

# Legal recognition of same-sex relationships

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## *The views of gays and lesbians.*

This article is about the views of cohabiting gays and lesbians on the legal recognition of same-sex relationships, and on the appropriate legal form in which such a recognition should be accomplished. An exploration of these issues is topical for a number of reasons. In the first instance, it has been demonstrated<sup>1</sup> that cohabiting gays and lesbians are being discriminated against, and deserve the attention and support of the community and the state. Apart from this, some interest groups of a diverse ideology and background as well as legal experts and social scientists have been putting pressure on government not only to legalise same-sex relationships but to also allow gays and lesbians to marry;<sup>2</sup> they challenge the prohibition of homosexual marriages through the courts, and demand that same-sex couples be treated the same way as heterosexual couples.

The discussion of the views of gays and lesbians on the legal recognition of same-sex relationships is topical also because Australian governments have entered the first stage of a process of legal reform that could eventually lead to legal recognition. Examples of such attempts are the *Significant Relationships Bill 1997*, and the *De Facto Relationships (Amendment) Bill 1998* (both in NSW), as well as the proposals generated by the Discussion Paper on Same-Sex Relationships published by the Victorian Equal Opportunity Commission.<sup>3</sup> All proposals recommended or contemplated the legal recognition of same-sex relationships, proposed or outlined possible forms of legal recognition,<sup>4</sup> and invited public debate and community reaction. In all cases, a full understanding of all factors associated with the legal recognition of this lifestyle is paramount.

Adding to the significance, topicality and urgency of state regulation of same-sex relationships is the fact that international policy and practice have taken a positive stance on this issue. A number of countries (for example, Norway, Denmark, Sweden, and Greenland)<sup>5</sup> have already legally recognised same-sex relationships, while others are currently contemplating such recognition. Australia stands far behind international developments. Same-sex couples have not been legally recognised although issues relating to homosexual cohabitation have been addressed by some governments (for example, by providing gays and lesbians with immigration entitlements, relocation benefits, travel allowances, insurance benefits, workers compensation, and property rights after death of the partner, or even by equating them to heterosexual couples — as in *Family Provisions Act 1994* (ACT)). Australia is, therefore, under pressure to consider seriously the legal recognition of same-sex relationships.

Despite the seriousness of the proposed changes and the wide-ranging effects they are expected to have on the lives of cohabiting gays and lesbians, knowledge of the views of gays and lesbians on the proposed changes is very limited. Preliminary research has produced mixed results<sup>6</sup> combined with considerable mistrust, disbelief and scepticism, even within the gay community. Critics suggest, for instance, that moves to legally recognise same-sex relationships do not reflect the

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views and opinions of cohabiting gays and lesbians; instead, they are driven by governments which are interested in gaining control over the lives of homosexual couples, and by a few activists and extremist militants who are pursuing personal ambitions rather than the rights of gays and lesbians. How valid are these views? Are gays and lesbians in favour of legal recognition, and, if so, in what form do they think such a recognition should be introduced? These questions will be addressed in this article.

## The study

The fieldwork that provides the basis for this analysis was conducted in Australia between the years 1995 and 1997 and included 316 same-sex couples (153 gay and 163 lesbian couples), of which 264 resided in Australia (all States and Territories) and 52 in New Zealand. The respondents were selected by means of snowball sampling and quota sampling procedures. The ages of the respondents range from the late teens to the over 50s, with 10% being below 20 years of age, 41% between 21 and 30, 33% between 31 and 40, and 16% over 41 years of age. The age difference between the partners of the same-sex couples ranged from nil to 21 years; the highest difference was among lesbians. Large differences were most common among couples with children in the relationship, with the biological parent usually being the younger partner. The respondents came from all walks of life, were of a low or middle class status, and from all levels of education. Finally, of the 316 couples, 128 (50 gay and 74 lesbian couples) had children below the age of 18 living in the same-sex relationship; 39 (26 gay and 13 lesbian) had children living outside the same-sex relationship, and 149 (73 gay and 76 lesbian) had no children.

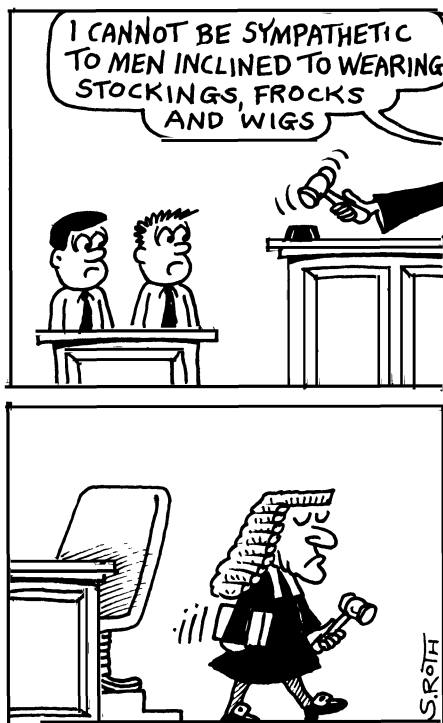
Data collection was accomplished by means of interviews conducted individually with each partner, and in the context of the Delphi technique,<sup>7</sup> where preliminary findings were handed to key informants for comments and explanations. Revised versions of the findings were further subjected to additional reviews by key informants, to assure that the findings were interpreted within the parameters of the culture of the respondents, and that deviations were sufficiently explained and justified.

## Legal recognition

The first question addressed in this study was whether respondents believed that same-sex relationships should be legally recognised. The answer obtained was as follows: 506 of the 632 respondents (about 80%) stated that same-sex relationships should be recognised. Only 126 (about 20% of the respondents) were against recognition. There were about as many gays as lesbians against recognition (18.9% and 20.85% respectively). Most likely to be in favour of recognition were respondents in long-standing relationships, in custody of young children, and over 30 years of age.

The respondents who were against recognition justified their position by arguing that legal recognition will:

- not bring any advantages to the relationship, and will not enhance the quality of life of the couple;
- disadvantage gays and lesbians because it means expansion of state control over homosexuals;
- result in shifting responsibility for care of gays and lesbians from the state to the partner, and reducing benefits and pension entitlements accordingly;
- restrict freedom and privacy of cohabiting partners, particularly those in clandestine relationships;



- result in 'establishing and maintaining a central registry of cohabiting homosexuals';
- empower public officials to enter in, interfere with and investigate relationships of gays and lesbians at will; and
- force all cohabiting gays and lesbians to come out, after a certain period of cohabitation (if recognition is accomplished in the form of the 'de facto' model).

## The preferred option

Having established that the vast majority of gays and lesbians are in favour of legal recognition of same-sex relationships, the question about the form in which such recognition should be implemented was addressed. The options offered to respondents were those which emerged from preliminary work, and literature review,<sup>8</sup> namely 'marriage' (gays and lesbians to be allowed to marry), 'de facto relationships' (gays and lesbians to be legally recognised as a couple after a set period of cohabitation), 'registration of domestic partnerships' (gays and lesbians to receive legal recognition as a couple after they register their relationship with the authorities), 'individual law adjustments' (no change of the status of the relationship, but laws to be adjusted to include same-sex relationships); and 'no legalisation' (the status of the relationship to remain as it is). The relevant responses can be summarised as follows.

1. The most popular option is 'registration of domestic partnerships', with 39% of the respondents (41% of gays and 38% of lesbians) choosing this option,<sup>9</sup> followed by 'marriage' and 'no legalisation' both being supported by 20% of the respondents, and 'de facto relationships' chosen by 14% of the respondents. Finally, 7% of the gays and lesbians surveyed were in favour of 'individual law adjustments'.

2. To test further the position of our respondents to marriage, the questions were put to them (a) whether they perceived their current relationship as marriage, and (b) whether they would marry if that were possible and permitted. The answers to the first question show that only 15.5% of the respondents thought their relationship was a marriage; 31.5% stated that their relationship was similar to marriage (they were like married persons in that they lived together and shared life, and residence, but did not consider each other as husband and wife, and did not adopt any patterns of life which married couples usually share). Fifty-three percent of the couples did not see their relationship as marriage. With regard to whether they would marry if this were possible and

permitted, the responses show that less than one quarter of gays and lesbians stated that they 'might marry' or 'will marry'. A further finding emerged through this questioning: in most cases, when gays and lesbians spoke of marriage as an option of legalising their relationship, they saw it as a quick and easy way of obtaining rights and benefits rather than as becoming married *per se*.

3. The respondents were further asked to list the three strengths and weaknesses of the four options given to them. The three most common strengths and weaknesses for each option are listed in *Table 1*.

**Table 1. Strengths and weaknesses of options according to those surveyed**

Weaknesses	Strengths
<i>Legal Recognition</i>	
allows state interference	assigns rights and obligations
may force gays out of the closet	regulates relationships
increases state control over gays	offers social recognition of relationships
<i>Marriage</i>	
is a lifestyle for heterosexuals	offers full equality for gays
is culturally biased	offers full legal rights
is too strict	discourages discrimination
<i>De facto</i>	
offers no freedom of choice	equates them to heterosexual couples
forces gays out of the closet	offers rights even if the partner objects to it
may encourage blackmail and exploitation	is closest to marriage
<i>Domestic partnership</i>	
has low status (2nd-rank marriage)	offers freedom of choice
is worthless if partner disagrees	offers sufficient legal support and protection
leaves out adoption, maintenance	offers easy entry — easy exit
<i>Individual law adjustments</i>	
may not cover important aspects of life	regulates what needs regulation only
is too cumbersome (so many laws)	allows independence of partners
is least popular overseas	leaves marriage 'intact'

### Main objections: marriage as an option

As shown above, for the vast majority (80%) of surveyed gays and lesbians marriage is not the preferred option. The reasons for this are many, for instance, many gays and lesbians argue that:

- marriage is an institution for heterosexuals and not for homosexuals;
- marriage is an 'antiquated' institution. Even heterosexuals have often expressed their discontent with it and tried to modify it or eliminate it, often with some success;
- marriage is an institution that 'oppresses and brutalises women' and a system that imprisons women and exploits them.<sup>11</sup> Simply, marriage has nothing valuable to offer;
- same-sex marriage is not a step to liberation but to subjugation. The expectation that among gays and lesbians marriage will work better than it does among heterosexuals is not supported by respondents, many of whom reported that in same-sex marriage suffering is expected to be as common as in heterosexual marriages;<sup>12</sup>
- same-sex marriage is a way of instituting state control over same-sex relationships, and an oppressive bureaucracy which can only lead to further deterioration of gay and lesbian relationships. As one respondent put it: 'Next thing we'll see is a central registry of homosexuals, and maybe a huge ID number on our forehead ...';
- what same-sex marriage promises can be achieved, with more dignity and fewer costs and risks, through other legal devices, particularly those which strengthen their identity as homosexual persons. As one young lesbian put it 'why accept somebody else's national anthem if you can have your own?';
- a same-sex marriage will be only second to other-sex marriage, a second-rank marriage, a 'queer marriage', or an inferior marriage, and one that will not be accepted by the heterosexual community;
- same-sex marriage would be an imposition of existing structures on same-sex relationships, where the state will dictate its boundaries, control and determine its possibilities and outline its options;
- same-sex marriage does not promise an economic improvement of the relationship. The costs of such a reform will outweigh its benefits;<sup>13</sup>
- same-sex marriage will 'domesticate' and assimilate gays and lesbians in the heterosexual community;

### Main objections: de facto relationships as an option

As shown above, although the option to award same-sex couples the status of de facto relationships was proposed by the Lesbian and Gay Legal Rights Service in its revised recommendation to the government,<sup>14</sup> many gays and lesbians have expressed serious concerns with this option. The two most frequently mentioned concerns are:

- de facto relationships are a form of marriage. People living in a de facto relationship are regarded as spouses, and have the same responsibilities as married spouses. If the majority of gays and lesbians reject legal marriage why should they accept a de facto marriage? and
- same-sex relationships will be recognised legally after a period of cohabitation, no matter whether gays and lesbians are closeted or out, and whether they wish to have their relationship legalised or not. This will deprive gays and lesbians of their right to decide whether to enter a legal relationship or not, will lead to a compulsory 'outing', and will subject them to government scrutiny and control.

## Main objections: registration of domestic partnerships as an option

Although the majority of our respondents are in favour of registration, there are many others who believe that this form of recognition is ineffective. Their main concern is that this model leaves the decision to register the relationship to the cohabiting persons, and therefore to the most powerful partner. Simply, the partner who may be against accepting responsibilities arising from their relationship, who has the power to put in effect his views, and who sees advantages in living in a non-committing unrecognised relationship may not agree to register. The weak partner, and the one most needing state assistance will have no say in the matter, and no legal avenue to obtain the rights they deserve.

## Summary and conclusion

The purpose of this article was to explore the views of cohabiting gays and lesbians on whether same-sex relationships should be legally recognised and if so in what form. The results offer two clear and convincing answers. First, the vast majority of respondents are in favour of legal recognition. This overwhelming support of legal recognition is consistent with popular beliefs and philosophical and ideological principles of the gay liberation movement, and is by no means surprising. Second, the views of the gays and lesbians on how recognition should be accomplished vary considerably. There is no one main form of recognition but many, each of which is supported by a substantial number of respondents. Although the 'registration of domestic relationships' is most popular, still 61% of the surveyed gays and lesbians were in favour of other options. This permits no definite conclusions on this point and certainly no conclusion that gays and lesbians support same-sex marriage, or want to marry.

These findings have implications for social policy. If the views of cohabiting gays and lesbians on legal recognition of their relationship were of any value for the outcome of this debate, then three points are particularly relevant here:

- same-sex relationships should be recognised but such recognition should not be compulsory for all cohabiting homosexuals. Although the findings of this study demonstrate that the majority of the respondents are in favour of recognition, they only refer to open homosexuals and not to members of clandestine unions, who are reported to be in the majority, and most of whom are against publicity, state involvement in their relationship, and against recognition.<sup>14</sup> It may be that the proportion of gays and lesbians who are against legal recognition is much larger than that reported in this study. Hence, legal recognition should proceed in a manner that allows personal choice. The 'de facto' model, where the relationship of cohabiting gays and lesbians becomes recognised after a set period of cohabitation, and without the consent of the cohabiting partners, offers no such choice and is, therefore, the least desirable model;
- legalisation — if implemented — should proceed in a diverse format. Given the plurality of views of cohabiting gays and lesbians about the appropriate form of legal recognition, it is advisable that government adopt a number of options (such as 'registration of domestic partnerships' and 'adjustment of individual laws') and not one option only;
- it is not advisable to institute same-sex marriage. Apart from the fact that marriage is constituted by cultural conventions and legal prescriptions (rather than personal

preferences), the results of the study suggest that the majority of cohabiting gays and lesbians are against marriage, do not consider their relationship as marriage, and would not marry if such an option became available to them.

Considering the trends identified in this study as well as the cultural and political climate of our times, and the fact that adjustments to existing legislation have been made and are currently being considered, one could argue that if only one legal option were to be adopted, 'registered domestic partnerships' would be the right option. This is the most popular option among gays and lesbians, the one adopted by most countries that have legalised same-sex relationships, and the one which is more likely to be accepted by the Australian community. Despite its shortcomings, this mode of recognition offers cohabiting gays and lesbians many advantages over their current status, and can be seen as a stepping stone to other options in the future.

## References

1. See for example Lauw, I., 'Recognition of Same Sex Marriage: Time for Change?', (1994) 3 *Sexual Orientation and the Law*; Winters, S., 'Gay and Lesbian Relationships and the Law of New South Wales', (1992) 1 *Australian Gay and Lesbian Law Journal* 73-86.
2. Eskridge, William, N., *The Case for Same-Sex Marriage. From Sexual Liberty to Civilised Commitment*, Free Press, New York, 1996, p.296; Baird, Robert, M. and Rosenbaum, Stuart, E. (eds) *Same-Sex Marriage: The Moral and Legal Debate*, Amherst: Prometheus Books, New York, 1997, p.242; Anet, Kate, *Unjust Enrichment and Same-Sex Property Disputes*, LLB (Hons) dissertation, University of Auckland, Auckland, 1991.
3. See Equal Opportunity Commission Victoria, *Same Sex Relationships and the Law, Discussion Paper*, Equal Opportunity Commission Victoria, 1997.
4. For a discussion of this issue see Walker, Kris, 'Same-Sex Relationships and the Law', (1997) 22(6) *Alternative Law Journal* 293-97.
5. See Sullivan, G. and Waite, H., 'A Rose by Any Other Name. Lesbian and Gay Families in Australia' in G. Wotherspoon (ed), *Gay and Lesbian Perspectives III. Essays in Australian Culture*, University of Sydney, 1996, pp.117-56.
6. Sarantakos, S., 'Nature of Same-Sex Relationships and Legal Recognition', submitted for publication, 1998.
7. Sarantakos, S., *Social Research*, Macmillan.
8. See Lesbian and Gay Legal Rights Services (LGLRS) *The Bride Wore Pink: Legal Recognition of our Relationships. A Discussion Paper*, Gay and Lesbian Rights Lobby, Sydney, 1993; Shaw, M and Katzen, H., 'Choosing a Wedding Dress', (1994) 5(1) *Polemic* 32-5.
9. It is worth noting that the Lesbian and Gay Legal Reform Service in the first edition of their publication *The Bride Wore Pink* proposed 'registration of domestic relationships' as the option of legal recognition (LGLRS, above, ref. 8.). However, this view was not supported in the second edition of the document, where the 'de facto model' was proposed (LGLRS, above, ref. 8.).
10. Similar views have often been reported in the literature. See, for instance Eskridge, above, ref 2, p.296; 'Noose or Knot: The Debate over Lesbian Marriage', (1989) *OUT/WEEK: New York's Lesbian and Gay News Magazine*, 18 Sept, pp.38-43.
11. It is interesting to note that similar views have been supported elsewhere. See, for instance, Polikoff, N.D., 'We will Get what we Asked for: Why Legalizing Gay and Lesbian Marriage will not "Dismantle the Legal Structure of Gender in every Marriage"', (1993) 79 *Virginia Law Review*; Ettelbrick, P. L., 'Since when is Marriage a Path to Liberation?' in S. Sherman (ed.), *Lesbian and Gay Marriage: Private Commitments, Public Ceremonies*, Temple UP, Philadelphia, 1992, pp.20-6.
12. This notion has been supported also by a number of overseas writers. See e.g. Posner, R., *Sex and Reason*, The President and Fellows of Harvard College, Cambridge, 1992; Eskridge, 1996, above, ref. 2. p.70.
13. LGLRS, above, ref. 8.
14. The notion that closeted gays and lesbians are the least interested in state interference in their relationship and especially in legal recognition has been identified in studies conducted by the author in Australia, New Zealand, Germany and Austria, and has also been verified by key informants in a variety of contexts.