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**Legal recognition of same-sex
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by

Rachel Simpson and Marie Swain

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Rachel Simpson and Marie Swain

NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE

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Mr Stewart Smith, Research Officer, Environment (02) 9230 2798

Ms Marie Swain, Research Officer, Law/Social Issues (02) 9230 2003

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EXECUTIVE SUMMARY

- The rationale for introducing legislative change in relation to parties in same-sex relationships is to ensure that all New South Wales citizens are treated equally before the law. At present those in same-sex relationships receive different treatment to those in heterosexual relationships in many areas of daily life. Illustrations of where this occurs, and the arguments for and against the recognition of same-sex relationships are presented on pages 1 to 10.
- Five ways in which legal recognition of same-sex relationships could be achieved are discussed on pages 10 to 19. These are: permitting same-sex marriages (pp. 10-12); broadening the definition of de facto partner under existing legislation (pp. 12-14); creating domestic partnerships (pp. 15-16); adjusting individual statutes (pp. 16-18); and amending existing discrimination laws (p. 19). Examples of approaches taken overseas and in other Australian jurisdictions are provided where appropriate.
- The current position in New South Wales is outlined on pages 20 to 32. In 1995 the Carr government foreshadowed changes in this area would be made (p. 20) and since this time certain attempts to achieve this have been made. The first was the introduction of the Significant Personal Relationships Bill by Ms Moore MP in 1997 (pp. 20-24), followed in 1998 by the De Facto Relationships Amendment Bill introduced by the Hon E Kirkby MLC (pp. 24-28). Neither of these Bills were passed. On 13 May 1999 the Government introduced the Property (Relationships) Legislation Amendment Bill (pp. 28-31).

1 INTRODUCTION ¹

This paper examines the legal changes necessary to recognize and treat the parties to same-sex relationships in a similar manner to those parties in heterosexual relationships. The first section of the paper outlines the rationale for adopting such a position (including arguments for and against), and the various ways in which this could be achieved are discussed in section two. Section two draws on experience both overseas and in other Australian jurisdictions. The position as it currently stands in New South Wales is highlighted in the third section with reference being made to three Bills introduced into the New South Wales Parliament to effect such changes.

For the purposes of this Paper, the right of homosexuals and lesbians to marry or to adopt children is not addressed in detail as the Government has expressly ruled out any likely reform in these areas in the near future.² Nor are these issues being pursued by the Gay and Lesbian Rights Lobby, in relation to legal recognition of same-sex relationships.³

2 RATIONALE FOR THE LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS

According to Walker:⁴

[S]ame-sex relationships, is the one area of life where the law remains expressly discriminatory. In relation to other important aspects of an individual's identity, legislation no longer expressly excludes people from access to benefits or services on the basis of gender, race, ethnicity or disability except where special needs services are set up for disadvantaged groups ... yet people in same-sex relationships are excluded from access to benefits and services simply on the basis of their sexual preference.

This statement, although written in relation to the position in Victoria, would apply equally to the current situation in New South Wales.

Arguments for recognition: the arguments put by those in favour of recognising the legal

¹ This publication updates the earlier Parliamentary Library *Briefing Paper* No 32/95 'Discrimination Issues in the 90s' in relation to the recognition of same-sex relationships.

² 'Gays may get de facto's rights', *Telegraph Mirror*, 19 April 1995; 'Carr says no to gay marriages', *Telegraph Mirror*, 4 July 1995.

³ The Co-Convenor of the Gay and Lesbian Rights Lobby was reported as saying 'the De Facto Relationships Amendment Bill is not about same-sex marriage or about adoption, its about equal rights for all couples whether they are of the same-sex or not.' 'Parlt push for gay law reform', *Illawarra Mercury*, 27 August 1998.

⁴ Walker K, 'Same-sex relationships and the law', *Alternative Law Journal*, Vol 22 No 6, December 1997, pp. 293-296.

rights of people in same-sex relationships are:⁵

- equal protection of the law;
- changing social attitudes;
- furthering the objectives of anti-discrimination legislation;
- the inability of gay men and lesbians to choose marriage as a form of commitment.
- international human rights objectives.

Over the years the Commonwealth government has ratified a number of human rights treaties and conventions, including the International Labour Organisation on Discrimination (Employment and Occupation) Convention 1958 (ILO 111), the International Convention on Economic, Social and Political Rights (ICESR) and the International Convention on Civil and Political Rights (ICCPR), which have been given effect to by the subsequent enactment of domestic legislation such as the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and so on. Being a signatory to these international instruments requires Australia to take all necessary measures to eliminate discrimination, including discrimination on the grounds of sexual orientation.

Some of the consequences of non-legal recognition of same-sex partners were outlined by the Co-Convenor of the Gay and Lesbian Rights Lobby:

If a homosexual was admitted to hospital ... the hospital could exercise its discretion not to allow the patient's same-sex partner to visit. If the patient was unconscious, the partner had no right to be consulted about treatment. If the patient died, the partner had no rights in relation to the deceased's personal effects or funeral arrangements. If the patient died intestate, the partner had no claim under wills and probate legislation.⁶

Arguments against recognition: the arguments for not legally recognising such relationships include:⁷

- moral/religious reasons;
- the definition of de facto relationship is generally based on financial dependence and a requirement that the parties live together. These factors may not be present in many lesbian and gay relationships;
- simple comparison of same-sex relationships with heterosexual relationships may

⁵ Ibid, p. 294.

⁶ 'Shaw acts to remedy anti-gay laws', *Sydney Morning Herald*, 1 July 1995.

⁷ Walker, n 4, p. 294.

fail to recognise differences between these forms of relationship;

- recognition of same-sex relationships in a way modelled on heterosexual relationships may be seen as an endorsement of a patriarchal mode of relationship;
- recognition of same-sex relationships may disadvantage many lesbians and gay men, particularly those already economically disadvantaged through loss or reduction of social security benefits; and
- many lesbians and gay men do not want their relationships recognised by the State.

Anti-Discrimination Act 1977: the analytical starting point for a discussion on the proposal to recognise the rights of those same-sex relationships necessarily has to be with the *Anti-Discrimination Act 1977* (ADA).

With the introduction of this Act in 1977, New South Wales became the second Australian State to introduce such legislation.⁸ The development of anti-discrimination legislation in Australia is a reflection of the belief in a democratic society that fundamental human rights, such as freedom from discrimination, are not only important but require legislative protection. This belief is evident in the following statement made by the then New South Wales Premier, the Hon N Wran QC MP, when introducing the Anti-Discrimination Bill:

The protection of fundamental rights and freedoms of the individual is of paramount importance to governments. The principle that all human beings are born equal, have a right to be treated with equal dignity and a right to expect equal treatment in a society is a principle firmly upheld by my government.⁹

As originally drafted the Bill extended immediate coverage on the grounds of race (Part II), sex (Part III) and marital status (Part IV), and provided for the future inclusions of other areas contained in Part V such as age, religious or political convictions, disability and homosexuality, to be achieved by way of regulation. The protection of those included in Part V was seen to be an innovative step and as such it was thought necessary for further research to be done by the Anti-Discrimination Board (ADB) and for it to then make specific recommendations to the Government prior to any regulations relating to these areas being made.¹⁰ However in March 1977 the Liberal/National Country Party Opposition, which had a majority in the Legislative Council, carried certain amendments to the Bill, one of which was the deletion of the original Part V and the regulation making power for the inclusion of these grounds, with provision being made for investigation into these areas to be carried out by the ADB. It would appear that while a number of reservations were

⁸ South Australia was the first with the *Prohibition of Discrimination Act 1966*. This Act has subsequently been repealed and replaced by the *Equal Opportunity Act 1984*.

⁹ NSWPD, Legislative Assembly, 23 November 1976, p. 3337.

¹⁰ NSWPD, Legislative Assembly, 23 November 1976, p. 3338.

expressed, the main Opposition argument in support of the amendment was not an objection to the inclusion of the particular grounds in Part V, but rather an objection to what it called the Labor government's intention to 'govern by regulation'.¹¹

Over the years a number of amendments have been made to include many of the Part V grounds referred to above, but in certain areas anomalies and tensions with mainstream legislative provisions remain. Moreover, in the 18 years in which the ADA has been in force, it has never been the subject of a comprehensive review. Such a review was commenced by the New South Wales Law Reform Commission (NSWLRC) following receipt of a reference by the then Attorney-General, the Hon P Collins QC MP in 1991. An initial lengthy and detailed Discussion Paper, asking for public comment on the 273 questions posed in the document, was issued by the NSWLRC in February 1993. To date the review has not been finalized, however, it is anticipated that a report will be tabled in the next session of the New South Wales Parliament.¹²

In the course of the review two areas relevant to the legal recognition of those in same-sex relationships have been highlighted. First, the need to broaden the scope of the ADA to include homosexuals and lesbians in couples, and secondly, the ongoing need to amend various pieces of mainstream legislation to ensure consistency with the ADA's underlying fundamental principles of equality and equity.

The ADA as it currently stands is of limited use to people in same-sex relationships primarily because these relationships are not covered by the Act. While it is unlawful to discriminate against homosexuals or lesbians who are single, the Act does not apply to discrimination against homosexuals or lesbians as couples. 'Marital status' is defined in the ADA as 'the status or condition of being: single; married; married but living separately and apart from one's spouse; divorced; widowed; or in cohabitation, otherwise than in marriage, with a person of the opposite sex'. At Question 60 in the Law Reform Commission Discussion Paper¹³ the issue of whether same-sex relationships should be included within the scope of discrimination on this ground is canvassed. The point being that while it is unlawful to treat an individual unfavourably on the ground of that person's homosexuality, there is no parallel protection for ensuring a homosexual or lesbian couple receives treatment equal to that enjoyed by heterosexual couples. This point is best illustrated by the case of *Wilson v Qantas Airways Ltd 1985*¹⁴ where two homosexual airline stewards, who were in a relationship and cohabiting, lodged a complaint of discrimination on the ground of marital status because they were not permitted the privilege of being rostered together. This privilege was, however, granted to heterosexual couples employed by the company. In handing down its decision in the matter, the Equal Opportunity Tribunal held that the

¹¹ Anti-Discrimination Board, *Homosexuality and Discrimination*, 1982, p. 1.

¹² Australian Law Reform Commission, *Reform*, Autumn issue, Non 74, 1999, p. 80.

¹³ New South Wales Law Reform Commission, Discussion Paper No 30, *Review of the Anti-Discrimination Act 1977 (NSW)*, February 1993.

¹⁴ (1985) EOC ¶92-141.

couple were more comparable to 'golfing buddies' than to married heterosexual couples.¹⁵

Since this case was decided there have been other matters before the courts where the issue at hand concerned different treatment of those in same-sex relationships, several involved inheritance of the deceased partner's estate.

- In one case a copy of the will could not be located so the deceased was deemed to have died intestate, and her parents, as next of kin, inherited her estate. This meant the surviving partner, with whom she had shared a home for 16 years, had to contest the will in the Supreme Court, a costly and complex procedure. Ultimately the surviving partner was awarded the house and car and a \$10,500 insurance payout, with the deceased's parents receiving the residual estate of almost \$100,000. After the judgment was handed down, the surviving partner commented on the distress caused by having to prove she had a relationship with the deceased while heterosexual couples did not have to go to court to prove their entitlement.¹⁶
- In another case where the couple had been together 14 years and the deceased had not left a will, the surviving partner took the matter to the Supreme Court to be awarded a portion of the estate. Although the deceased's brother challenged the action, the court ultimately awarded part of the estate to the surviving partner.¹⁷
- In relation to health insurance, a fund, NIB Health Funds Ltd, had refused to allow a male homosexual couple (and the child of one of the men) to be covered as a family thereby paying the concessional family rate of health insurance. This decision was challenged by the couple and the NSW Equal Opportunity Tribunal found that NIB Health Funds Ltd had contravened the NSW *Anti-Discrimination Act 1977* prohibition on discrimination on the grounds of homosexuality.¹⁸ It held that the health fund member's partner was a 'dependent' for the purposes of the eligibility rules of the health fund. NIB Health Funds Ltd appealed this decision to the Supreme Court, however, Justice McInerney upheld the Equal Opportunity Tribunal's decision. Justice McInerney examined the rules of the NIB health fund and found that they allowed 'dependents' to access family cover, and deemed heterosexual couples to be dependents. The rules did not deem same-sex couples to be dependents, and therefore the rules were discriminatory and in breach of the *Anti-Discrimination Act*.

Another limitation with the ADA as it currently stands is that section 54 provides for acts

¹⁵ NSWLRC, n 13, p. 98.

¹⁶ 'Lesbian loses fight for all of her dead partner's estate', *Sydney Morning Herald*, 27 November 1996.

¹⁷ 'Gay man fights for share of partner's estate', *Sydney Morning Herald*, 28 May 1998; and 'Gay lover wins claim on estate', *Sydney Morning Herald*, 1 August 1998.

¹⁸ *Hope v NIB Health Funds Ltd* (1995) EOC ¶92-716

done under statutory authority to be excepted from the operation of the ADA. The practical effect of this provision is that if discriminatory conduct is authorised under another piece of legislation, the ADA will be overridden. However, when the Act was introduced, it was intended that section 54 be read in conjunction with section 121 which gives the Board the power to review all NSW legislation for discriminatory provisions. The implication being, that over time, provisions inconsistent with the principles outlined in the ADA would be amended and brought into line. In this way conflicting duties would be removed and the section 54 exception would no longer be necessary. The exception applies equally to requirements of Acts passed before or after the ADA,¹⁹ which makes the provision unusual in that it is not in keeping with general legal principles of interpretation, whereby the supremacy of legislation is arranged hierarchically. As a general rule: Acts of Parliament override regulations; a law which deals specifically and comprehensively with a subject normally overrides a law that refers to the subject only in passing; and the later in time prevails. In contrast section 54 means that: regulations can override the ADA; other general laws can override its specific provisions and laws made after it do not need to recognise or reflect its provisions.

It is in this context that the New South Wales Law Reform Commission posed the question of whether the exemption should be removed and/or whether compliance with the ADA should be required. In the United States and Canada discrimination laws are entrenched so that all the other laws must conform with them. In Australia all discrimination legislation took effect from the date of proclamation. None had retrospective effect. This means that all laws and regulations in force at the time of the enactment of the discrimination laws continue unchallenged (unless amended) even if they are inconsistent.²⁰

At the federal level, amendments were made to the *Sex Discrimination Act* to ensure that by 1996 all federal legislation would comply with its provisions. In the report reviewing the permanent exemptions which were available under that Act, the following comment was made:

Section 40 throws into sharp relief the debate about whether an Act protecting human rights legislation is an Act that can be overridden by another Act of Parliament because of the supremacy of Parliament or whether it is different in that it sets a standard with which other legislation should comply.²¹

In its earlier submission to the NSWLRC review, the Anti-Discrimination Board indicated its support for the view that all State legislation should be consistent with the ADA unless

¹⁹ Section 54(a).

²⁰ NSWLRC, n 13, pp. 125-128.

²¹ Report on the Review of Permanent Exceptions under the *Sex Discrimination Act* 1984, AGPS, 1992, p. 105.

an exemption could be justified on policy grounds.²² In the past, industrial awards and enterprise agreements were also exempt from compliance with NSW anti-discrimination laws. However, following an amendment made in 1994, this exemption was removed. All new industrial awards and enterprise agreements, made after 8 August 1994, must comply with anti-discrimination legislation and all existing awards and agreements had until 8 August 1995 to remove any discriminatory provisions.

While it may be useful and necessary to amend the ADA to extend protection against discrimination to homosexuals and lesbians as couples, it is important to recognise that the ADA is only useful in certain specified circumstances, and that to ensure more comprehensive non-discriminatory legal treatment, it is necessary to amend certain existing pieces of mainstream legislation. Furthermore, for some, the very recognition of those in same-sex relationships in the eyes of the law, is of itself extremely important. This point was made in a submission by the Human Rights and Equal Opportunity Commission (HREOC) to the Senate Legal and Constitutional References Committee on the need to protect Australian citizens against discrimination and vilification on the grounds of their sexuality. It wrote:

If the law is to afford freedom of expression and identity in private life, individuals who wish to have their relationships recognised should be entitled to obtain that recognition without discrimination. The rights of individuals to their own identity and to their private life inherently involve an obligation to ensure that individuals are not discriminated against on the basis of these private matters. What is required in addition to general anti-discrimination prohibitions is some form of legal recognition of same-sex and trans-gender relationships.²³

The need to reconcile provisions in other areas of the law to ensure consistency with the principles enunciated in the ADA has been acknowledged in the past. Indeed this view was expressed at the outset in the Second Reading speech to the ADA in 1976, when the then Premier, the Hon N Wran QC MP, said:

Many of the statutes of New South Wales in their present form are discriminatory. It is therefore proposed in Clause 130 that the Anti-Discrimination Board ... undertake a review of the legislation of the State, and of governmental policies and practices to identify discriminatory provisions and to report these matters to the Government.²⁴

In 1978 the Anti-Discrimination Board conducted such a review and a three volume report

²² Anti-Discrimination Board submission, *Balancing the Act*, May 1994, p. 111.

²³ HREOC, *Human Rights for Australia's Gays and Lesbians*, Occasional Paper No 5, February 1997, p. 23.

²⁴ NSWPD, Legislative Assembly, 23 November 1976, p. 3341.

of its findings, identifying numerous potential conflicts was produced.²⁵ Some of these findings related to people in same-sex relationships. No specific action in the intervening years appears to have occurred as a result of this report. As part of its submission to the Law Reform Commission in 1994,²⁶ the Anti-Discrimination Board identified many areas where homosexuals and lesbians continue to be discriminated against under more than 20 pieces of legislation (**Appendix 1**) and the Gay and Lesbian Rights Lobby in a paper *Legal Recognition of Same-sex Relationships*, prepared in April 1995, identified some 160 statutes in which the concepts of 'spouse', 'wife/husband', 'widow/widower' and 'marriage' are given special status, and under which same-sex partners would not receive the same benefits or protections.²⁷ (**Appendix 2**).

The following amendments to mainstream state legislation have been identified by the Gay and Lesbian Rights Lobby as priority areas:²⁸

- The *Wills Probate and Administration Act* 1988: amendment to allow same-sex de facto partners of all genders to be treated identically when one of the partners dies intestate and the deceased's estate needs to be distributed.
- The *Family Provision Act* 1982: amendment to allow same-sex de facto partners the same rights to contest wills as do spouses and heterosexual de facto partners.
- The *Coroners Act* 1980 gives relatives of the deceased a right in certain circumstances to request an inquest or to be given notice of an inquest. An amendment is necessary to include same-sex de facto partners in the definition of relative. The word 'relative' should be substituted for the term 'next of kin' which is also used in the Act.
- The *Motor Accident Act* 1988: amendment to allow same-sex partners to be treated identically to heterosexual spouses or de facto partners for the purpose of determining when nervous shock claims can be brought.
- The *Law Reform (Miscellaneous Provisions) Act* 1944: seeks to make clear that certain persons not present at the scene of an accident or who, whilst present did not suffer any frank injury, are not prevented from bringing a nervous shock claim if in fact they suffer some recognised psychiatric condition which is connected with the accident. It does so by setting up categories of persons who, because of their relationship with someone injured or killed in the accident, are sufficiently proximate to bring an action. An amendment is necessary to bring same-sex

²⁵ Anti-Discrimination Board, *Discrimination in Legislation*, May 1978.

²⁶ Anti-Discrimination Board, n 22.

²⁷ Gay and Lesbian Rights Lobby, *Legal Recognition of Same-Sex Relationships*, April 1995.

²⁸ This information is taken directly from pages 3 and 4 of the *Legal Recognition of Same-Sex Relationships* paper.

partners into those categories.

- The *Compensation to Relatives Act 1897*: gives a statutory right to compensation to relatives of a person killed by someone else's negligence. An amendment is necessary to extend this statutory right to same-sex de facto partners. In reality an entitlement to damages only arises if a person can show some economic dependency on the deceased. The statute does not allow damages for non-economic loss.
- The *Victim's Compensation Act 1987*: currently provides that a close relative of a deceased victim of an act of violence may receive compensation. An amendment is necessary to bring same-sex de facto partners into the definition.
- The *Guardianship Act 1987*: establishes a hierarchy of people who may consent to medical or dental treatment on behalf of another person where that person is not capable of giving consent. An amendment is necessary to include same-sex partners in the definition of spouse.
- The *Human Tissue Act 1983*: deals with consents for the removal of tissue after death and for post-mortem examinations. An amendment is necessary to include same-sex de facto partners within the meaning of spouse for the purposes of giving such consent.
- The *Bail Act 1978*: needs to be amended to include same-sex partners within the definition of close relatives. The protection of close relatives of a victim of an alleged crime is specifically listed as a matter a court is required to consider when making a bail determination.
- The *State Authorities Superannuation Act*, the *State Authorities Non-Contributory Superannuation Act* and the *Superannuation Act*: require amendment so as to extend the same benefits to same-sex partners as currently apply to heterosexual de facto partners. These three Acts govern superannuation schemes for State public servants.
- The *Police Regulation (Superannuation) Act* and the *Parliamentary Contributory Superannuation Act*: govern schemes for police officers and members of Parliament respectively. They currently discriminate against de facto partners whether they be of the same gender or of different genders. Amendments are necessary to bring entitlements that extend to married couples to de facto partners both heterosexual and homosexual.
- The *Stamp Duties Act 1920*: when a heterosexual couple ends a relationship and one party wishes to sell their share of a jointly owned property to the other party, there is no requirement under the Act for stamp duty to be paid. Lesbian and gay couples

are not entitled to this exemption.²⁹

There have also been calls for similar changes to be made in areas within the federal sphere of responsibility such as social security, insurance, tax, superannuation, and family law. The federal government indicated in its 1994 *National Action Plan on Human Rights* that it supports ‘moves internationally to proscribe discrimination on the basis of sexual orientation’ and that a challenge ahead for it will be the ‘removal of federal legislative and administrative provisions which unjustifiably discriminate on the grounds of sexual orientation’.³⁰

3 POSSIBLE MODELS FOR ACHIEVING SUCH RECOGNITION

Legal recognition of same-sex relationships may occur in a number of ways: permitting same-sex marriage; broadening the definition of de facto partner; enacting domestic partnership legislation; amending individual pieces of legislation and/or relying on the courts; or amending anti-discrimination legislation. There are advantages and disadvantages with each of these models, which are outlined below.

3.1 Permit same-sex marriages

The main advantage of permitting same-sex marriages is that the relationship would be given automatic recognition and all the legislative provisions conferring benefits on a ‘spouse’ would become available to same-sex partners. However, political and community acceptance of this option seems remote at present, so despite its apparent advantages, this option is the least likely to be pursued. Furthermore, this option is not one which state parliaments can address: under the Australian Constitution, only the Federal Parliament has the power to legislate with respect of marriage and divorce. Marriage was defined in the 1866 English case of *Hyde v Hyde and Woodmansee*³¹ as “the union of one man and one woman”. Currently, the *Marriage Act 1968* does not specify the sex of the parties to a marriage, except in section 46(1) which requires a marriage celebrant to say to the parties being married that “Marriage, according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”. Thus the interpretation of the *Marriage Act 1968* limits marriage to heterosexual couples.³²

Members of same-sex couples have begun to apply to courts to be allowed to marry. In 1991 three same-sex couples joined to sue for marriage in the Hawaiian Supreme Court

²⁹ Goulding T (co-ordinating editor) *The Law Handbook: The easy to use practical guide to the law in NSW*, 5th edition, Redfern Legal Centre Publishing, 1995, pp. 1061-1072.

³⁰ *Australia's National Action Plan on Human Rights*, AGPS, 1994, pp. 67-68.

³¹ [1861-1873] All ER Rep 175.

³² Senate Legal and Constitutional References Committee, *Inquiry into Sexuality Discrimination*, December 1997, ¶6.43.

based on the proposal that the state's refusal to issue a marriage license presumptuously violated Hawaii's Equal Rights Amendment which prohibits discrimination on the basis of sex.³³ A Circuit Court dismissed the suit, ruling that Hawaiian law did not provide them with a right to recovery (Hawaiian marriage law refers to the man and woman being married, and it was on this grounds that the license was refused). The couples appealed to the Supreme Court which found in their favour on the basis of the couples' right to equal protection by the law. The Hawaiian constitution prohibits state sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.³⁴ The case was returned to the lower court where the State was required to show a "compelling state interest" if it was to continue denying marriage licenses to same-sex couples. The State failed to do so and the court found that the Hawaiian marriage law was unconstitutional and the state could not deny marriage licenses to same-sex couples solely because of their sex. The State appealed to the Supreme Court.

While the appeal was being heard, the Hawaiian legislature passed a bill which grants couples unable to marry certain rights. It creates the status of 'reciprocal beneficiaries'. This 'domestic partnership' model for recognising same-sex relationships is discussed in Part 3.3 below. In November 1998 a referendum was overwhelmingly passed which approved a constitutional amendment giving the Hawaiian legislature the power to limit marriage to heterosexual couples. This follows action in other states which had passed statutes banning same-sex marriages, and the 1996 Federal *Defense of Marriage Act* which denies recognition of same-sex marriages on the federal level.³⁵

Gay and lesbian rights organisations do not favour the marriage model, despite the full legal equality it offers. There are three main reasons for this view. First, same-sex marriage, based on a model of heterosexual marriages, will favour those relationships which look like heterosexual relationships and create a hierarchy of relationships within the gay and lesbian community. Second, marriage is a traditional, often religious institution and to achieve inclusion for same-sex relationships would be fraught with difficulty and would most likely result in a backlash from conservative and religious sections of the community as well as divide the gay and lesbian community along ideological lines. Third, it is argued by some lesbians and gay men that they should not buttress the legitimacy of marriage (an inherently patriarchal institution that has oppressed women for centuries, some feminists argue) by

³³ Similarly, couples in Vermont and Alaska have applied to the courts for recognition of the right to marry. All these cases, like the Hawaiian case, are based on anti-discrimination grounds, and are in the appeals courts awaiting decisions. Three lesbian couples in New Zealand appealed to that country's High Court after they were denied the right to marry. The High Court also refused their application, one judge stating that "to give marriage a meaning which the plaintiffs seek would require me to interpret the law in a way which I do not perceive Parliament to intend ..." (http://www.religioustolerance.org/hom_mar4.htm, accessed 12/05/99). This is despite the New Zealand Bill of Rights which prohibits discrimination based on sexual orientation.

³⁴ 'Analysis of the Hawaii Same-sex Marriage Case', <http://www.hawaiilawyer.com/articles/zbsame.html>, page 2 of 8, accessed 21/05/99.

³⁵ Yuen, M, 'Same-sex marriage strongly rejected', *Honolulu Star Bulletin*, Wednesday 4 November 1998, <http://starbulletin.com/98/11/04/news/story3.htm>, accessed 21/05/99.

seeking to become part of it.³⁶

3.2 Broaden the definition of de facto partner

The attraction of this model is that it takes an existing working model and applies it to same-sex relationships without having to propose an entirely new and untried approach. It also treats same-sex unmarried relationships in the same way as unmarried heterosexual relationships. The traditional notion of marriage is not challenged yet the rights of partners in other types of relationships are recognised. Another identified advantage to this model is that it does not require same-sex partners who want recognition of their relationship to take any step other than asserting their relationship: if the criteria are satisfied, the relationship will be recognised. This may be desirable for people who do not wish to make a public statement of their sexuality but who do wish to have legal protection in certain situations such as death or relationship breakdown. It has also been said that this model is useful for those who do not understand the consequences of failing to register their relationship.³⁷ It has also been suggested that de facto recognition can be both under and over-inclusive, catching those couples who do not want state intervention in their relationships (a criticism of the current de facto regime as it applies to heterosexual couples), and yet not encompassing those couples who do not live together or have shared finances or exhibit traditional interdependency. Again, the de facto model mimics an existing heterosexual relationship model, which has been identified as a problem for some people in same-sex relationships. Additionally, because a person will have to go to court to prove the existence of a de facto relationship, it has been argued that it may cause some people to “come out” in order to claim the benefits of the changes.³⁸

“De facto partner” is defined in section 3 of the New South Wales *De Facto Relationships Act* 1984 to mean:

(a) in relation to a man, a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him; and

(b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.

'de facto relationship' means 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.

This definition excludes those in a same-sex relationship as well as other domestic relationships such as the extended family or those related through kinship. These limitations have been addressed in the ACT's *Domestic Relationships Act* 1994, which replaces the

³⁶ Walker, n 4, p. 295.

³⁷ Ibid.

³⁸ Ibid.

concept of ‘de facto relationship’ with that of ‘domestic relationship’. A ‘domestic relationship’ may exist irrespective of the gender of the parties, and irrespective of whether or not the relationship is of a sexual nature. The *Domestic Relationships Act 1994* does not address the issue of the rights and entitlements of people whilst in a relationship, but provides a mechanism for the division of property on the breakdown of domestic relationships. A ‘domestic relationship’ is defined in Section 3 to mean:

a personal relationship (other than a legal marriage) 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 includes a de facto marriage.

Upon breakdown of a relationship, the legislation enables a person who has lived in a domestic relationship for two years and who has spent at least a third of the period of the relationship as a resident in the ACT, to apply to the Court for adjustment of property rights on the basis of the applicant's contribution to that property. One or both of the parties must be resident in the ACT on the date the application is made.³⁹ The Act also provides for an application to the Court for a maintenance order. It is clear from the second reading speech to the Act that the focus has shifted from who has what rights to the rights themselves. This can be seen in the following comments by Mr Connolly, the then Attorney-General and Minister for Health, when introducing the Bill:

We have removed the definition of de facto relationships which was in the exposure draft of the Bill, as this was considered an unnecessary distinction on the basis of gender. The definition in referring to a relationship between a man and a woman, seems to unnecessarily put the issue of sex back into the Bill. Instead of the Bill being debated on issues of equity and convenience, the definition redirects attention to the contentious and divisive issues of government recognition of non-marital heterosexual and homosexual relationships.

This Bill addresses the fact that those who live in domestic relationships are subject to the laws which, for the most part, are based on the traditional laws of property, which do not take account of matters such as unpaid labour in the home and have not evolved to do so. The Commonwealth *Family Law Act* takes account of those matters when dealing with property claims between spouses. However, it can deal only with legally married couples. There is no similar legislation for those living in domestic relationships in the ACT.

By limiting special consideration of indirect and non-financial contributions

³⁹ Two cases under the Act concerning settlement of property following the breakdown in a domestic relationship have been reported - *Suzanne Marian Ferris v Stephen Lance Winslade* (1998) 26 fam LR 725 and *Margaret Anne Napier Brown v James William George* [1998] SCACT 92. However, these cases involved heterosexual couples and their domestic relationships were not in dispute.

to property to those who are legally married, the law does not adequately recognise that families may take other forms than the traditional nuclear family of a married couple and their children.⁴⁰

The Queensland Law Reform Commission has recommended legislation similar to the NSW *De Facto Relationships Act* to provide a mechanism for resolving property and financial disputes after a relationship breaks down where the parties are not legally married and are thus not able to use the Commonwealth *Family Law Act*.⁴¹ In its Report the QLRC also recommended that the definition of a de facto relationship be expanded to include same-sex partners. The definition contained in clause 5 of the draft *De Facto Relationships Bill 1993* reflects this approach:

5. A “**de facto relationship**” is the relationship between 2 persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.

To date the Queensland government has not adopted the QLRC draft legislation, although legislation proposed by the government giving same-sex couples the same legal status as heterosexual couples has been described as “uncertain” following moves by One Nation to join the Coalition in condemning the initiatives.⁴² To date nothing has been introduced into Parliament. A similar recommendation was made by the QLRC in relation to damages claims by surviving de facto partners for wrongful death of their partners and in its Report on Intestacy Rules.⁴³ The definition it proposes for de facto partner in this context is:

An intestate’s de facto partner is a person, whether or not of the same gender as the intestate, who at the intestate’s death - (a) lived with the intestate as a member of a couple on a genuine domestic basis and either (i) in the six years before the intestate’s death, lived with the intestate as a member of a couple on a genuine domestic basis for a period of, or periods totalling, at least five years; or (ii) is the parent of a child of the intestate who is less than 18 years old; but (b) was not legally married to the intestate.⁴⁴

3.3 Create domestic partnerships

The domestic partnership model operates by providing a voluntary system of relationship recognition. Upon registration as a domestic partnership a couple is provided with a

⁴⁰ ACT Parliamentary Debates LA, 21 April 1994, p. 1119.

⁴¹ Queensland Law Reform Commission, *De Facto Relationships*, Report 44, June 1993.

⁴² Roberts, G, ‘Uphill fight on gay rights’, *The Sydney Morning Herald*, 20 October 1998, p. 6.

⁴³ Queensland Law Reform Commission, *Intestacy Rules*, Report 42, June 1993.

⁴⁴ *Ibid.*

certificate of registration and certain rights and responsibilities are attached to registration. Unlike the marriage or de facto model, members of domestic partnerships need not be living together or be in a sexual relationship - the parties must simply wish to provide mutual support and security to one another. Identified benefits of the domestic partnership model include its voluntariness, which answers some of the objections to the de facto model. It would also enable a more open model of relationship recognition since there would be few pre-requisites for recognition - legal consequences flow simply from a choice to nominate a particular relationship as significant, whether the relationship is heterosexual-like or not, whether the parties live together or not, or whether the relationship is sexual or not. It has also been noted that the model could enable a person to nominate more than one person for different purposes. For example, a person may nominate one person for the purposes of medical issues, but another for superannuation benefits (although the proponents of this suggestion accept that this level of sophistication of the model is unlikely). Disadvantages which have been identified include the fact that some people would not register and that the relationship register may become to be identified as a second-best option which could create a second-class of relationship, particularly given the restrictions on the rights which flow from registration.⁴⁵ Another disadvantage is that since this model leaves the decision to register to the parties, the weaker partner who may be the one in most need of protection and assistance may be further disadvantaged if the stronger party decides not to register the relationship.⁴⁶

Denmark was the first country to introduce registered partnerships, in 1989. In fact, many Northern European countries have passed legislation recognising registered partnerships: Norway recognised domestic partnerships in 1993, Sweden in 1995, Spain, Iceland and Hungary in 1996 and the Netherlands in 1998. In Denmark registered partnerships apply only to 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.⁴⁷ There are various conditions for registration including age (18 years), and a partner cannot be married or party to another partnership. Registration carries the same legal consequences as marriage, and where Danish law refers to 'marriage' or 'spouse' such references automatically include registered partnerships and partners. Rights previously restricted to married couples - inheritance, insurance, pensions, social benefits, income tax deductions are examples. Registered partners may also be responsible for alimony payments if they divorce. There are exceptions provided by the Act, for example, registered partnerships are not recognised for custody or adoption purposes, nor can partners receive free artificial reproductive technology services. In late 1995, a Danish gay newspaper reported that there had been about 1, 449 gay and 634 lesbian registered partnerships registered under the law. Twenty

⁴⁵ Walker, n 4, p. 295.

⁴⁶ Sarantakos, S, 'Legal recognition of same-sex relationships', *Alternative Law Journal*, vol 22 no 5, October 1998, p. 225.

⁴⁷ Morgan, S, 'Legal Recognition of Gay and Lesbian Relationships', *Australian Gay and Lesbian Law Journal*, October 1993, p. 64.

three per cent of the lesbians and fourteen percent of the gay couples had since divorced.⁴⁸

Domestic partnership legislation exists in a number of US States and municipalities, Canadian provinces and Scandinavian countries. In the United States it extends benefits and protections available to legally married heterosexual couples to 'domestic partners' who are defined as unmarried couples, whether of the same-sex or opposite sex, who live together and seek economic and non-economic benefits granted their married counterparts. These benefits include: health, dental and vision insurance; sick and bereavement leave; accident and life insurance; death benefits; parental leave; housing rights and tuition reduction (at universities); and use of recreational facilities.⁴⁹ In the United States most municipalities 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. Parties are required to pay a filing fee, and if the relationship ends, to terminate the partnership by filing a 'Statement of Termination of Domestic Partnership'.⁵⁰

Legislation such as that outlined above is not dependent upon passage by the Federal Parliament but could be introduced by a State government in the same way as the *De Facto Relationships Act 1984*.⁵¹ However, if such a scheme was implemented in NSW it would not include recognition for the purposes of federal legislation in areas such as immigration, social security, workers compensation for Commonwealth employees, veterans' affairs, defence or taxation. For such recognition to occur the Commonwealth would have to enact its own legislation. Another option suggested is for the Commonwealth to have sole responsibility for the creation and control of same-sex partnership legislation, in a manner similar to the *Corporations Law*.⁵²

3.4 Adjust individual laws

Piecemeal change would involve examining individual legislative provisions for amendment. A list of NSW legislation which would require change is reproduced in **Appendix 2**. Although this option is attractive because it would allow consideration of the most appropriate form of recognition in each particular instance, it is also a slow and

⁴⁸ 'Countries and companies which have taken action on same-sex relationships', http://www.religioustolerance.org/hom_mar4.htm, p. 3 of 5, accessed 12/05/99.

⁴⁹ Curry, H, Clifford, D and Leonard, R, *A legal guide for lesbian and gay couples*, 7th edition, Nolo Press, 1993 at p. 1-7.

⁵⁰ The Lesbian and Gay Legal Rights Service submission, *The Bride wore Pink: Legal Recognition of our Relationships*, February 1994 at p. 25.

⁵¹ Ibid.

⁵² Morgan, n 47, p. 65.

fragmented process and could result in some areas remaining untouched.⁵³ Nevertheless, there are a number of examples where ad hoc amendments have been made which recognise same-sex relationships:

- *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998* (NSW). This Act inserted into section 3(1) of the *Workers Compensation (Dust Diseases) Act 1942* and section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* the following definition of “de facto relationship”:

De facto relationship means the relationship between two unrelated adult persons:

- (a) who have a mutual commitment to a shared life, and
- (b) whose relationship is genuine and continuing, and
- (c) who live together,

And who are not married to one another.

‘Spouse’ is redefined to be a husband or wife where the claim for compensation was made before the commencement of the amending act (1 December 1998) or where the claim was made after that date, either a husband or wife or “the other party to a de facto relationship with the person”. Similarly, a “dependant” after the date of commencement is “the other party to a de facto relationship with the person”. When determining whether two persons are in a de facto relationship, “all the circumstances of the relationship are to be taken into consideration” (section 3(2)). These amendments clearly extend the definition of de facto relationship and spouse to allow workers compensations claims to be made by partners in same-sex relationships.

- *Duties Act 1999* (ACT). This Act charges the same duty (\$20) for transfers of property made pursuant to a domestic relationship agreement or a termination agreement made under the *Domestic Relationships Act 1994* as made pursuant to a court under the *Family Law Act 1975* (Cth) or the *Married Persons’ Property Act 1986* (ACT). This ends any differences between married spouses and partners in a domestic relationship for the purposes of stamp duty.
- *Administration and Probate (Amendment) Act 1996* (ACT). This Act amended the *Administration and Probate Act 1929* by inserting into the Act the following definition of “eligible partner” in relation to an intestate:

‘eligible partner’ in relation to an intestate, means a person other than the intestate’s legal spouse who -

⁵³ Walker, n 4, p. 295.

- (a) whether or not of the same gender as the intestate - was living with the intestate immediately prior to the death of the intestate as a member of a couple on a genuine domestic basis; and
- (b) either
 - (i) had lived with the intestate in that manner for 2 or more years continuously prior to the death of the intestate; or
 - (ii) is the parent of a child of the intestate who had not attained the age of 18 years at the date of death of the intestate.

Spouse is defined to be either the legal spouse (husband or wife of the intestate immediately prior to death) or the eligible partner of the intestate. When determining the distribution of property of an intestate, therefore, this amendment does not distinguish between married or unmarried partners, or partners of same or different sex. The Act also makes provisions for the distribution of the intestate's property where the intestate is survived by both an eligible partner and a spouse.

- *Family Provision (Amendment) Act 1996* (ACT). This Act is also concerned with the distribution of a deceased person's estate, and was cognate to the *Administration and Probate (Amendment) Act 1996*. The Act includes the same definition of 'eligible partner' as in the *Administration and Probate (Amendment) Act 1996*, and also inserts definitions of 'domestic relationship' and 'domestic partner' taken from the *Domestic Relationships Act 1994*. This Act provides that, in addition to eligible partners, a domestic partner may make an application for provision from the estate of the deceased.
- Superannuation (Entitlements of Same Sex Couples) Bill 1998. This Bill was introduced as a private member's bill by Anthony Albanese, MP on 7 December 1998 and was read a second time on February 11, 1999.⁵⁴ The purpose of the Bill is to amend the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) to extend the definition of 'de facto partner' to include partners in same-sex relationships who live together on a genuine domestic basis, and to amend the definition of 'dependent' to have the effect of allowing a same-sex partner to be considered a dependent for the purposes of the SIS Act.⁵⁵ Debate on the Bill has been adjourned, and unless it is given priority for debate by 28 June 1999 it will lapse.

⁵⁴ The bill was previously introduced prior to the 1998 Federal Election, after which it was re-introduced by Anthony Albanese, MP.

⁵⁵ Superannuation (Entitlements of Same Sex Couples) Bill 1998, Explanatory Memorandum.

3.5 Amend discrimination laws

Another model for recognising same-sex relationships is to utilise anti-discrimination laws which prohibit discrimination on the basis of sexuality. This model has been proposed in two Australian jurisdictions: the Commonwealth in 1995, and more recently in Western Australia in 1997. The Sexuality Discrimination Bill 1995, introduced by then Democrat Senator Sid Spindler, among other things, proposed to grant same-sex couples the same rights as are available to de facto heterosexual couples. However, as the Senate Legal and Constitutional Committee pointed out in its *Inquiry into Sexuality Discrimination*, anti-discrimination legislation does not, in itself, provide sufficient recognition of same-sex couples: other legislation such as the *Marriage Act 1968* and the *Social Security Act 1991* would also have to be amended. An example given is the definition of “couple” in the *Social Security Act 1991*. This is because of a provision in the Sexuality Discrimination Bill 1995 which states that the proposed legislation would not affect anything done by a person in direct compliance with a law of the Commonwealth.⁵⁶ In fact, South Australia is the only state whose anti-discrimination legislation does not provide an exception for discrimination authorised or necessitated by other legislation - the South Australian *Equal Opportunity Act* may override prior inconsistent legislation.⁵⁷

The Western Australian Acts Amendment (Sexuality Discrimination) Bill 1997 was introduced into the Legislative Council in September 1997, and was read a first and second time before it was referred to the Legislative Council’s Standing Committee on Legislation on 19 November 1997.⁵⁸ Amongst other things, the Bill amends the *Equal Opportunity Act 1984* to include a same sex de facto relationship as a form of marital status for the purposes of Part II of the *Equal Opportunity Act 1984* which prohibits discrimination on the grounds of marital status among others.⁵⁹ Whether or not this amendment amounted to legislative recognition of same-sex relationships was discussed at length in the second reading debate. However, the Committee noted that this Bill does not propose to make an overall amendment to the law’s treatment of same-sex relationships: existing differences between heterosexual and homosexual relationships remain except for the purposes of the *Equal Opportunity Act 1984*.⁶⁰ At the time of writing, the Bill has not been debated further in Parliament.

⁵⁶ Senate Legal and Constitutional Reference Committee, n 32, ¶16-45-6.46.

⁵⁷ Equal Opportunity Commission Victoria, *Same Sex Relationships and the Law*, March 1998, p. 38.

⁵⁸ Parliament was prorogued on 7 August 1998, upon which the Bill and the referral to the Committee lapsed. The Bill was restored to the Notice Paper in August 1998 and again referred to the Committee in September that year.

⁵⁹ Standing Committee on Legislation, *Report in Relation to the Acts Amendment (Sexuality Discrimination) Bill 1997*, Report No 45, pp. 51-53.

⁶⁰ *Ibid*, p. 53.

4 POSITION IN NEW SOUTH WALES

Following the election of the Carr Labor government in 1995, an announcement was made in June that year, indicating that the issue of the legal recognition of same-sex relationships was being considered. The Attorney-General, the Hon J Shaw QC MLC, was reported to have stated:

While discrimination on the grounds of homosexuality was prohibited in 1982, other legislation remains which is anomalous and blatantly discriminatory. There is a tension between the policy in the ADA and other laws and we are examining those anomalies.⁶¹

Support for this position was still evident in September of that year with the Attorney-General being attributed as saying:

I would like to see legislation which treats a variety of stable relationships in a non-discriminatory way. That includes same-sex relationships and other relationships, irrespective of their sexuality ... We want to treat all relationships in a way which is not governed by the traditional heterosexual view. I think society has changed, and the community is ready to accept that relationships ought to be dealt with equitably, whether they are based on marriage or otherwise.⁶²

No government legislation was introduced until 13 May of this year. In the intervening years, however, two private members Bills have been introduced. The first was the Significant Personal Relationships Bill 1997 introduced by Ms C Moore MP in September 1997,⁶³ and the second was the De Facto Relationships Amendment Bill 1998 introduced by Ms E Kirkby MLC in June 1998, neither of which were passed.⁶⁴

4.1 Significant Personal Relationships Bill 1997 (SPR Bill)

In introducing the SPR Bill Ms Moore MP said:

... the Significant Personal Relationships Bill ... will ensure that people in close personal relationships have access to and the protection of the law, if and when they need it. And it will do so in a totally non-discriminatory way. It will equally provide for relationships whether they are between people of the opposite sex or of the same-sex; whether they live in the same

⁶¹ 'Shaw acts to remedy anti-gay laws', *Sydney Morning Herald*, 1 July 1995.

⁶² 'A Shaw thing: same-sex and tranny reforms before Cabinet', *Star Observer*, No 270, September 21, 1995.

⁶³ *NSWPD*, Legislative Assembly, 25 September 1997, p. 584.

⁶⁴ *NSWPD*, Legislative Council, 24 June 1998, p. 6319.

household, or live apart; or whether it is a sexual and/or non-sexual relationship. The bill will equally provide for relationships that are heterosexual, homosexual or platonic.⁶⁵

The Bill would repeal the existing *De Facto Relationships Act 1984* (NSW) replacing it with a new Act, the *Significant Personal Relationships Act*. The main points in relation to this Bill are:

- The Bill establishes a new concept for the legal recognition of primary relationships between two adult people: **the significant personal relationship**. This is defined as ‘a relationship which exists because the parties to the relationship mutually acknowledge: their emotional interdependency, or the fellowship and support that each provides to the other, or both; **and** they believe that the relationship will continue and are mutually committed to the relationship continuing’. Such a relationship may exist regardless of whether the people involved live together, share their finances or have a sexual relationship. However, the Bill makes it clear that relationships of convenience, such as flat or house sharing, business and professional relationships, and employee-employer relationships are not in themselves significant personal relationships.
- The umbrella term ‘significant personal relationship’ covers two types of relationship: the first being a **recognised relationship** which provides for people who want to establish the existence of their relationships by a clearly defined legal process; and the second, a **domestic relationship** to ensure that people are able to have their relationships recognised by law if circumstances require it.
- In relation to the **recognised relationship** the Bill provides for:
 - (i) formal recognition by a designated legal process, which involves making a written declaration before a local court official or lawyer
 - (ii) a minimum of 45 days notice must be given before a declaration may be made
 - (iii) both parties must acknowledge and accept the legal rights and responsibilities of the relationship
 - (iv) a recognised relationship provides legal recognition of the relationship for all purposes and in all circumstances
 - (v) all rights and responsibilities associated with the relationship are immediately available upon recognition
 - (vi) any prior will made by either of the parties is automatically revoked upon

⁶⁵ NSWPD, Legislative Assembly, 25 September 1997, p. 584.

recognition, and if one partner dies without making a will, the surviving partner will inherit the estate

- (vii) a recognised relationship will be terminated by marriage, if either partner marries or both partners marry each other, or by court order on application by one or both partners; and
 - (viii) people who are married; already in a recognised relationship or not Australian citizens or permanent residents may not enter a recognised relationship.
- A **domestic relationship** is defined as ‘a significant personal relationship of two adult persons who live together or, if living apart, do not live apart on a permanent basis or share a common household or households for a significant period of the relationship, or otherwise share their lives’. In relation to a ‘domestic relationship’ the Bill provides:
 - (i) this definition includes existing heterosexual de facto relationships
 - (ii) the relationship may be legally recognised if circumstances require it, for example, where those in the relationship experience discrimination, the relationship breaks down, or one partner is incapacitated or dies
 - (iii) the existence of a relationship can be determined by a court or tribunal, on application of either or both partners to deal with specific circumstances. However, a court or tribunal decision about the existence of a domestic relationship is not binding on any other court or tribunal, which limits the extent to which the relationship is legally recognised
 - (iv) if one partner dies without making a will, the surviving partner will have the same rights as are currently available to surviving partners of heterosexual de facto relationships
 - (v) a domestic relationship can be terminated by mutual agreement of both partners or when one partner signifies to the other ‘by words or conduct’ that the relationship has ended.
 - The SPR Bill provides that, with some exceptions, where an existing NSW law states that people in marital or heterosexual de facto relationships have a right or responsibility, that right or responsibility shall be extended to people in recognised and domestic relationships, whether these relationships are heterosexual or homosexual. There are some exceptions to this, in particular in relation to superannuation and adoption. Superannuation is subject to an agreement between the Commonwealth and the States. Under this agreement, all States agree to comply with Commonwealth law regarding superannuation. This effectively prevents any State from changing its superannuation laws unilaterally. In addition, the Bill would

amend other key NSW Acts, notably those dealing with wills and intestacy, and the *Anti-Discrimination Act* would also be amended to outlaw discrimination on the ground of significant personal relationship where the relationship is a recognised relationship or a domestic relationship. New sections would be inserted to make it unlawful for hospitals and health care facilities to discriminate in the granting of access to patients' partners and providing information to patients' partners.

In the case of 'recognised relationships', rights and responsibilities created by the SPR Bill would run from the date the two people enter a recognised relationship. In the case of a 'domestic relationship', they would be subject to the same conditions as currently exist for de facto relationships, that is, the relationship must have existed for two years. There will be circumstances where a domestic relationship of less than two years will end due to the death of a partner. In such cases, the surviving partner shall enjoy any rights associated with the relationship, provided it can be established that: a denial of such rights would result in the surviving partner experiencing substantial hardship; and, but for the death of the other partner, the relationship would have continued; or a denial of these rights would be unconscionable.

- Although the Bill will retain many of the provisions of the *De Facto Relationships Act 1984* related to relationship breakdown, it will expand the range of matters that a court can take into account. These include:
 - (i) the promises or commitments either person may have made to the other during the relationship; and
 - (ii) the conduct of one partner which may have had a significant or deleterious impact on the other, or their children, such as physical or sexual abuse.
- Unlike the *De Facto Relationships Act 1984*, this Bill places strong emphasis on people resolving their differences. For this reason, it provides for counselling, mediation and conciliation, to enable people to avoid going to court, if possible.

Although the range of options in the Bill would appear to give a sufficiently wide choice of the way in which personal relationships could be recognised, the Bill did not have the full support of the Gay and Lesbian Rights Lobby, who saw it as possibly jeopardising amendments which the Government had foreshadowed in 1995. The Co-Convenor of the Gay and Lesbian Rights Lobby was reported as saying:

It [the Significant Personal Relationship Bill] creates a third rung in the hierarchy of relationships. At the top there's heterosexual marriage, then heterosexual de facto relationships, and then third in line there's recognised partnerships for gays and lesbians. We'd much rather see gays and lesbians included in the existing de facto legislation. It's better for us to look at the

issue of equality and inclusion in the laws that currently exist.⁶⁶

The Bill introduced by Ms Moore MP has not been debated.

4.2 De Facto Relationships Amendment Bill 1998 (DFRA Bill)

This Bill, introduced by the Hon E Kirkby MLC on her last day as a Member of the Legislative Council on 24 June 1998,⁶⁷ would amend the existing *De Facto Relationships Act 1984* (NSW), which was originally designed to meet the needs of heterosexual couples who were not legally married, but whose relationships were ‘marriage-like’. It would give same-sex couples a range of new, mostly financial rights, to match those granted to heterosexual couples under the *De Facto Relationships Act 1984*. These include the right to inherit a partner’s estate when no will has been written, mutual home-ownership contracts and access to life insurance and superannuation benefits. It would also make provision for visiting rights at hospitals, decisions on coronial inquests and funeral arrangements.

The Bill would also cover persons of the same-sex who are in stable, committed and cohabiting relationships which are purely platonic. Examples are given of women who have lost partners through war, who have formed friendships with others in similar circumstances; or men such as stockmen and soldiers who, in later life, have chosen to stay together, through mateship alone.

In the Second Reading speech to the Bill the Hon E Kirkby said:

The De Facto Relationships Amendment Bill is not so much about sexuality as human rights ... The Bill does not confer any additional rights on people of the same gender who choose to live together, and who decide they wish to leave property, shares, life insurance or superannuation to another person of the same gender when it can be established that they had a relationship of considerable duration. The Bill does not confer any additional rights on people of the same-sex who cohabit. However, it imposes certain obligations, which should be fully considered by those entering such a relationship. The bill will not change the legal definition of marriage.⁶⁸

And further:

Some in our society would seek to punish people living in same-sex relationships simply for asking for the same rights that are currently enjoyed by people living in what are accepted as conventional relationships. No

⁶⁶ ‘Couples Bill irks gay lobby’, *Sun Herald*, 27 July 1997.

⁶⁷ Despite the fact that Mrs Kirkby has retired from the NSW Parliament, the Bill has been taken up by her successor, the Hon Dr A Chesterfield-Evans, MLC.

⁶⁸ *NSWPD*, Legislative Council, 24 June 1998, pp. 6324-6325.

extra rights are being sought by people living in same-sex relationships.⁶⁹

The main points in relation to this Bill are:

- The Bill would amend the current Act's existing definition of de facto relationship with a new definition that would include same-sex couples. The new definition is: **de facto relationship** means 'the relationship between two persons who live together as a couple on a bona fide domestic basis'. This Bill also introduces the concept of **domestic relationship**. However, it is different to that in the SPR Bill. In the DFRA Bill, 'domestic relationship means a relationship between two adult persons, whether or not they live together or share a sexual relationship, where there is emotional and financial interdependence, and which may or may not be a de facto relationship'.

The definition of 'domestic relationship' used in the DFRA Bill is similar to that used in the ACT legislation discussed at page 13 above.

- Apart from amending the *De Facto Relationships Act 1984* (NSW), the DFRA Bill would amend a variety of other Acts, primarily to ensure that the new de facto relationship definition applies in these Acts. These are all Acts which deal in some way with the rights and responsibilities of people in either marital or heterosexual de facto relationships. In this way discrimination against those in same-sex relationships in these Acts would be removed.
- Seven Acts would be amended to include 'domestic relationships' as defined in the DFRA Bill. These are:
 - *De Facto Relationships Act 1984* to enable domestic partners to make a claim to property if the relationship breaks down
 - *Adoption Information Act 1990* to provide a domestic partner with access to adoption records after the death of an adopted person or birth parent
 - *Bail Act 1978* to include a domestic partner as someone whose interests should be considered protecting when a person in custody applies for bail
 - *Coroners Act 1980* to permit a domestic partner to exercise certain rights and privileges in relation to the former partner such requesting the coroner to hold an inquest into the person's death.
 - *Family Provision Act 1982* to provide eligibility to claim part of a domestic partner's estate
 - *Wills, Probate and Administration Act 1898* to provide automatic inheritance on

⁶⁹ Ibid, p. 6326.

the death of a domestic partner who had no will but only where s/he left no spouse, no children and no parents; and

- *Workers Compensation Act 1987* to extend eligibility for provision of death or injury benefits paid to employee's domestic partner

Not all NSW Acts discriminating against same-sex relationships are amended, nor are they identified in the DFRA Bill. The unamended Acts include the *Adoption Act* and Acts relating to superannuation.

- The NSW *De Facto Relationships Act 1984* primarily deals with the division of property when a heterosexual de facto relationship breaks down. It provides for the court to decide how property will be divided if the parties cannot agree. Since a judgement of the Court of Appeal of the NSW Supreme Court in July 1998, the only matters the court can take into account in making its decision are the contributions, financial and non-financial, direct and indirect, of the parties. The DFRA Bill will not change these provisions. However, it will extend its application to same-sex de facto couples.
- A court may, on application or of its own motion, declare whether a de facto or domestic relationship exists, or existed, between specified persons on a specified date or during a specified period. Such a declaration can be made whether or not the persons concerned or either of them are or is alive. In determining whether two persons are in a de facto or domestic relationship, all the circumstances of the relationship are to be taken into account. These include matters concerning 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.

Support for the Bill came from many quarters including the Law Society of New South Wales who called on the State Government and Opposition to support the proposed legislation. The then President, Mr R Heinrich said:

The law should be changed to define a domestic relationship as extending to carers and people in same-sex relationships ... The bill, introduced by the Democrat's leader ... simply offers to individuals and couples access to a range of rights associated with their relationships including probate, workers compensation entitlements, life insurance and mutual property entitlements.⁷⁰

As the Bill was modelled on one drafted by the Gay and Lesbian Rights Lobby, it received their support, with the Lobby reportedly threatening to stand candidates at the March 1999

⁷⁰ Media Release, 'Lawyers urge fairness of same-sex relationships', Law Society of NSW, 25 June 1998.

State election if the major parties did not vote for the measures it proposed.⁷¹

The Anti-Discrimination Board made the following points:⁷²

The Kirkby Bill aims to amend the definition of ‘marital status’, ‘relative’ and ‘spouse’ in both the *De Facto Relationships Act 1984* and the *Anti-Discrimination Act 1977*. Such an amendment would be extremely significant for people in same-sex relationships because it would mean that any rights afforded to married or de facto couples would also have to be afforded to homosexual couples. However, because of the operation of section 54 of the *Anti-Discrimination Act 1977*, only statutory changes which are identified in Schedule 2 of the Kirkby Bill will be affected. Those which have not been identified, or any future Acts or Regulations of the NSW Parliament which may have a discriminatory impact on certain groups, may not be subject to the *Anti-Discrimination Act 1977*. As such, to give full equality before the law to people in a de facto relationship or a domestic relationship, sections 54(1)(a) and (b) of the *Anti-Discrimination Act 1977* need to be repealed or amended so as not to apply to legislation which requires different treatment for people in same-sex relationships.

The definition of de facto relationship in the Kirkby Bill relies on ‘two persons who live together as a couple on a bona fide domestic basis’. This requirement is likely to have an adverse impact on many homosexual couples who do not cohabit, but are in fact in a primary relationship of mutual emotional interdependency ... The Board would prefer that the definition of de facto relationship exclude the need for two persons to live together and be based instead on a primary relationship of mutual interdependency.

Although the Bill was not debated, in the comments made by Members of the Legislative Council on the motion to introduce it, it is apparent that there was both support for and opposition to the contents of the Bill. In mid-October 1998, the Attorney-General announced that the issue had been referred to the Legislative Council’s Standing Committee on Social Issues. He was reported as saying: ‘Due to the emotive aspects of the issues, and the lack of clear bipartisan support, the government considers this reference is the most appropriate method of having the matter properly considered.’⁷³

The reference given to the Committee was to inquire into, and report on:

- the rights and obligations of persons in interdependent personal relationships other

⁷¹ ‘Gay lobby threatens to go for votes’, *The Sydney Morning Herald*, 25 June 1998.

⁷² Anti-Discrimination Board, ‘Same-sex relationships: legal recognition’, *Equal Time*, No 39 February 1999, pp. 6-7.

⁷³ ‘Gay rights backdown’, *Daily Telegraph*, 16 October 1998.

than those defined in the *De Facto Relationships Act 1984*; and

- the extension of those rights and obligations as proposed in the De Facto Relationships Amendment Bill 1998.

At the time of writing, this Inquiry is still ongoing.

4.3 Property (Relationships) Legislation Amendment Bill 1999 (PRLA Bill)

On 11 May 1999, the Attorney-General announced the Government's intention to 'introduce legislation to State Parliament which modernises the *De Facto Relationships Act* on a non-discriminatory basis', saying that it 'honoured a commitment by Labor to extend the rights and obligations of de facto relationships to other domestic relationships between adult persons'.⁷⁴

The Property (Relationships) Legislation Amendment Bill was introduced on 13 May 1999. According to the Second Reading speech:

The Property (Relationships) Legislation Amendment Bill recognises that contemporary society has developed to a point where laws that regulate the division of property on the failure of a broad range of intimate relationships are necessary and desirable. Presently, persons living in intimate partnerships but who are not married or covered by the existing *De Facto Relationships Act* have limited rights to a share of the property of the partnership in the event that it fails or one partner dies.

In New South Wales, partners without the protection of living in a de facto relationship as currently defined by statute, and interpreted by the courts, must rely on the vagaries of the common law relating to constructive trusts and the like on the breakdown of a relationship; or, in the event of a partner dying intestate or making inadequate provision for the surviving partner in a will, on the narrow grounds provided for in the *Family Provision Act*, but only if there was a relationship of dependency; or, for the purposes of making decisions about the incapacitated partner's medical treatment, confinement and the like, on their ability to establish, to the satisfaction of a person in authority, such a close personal relationship with an incapacitated partner that it should be regarded as the paramount relationship.

Such reliance is costly, time consuming and, at times, unfair. In order to redress the inadequacies in the current laws concerning personal relationships, this bill extends the ambit of the *De Facto Relationships Act* to parties to domestic relationships which are defined in this bill as being a

⁷⁴

Hon J Shaw QC MLC, Media Release, 'Carr government introduces property relationships Bill', 11 May 1999.

de facto relationship; or close personal relationship other than a marriage; or a de facto relationship between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.⁷⁵

The main points in relation to the Bill are:⁷⁶

- the creation of an umbrella term **domestic relationship** to cover two kinds of relationship: the first is a **de facto relationship** which has been re-defined to describe a relationship in which the two people involved live together as a couple and are not married to one another (this would cover both heterosexual and homosexual relationships) or related by family; the second is a **close personal relationship** in which one or each of the parties to the relationship provides the other with domestic support and personal care. An example of this second relationship would be a daughter or son who cares for an aged parent in his or her own home.
- further guidance is given as to the factors to be taken into account in determining whether a de facto relationship exists between the parties. It provides that all the circumstances of the relationship are to be taken into account and a non-exhaustive check list of matters to be considered is included. It is important to note that it is open to a court to decide that a de facto relationship in the redefined sense exists even if some of the factors contained in the check list are not present in a particular relationship.
- in establishing whether a ‘close personal relationship’ exists, regard should be had to the domestic support and personal care that the parties provide, one or both for the other. Such support and care will commonly be of a frequent and ongoing nature. For example, domestic support services will consist of attending to the household shopping, cleaning, laundry and like activities. Personal care services may commonly consist of assistance with mobility, personal hygiene and generally ensuring the physical and emotional comfort of one or both parties for the other.
- it does not attempt to provide for any form of marriage, and it does not create rights and obligations between people who merely share accommodation or where one person is providing care to another by way of employment or in the course of acting on behalf of a charitable organisation.
- to ensure that the welfare of children being cared for in the domestic relationships contemplated by the Bill is considered if the domestic relationship breaks down, the definition of ‘child’ has been extended to include ‘a child for whose long term welfare both parties have parental responsibility (within the meaning of the

⁷⁵ Hon J Shaw QC MLC, *NSWPD* [proof], Legislative Council, 13 May 1999, p. 45.

⁷⁶ This information is taken from the Second Reading speech referred to above.

Children and Young Persons (Care and Protection) Act 1998)’.

- it will require the parties in a domestic relationship to conform to the requirements currently imposed on de facto couples under the *De Facto Relationships Act* before they may exercise the rights conferred on them by the bill. Accordingly, the relationship must have been in existence for a period of two years, or there must be a child of the relationship, or other special circumstances, before the provisions of the bill entitling them to seek redress from the court for a division of property, or an order for maintenance in certain circumstances, may be utilised.
- it makes consequential amendments to a number of pieces of legislation containing provisions which confer rights or privileges, afford concessions or impose obligations with respect to married persons or those in a de facto relationship, to extend their application to the parties in a domestic relationship as defined above. These include:
 - amendments to the *Family Provision Act* to ensure parties to all domestic relationships are included as eligible persons for the purposes of making an application under that Act for a share of a deceased party’s estate
 - amendments to the *Wills, Probate and Administration Act* to the effect that when a de facto partner, as redefined, dies intestate, his or her partner will be entitled to a share of the estate, including the house in which they lived. In order to qualify for such entitlements the de facto partner will be required to prove that the relationship was of at least two years duration.
 - amendments to the *Duties Act* to facilitate the sharing of property between de facto partners, in the redefined sense, and to provide for stamp duty exemptions for transactions arising out of redistribution of property following the breakdown of a domestic relationship, as defined.
 - amendments to legislation such as the *Motor Accidents Act* and the *Law Reform (Miscellaneous Provisions) Act* to ensure rights flowing to a dependant partner, when the dependency may be emotional or financial, on the incapacity or death of a providing partner, will be extended to all de facto partners in the redefined sense.
 - amendments giving competent partners the right to advocate and make decisions on behalf of incapacitated partners pursuant to the *Guardianship Act*, the *Mental Health Act* and the *Inebriates Act* will be extended to all de facto partners in the redefined sense.
 - amendments to the *Anatomy Act* and the *Human Tissue Act* to permit the de facto partner, in the redefined sense, of a deceased person to make decisions as to the treatment of body parts of the deceased. The *Coroners Act* will also be amended to permit a de facto partner, in the redefined sense, to participate in any inquest.

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- Finally, the bill contains further amendments of a consequential nature which flow from the expanded definitions already mentioned, and other amendments which are designed to preserve the status quo in relation to existing statutory obligations based on the current definition of ‘de facto relationship’. It also proposes to re-name the amended *De Facto Relationships Act 1984* as the *Property (Relationships) Act 1984*.

The reaction to the Bill introduced by the Attorney-General has been mixed. The Gay and Lesbian Rights Lobby Co-convenor, Mr A Kirkland, is reported as saying he ‘would be relieved when the Government had finally met its commitment’, while the Reverend the Hon F Nile MLC condemned the Government for reviving the Australian Democrat’s same-sex Bill. He said: ‘the Carr government has no mandate for this controversial ‘same-sex’ Bill, as it never stated its intention to voters of NSW.’⁷⁷

Comparison of definitions used

It is worth noting at this point that although the three recent New South Wales Bills share certain similarities, there are a number of differences. This is further complicated by the use of like terms.

Close personal relationship

- In the Bill introduced by the Hon J Shaw QC MLC is the term used to describe a relationship in which each of the parties provides the other with domestic support and personal care.

De facto partner

- This is defined in the current *De Facto Relationships Act 1984* as:
 - (a) in relation to a man, a woman who is living or has lived with a man as his wife on a bona fide domestic basis although not married to him, and
 - (b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.

De facto relationship

- In the current *De Facto Relationships Act 1984* this is defined 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.’

⁷⁷ The Reverend the Hon F Nile MLC, Media Release, ‘ALP Government gives first priority to ‘same-sex’ homosexual Bill, 13 May 1999.

- In the Bill introduced by Hon E Kirkby MLC this term is redefined to mean a relationship between two people who live together as a couple on a bona fide domestic basis.
- In the Bill introduced by the Hon J Shaw QC MLC is used to describe a relationship in which the two people involved live together as a couple and are not married. This would cover both heterosexual and homosexual relationships.

Domestic relationship

- In the Bill introduced by Ms Moore MP is used to describe a significant personal relationship which has not been formally recognised by a clearly defined legal process.
- In the Bill introduced by Hon E Kirkby MLC is an umbrella term used to describe a relationship where there is interdependence, which may or may not be a de facto relationship, and where the parties may or may not live together or share a sexual relationship.
- In the Bill introduced by the Hon J Shaw QC MLC is an umbrella term which covers both ‘de facto relationships’ as redefined and ‘close personal relationships’.

Recognised relationship

- In the Bill introduced by Ms Moore MP is the term used to describe a significant personal relationship which has been formally recognised by a clearly defined legal process.

Significant personal relationship

- In the Bill introduced by Ms Moore MP, is the umbrella term which covers both ‘recognised relationships’ and ‘domestic relationships’ and means a relationship in which two key elements are present, namely mutuality and commitment. Aspects such as cohabitation, sexual intimacy, sharing financial resources may be present but are not necessary.

5 CONCLUSION

In contemplating the reforms outlined above, which are aimed at combatting or removing, areas of continuing discrimination, it is important to recognise that although society today is arguably more diverse,⁷⁸ and as a result, more tolerant than it was in 1977 when the *Anti-*

⁷⁸ While most families still involve a registered marriage, an increasing proportion involve de facto couples with and without children, single parent families and same-sex couples with and without children. In 1986 Census data indicated de facto couples made up 5.8% of all couples living in Australia. By 1991 this figure had risen to 8.1% and 1996 Census data put

Discrimination Act was introduced, there is still a need to ensure fundamental human rights are protected and that all NSW citizens are treated equally. While many people are of the view that the granting of rights to those in same-sex relationships is nothing more than the extension of the general principles as exemplified in the *Anti-Discrimination Act*,⁷⁹ it should be acknowledged that support for this view is not universal.⁸⁰

A significant point, however, was raised in the debate on the *ACT Domestic Relationships Act 1994*:

It is one thing to be judgmental about some of the relationships and the lifestyles we are talking about here; it is quite another to say that people who adopt those lifestyles deserve no protection from the law.⁸¹

the figure at 10.1%. Note that 1986 and 1991 figures apply only to heterosexual couples as information on same-sex couples was not collected, however in the 1996 Census, details on same-sex couples were collected. In relation to NSW, the Census figures indicated that there were approximately 4,635 same-sex couples in NSW: Bolger, B, 'Census consensus', *Sydney Star Observer*, 4 September 1997, pp. 11-13.

⁷⁹ 'Law should remove discrimination against same-sex partners', *The Australian*, 10 January 1995 and 'A Fair Go for Gays', *The Australian*, 14 January 1995.

⁸⁰ 'Moore's gay reform plans outrage MPs', *Sydney Morning Herald*, 28 March 1995. In relation to the De Facto Relationships Amendment Bill, Reverend the Hon F Nile MLC said:

It must be noted that this Bill is a Trojan horse. The real agenda is to clear the main obstacles to the legalisation and to recognition of same-sex marriages so that homosexuals do not, as they say, continue to live in sin - which makes a mockery of marriage. The claim that this Bill will rectify an injustice is false, because anyone can make a will and leave their property to any person or organisation. (NSWPD, Legislative Council, 24 June 1998, p. 6320.)

⁸¹ *ACTPD*, Legislative Assembly, 12 October 1994.

APPENDIX 1

Discrimination against people in gay/lesbian relationships

List drawn up by the Anti-Discrimination Board, last revised in April 1994 and included in its submission, *Balancing the Act*, as Attachment 4.

Currently, gays and lesbians in relationships are *legally* allowed to be discriminated against (in comparison with heterosexuals in relationships) in the following major ‘service delivery’ areas.

AREA OF DISCRIMINATION	STATUTORY / LEGAL REASON FOR THIS
<i>Death of a partner</i>	
<p>Organ donation / post mortem examinations / funeral arrangements - executor / administrator of estate, controls all this in line with the will or intestacy laws. However, ‘next of kin’ has control over organ donation & post mortem exams, and often manages to control funeral arrangements - particularly if there is no will, or the will is not specific enough.</p>	Human Tissue Act 1983 (NSW)
<p>Inquest request - ‘relatives’ have right to request inquest with jury. Excludes gay / lesbian partner</p>	Coroners Act 1980 (NSW)
<p>Intestacy (dying without a will) - no provision for gay / lesbian partners to get anything, unlike heterosexual married & de facto partners who get substantial portion</p>	Wills Probate & Administration Act 1988 (NSW)
<p>Challenging a will - lesbians and gays can only challenge a will, if can satisfy dependency and cohabitation tests - these tests don’t apply to heterosexual couples</p>	Family Provision Act 1982 (NSW)
<p>Victims compensation - if death occurs as result of act of violence, victims compensation can be paid to ‘close relatives’ - this does not include gay / lesbian partners</p>	Victims Compensation Act 1987 (NSW)
<p>Workers compensation lump sum - if death occurs as result of employment injury, ‘dependants’ entitled to lump sum compensation payment under C / W law - this excludes even <i>dependent</i> gay / lesbian partners; & ‘family’ entitled under NSW law, which probably excludes gay / lesbian partners</p>	<p>Safety Rehabilitation & Compensation Act 1988 (C/W);</p> <p>Workers Compensation Act 1987 (NSW)</p>
<p>Superannuation - benefits usually only payable to spouse / children of contributor - this excludes gay / lesbian partner. Schemes for State and C/W public servants definitely exclude gay / lesbian partners</p>	<p>depends of fund rules;</p> <p>Superannuation Act 1916 (NSW);</p> <p>Superannuation Act 1976 (C/W)</p>
<p>Nervous shock after partner is killed - no mention of gay / lesbian partners being able to sue in the same way that heterosexual partners / family members can</p>	Law Reform (Miscellaneous Provisions) Act 1944 (NSW)
<p>Psychological / psychiatric injury following death / injury of partner in road / motor accident - gay / lesbian partners excluded from claiming</p>	Motor Accidents Act 1988 (NSW)
<p>Compensation for death due to wrongful act, neglect or default - gay / lesbian partners excluded</p>	Compensation to Relatives Act 1987 (NSW)

<i>Incapacity / injury of partner</i>	
Medical consent / power over other affairs - heterosexual partners automatically get these powers as 'person responsible', gay / lesbian partners have to apply to Guardianship Board	Guardianship Act 1987 (NSW)
Hospital visiting rights - can get difficult if there are disputes about who is 'next of kin' / has power to give medical consent etc (<i>see above</i>)	
Sporting injuries - gay / lesbian partners excluded from benefits available to heterosexual partners	Sporting Injuries Insurance Act 1978 (NSW)
Road / motor accidents - see above under 'death of partner'	
<i>Ending of relationships</i>	
Disputes about distribution of property - no access to cheaper / more predictable Family Courts. Have to go to Equity Division of Supreme Court	Family Law Act 1975 (C/W) for married partners; De Facto Relationships Act 1984 (NSW) for heterosexual de facto couples
Relationship counselling - only married couples able to use counselling / mediation services of Family Court, although heterosexual de facto couples may also be allowed to use these services soon	same laws as above
Stamp duty on sale of share of house / unit to partner - only heterosexual couples exempt	Stamp Duties Act 1920 (NSW)
<i>Crime committed by partner</i>	
Bail - consideration given to protection of 'close relatives' - this definitely excludes gay / lesbian partners	Bail Act 1978 (NSW)
Giving evidence against partner - no exemptions / privileges for gay / lesbian partners, unlike for heterosexual couples	Evidence Act 1898 (NSW); Crimes Act 1900 (NSW)
<i>Children</i>	
Adoption - gay / lesbian couples not entitled	Adoption of Children Act 1965 (NSW)
Adoption of partner's child - only for 'prescribed adopting parent' - this excludes same sex partners. Might be possible to get 'consent order' for custody, but only if legal parents agree	Family Law Act 1975 (C/W)
Custody disputes between biological parents and gay / lesbian couple- depends on Family Court and their interpretation of what is in child's best interests - courts have gone both ways	

<p>Where you split from gay / lesbian partner who is the child's natural parent - can only get rights under 'consent order' for custody, and then only if biological / legal parent agrees - see above</p>	<p>Family Law Act 1975 (C/W)</p>
<p>Artificial / donor insemination - most clinics will only provide service to treat 'infertility' - some argue that this is the commitment they've given to sperm donors; others (?wrongly) argue that the Artificial Conception Act's presumption of paternity would create problems if service was provided to unmarried women - probably open to challenge under current Anti-Discrimination Act</p>	<p>Artificial Conception Act 1984 (NSW)</p>
<p>Blood or semen donation - Gay men excluded from donating if they've had male to male sexual activity in last 5 years</p>	<p>Human Tissue Act 1983 (NSW)</p>
<p>Employee benefits (eg. travel benefits, roster organisation, loans, compassionate leave) Most of these should be provided to gay / lesbian partners if they are provided to heterosexual partners. If not, could claim "indirect homosexual discrimination" under current Anti-Discrimination Act (ADA). However, Commonwealth employees not covered by ADA, and their rules appear to discriminate....</p>	<p>C/W public sector employee rules and regulations</p>
<p>Health funds Only some funds allow gay / lesbian families to pay cheaper family rate. Those that don't hide behind their interpretation of definitions in controlling laws of 'dependants', and / or of 'spouse'</p>	<p>National Health Act 1953 (C/W); For Medibank Private - Health Insurance Commission Act 1973 (C/W)</p>
<p>Taxation Neither dependent spouse rebate nor housekeeper allowance to gay / lesbian partners</p>	<p>Various Taxation Acts (C/W)</p>
<p>Age of consent Homosexual men can't have legal sexual relationships with each other until aged 18, unlike everyone else for whom the age of consent for sexual relationships is 16</p>	<p>Crimes Act 1900 (NSW)</p>

APPENDIX 2

Discrimination against people in gay and lesbian relationships

**List drawn up by the Gay and Lesbian Rights Lobby and attached as Appendix A
in *Legal Recognition of Same-Sex Relationships*, April 1995.**

NSW STATUTES REQUIRING EXAMINATION FOR POSSIBLE AMENDMENT

Acts

Adoption Information Act 1990
Adoption of Children Act 1965
Albury-Wodonga Development Act 1974
Anatomy Act 1977
Anti-Discrimination (Amendment) Act 1994
Anti-Discrimination Act 1977
Artificial Conception Act 1984
Bail (Domestic Violence) Amendment Act 1993
Bail Act 1978
Children (Equality of Status) Act 1976
Co-operation Act 1923
Co-operatives Act 1992
Coal and Oil Shale Mine Workers (Superannuation) Act 1941
Coal and Oil Shale Mine Workers (Superannuation) Amendment Act 1992
Coal and Oil Shale Mine Workers (Superannuation) Amendment Act 1994
Compensation to Relatives Act 1897
Conveyancers Licensing Act 1992
Conveyancing Act 1919
Conveyancing and Law of Property Act 1898
Coroners (Amendment) Act 1993
Coroners Act 1980
Credit (Amendment) Act 1993
Credit Act 1984
Crimes (Domestic Violence) Amendment Act 1993
Crimes Act 1900
Crown Lands (Continued Tenures) Act 1989
De facto Relationships Act 1984
Defamation Act 1974
Dentists Act 1989
Director of Public Prosecutions Act 1986
District Court Act 1973
Domicile Act 1979
Door-to-Door Sales Act 1967
Drug Trafficking (Civil Proceedings) Act 1990
Electricity Act 1945
Electricity Commission Act 1950
Evidence Act 1898
Family Provision Act 1982
Financial Institutions Commission Act 1992
Friendly Societies Act 1989
Growth Centres (Development Corporations) Act 1974
Guardianship (Amendment) Act 1993
Guardianship Act 1987
Hay Irrigation Act 1902
Health Insurance Levies Act 1982

Housing Indemnities Act 1962
Human Tissue Act 1983
Industrial Relations Act 1991
Inebriates Act 1912
Insurance Act 1902
Judges' Pensions (Amendment) Act 1994
Judges' Pensions Act 1953
Jury Act 1977
Landlord and Tenant (Amendment) Act 1948
Landlord and Tenant Act 1899
Law Reform (Marital Consortium) Act 1984
Law Reform (Miscellaneous Provisions) Act 1944
Law Reform (Miscellaneous Provisions) Act 1946
Legal Aid Commission Act 1979
Legal Profession Act 1987
Liquor Act 1982
Local Courts (Civil Claims) Act 1970
Local Government Act 1993
Local Government and Other Authorities (Superannuation) Act 1927
Married Persons (Property and Torts) Act 1901
Mental Health (Amendment) Act 1994
Mental Health Act 1990
Minors (Property and Contracts) Act 1970
Motor Accidents Act 1988
Motor Vehicles (Third Party Insurance) Act 1942
Motor Vehicles Taxation Act 1988
National Parks and Wildlife Act 1974
Navigation Act 1901
New South Wales Retirement Benefits Act 1972
Parliamentary Contributory Superannuation Act 1971
Parliamentary Electorates and Election Act 1912
Partnership Act 1892
Police Association Employees (Superannuation) Act 1969
Police Regulation (Superannuation) Act 1906
Police Service Act 1990
Pre-Trial Diversion of Offenders (Amendment) Act 1993
Pre-Trial Diversion of Offenders Act 1985
Protected Estates Act 1983
Public Authorities Superannuation Act 1985
Public Hospitals Act 1929
Public Sector Executives Superannuation Act 1989
Public Sector Management Act 1988
Real Property Act 1900
Registration of Births, Deaths and Marriages Act 1973
Retirement Villages Act 1989
Rural Lands Protection Act 1989
Sporting Injuries Insurance Act 1978
Stamp Duties Act 1920
State Authorities Non-Contributory Superannuation Act 1987

State Authorities Superannuation Act 1987
State Revenue Legislation (Amendment) Act 1994
State Revenue Legislation (Further Amendment) Act 1992
Statute Law (Miscellaneous Provisions) Act 1991
Statute Law (Miscellaneous Provisions) Act 1992
Statute Law (Miscellaneous Provisions) Act 1994
Superannuation Act 1916
Superannuation Legislation (Amendment) Act 1991
Superannuation Legislation (Amendment) Act 1992
Superannuation Legislation (Further Amendment) Act 1993
Superannuation Legislation (Superannuation Guarantee Charge) Amendment Act 1992
Supreme Court Act 1970
Sydney Cove Redevelopment Authority Act 1968
Sydney Cricket and Sports Ground Act 1978
Sydney Market Authority Act 1968
Teaching Services Act 1980
Testator's Family Maintenance and Guardianship of Infants Act 1916
Transport Administration Act 1988
Transport Employees Retirement Benefits Act 1967
Trustee Act 1925
Trustee Companies Act 1964
Unitarian Church Act 1927
Victims Compensation Act 1987
Voluntary Workers (Soldiers' Holdings) Act 1917
Waste Disposal Act 1970
Wentworth Irrigation Act 1890
Will, Probate and Administration Act 1898
Workers Compensation (Benefits) Amendment Act 1991
Workers Compensation Act 1987
Workers Compensation Legislation (Amendment) Act 1994
Workers' Compensation (Dust Diseases) Act 1942
Workmen's Compensation (Broken Hill) Act 1920
Youth and Community Services Act 1973

Regulations

Adoption Information Regulation 1991
Adoption of Children Regulations
Bail Regulation 1994
Co-operation (Accounts and Audit) Regulation 1988
Co-operation (Starr-Bowkett and Co-operative Housing Societies) Regulation 1994
Constitution (Disclosures by Members) Regulation 1983
Coroners Regulation 1980
Crimes (Domestic Violence and Child Assault) Regulation 1994
Crown Lands (General Cemetery) By-Law 1991
Dog Regulation 1981
Electricity Distributors (Contract Tendering) Regulation 1994
Forestry Regulation 1994
Friendly Societies General Regulation 1990
Funeral Funds Regulation 1994

Human Tissue Regulation 1984
Independent Commission Against Corruption (Disclosure of Financial Interests) Reg 1989
Independent Commission Against Corruption (General) Regulation 1989
Jury Regulation 1993
Legal Profession Regulation 1987
Liquor Regulation 1983
Local Government (Rates and Charges) Regulation 1993
Local Government (Savings and Transitions) Regulation 1993
Lord Howe Island (General) Regulation 1994
Motor Traffic Regulations 1935
Parliamentary Contributory Superannuation Regulation 1993
Police Service Regulation 1990
Pre-Trial Diversion of Offenders Regulation 1989
Prisons (General) Regulation 1989
Protection of the Environment Administration (Disclosure by Board Members) Regulation 1992
Public Authorities Superannuation (Closed Local Government Schemes Transfer) Reg 1986
Public Authorities Superannuation (Transitional Provisions) Regulation 1985
Public Authorities Superannuation (Transport Retirement Fund Closure) Regulation 1986
Public Health Regulation 1991
Public Sector Management (General) Regulation 1988
Public Trustee Regulation 1991
Retirement Village Industry Code of Practice Regulation 1989
State Authorities Superannuation (Gov Railways Superannuation Scheme Transfer) Reg
State Authorities Superannuation (Transitional Provisions) Reg 1988
State Authorities Superannuation Regulation 1988
Sydney Cricket Ground and Sydney Football Stadium By-Law 1994
Victims Compensation Regulation 1988
Water Supply Authorities (Finance) Regulation 1987
Will, Probate and Administration Regulation 1993