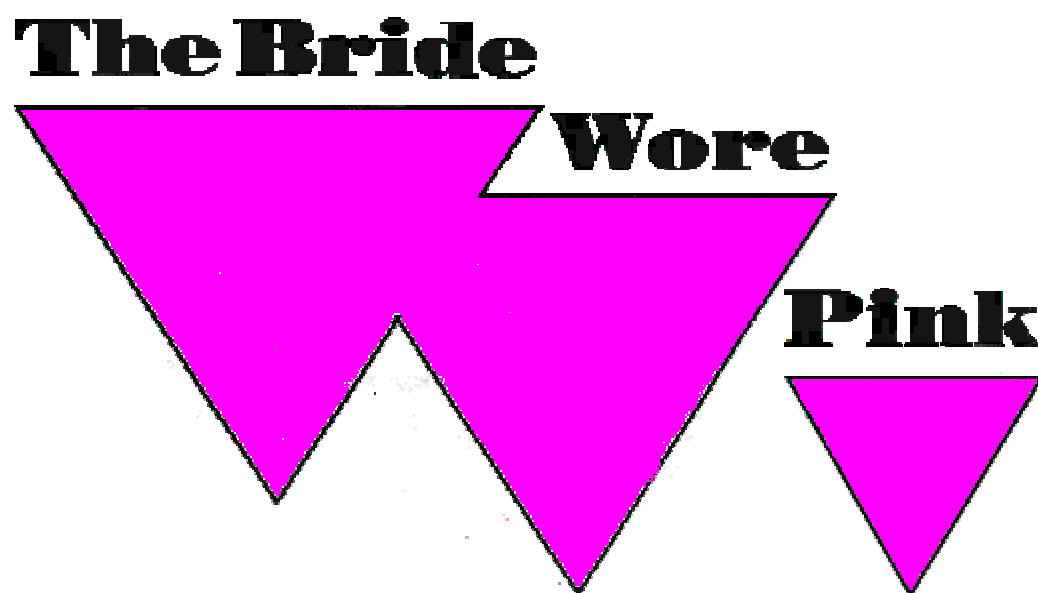


The Bride Wore Pink



**Legal Recognition of Our Relationships
A Discussion Paper**

**February 1994
Second Edition**

**Lesbian and Gay Legal Rights Service
A project of the Gay and Lesbian Rights
Lobby**

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1. Introduction

The issue of the recognition of lesbian and gay relationships was first raised by the Lesbian and Gay Legal Rights Service, a project of the Gay and Lesbian Rights Lobby, in February 1992. In February 1993, the Legal Rights Service Produced the first version of the *Bride wore pink, Legal Recognition of our Relationships, A Discussion Paper*. Our aim was to explain the various options open to the lesbian and gay communities and to stimulate an informed debate.

Almost one year later, we have revised the discussion paper and altered our recommendations. This revision is a result of consideration of some written submissions, opinions expressed by members of the communities at forums organised by the Legal Rights Service and the Lobby and further thought about the political feasibility of the opinions we initially recommended. Our aim has been to achieve effective law reform which will have practical consequences for lesbians and gay men in NSW.

The discussion paper does not claim to reflect any real community consensus on the issue. We have been hampered by lack of funds and time. Debate has been largely been concentrated in inner-city Sydney. Debate has been undertaken under the umbrella of coalition organisations. Many women and many men choose not to involve themselves in such debate.

We have decided to revise our recommendations based on what we perceive to be a general trend within the communities with which we have consulted.

In 1994, the Gay and Lesbian Rights Lobby will ask the Attorney General to extend the De Facto Relationships Act (1984) to include lesbian and gay relationships, and to amend specific legislation to include relationships with a 'significant person'. The specific recommendations we will make appear further in this document.

The Legal Rights Service has chosen a combination of the 'significant person' and de facto relationships approaches because ...

Significant Persons

Many lesbians and gay men do not live in de facto relationships. Many lesbians and gay men do not perceive themselves to be a member of a couple. They have friends, lovers and relatives with whom they have relationships. They want these people to have the benefits under which the law automatically go to a spouse or family members. This is a problem faced by lesbians and gays and by heterosexuals. 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 to benefit whom they choose. Also people who are in de facto relationships but would choose to benefit a person other than their de facto spouse are unable to do so. The aim of amending specific legislation to include recognition of a significant person is to enable these people to benefit whom they choose.

De Facto Relationships

In NSW, the law that deals with people who live together in sexual relationships who are not married is the De Facto Relationships ACT (1984). The major indications of these relationships are living together for two years or more, financial inter-dependence, joint care of children and sex. The De Facto Relationships Act (1984) creates the legal concept of a de facto spouse. That definition features in numerous other pieces of Federal and State legislation creating rights and obligations. If the law defines a person a de facto spouse, that person has rights in relation to health, housing, property ownership, income, children, sex, employment, crime and violence. Lesbians and gay men in de facto relationships do not have these rights and obligations.

The Lesbian and Gay Legal Rights Service is approached on a weekly basis by lesbians and gay men in relationships who have a problem in relation to housing, health, property ownership, income, children, sex, employment, crime and violence. If these lesbian and gay relationships were recognised as de facto relationships, these people could utilise the law, to the extent that it can do anything, to resolve their problems.

At present the de facto relationship law is only based on heterosexual experience. Lesbians and gay men in relationships can utilise inclusion in that law to their benefit. We anticipate that, once amended to include lesbian and gay relationships, the de facto relationships law will be responsive to at least some of the needs and experiences of lesbians and gay men in relationships.

In the February 1993 edition of the *Bride Wore Pink* we recommended against inclusion in the De Facto Relationships Act (1984) because we were concerned that people would be deemed to be in a de facto relationship, with all its rights and obligations, without intending this consequence. In this edition, we have altered our recommendation as we realised that if people are living in these kinds of relationships then they are entitled to the protection given to heterosexual de facto couples. Only very specific kinds of relationships will fall within a definition of a "de facto relationship". House mates are unlikely to qualify.

2. 1994 RECOMMENDATIONS

Recently, the Legal Rights Service drafted a new set of recommendations. These have been adopted by the Gay and Lesbian Rights Lobby as the basis for the Lobby's law reform activities in this area.

While noting that:

- There is a disagreement within the Gay and Lesbian communities as to the value and appropriate form of legally recognising lesbian and gay relationships, and
- The established system of relationships recognition has developed out of, and in response to, the inequality of partners within heterosexual relationships and is subsequently flawed,
- The failure to legally recognise our relationships amounts to discrimination against gay and lesbians and results in gays and lesbians being severely disadvantaged under the current legal system.
- Consequently, we propose that the NSW state government be called upon to do the following:
 1. immediately amend the De Facto Relationships Act (1984) to extend its definition of 'de facto relationships' to include lesbian and gay relationships, thereby extending all provisions of the Act to de facto partners in lesbian and gay relationships;
 2. amend all Acts (see below) conferring rights or benefits on persons on the basis of their relationship with someone else so as to
 - i. extend the definition of 'de facto relationships', where this expression is used, to include lesbian and gay relationships, and
 - ii. confer these same rights or benefits upon those who can legitimately claim to have been involved with a person in a 'significant personal relationship'.
 3. allocate money and resources to the training of the judiciary and other decision-makers who will be responsible for making determinations based on these amendments, to address ignorance of, or prejudice against, gays, lesbians and our relationships.

4. Amend the Anti-Discrimination Act 1977 to include lesbian and gay relationships under the definition of marital status
5. allocate funds to an appropriate agency (such as the Law Reform Commission) to consider the question of relationships generally, including:
 - i. The appropriateness or otherwise of bestowing entitlements on the basis of relationships,
 - ii. the focussing on monogamy, exclusivity and blood relations,
 - iii. the need to replace the De Facto Relationships Act (1984) with an Act which bestows rights and entitlements on a broader concept of 'relationships', and
 - iv. The need to ensure that all people with disputes which are based on rights and obligations arising from relationships have access to an inexpensive and accessible forum for the resolution of these disputes, and to that extent, extending cross-vesting arrangements to enable same-sex partners to access the Family Court in all circumstances.

Included in the list of NSW Acts requiring amendment are the following:

- Human Tissue Act 1983
- Coroners Act 1980
- Wills Probate and Administration Act 1988
- Family Provisions Act 1982
- Victims Compensation Act 1987
- Safety Rehabilitation and Compensation Act 1988
- Worker Compensation Act 1916
- Guardianship Act 1987
- Stamp Duties Act 1920
- Bail Act 1978
- Evidence Act 1898
- Crimes Act 1900
- Adoption of Children Act 1965
- Artificial Conception Act 1984
- Motor Accidents Act 1988
- Compensation to Relatives Act 1897

3. 1993 RECOMMENDATIONS

We have included these recommendations as a record of our previous position. We acknowledge that many lesbians and gay men prefer these recommendations to our 1994 recommendations.

The Lesbian and Gay Legal Rights, a project of the Gay and Lesbian Rights Lobby recommends that:

The NSW Government introduce registered partnership legislation for lesbians and gays;

The NSW Government and the Federal Government change particular legislation to include our significant personal relationships;

The NSW government and the Federal Government change the Anti-Discrimination Act (1977) to include lesbian and gay relationships under the definition of "marital status";

The Federal Government change existing anti-discrimination legislation to extend protection to lesbians and gays in all areas on the grounds of sexual orientation and marital status;

The NSW State Government and Federal Government provide adequate services to facilitate the implementation of effective reform which responds to the needs of different groups within our community.

4. WHY LEGAL RECOGNITION?

Federal and state laws must recognise lesbians and gays and our relationships. Legal rights are human rights. The fact that our relationships are not recognised is a serious and damaging, but temporary situation.

All lesbians and gays will not be united on the best options for reform. Marriage to some is the ultimate recognition. To others, it is meaningless. For some, registered partnerships hold promise for a legal recognition which we define. To others a registered partnership is a second rate marriage.

We have chosen recognition under the de facto scheme as a practical approach to obtaining some recognition of our relationships. This together with the specific amendments to various state and federal laws giving benefits, by nomination, to whom we choose will provide recognition for a range of different relationships.

Beyond these we agree to differ

The following principles inform the Lesbian and Gay Legal Rights Service recommendations:

1. Recognition

We cannot resolve the present discrimination without some recognition of our relationships. Currently the law denies us benefits. If the recommendations were introduced we would have most of the benefits and obligations presently granted only to heterosexual de facto spouses.

2. Political Will

We reject options which have little or no political feasibility. Marriage and a Significant Personal Relationship Act fall into this category as does Registered Partnerships. We believe that it is feasible for the NSW State Government to extend the existing de facto legislation to cover lesbian and gay couples.

3. Give and Take

With benefits come obligations. The sad but realistic truth is that if we want recognition, we will have to forgo some benefits.

4. Other Battles

Although we have been wary of the impact of de facto law on our social security entitlements, we believe that this cannot remain the only reason for rejecting this option. We should challenge the social security system and its assumptions about economic dependency.

5. Action

We cannot remedy our legal system from the outside. Initial reform may not get us to where we want to be. It will get us in.

6. Relationship Rights are Individual Rights

Some legal rights have nothing to do with relationships. The right to employment regardless of sexuality, is an individual right. We have chosen to focus our law reform direction on relationships rights. The law around relationships is the linchpin of prejudice. The right to choose with whom you relate is a fundamental individual right.

5. OUR AGENDA

Relationships what do we have and want?

Look around. Sex, Friendship, Loss, Fun, Violence, Love, Boredom, Breakfasts, passion, need and ecstasy. These are our relationships.

Relationship laws will not take away the negative, nor necessarily uphold the positives.

The history of relationship laws has created a model that is good for some and a source of repression and control to others. For women, particularly, the model of relationships upheld by our laws has caused more damage than good. It has tied women to men by denying voting, employment, financial and parenting rights. It has been the source and validation of extreme violence.

Not all of us relate to this history. Some of us do. Resistance to the model of relationships upheld by our laws is legitimate. Throughout this paper we attempt to find options which together, achieve legal recognition of our relationships and also support the freedom to choose how to live them.

Recognition: What do we want?

We want laws which affirm rather than doubt our relationships. The situation at the moment is that lesbians and gay men must argue their relationships into the law. This is costly and invasive, particularly in times of crisis.

Recognition: When do we want it?

Soon. We are keen to have law reform. But only after consultation with lesbian and gay groups by the Federal and State Governments.

6. THE AUSTRALIAN LEGAL SYSTEM

Australia has three levels of government - federal, state and local. Local governments in Australia have no legislative capacity in respect of relationships.

The federal government's power to make laws is defined by the Constitution. Federal matters include marriage and divorce, social security, immigration and taxation.

The states can make a law about anything as long as it does not conflict with a federal law. Some areas where the state has legislated include most criminal law, education, health and property.

The states and federal government have agreed that in certain areas of law a federal court can hear a matter that falls under state legislation, and a state court can hear a matter that falls under commonwealth legislation. This is called cross-vesting legislation.

Making law ...

There are three ways of making law in our legal system.

Legislation

When governments make laws these are called Acts of Parliament or Statutes - for example, the Family Law Act (1975-Commonwealth). Acts and the Regulations and Rules attached to them, are called legislation. Only the Parliament, and not the courts, can amend an Act.

Case law

Cases tell us how the courts interpret legislation and other legal principles. The application of legislation to a particular set of facts depends on how the courts interpret the wording of legislation.

Equity

Equity is judge-made law. Where legislation and case law fail to redress a particular injustice, equitable remedies may be available.

We favour legislative reform

Equity and case law are costly and unpredictable options. The process can be invasive and humiliating. A homophobic system quickly quells a fabulous legal argument. Whilst a good win is worthwhile, the decision will not necessarily create a precedent for other similar cases.

If we are to achieve legal recognition of our relationships, we will need to rely on federal and state Parliaments to amend or introduce legislation.

7. EFFECTIVE LAW REFORM

Consultation ...

Law Reform Commissions

Recognition of our relationships is a major law reform issue. In areas of major law reform the consultative body is usually the relevant Law Reform Commission.

Law Reform Commission Inquiries usually take years and sometimes the recommendations are never acted upon. Some of our issues are urgent because of HIV/AIDS which affects all the groups in our community. We cannot wait.

Legal rights service consultation

During 1992, the Legal Rights Service held a series of public forums about legal recognition issues and participated in lesbian, gay and straight media coverage of the issues. In February 1993, we produced the first edition of *The Bride Wore Pink*, A Discussion Paper on the Legal Recognition of our relationships. We received 10 written responses to the paper and have accepted several invitations to discuss the issues with community groups.

As a voluntary organisation we are limited as to the extent of further consultation. This is particularly so in respect of people living in outer Sydney and country areas.

Consultation and implementation of law reform are the responsibilities of the federal and state government.

Coalition Politics

It is inevitable that any law reform we achieve will apply to both lesbians and gays. We acknowledge that many lesbians and gays do not identify with each other's politics.

Consultation about law reform and implementation must involve groups which are specifically lesbian, gay, or transgender as well as coalition groups.

HIV / AIDS ...

HIV / AIDS adds a degree of urgency to the whole question of the legal recognition of lesbian and gay relationships. The NSW Anti-Discrimination Board in its report *Discrimination - The Other Epidemic*, April 1992, made a number of recommendations in relation to the problem of discrimination. The Lesbian and Gay Legal Rights Service endorses the recommendations.

Lovers and others denied many basic rights in the care and death of the person as well as the benefits which arise from the relationship. Crucial decisions in relation to medical treatment may inappropriately be left to family members rather than the relevant partner or friend. Disputes, particularly when there is not a will, often arise and are a direct consequence of the lack of legal recognition of gay, lesbian and transgender relationships.

Legal recognition of lesbian, gay and transgender relationships would greatly assist the process of ending HIV and AIDS related discrimination and the distress which is associated with the virus, not only for those who are HIV antibody positive but for their partners as well.

Transgender Issues ...

The Lesbian and Gay Legal Rights Service does not hold itself out as a representative of people who identify themselves as people with transgender issues. We acknowledge the importance and relevance of such issues. We consider that the law reform options we recommend will create legal rights for people with transgender issues in relationships. We choose not to use the term same sex relationships as that would exclude people with transgender issues for the purpose of law reform.

Cultural diversity ...

The NSW lesbian and gay community is culturally diverse. It includes Kooris and people from many other cultural and language backgrounds.

In respect of law reform of relationships law in the past, specifically in relation to family law and de facto relationships, federal and state governments consulted with a diverse range of people. This should be no less so in relation to lesbian and gay relationship recognition.

Information in relation to proposed reforms and implementation of them should be available in various languages. Lesbians and gay men should be provided with services which reflect and affirm cultural diversity.

Access to justice ...

As far as possible the recommendations proposed by the Legal Rights Service are aimed at involving minimal legal costs. It is inevitable, however, that utilising the legal system involves costs.

There is a move towards avoiding the court system to resolve disputes. Alternative methods of resolving disputes include mediation, arbitration and other forms of negotiation.

Our relationship disputes may be best resolved in a lesbian and gay court-like forum or mediation centre.

It is a government responsibility to include consideration of lesbian, gay and transgender issues in determining legal aid funding, the establishment of community legal centres, and the availability of alternative dispute resolution centres.

8. CURRENT LAW

Here are some examples of how the law treats lesbian and gay couples differently from heterosexual couples.

No legal status ...

Heterosexual relationships have legal status if the couple marry (Marriage Act 1961 (Commonwealth)) or live together in a de facto relationship (De Facto Relationships Act 1984 (NSW)). De Facto couples have virtually the same legal rights as married couples. Various entitlements and obligations flow from this legal status.

Neither marriage nor de facto recognition are available to lesbian and gay relationships. Lesbian and gay relationships do not have any legal status.

The Sex Discrimination Act 1984 (Commonwealth) and the Anti-Discrimination Act 1977 (NSW) protect heterosexual and heterosexual couples from discrimination based on marital status. This legislation has not been interpreted to make discrimination against lesbian and gay couples unlawful. It does make some discrimination against individuals unlawful.

The death of a partner ...

When a heterosexual person in a relationship dies, their partner has certain rights. Lesbians and gay men involved in relationships do not have the same rights.

Disposal of the body ...

An executor appointed in a will has the discretion to control funeral arrangements and the disposal of the body. However, the executor's discretion is limited by the Human Tissue Act (NSW) (Part 5) which gives the "senior next of kin" excludes lesbian and gay partners.

Inquests ...

Relatives have the right to request that an inquest be held with a jury. A "relative" as defined by s4 of the Coroners' Act 1980 (NSW) does not include a lesbian or gay partner.

The estate ...

If a lesbian or gay man dies without a valid will, the property in their estate will be distributed under the laws of intestacy (s61B of the Wills Probate and Administration Act 1898 (NSW)). Family members (i.e. traditional patriarchal definitions of the family) receive shares of the estate and a surviving heterosexual spouse is entitled to a significant proportion of the estate of a deceased spouse or to the matrimonial home (s61D). These provisions do not apply to surviving lesbian or gay partners.

The Family Provision Act 1982 (NSW) allows lesbians and gay men to challenge the distribution but only if they can satisfy dependency and cohabitation tests. These requirements are not imposed on heterosexual couples.

If a heterosexual dies without a valid will, but the surviving partner considers the inheritance unfair, they are automatically entitled to apply for a larger share of the estate under the Family Provisions Act 1982 (NSW). Surviving lesbian and gay partners are not automatically entitled to challenge the will - they need to establish that at some time they were wholly or partly were dependent on the deceased and were at some time a member of the deceased's household.

Victims Compensation ...

When a person dies as a result of an act of violence, compensation of up to \$50,000 may be paid to "close relatives" (Victims' Compensation Act 1987 (NSW)). This definition does not include lesbian or gay partners so no compensation would be payable. The Act is currently being reviewed.

Incapacity of a partner ...

When a heterosexual spouse becomes unable to handle their own affairs, and they do not have a legal guardian, their partner automatically becomes the "person responsible" (Disability Services and Guardianship Act 1987 (NSW)) and they are able to give medical consent. A lesbian or gay partner cannot be appointed automatically. An application can be made to the Guardianship Board for appointment as guardian. This decision is at the Board's discretion and usually based on who is providing the person with daily care. Evidence such as an enduring Power of Attorney made by the incapacitated person would probably be regarded as persuasive evidence.

Ending of relationships ...

When a heterosexual couple and their relationship disputes about the distribution of property can be resolved under the Family Law Act 1975 (Commonwealth) if they are married, or the De Facto Relationships Act 1984 (NSW) if the couple has lived together for at least 2 years or if there is a child of the relationship. A married couple is also entitled to the counselling and mediation services provided by the Family Court Counselling Service.

For a lesbian or gay partner, the only court for the resolution of a property dispute is the Equity Division of the Supreme Court of NSW. Such court cases are almost always more expensive and difficult than proceedings under the Family Law Act 1975 (Commonwealth) or the De Facto Relationships ACT 1984 (NSW).

Heterosexual couples who end their relationships and sell property are not required to pay stamp duty (Stamp Duties Act 1920 (NSW)). Lesbian and gay couples are not entitled to this exception.

Criminal ...

When deciding whether bail should be granted the court is required to consider the protection of "Close Relatives" (Bail Act 1978 (NSW)). The definition of "close relative" excludes lesbian and gay partners.

A heterosexual spouse (husband or wife or de facto spouse) is not compelled (forced by subpoena or otherwise) to give evidence in relation to communications between spouses (Evidence Act 1898 (NSW) s11). This privilege does not apply to lesbian and gay partners. Heterosexual spouses are also only compellable in relation to certain specified offences of a serious nature or giving protection to spouse and family (Crimes Act 1900 (NSW) ss407, 407AA). These provisions do not apply to lesbian and gay couples.

Children ...

Adoption

s19 of the Adoption of Children Act 1965 (NSW) provides that adoption orders may only be made "in favour of a husband and wife jointly", except in exceptional circumstances where an order may be made in favour of a man and a woman who have lived together for not less than 3 years (s 19(1a)) or in favour of one person (s 19(2)).

Adoptions by parents of the child and their partners are regulated by the Family Law Act 1975. A court may grant leave for the commencement of proceedings for the adoption of the child by a "prescribed adopting parent" (s 60AA). A "prescribed adopting parent" only covers opposite sex partners as does the definition of "step-parent" since a step-parent must be married to, or have been married to, the parent of the child (s60).

Guardianship and custody

In the absence of a court order each "parent" of the child is a guardian and the parents have joint custody (s 63F of Family Law Act 1975 (Commonwealth)). "Parent", although not defined, presumably refers to biological parents of the child.

Gay men and lesbians can be granted custody of their children. Until recently, the Family Court resisted granting custody to lesbians and gays or, if it did, discriminatory conditions were imposed upon the lesbian or gay man and/or their partner. The court may still consider that a parent's lesbian or gay relationship will be detrimental to the child's welfare.

Lesbian and gay co-parents do not have legally recognised relationships with the children for whom they have been caring. There is no specific provision in the law for a co-parent to acquire rights and responsibilities in relation to the children. However, under the Family Law Act 1975 (Commonwealth) consent orders can be made concerning the custody of the child. If the child does have a legal mother or father, they must be informed of the proposed arrangement. The orders would only be granted if they did not oppose them.

Conception

The artificial Conception Act 1984 (NSW) provides that children conceived through sperm donation have no legal father if the mother is not married or living in a heterosexual de facto relationship (s6). The presumption of no paternity can be altered if the sperm donor makes an acknowledgment in writing. If a dispute arose between the lesbian mother and the donor, the federal Family Law Act 1975 (Commonwealth) may be used to create obligations such as payment of child support, and rights such as access, custody and guardianship.

The Human Tissue Act 1983 (NSW) attempts to preclude gay men from donating blood or semen by imposing that the donor certify, amongst other statements, that he has not engaged in male to male sexual activity within the past 5 years. The penalty for signing a false or misleading statement is \$5,000 or imprisonment for one year or both.

Employment ...

Superannuation

Superannuation schemes often pay a higher retirement benefit if the contributor has a spouse. Upon death of a contributor, benefits are often payable to a spouse or child of the contributor and not to a lesbian or gay partner. Some schemes do not allow you to nominate a lesbian or gay partner as the beneficiary.

Relocation Expenses

In Commonwealth Public Service, a heterosexual partner who accompanies an employee upon relocation has their costs met by the Federal Government. Partners of lesbian or gay employees relocate at their own expense unless the Department exercises its discretion to pay.

Workers compensation

Under Commonwealth compensation law, where a person dies as the result of an injury sustained in the course of employment, any dependants of the person are entitled to a lump sum compensation payment (s17 Safety Rehabilitation and Compensation Act 1988 (Commonwealth)). The definition of dependant does not include lesbian and gay partner, even when they have been dependant on the deceased employee.

Under the Workers Compensation Act 1987 (NSW), if an employee's death results from a work caused injury, any dependants are entitled to lump sum compensation. The legislation uses the words "family", "husband", "wife". It is unlikely that a Court could be persuaded that a lesbian or gay couple were covered by these terms.

Health insurance ...

Private health insurance companies provide insurance for "families" at a reduced rate. HCF, FAI and Manchester Unity are prepared to recognise lesbian and gay families as "families"; NIB and MBF won't. These insurers are controlled by the National Health Act 1953 (Commonwealth) which is open to interpretation on the issue of dependants. Medibank

Private established under the Health Insurance Commission Act 1973 (Commonwealth) which is open to interpretation on the issue of "spouse" and "dependant".

Social security ...

A heterosexual couple is regarded as an economic unit and a claimant can be denied a social security benefit or pension, or have the benefit reduced depending on their partner's income. Lesbians and gay men in receipt of benefits or pensions are assessed as individuals and their partner's income is not taken into account.

Immigration ...

A heterosexual partner of an Australian resident can apply for residency if they are married or can establish that they are in a de facto relationship. The Migration Regulations 1993 (Commonwealth) include a category of "non-familial emotional interdependency". This category opens the way to a permanent residence for lesbian and gay partners.

However, lesbian and gay partners of a person who is migrating to Australia on refugee, family reunion or other grounds will not necessarily be able to migrate with their partner. They could later be sponsored to migrate to Australia after their partner has arrived.

Taxation ...

A heterosexual couple can claim a dependant spouse rebate or a housekeeper's allowance. This option is not available to a lesbian or gay couple.

Domestic Violence ...

Under part XVA of the Crimes Act 1900 (NSW) anyone can get Apprehended Violence Orders if the court is satisfied on the balance of probabilities that the person fears harassment or violence.

Where police suspect that a domestic violence offence will take place, they have special powers of entry. The definition of "domestic violence offence" clearly includes lesbian and gay partners as it includes "a person who has or has had an intimate personal relationship with the person who commits the offence".

8.1 YOUR SIGNIFICANT PERSON

PROPOSAL

The Lesbian and Gay Legal Rights Service will lobby the NSW State Government and the federal government to amend particular legislation to include our Significant Personal Relationships.

The Lesbian and Gay Legal Rights Service will not lobby the NSW state government to enact a Significant Personal Relationships Act.

What are significant personal relationships? ...

If you refer to chapter 7, "Current Law", you will see that much legislation gives benefits to spouses, next of kin or family. As a general rule only spouses and blood relatives have legal rights arising from their relationships.

Recognition of significant personal relationships would give legal status to relationships involving significant emotional interdependency. This may include financial dependency, but does not assume or rely on this aspect. It covers sexual relationships, long term friendships, flatmates, or any chosen family. It also covers your relationship with a child. It is not confined to lesbian and gay relationships.

The legal definition could take the form of:

"Two persons who are emotionally, physically or psychologically interdependent who wish to benefit each other and are prepared to accept certain obligations."

Implementation ...

There are two ways this system could be implemented:

1. a Significant Personal Relationships Act (NSW);

or

2. changes to specific legislation to include people in "significant personal relationships".

Both these options are about individual rights and your right to benefit whomever you choose. The difference is an Act would impact on all benefits arising under legislation or policy, whereas specific legislative amendments would only impact on only certain benefits in particular Acts or policies.

Whether we recommend an Act or amendments to specific Acts is largely a strategic decision.

An Act or specific amendments to existing legislation could be introduced the the NSW state government. The federal government has no constitutional power to pass an Act about significant personal relationships.

Benefits given to married or defacto spouses, next of kin or close relatives could extend to a "significant person".

People could choose to nominate a significant person be electing them for a specific benefit.

In crisis situations, for example death or incapacity, in the absence of any nomination of a "significant person", the courts could consider whether the claimant is a significant person. It is possible that the Courts would have to consider a range of relationships and choose who the "significant person" is. You could be deemed to be a significant person. In this way this option differs from the registration system outlined in Chapter 8.3.

Forms of proof could include the length of the relationship, statutory declarations and nomination for another benefit. The emphasis of the legislation should be focused on the mutually supportive nature of the relationship.

The difference between this option and the registration scheme is that:

- you are not required to formally register the relationship. You only have to nominate a person for
- one or more of the benefits which you want them to have.
- you are not included in any existing scheme like de facto relationships or marriage law.
- you cannot bring an action against your significant person for maintenance or property distribution
- whilst they are still alive.
- even if you don't elect a significant person, you may end up with one. This may be an advantage
- for crisis situations where people have not yet elected someone.

AREAS OF BENEFIT ...

This option is about individual rights and your right to benefit whomever you choose. Areas of benefit include the following:

Employment benefits

These benefits include travel allowances, relocation expenses, bereavement leave and superannuation.

Particular industries have special entitlements such as allocation of shifts when both partners work for the same employer.

These benefits are granted to employees on the basis of employment. It is discriminatory to restrict the benefits to employees who are in traditionally recognised relationships such as marriages and de facto relationships.

Health Funds

Health funds are registered under the National Health Act 1953 (Commonwealth). Heterosexual families can pay for coverage at a family rate. Generally, lesbians and gay men must pay the higher single rate whether or not they are in a relationship. Where a lesbian or gay couple have a child, some funds currently exclude them from the family rate.

If we introduce this scheme, you and your significant person (and children) could be considered to be a family.

Death benefits

If you die without a will, the law assumes that your blood relatives are the people you wish to benefit. The law should not make these assumptions without inquiring whether there is anyone else whom you may have wanted to benefit.

The same argument applies to the Family Provisions Act 1982 (NSW) which allows people to challenge wills in certain circumstances. Heterosexual spouses. Heterosexual spouses are entitled as a right but we have to fit into another category and prove that the surviving person was financially dependant upon and lived with the deceased.

Under this option you would not have to prove financial dependency. You would have to prove that you were the deceased's significant person, or one of them.

Donor insemination

At present donor insemination schemes are only available to heterosexual couples. Single women and lesbians, either in relationships or not, are denied access.

Policy could be amended so that women in significant personal relationships have access. For single women, see Chapter 8.5.

PROS and CONS

PROS

Financial benefits during the relationship

No financial obligations during the relationship

At present the fact that you nominate someone for a particular benefit does not mean your Social Security entitlement will be dependent on your partner's income.

Does not privilege marriage-like relationships

Marriage and de facto definitions will not be the standard for access to these benefits. Monogamy, cohabitation, duration of the relationship should not be relevant.

Definitions of Family are expanded

In some cases these amendments will give your relationship a family status which would not otherwise exist in law. Australia also has international obligations in relation to families.

Not gender-based

Although heterosexuals do have recognition of their relationships, many reject the way the De Facto Relationships Act 1984 (NSW) forces them into a financial arrangement. This option creates greater freedom for everyone to allocate benefits to whom they choose.

Not based on a permanent sexual relationship

Many people are not in long term sexual relationships, many people do not wish to tie everything to a lover but would rather benefit and share with a friend. This option allocates rights not only to those in sexual relationships.

The right to choose

The status is not imposed on you. You can choose whom you wish to benefit. It will only be deemed in crisis situations like death or incapacity.

Cost

In all cases other than crisis situations, you will not have to fight your way in to the court system or spend money on lawyers' fees.

Not based on financial dependency or interdependency

It recognises that you may live financially as an individual but that nevertheless there is an important person in your emotional life and that person is the person whom you wish to benefit.

CONS

The definition

How do you define these important relationships

Proving a significant personal relationship

In most of the benefits we have considered spouses, whether married or de facto, have an automatic right. No doubt in times of crisis we would have to prove the existence of a significant personal relationship. This may be invasive.

People in crisis - death or Incapacity

If you don't nominate someone and there is a crisis, the matter will be left to the courts to determine. As with all emotional connections, the people involved are the only ones who know the real value or nature of the connection and so proof may be problematic. Will conservative judges be able to cope with these concepts when the kinds of relationships they are accustomed to are those which are based on marriage- like relationships?

You could have financial responsibilities at the end of the relationship

Your significant person could go to the Equity Division of the Supreme Court of NSW and claim that you intended to benefit them financially and so you continue to have financial responsibilities to them.

A system with benefits and no obligations is not realistic

Although this system would give us benefits without obligations, it may for that reason be considered inequitable.

Can we justify benefits like relocation costs and health insurance for people who don't live together?

POLITICAL FEASIBILITY

There are no major legal impediments to this option. Political will is enough to achieve it. We have some concern however about finding a definition that it is administratively workable.

A Significant Personal Relationships Act would embody the concept that people should be free to choose whom they wish to benefit in particular areas. It is our view that there would be little political will for such an Act.

A similar concept of "alternative families" was suggested by the Madison, Wisconsin Equal Opportunities Commission Alternative Family Rights Task Force. The ordinance was never passed. The definition of alternative family was limited to two adults and required that the family "live together in a single housekeeping unit in a dwelling unit".

Because of the radical nature of a Significant Personal Relationships Act, we suggest that it is more politically feasible to recommend amendments to particular NSW legislation and policy in areas such as superannuation, donor insemination, incapacity and death benefits. We also recommend amendments to federal legislation and policy to give us access to benefits that we want such as health funds and employee benefits.

We also suggest that this option is not a purely lesbian or gay issue. Many heterosexuals have significant relationships with people of the same or opposite sex and may wish to benefit them in similar ways. The lobbying for these changes should come from a coalition of groups including lesbian and gay groups, women's groups and other organisations that wish to challenge the current emphasis on the traditional family.

8.2 DE FACTO RELATIONSHIPS

Proposal

The Lesbian and Gay legal Rights Service will lobby the state government for inclusion of lesbian and gay relationships under the De Facto Relationships Act 1984 (NSW).

The Lesbian and Gay Legal Rights Service will lobby the state government to fund education campaigns to inform people of the potential consequences of the legislation.

The Lesbian and Gay Legal Rights Service will lobby the state government to fund legal advice to assist people with cohabitation and separation agreements. This would enable them to opt out of the legislation.

What is a de facto relationship?

A de facto relationship is something which is in fact, not in law, a marriage. The De Facto Relationships Act 1984 (NSW) defines a de facto relationship as: "The relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other" Some of the factors, initially derived from the Social Security Act 1947 (Commonwealth), used to determine whether a couple have lived as de facto spouses are:

- Have you lived together for at least 2 years?
- Is the relationship sexual?
- Are you financially interdependent?
- Do you own property together?
- Do you have the care of children together?
- Who does the housework?
- Mutual commitment?
- Do other people recognise your relationship?

What does the de facto relationship do?

The De Facto Relationships Act 1984 provides a mechanism for resolving property and financial disputes on the ending of a relationship.

The Act also impacts on other legislation and this has the effect of conferring benefits on de facto partners equivalent to those conferred on married spouses. For example, a de facto spouse is entitled to the same share of a deceased partner's estate on intestacy as a married spouse of the deceased would have been entitled.

A brief history of de facto relationships

De facto relationships law was introduced in NSW to give marriage-like relationships similar benefits and obligations accorded to men and women in legal marriages. The law sought to overcome the injustice afflicting women who make substantial indirect contributions to the well-being of the family and household during the relationship and on break up have no recognised proprietary interest. Another important aim of the legislation was the desire to improve the status of children born outside marriage.

The financial adjustment available under the De Facto Relationships Act 1984 (NSW) differs from that which is available to married couples under the Family Law Act 1975 (Commonwealth). The NSW legislation confines itself to compensation for contributions (financial, non-financial, home-maker and parent) made during the relationship with no adjustment for post-separation financial inequalities and maintenance only in certain cases.

A recent Federal Parliamentary Enquirer into the Family Law Act 1975 (Commonwealth) has recommended that the Family Court hear de facto relationship disputes instead of the State Supreme Courts. If this was introduced, the same principles would be used to divide property at the end of a marriage and at the end of a de facto relationship.

The De Facto Relationships Act 1984 (NSW) does not include lesbian and gay relationships in the definition of de facto relationships. However, the Queensland Law Reform Commission in its De Facto Relationships Working Paper No 40 has recommended inclusion of lesbian and gay couples in the legislation.

Implementation

The New South Wales Government could enact legislation by amending the current definition of a de facto partner. The new definition of de facto partner could be:

" a person who is living or has lived with another person whether or not of the same gender on a bona fide domestic basis but is not legally married to the other person".

PROS AND CONS

PROS

Financial benefits during the relationship

Financial responsibilities on ending the relationship

Maintenance and property obligations may be more limited than under marriage. There is no ongoing maintenance obligation.

Cheaper mechanisms for resolving disputes would be available

When a relationship ends, the De Facto Relationships Act 1984 (NSW) gives couples the right to bring an action in the Supreme Court of NSW. Property adjustments can be made, and maintenance awarded. Although very costly and often subject to numerous time delays, this process is cheaper and more predictable than the Equity Division of the same court. -

Relationships would be recognised

Parties can sign cohabitation agreements to avoid interference by the court

The NSW Act enables parties to enter into cohabitation or separation agreements after seeking the advice of a solicitor. The court cannot vary this agreement unless satisfied that the circumstances of the partners have so changed since the time of the agreement that it would lead to serious injustice if the provisions of the agreement were to be enforced by the court.

Access to the Family Court

If you had a child, you could go to the Family Court for counselling, conferences and other assistance to resolve disputes about the relationship and the child.

Impending changes to De Facto Relationships law

The recommendations that the Family Court hear de facto disputes are likely to be implemented. Then, all the advantages of access to the Family Court would apply to this option.

Anti discrimination legislation

Legal recognition of lesbian and gay de facto relationships would give us access to the "marital status" provisions of the Anti Discrimination Act 1977 (NSW) and the Sex Discrimination Act 1984 (Commonwealth).

CONS

Separation and cohabitation agreements don't alleviate this problem

Certifying an agreement requires employing a solicitor - that costs heaps of money. The Court can still review the terms of the agreement if it considers the contents to be unjust.

Can the judiciary understand our relationships?

The criteria mentioned above will be used to assess whether our relationships fall within the legislation's definition. Can a judiciary understand that some couples may not have any "public" relationship because of the homophobic environment?

Unpredictable

The partners to a relationship will not know if the judges will be able to apply these criteria to their relationship. Partners will have difficulty anticipating the legal consequences.

Costly and invasive evidentiary requirements

It is onerous and invasive in its evidentiary requirements - the couples' relationship will be brought up for scrutiny. This takes days of court time and so costs money. Matters before the Supreme Court can take years before resolution.

Is legislation based on economic disparities arising from role divisions relevant to same sex relationships?

The legislation was enacted to remedy the injustice that arises because of the assumption of certain roles in the home during a heterosexual relationship. This raises questions as to whether the same types of exploitation occurring in our relationships or whether it is the role divisions of heterosexual relationships which lead to this inequality.

Do we want our relationships compared with marriage?

Once again we return to the question about whether we want a marriage-like system. Equating these relationships to marriage has problems, not least because different people have different ideas of what "marriage" is. No room for varied ways of relating.

More money to the lawyers.

8.3 REGISTERED PARTNERSHIP LAWS

PROPOSAL

The Lesbian and Gay Legal Rights Service will not lobby the NSW State government to introduce Registered Partnership legislation for lesbians and gay men.

What is partnership law?...

Domestic partnerships in the United States

Various municipalities in the US have granted family benefits to lesbian, gay and heterosexual couples through the mechanism of "domestic partnerships". The registration of the partnership allows public and legal recognition of unions which meet specified criteria, grants specific rights to partners and imposes certain duties on partners. Other municipalities have enacted legislation to provide benefits such as sick leave, hospital visitation rights, bereavement leave and health benefits to city employees and their domestic partners. Some municipalities, such as New York, provide bereavement benefits pursuant to executive orders.

Municipalities require various criteria to be satisfied. The Maryland legislation defines "domestic partner" as:

"Persons who have lived together for at least one year and who consider themselves to be in a committed relationship or if they have lived together for less than one year, can show other indicia of a committed relationship".

The Minneapolis scheme requires the parties "to be committed to one another to the same extent as married persons are to each other except for the traditional marital status and solemnities".

Most cities require parties to sign and file an "Affidavit of Domestic Partnership" certifying that the parties are each other's sole domestic partner, intend to remain so indefinitely, are responsible for "our common welfare", are not married, are not barred from marriage by blood ties, are 18 years of age and competent to contract. Partners are required to pay a filing fee, and terminate the partnership by filing a "Statement of Termination of Domestic Partnership".

Registered partnerships In Denmark

Registered Partnerships were introduced in Denmark in 1989 and provide only for couples of the same sex, whether or not the parties are living together, or in a sexual relationship. The key issue is that they wish to provide mutual security.

Then are various conditions for registration - age, a partner cannot be married or party to another partnership, prohibitions on relatives entering partnerships.

The aim of the Parliamentary Commission was to equalise the status of "homosexuals" and heterosexuals. Denmark does not have cohabitation law like our De Facto Relationships Act 1984 (NSW), so now lesbians and gays and straights all have two options: married/registered, or not.

Registration carries the same legal consequences as marriage, except where otherwise provided by the Act, and where Danish law refers to "marriage" or "spouse" such references automatically include registered partnerships and partners. For example, if one partner dies the surviving partner will have the same legal rights as a surviving spouse in marriage.

Continue to be some differences - registered partnerships are not recognised for custody or adoption purposes.

The basic elements of a NSW scheme:

- You opt in by signing and filing an affidavit. We are calling this registration;
- You are not required to live together;
- You get benefits and have obligations;
- If you want to end the relationship, you file an affidavit;
- On termination of a relationship you could have financial responsibilities to your ex-partner.

Without registration, parties could not use this legislation. The status is based entirely on registration and is never imposed on anyone.

Implementation.

As with the existing De Facto Relationships Act 1984 (NSW) the state government could enact The Registered Partnership Act. The Commonwealth government does not have the power to enact such legislation.

The state government, to ensure consistency in legislation, would then have to amend legislation which provides for de facto couples and married couples to include "registered partners". Once this legislation is amended the same rights and obligations that accrue to heterosexual de facto couples would accrue to lesbian and gay couples.

PROS AND CONS

PROS

Our own institution

Automatic status upon filing an affidavit

You have to go and register

This allows choice and so status is not imposed.

Financial benefits during the relationship

Financial responsibilities at the end of the relationship

Some would see this only as a con. When you end a relationship, you may have to give your ex-partner property or pay maintenance.

Certainty

When parties opt in to the scheme they can find out what their rights and responsibilities are.

Social recognition and reduce discrimination

It affirms and sanctions the partners' relationship and equalises the position of lesbians and gays with straights.

Self-esteem

Some lesbians and gay men will not feel proud of their relationships until they receive support and enthusiasm from their families and society. Registered Partnerships can achieve this.

No requirement of sex

There is no requirement of a sexual relationship.

Confidentiality

Confidentiality provisions in the US arrangements protect the partners from unwanted disclosure. In NSW we could amend the Freedom of Information Act (NSW) to prevent release of information about the registered partnerships.

Access to the Family Court

If you had a child, you could go to the Family Court for counselling, conferences and other assistance to resolve disputes about the relationship and the child. This would require inclusion in the cross-vesting legislation so that the Family Court can hear matters concerning NSW Registered Partnerships.

CONS

No room for varied ways of relating

Neither the US nor the Danish schemes really challenge the traditional family in any way. The US options require cohabitation.

You have to go and register

If you don't get around to registering, in the same way many people don't get around to making a will, then your rights will not be protected at all. The US experience has shown that few people actually register.

Financial responsibilities on ending a relationship

When you end a relationship, you may have to give your ex-partner property or pay maintenance.

More money to the lawyers

Partners would have to seek legal advice on the implications of the terms of the partnership initially and on break up. This costs.

Political feasibility

NSW already has two layers of relationship law: marriage and de facto. It is questionable whether state parliament would pass legislation creating a third layer. Other states, such as Queensland and the ACT, are considering enacting de facto relationships legislation or variations of such legislation.

8.4 MARRIAGE

PROPOSAL

The Lesbian and Gay Legal Rights Service will not lobby the federal and state governments for legal recognition of lesbian and gay marriages.

What is marriage?

Marriage is a legal concept. In Australia, our law of marriage is based on the English common law which defines marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others".

Some people many with this expectation. Of course, exclusivity and the "eternal" nature of the commitment are not the realities for many marriages.

A brief history of marriage

In English legal history women had no legal identity once they married - "in law a husband and wife are one person, and the husband is that person". A variety of legal disabilities flowed from the fact that the wife's "legal existence" was incorporated into that of her husband. A married woman could not sue or be sued in her own right, bring charges against her husband for rape, and a mother had no rights to the custody of her children. The Married Women's Property legislation enabled married women to own property in their own right and to sue and be sued.

At a Lesbian and Gay Legal Rights Service forum, Dawn Cohen, a Sydney psychotherapist, argued that historically marriage is not a heterosexual institution. She presented numerous examples from various cultures of the history of lesbian and gay marriages. She argued that to allow marriage to be claimed as heterosexual is to allow lesbians and gays to be written out of anthropology and history. Our participation should be seen in an historical context and therefore we should support that choice to marry.

Implementing this option...

Federal law reform using the current marriage power

Marriage, as an option for law reform, is made difficult by the Australian Constitution. Only the Commonwealth Parliament has power to legislate in respect of marriage and divorce. The Australian law relating to marriage is found in the Commonwealth Marriage Act 1961 (Commonwealth). Where a marriage breaks up, matters such as the ending of the marriage, the custody of children and distribution of property are dealt with by the Family Law Act 1975 (Commonwealth).

The Marriage Act 1961 (Commonwealth) does not expressly limit marriage to a marriage between a man and a woman. However, based on existing case law, the High Court is very likely to say that marriage as used in the Constitution means a marriage between a man and a woman. One view is that the High Court would not hear a case on this question unless the federal parliament had already passed a law recognising lesbian and gay marriages. Politically and legally this option for reform is expensive and slow. It is also a longshot.

If it is accepted that the federal government has no power to legislate in respect of lesbian and gay marriage, the states would be free to legislate unless challenged by the Commonwealth. A state could pass a law which provides for lesbian or gay marriage.

If NSW government introduced gay and lesbian marriage, then the definition of terms such as "husband", "wife" and "spouse" in other state legislation would be changed to include lesbian and gay partner.

Giving the federal government power to make these laws

There are two ways that the federal parliament could make a valid law with respect to lesbian and gay marriage: there could be a referendum to change the Constitution or there could be a referral of power by the states.

A referendum would only succeed if a majority of voters in a majority of states consent to the changes to the Constitution.

A referral of power requires the states to give their power in this particular area to the federal government.

If the Marriage Act 1961 (Commonwealth) was changed, then the definition of terms such as "husband", "wife" and "spouse" in other Commonwealth legislation would automatically be changed. It would probably also mean that these words would change their meaning in any NSW legislation in which they are used.

PROS AND CONS

PROS

Automatic Status

Your commitment would be effective from the moment of the legal recognition. You would not have to live together for a certain period of time as required by de facto legislation for heterosexual couples.

Financial benefits during the relationship

Financial responsibilities on ending a relationship

Some people will see this as a con. Others will consider the fact that there are maintenance and other financial obligations as appropriate.

Social recognition and reduce discrimination

Marriage is not simply about legal rights. It is public recognition and support for the relationship from family, friends and the community. Thomas Stoddard, formerly of Lambda Legal Defence and Education Fund in the US, has argued for the right to marriage because without this right same-sex relationships will be maintained "in their subsidiary status".

Self-esteem

Some lesbians and gay men will not feel proud of their relationships until they receive support and enthusiasm from their families and society. Marriage can achieve this.

Reclaims Lesbian and gay institution

Allows choice and is not imposed

Parties can choose to marry and obtain the consequent legal rights and obligations. It, is not imposed on anyone who does not want it.

Marriage gives access to the Family Court

The Family Court has special expertise and procedures in the area of family disputes. Time delays and costs are limited compared with state courts. Conference facilities, counselling and mediation are also available.

Anti discrimination Legislation

Legal recognition of lesbian and gay marriages would give us access to the "marital status" provisions of the Anti Discrimination Act 1977 (NSW) and the Sex Discrimination Act 1984 (Commonwealth).

Marriage brings with it de facto recognition

Some people will be treated as de facto couples.

Encourages lesbian and gay commitment ceremonies

Just think about the prezzies!

CONS

Marriage brings with it de Facto recognition

Introduction of the institution of marriage for lesbian and gay couples will have the spin off effect of extending the definition of "de facto" relationship in the De Facto Relationships Act 1984 (NSW) to include lesbians and gay couples. Some people will be treated as a de facto when they do not wish to be treated as such.

Marriage is the law of men and women - in that order

As a legal and social institution marriage is only about sexual relationships between men and women. Its historical development reflects the position of men and women in relation to each other at a particular time. It is irrelevant to lesbian and gay relationships.

Marriage should not be upheld as the only form of relationship

By lobbying for marriage, it is perpetuated as society's sole method of recognising intimate relationships.

Marriage creates a hierarchy of relationships

The consequence: a hierarchy of "good" and "bad" lesbians and gays will be created. Those who are married on one hand and all the rest on the other. Where a person is married and has a lover there is a legal partner and one not recognised by the law.

Financial obligations during the relationship

Marriage contains an implied obligation to support, eg entitlements under Social Security law would be limited.

The only way out is divorce

Do we want a legal structure for the ending of our relationships. Would this add to the trauma?

Politically and legally problematic

At both the federal and state levels, this option for reform is expensive and slow.

Encourages lesbian and gay commitment ceremonies

What will you wear?

8.5 INDIVIDUAL STATUS

Disaggregation - financial independence

There is another way of looking at the world.
Relationships need not be the only reference point.

We could argue that we prefer every individual to be treated as an individual economic unit, rather than being assumed to be part of a family, household or group economic unit.

This approach, also known as "disaggregation", differs from all the other options we discuss in this paper. All the other options assume that there is something about the relationship which needs special treatment in law because it creates rights and obligations between two individuals. For a thorough analysis of "disaggregation" see *Life Without Marriage: A Woman's Guide to the Law*, Pluto Press, 1987.

individuals should not be denied access. . .

Donor insemination

The right to have children should not be determined by whether or not a woman is in a relationship. Single women should have access to donor insemination schemes.

Relationships should not stop you from being recognised as an individual...

Social security

In certain areas, such as social security law, the law has gone too far in assuming this assumption. It assumes the continued existence of the nuclear family despite the changes in household arrangements.

The cohabitation rule applies to the payment of social security benefits and pensions. Under this rule, heterosexuals who are living as "a member of a couple", in the Department of Social Security's view, are paid at a "married rate" which is lower than two single rates.

Sole parents in relationships are called a "member of a couple" and cannot receive sole parent pension even if they are not receiving financial support from the person with whom they are in a relationship. This often means that sole parents who have not declared themselves to be a "member of a couple" will be required to pay back any pension received in a period when social security regarded them as a "member of a couple".

It is likely that legal recognition of lesbian and gay relationships will result in the cohabitation rule being applied to us. This would be consistent with the underlying philosophy of social security law which requires people to support each other financially before the state steps in to help. We would have this "public" obligation to support partners.

We reject the view that this consequence is a reason for no legal recognition of our relationships. Recent social security policy indicates that lesbians and gays in relationships are likely to be included in the cohabitation rule regardless of whether there is any general recognition of our relationships.

If we are included in the cohabitation rule and its assumption that if you share a house or are in a relationship you are financially interdependent, we could argue that we should have access to benefits presently only granted to spouses if the reason for granting benefits to spouses is the financial interdependency.

The Lesbian and Gay Legal Rights Service would support the removal of the cohabitation rule from the Social Security Act 1991 (Commonwealth) so that pensions and benefits are always paid at a single rate and Sole Parent Pension is payable to people who define themselves as Sole Parents. The increased cost to the community in paying all benefits and pensions at the single rate would be offset by the reduction in the considerable amount of money that is spent in "policing" the cohabitation rule and other social security "fraud".

We recommend that the lesbian and gay community join together with other groups to lobby for the removal of the cohabitation rule in the Social Security Act 1991.

8.6 ANTI DISCRIMINATION LAWS

PROPOSAL

The Lesbian and Gay Legal Rights Service will recommend that

The State Government amend the Anti Discrimination Act 1977 (NSW) to include Lesbian and gay relationships under the definition of marital status" or under a new ground of relationship status".

The Federal Government introduce legislation which means discrimination on the grounds of sexual orientation unlawful.

The Federal Government amend the Human Rights and Equal Opportunity Commission Act 1986 (Commonwealth) to make unlawful discrimination against lesbians and gays in all areas.

The Federal Government amend the Sex Discrimination Ad 1984 (Commonwealth) to include lesbian and gay relationships under the definitions of "marital status" or under a new ground of "relationship status".

What is anti discrimination Law...

The civil, political and workplace rights of lesbians and gays are regularly breached in the failure to recognise our relationships in areas such as superannuation benefits, workplace benefits, health insurance and even the "right" for our relationships to be acknowledged in the national Census.

Anti discrimination law has so far formed an unsteady plank in the raft of recognition of our relationships.

NSW ANTI DISCRIMINATION ACT 1977...

In NSW, a lesbian or gay man can complain to the Anti Discrimination Board if they have been discriminated against in employment, education, provision of goods and services, accommodation and in relation to registered clubs.

The complaint must fit within the wording of the legislation. It must be against discrimination on the grounds of "homosexuality" or "marital status".

Direct and indirect discrimination

This discrimination can be either direct or indirect. Direct discrimination occurs when a person is disadvantaged because of their "homosexuality" in circumstances where they can show that a heterosexual standing in their shoes would have been treated more favourably. This discrimination includes discrimination on the basis of an attribute or characteristic that generally appertains to that person or is generally imputed to that person. This should include the fact that an attributes of a lesbian or gay is that they have relationships with another lesbian or gay.

Indirect discrimination involves actions that appear to be neutral but which in reality result in a particular group of people being disadvantaged. A rule or condition may not specifically refer to a person's sexual orientation, but it may in practice result in a large number of "homosexuals" being excluded or adversely affected. Such a condition may be unlawfully discriminatory if it impacts more on one group than another because of a certain attribute or characteristic which generally appertains or is imputed to a person of this group.

Homosexuality grounds

This ground has been employed successfully to bring changes to practices and policies discriminating against lesbians and gay men as individuals - the right not to be harassed at work, to have classified advertisements placed for lesbian and gay organisations and the right to be considered as foster parents.

This ground has not been used successfully to cover relationship discrimination, although it could be. The spectacular failure of a 1985 complaint brought by two gay male couples who worked as Qantas flight attendants was an eye opener to the potential for the legislation to be interpreted restrictively.

The men complained that they had been discriminated against because they were not permitted to join the "married roster". This would have allowed them, like their heterosexual colleagues, to be rostered off duty at the same time as each other. The complaint was on the grounds of marital status and sexual preference. They lost on both grounds.

The Equal Opportunity Tribunal decided that sexual preference was not the issue. It was that the men were treated less favourably on the ground of the nature of their relationships - that is, that they were in relationships with people of the same sex. However, the Tribunal held that this was not discrimination on "marital status" grounds.

Marital status grounds

The Qantas case did not succeed on this ground because the legislation defines "marital status" as including the state of being single, the de facto spouse of another person, married, married but living separately and apart from one's spouse, divorced or widowed.

This ground does not cater for lesbians and gays in relationships. In order for a couple to challenge discrimination together, the legislation would have to be amended to include our relationships under marital status.

The effect of the Qantas case

The Qantas decision sapped lesbian and gay community confidence in the capacity of anti discrimination legislation to correct the lack of recognition of our relationships. It is small comfort that many commentators have declared that the case could be distinguished and not relied upon as precedent in the future or that it is just plain wrong...

However, a large suitcase of complaints against Qantas on the same issue is presently before the Anti Discrimination Board. This time around they may win.

Human Rights and Equal Opportunity Commission Act 1956 (Commonwealth)...

This Act lacks any coercive powers - the worst thing that can happen to a discriminating person or body is their naming in federal parliament. What is more, the Act makes discrimination on the grounds of sexual preference "unlawful" only in the area of employment.

On the positive side this Act has been used to force changes in Defence Force policy on the employment of lesbians and gay men. It has not yet been successful in bringing change to ensure that lesbian and gay relationships are recognised for those employed in the Australian Public Service.

Expansion of existing legislation...

The existing interpretation of the NSW legislation and the absence of sexual orientation in the federal legislation is the greatest stumbling bloc for our use of anti discrimination laws.

Expansion by interpretation of the NSW Act

We suggest that the existing interpretation of the "homosexual" ground in the Anti Discrimination Act that you have 1977 (NSW) is restrictive. It has failed to acknowledge that an attribute of "homosexuality" is relationships with someone of the same sex. It has failed to accept that "homosexuals" are directly discriminated against in cases such as exclusion from marital rosters. Cases should be argued on the basis that such exclusion is direct discrimination on the grounds of "homosexuality".

By amendment of existing legislation

The "marital status" ground in the Anti Discrimination Act 1977 (NSW) and in the Sex Discrimination Act 1984 (Commonwealth) should be replaced by a new ground of "relationship status" which would make illegal discrimination, either indirect or direct, against a person because of their status as a single person or a person in a relationship.