Facto Relationships Amendment Bill*.

Equality

Equality before the law is fundamental to our legal system and is a basic Australian value.

Australia is a signatory to many international conventions which are aimed at enhancing equality and prohibiting discrimination. These include: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Labour Organisation Discrimination (Employment and Occupation) Convention (ILO). These commitments to equality include a commitment to equality for lesbians and gay men. Australia has declared sexual orientation as a ground of discrimination under the ILO, and on that basis since 1989 has provided legal redress for sexuality discrimination in employment under the *Human Rights and Equal Opportunity Act 1984* (Cth). In the 1994 decision of the United Nations Human Rights Committee in *Toonan*, the ICCPR prohibition on sex discrimination was explicitly held to include discrimination based on the sex of one's partner; that is, sexuality discrimination.

These conventions display Australia's commitment as a nation to the principles and practice of equality. As the Human Rights and Equal Opportunity Commission has said:

Liberty and equality are the bases of human rights. The concept of equality contained in the ICCPR includes not only equality before the law but equal protection of the law and equal and effective protection against discrimination.

(HREOC, *Human Rights for Australia's Gays and Lesbians*, 1997, at 3)

These obligations have already been incorporated into some areas of domestic law. Providing equal access to the law for same sex couples is another way of fulfilling these commitments.

The bill does not propose any special rights for lesbians and gay men but simply includes same sex couples in existing legislation on the same basis as heterosexual de factos. It is a measure which promotes equality and access to justice for all NSW citizens on an equal footing.

Positive Impact on Families

There are a number of areas that have been noted above where discriminatory laws result in the impoverishment of lesbian and gay families, especially children. Discrimination in employment can mean less family income and lack of parenting leave may result in a parent on whom there is financial dependence losing his/her job. If same sex parents separate, lack of access to the *De Facto Relationships Act* for assistance with property division could leave the child worse off and maintenance for his or her care may not be available. If the primary earner dies, a partner or children may not inherit and will not be eligible for compensation. The children of lesbians and gay men are losing out financially at every turn under the current discriminatory system. The result can be poverty.

Flexibility

The proposed change to the *De Facto Relationships Act* and other acts allows couples who wish to opt out of key areas of the law to do so. In particular, some couples prefer to reach agreement on the division of property rather than go to court. This can be done at present by reaching an agreement during the relationship (a co-habitation agreement) or after separation (separation agreement). This will not be changed by the *De Facto Relationships Amendment Bill* and heterosexual and same sex couples who wish to opt out of the system in this way will be able to do so. Similarly, those who do not wish their partner to inherit may make a will benefiting

someone else. Other areas where a choice can be made include guardianship and some employment benefits.

Certainty

The current system of using complex legal procedures in order to access rights can lead to uncertainty as well as increased cost. This is the case, for example, where one has to use the dependency provisions of the *Family Provisions Act*. It is easier to ascertain if one is in a de facto relationship than to predict how the court will apply the notion of dependency in an individual case. Equitable arguments in the Supreme Court are even more unpredictable. Similarly, health professionals currently face difficulties in identifying the “person responsible” when the patient is in a same sex relationship. This will be addressed by the proposed changes to the *Guardianship Act*.

The proposed amendment does not change de facto relationships law or the *Anti-Discrimination Act* other than to change the definition of a de facto relationships so as to include same sex relationships. Most of the existing de facto provisions have been in operation for more than 10 years and resemble legislation in other states. The change is finite and predictable.

The recognition of domestic relationships only changes a limited number of acts. A tight definition of these relationships has been adopted so as to avoid an unpredictable range of claimants in given circumstances. In particular the need to demonstrate both financial and emotional interdependence ensures that a broad category of friends and relatives cannot make claims on property where finances are separate and neither would have contemplated this result. Similar legislation has been operating in the ACT for some years to good effect.

Access to Justice for Disadvantaged

The 1994 federal action plan for access to justice established that access to justice in Australia requires that:

All Australians, regardless of means, should have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests.

All Australian, regardless of their place of residence should enjoy, as nearly as possible, equal access to legal services.

All Australians should be entitled to equality before the law.

(Access to Justice Advisory Committee, *Access to Justice – an Action Plan*, Cth of Australia, 1994 at xxx)

As this submission has made clear, lesbians and gay men in NSW do not have access to effective or accessible dispute resolution mechanisms, nor do they have access to many statutory regimes which are necessary to protect their rights and interests. Lesbians and gay men are not equally able to access legal services, because the expense of those services is far in excess of the cost to heterosexuals. As a result, a sizeable proportion of NSW citizens are routinely denied equality before the law.

In all the areas in which the current laws discriminate, those who are most affected are the most vulnerable. This includes those with less power in relationships, those without access to legal advice and the financially disadvantaged. Those who already experience disadvantage or lesser access to justice are the most likely to be left with nothing at the end of a relationship or on the death of their partner. They will be least able to access the difficult, costly and limited processes currently available to gays and lesbians in some areas. These processes are restricted to those who have the knowledge, time and money to use the Supreme Court.

This Bill will increase access to justice and reduce the costs of justice by making appropriate dispute resolution mechanisms more widely available.

Addressing HIV/AIDS

HIV/AIDS adds an even greater note of urgency to the need for reform. People with HIV/AIDS and other people with disabilities are the most immediately affected by exclusion from our legal system. While discrimination on the basis of having HIV or AIDS is unlawful under both state and Federal legislation, this has not addressed many types of discrimination experienced by people with HIV/AIDS. People continue to get sick and die without any assurance that their partner will be able to visit them in hospital, make decisions on their behalf if necessary, continue to live in their home if they die or even attend their funeral.

In addition, a number of inquiries into HIV/AIDS have recognised that effective prevention depends on a supportive legal environment. The Final Report of the Intergovernmental Committee on AIDS Legal Working Party recommended the recognition of same sex relationships as necessary to the prevention effort and ending the HIV epidemic.

OTHER AUSTRALIAN JURISDICTIONS

In many parts of the world the practical injustices and costs that flow from failure to give legal protections and obligations to same sex couples have been recognised. Moves to recognise same sex relationships have been made in Denmark, Norway, Sweden, Iceland, the Netherlands, many US cities and parts of Canada, for example. These are more fully outlined in Attachment 4.

Reforms are also underway in Australia.

Australian Capital Territory

The most comprehensive reforms have been made in the ACT and resulted from a 1993 Attorney-General's Department discussion paper which looked at property division and inheritance. It recommended that same sex relationships and other non-marital relationships be included in these areas. In 1994, the *Domestic Relationships Act* was passed under the Labor government. It defined "domestic relationship" as a personal relationship between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other and allowed for court assistance in property division.

The *Administration and Probate Act 1929* (ACT) and *Family Provision Act 1969* (ACT) were amended in 1996 by the Liberal government to provide access to inheritance for de facto partners. These amendments put same sex and heterosexual de factos on the same footing by defining a spouse as a partner, whether or not of the same gender, "who had lived with the deceased as a member of a couple on a genuine domestic basis". To be eligible, de factos would have to have lived with the person who has died for 2 years or have had a child with him/her. This is the same approach as that proposed in NSW under the *De Facto Relationships Amendment Bill* with the inclusion of same sex partners in the definition of de facto couple and the use of an almost identical definition.

The changes to the *Family Provisions Act* also included domestic partners. Domestic Relationship was defined in the same way as in the *Domestic Relationships Act* as a personal relationship in which one person provides personal or financial commitment and support of a domestic nature for

the material benefit of the other. A person would have to have lived with the deceased for 2 years in order to make a claim.

The whole approach to inheritance is very similar to that proposed in NSW. The rights of married couples are unchanged; de facto couples (heterosexual and same sex) are included and the need to provide for other close relationships in some circumstances is recognised. As noted above, the definition of domestic relationship is slightly different, as a more expansive approach is taken in the ACT.

All of these measures were introduced with bipartisan support.

Victoria

Inheritance has also been the subject of changes in Victoria with the passage of the *Wills Act 1997* under the Kennett government. This allowed family provision orders to be made for the proper maintenance and support of any person for whom the deceased had responsibility to make provision. Eligibility is defined, therefore, purely by reference to the underlying rationale of family provision legislation. This is to provide for those for whom the deceased had a responsibility and who might otherwise be left without means of support. In a pragmatic sense this is also to ensure that individuals who should have been provided for do not instead become dependant on the state. The court looks at such factors as nature and length of the relationship and any contributions made by the applicant. The focus of this change is to ensure that the legislation operates in a way which is tied to its purpose and leaves out irrelevant factors such as the sex and marital status of the applicant.

This is also the underlying rationale for the changes that the *De Facto Relationships Amendment Bill* would make to family provision legislation in NSW. It is a more limited change, however, which focuses on same sex couples and close relationships in which there is financial interdependence. The operation of the system proposed in the *De Facto Relationships Amendment Bill* would be similar to the Victorian system, but it would generally not cover relationships in which there would not be expected to be an element of financial support or an obligation to provide for the other person.

The Victorian Equal Opportunity Commission has also looked at other areas of law which impact on couples. Its report, released this year, recommended comprehensive law reform to ensure that those in same sex relationships received the same protection as heterosexuals.

Queensland

In Queensland during the 1998 State election, the ALP announced its intention to legislate for the recognition of gay and lesbian relationships in the areas of property rights and domestic violence orders. The Attorney General has since indicated that the extension of property rights to lesbians and gay men will be included in the government's De Facto Legislation, which will be the core legislation governing non-marital spousal rights.

Tasmania

At the time of writing, the GLRL received notice that legislation had been introduced into the Tasmanian Parliament which recognises same sex couples and other close relationships in a range of areas.

The Commonwealth

There are a small but important number of areas of Commonwealth law where same sex relationships are recognised. For example, same sex partners are recognised as interdependent relationships for the purposes of immigration, enabling same sex partners of Australian permanent residents to gain permanent residency. They must show they have a mutual commitment to a shared life and that the relationship between them is genuine and continuing. Couples in interdependent relationships must live together (or not live apart permanently) and the relationship must be to the exclusion of other similar relationships. This is extremely similar to the provisions proposed in NSW and has been being used by lesbians and gay men since its introduction. The key provisions are for an exclusive committed relationship in which the partners live together - essentially de facto couples. In deciding whether such a relationship exists, the Minister must have regard to the same factors as those included in the *De Facto Relationships Amendment Bill*.

The fact that so many jurisdictions both here and overseas are proceeding with law reform reflects the level of need for practical change in this area. This is also supported by the fact that every relevant Law Reform Commission or similar report has recommended recognition of same sex relationships (*see attachment 5*). It has been driven by this need rather than ideologically as evidenced by the support of a range of parties and individuals.

ADDRESSING THE ARGUMENTS AGAINST REFORM

It is anticipated that a number of misleading arguments will be made against the recognition of same sex relationships as proposed by the *De Facto Relationships Amendment Bill*. Some who oppose reform wish to deny gays and lesbians all human rights. Their continued opposition merely underlines the fact that prejudice is alive and well and needs to be addressed. The NSW Parliament has already enshrined its opposition to discrimination on the basis of homosexuality in legislation.

Other concerns are the result of misunderstanding the effect of the bill and its limited impact. These are addressed below.

Cost

Most of the proposed changes are cost-neutral or cost-saving. There are two areas, however, where there may be some increased costs.

The first is the limited exemptions from duty which will lose the government some revenue. The current duty paid by lesbian and gay couples is inequitable, being a higher tax burden on the basis of sexual orientation. Many nondiscriminatory means of raising revenue are available to the government.

Replacing this revenue will not be necessary, however, as only a small amount of revenue is likely to be lost in this way. It will be more than offset by the streamlined procedures for dealing with property disputes without the need for very expensive Supreme Court lawsuits. The provision of exemptions from stamp duty is a pragmatic decision on the part of the government which recognises the need for easy transfer of some property, particularly homes, between members of couples. The failure to facilitate these transfers results in many cases in property being left in one name, necessitating litigation at a later stage. Easier property transfers will do away with the need for using taxpayer funded courts altogether in many cases.

The second potential cost is in the area of employment benefits. Although some like rostering arrangements or unpaid leave are cost-neutral, others may not be. As noted these changes are

going ahead already in many workplaces without disruption to profits or efficiency. In many cases, employers have chosen to provide these benefits as a cost effective way of attracting employees or in lieu of more expensive benefits.

Nondiscriminatory policies in employment are good for the economy (especially as it becomes more sophisticated) as they increase the flexibility of the workforce by removing artificial restrictions and ensure an approach which rewards merit. The adoption of nondiscriminatory practices benefits individual employers as well as the state's economy. Where employers choose to provide these benefits they should be required to do so on a nondiscriminatory basis.

Effect on Marriage

The *De Facto Relationships Amendment Bill* 1998 does not have any effect on marriage.

Marriage is regulated by Federal law and will be untouched in every respect by the proposed amendment. This includes the requirements to start and end a marriage. Same sex couples will not be able to get married after the changes.

The recognition of married couples under State laws will also be unaffected. For example, if a man dies suddenly without a will his wife will still inherit his property as she does at present.
