

A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW

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The 1990s have witnessed a gradual increase in the legal recognition of lesbian and gay relationships around the world. Although in many jurisdictions battles for civil status in other areas are still being waged – for example over anti-discrimination protections,¹ decriminalisation of gay sex² and an equal age of consent for gay sex³ – there has been a distinct frisson around relationship recognition in recent years. Opponents have argued that the legal recognition of same sex relationships and other measures to accord lesbians and gay men legal and social status are a threat to marriage and ‘the family’.⁴ Lesbians and gay men have countered with their own claim, both legal and rhetorical that: ‘We are family’.⁵ In doing so, however, they have also sought to reconfigure what family *means* and to contest the boundaries of inclusion.

This article discusses recent reforms in New South Wales that include cohabiting same sex couples as de facto partners across a wide range of laws and also recognise cohabiting non-couples in some more limited circumstances. This is the first broad-based recognition of same sex relationships in Australian law. It is remarkable not just for the result, but for the process by which it was

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1 Still not available in Western Australia, and the UK for instance, and only recently hard won in Alberta, Canada: see *Vriend v Alberta* [1998] 1 SCR 493.

2 Only recently achieved in Ireland in 1994: see *Criminal Law (Sexual Offences) Act* 1993, No 20 of 1993. That legislation followed a successful complaint to the European Court of Human Rights: see *Norris v Ireland* [1988] UN Doc Ref 00000132. In Tasmania decriminalisation was achieved in 1996 after a decade long struggle, the trigger for which was a successful complaint to the UN Human Rights Committee: *Toonen v Australia* (1995) 69 ALJ 600, also see Wayne Morgan, ‘Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations’ (1994) 19 (3) *MULR* 740. There remain many jurisdictions, for instance numerous US states, that criminalise gay (and sometimes lesbian) sex.

3 In the UK the House of Commons passed a Bill in 1998 to equalise the age of consent at age 16. The Bill was rejected by the House of Lords in 1998 and again in 1999. The Sexual Offence (Amendment) Bill 1999 was reintroduced into the Commons, where it became law without the need for approval in the House of Lords upon passing for a third time on 10 February 2000: see <<http://www.parliament.the-stationary-office.co.uk>>. The legislation followed a successful complaint to the European Court of Human Rights: see *Sutherland v United Kingdom* [1997] Ref 00025186/94. In NSW Hon Jan Burnswood (Labor) introduced a private member’s Bill to equalise the age of consent at 16 into the Legislative Council in 1999; it was defeated at an early procedural stage by one vote: Crimes Amendment (Sexual Offences) Bill 1999.

accomplished. The Act had its genesis in a community project, and the model it enacts is closely based on that recommended in a discussion paper produced by a lesbian and gay community organisation. The reforms are also unusual in that they do not implement either couple based or 'other' non-couple recognition, but do both simultaneously.

Before discussing these reforms, this article will note the national and international context in which they appear. Recognition of same sex relationships has taken various forms in the past decade in various jurisdictions, with a notable division between opt-in registration systems and presumptive recognition. Opt-in systems require a formal declaration of some kind, such as lodging a document which declares the status of the parties and thereby accords their relationship legal recognition. Presumptive recognition does not require any steps to be taken or formal acknowledgment, and operates to recognise the relationship automatically when the parties have satisfied certain criteria (such as living together as a couple for a certain time).

Another variation is that of strategy. While many other jurisdictions, such as the US and Canada, have proceeded primarily through litigation-based strategies, NSW and other Australian jurisdictions have focused upon legislative changes.

This article will explain the effects of the new law in NSW, how it was developed and how it attempted to integrate feminist and critical approaches to relationship recognition rather than simply 'assimilate' same sex relationships into pre-existing regimes. We will also discuss the parliamentary process and reflect on how the passage of the law was achieved. Finally, we will consider a number of areas of NSW law that remain unchanged by the legislation, compare the new Act

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- 4 See Didi Herman, *Rights of Passage* (1994). Some arguments against lesbian and gay equality rights premised upon religious concerns and the 'sacred' nature of marriage also arose during parliamentary debates on the Property (Relationships) Legislation Amendment Bill 1999 (NSW): see for example, Mr Fraser (NP), 'It disturbs me that the Bill does not mention homosexual relationships ... I am a God-fearing person who does not believe in homosexual relationships. I do not think that God intended us as a race to behave in that way': Parliamentary Debates, NSW Legislative Assembly, 26 May 1999, *Hansard* at 736-737. See also Mr Page (NP), *id* at 738, Mr Glachan (Lib), *id* at 740, Mr Souris (NP), *id* at 714. See also the arguments by church groups to the Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform: Inquiry into De facto Relationships Legislation*, Report 20 (1999) at 39-42. More extreme examples also arose in recent debates in the Queensland Parliament concerning amendments to cover same sex partners in legislation regarding domestic violence protection orders: see Queensland Legislative Assembly, Domestic Violence Family Protection Amendment Bill 1999, *Parliamentary Debates (Hansard)*, 12 November 1999 at 5054-5078.
 - 5 This was, for example, the theme supporting Karen Andrews' legal battle in Canada in the late 1980s: see Didi Herman, 'Are We Family? Lesbian Rights and Women's Liberation' (1990) 28 *Osgoode Hall LJ* 789. In Australia this was the theme of the 1993 Sydney Stonewall March and Rally, and the slogan on at least one of several photos of lesbians with their mothers, lovers and children in the 1993 'Lovely Mothers' poster series by the Sydney Word of Mouth Arts Collective.

to an earlier Bill before NSW parliament, and consider what other reforms may be undertaken in the future.

1. The International Context

Relationship recognition laws to date have clustered around two main approaches. These are opt-in models, known as registered partnerships, and presumption-based inclusion, through laws of general application which include same sex partners without any formal registration process. While opt-in reforms could be assimilated within existing systems such as marriage, this has not happened in any country to date (although it is currently being considered in the Netherlands).⁶ Registered partnerships have instead been set up as parallel systems, which recognise 'other' relationships outside of marriage. Such schemes may be open to all those who are unable to legally marry (as is the case in Hawaii, where the scheme therefore extends to non-couple relationships, but is not open to heterosexual unmarried couples), or be available to all couples, or only to same sex couples. Registered partnership schemes vary considerably, and may therefore form a second or third tier of relationship recognition for same sex couples within the jurisdiction in which they operate – depending upon whether heterosexual cohabiting couples are already covered by presumptive laws, and/or are likewise included in the registration system.⁷

6 See Kees Waaldijk, 'The Law of Small Change: How the Road to Same Sex Marriage got Paved in the Netherlands' in Robert Wintemute and Mads Andenæs (eds), *Legal Recognition Of Same-Sex Partnerships: A Study of National, European, and International Law* (forthcoming 2000).

7 So for instance, some jurisdictions may have two opt-in systems (marriage and registered partnerships), or two opt-in regimes and one presumptive system (that is, marriage plus registered partnerships, in addition to presumptive coverage for heterosexual de facto couples).

The bundle of rights which registration schemes carry with them vary from a limited set of 'private' rights (such as property distribution regimes and inheritance) to a nearly comprehensive set of 'public' rights encompassing the entire range of relationship laws which govern spouses, such as immigration, pensions and workplace entitlements (but almost universally excluding eligibility for joint adoption of unrelated children or of each other's children).⁸ Comprehensive registered partnerships which grant a wide range of public and private law rights are currently available in Denmark,⁹ the Netherlands,¹⁰ Norway,¹¹ Sweden,¹² Iceland,¹³ Finland,¹⁴ Greenland¹⁵ and Hawaii.¹⁶ More limited regimes have been introduced in France,¹⁷ some US cities,¹⁸ Belgium,¹⁹ and Catalonia in Spain.²⁰

Presumption based laws alter statutory definitions of spouse or family so that lesbian and gay relationships are automatically covered by laws without the need to formally register. Presumptive models can likewise be limited to operate in specific areas, or be comprehensive in application across all legislation that affects relationships. The Netherlands,²¹ Hungary,²² Ontario²³ and Quebec²⁴ all have comprehensive presumption based relationship recognition, with federal legislation also being introduced in Canada.²⁵ More limited recognition exists in Norway²⁶ and a number of Canadian jurisdictions such as British Columbia.²⁷

8 Denmark is one of the few exceptions to this rule, having amended its registered partnership scheme in 1999 to cover adoption (but not international adoptions): see Ingrid Lund-Anderson 'The Danish Registered Partnership Act, 1989 – Has the Act meant a change in attitudes?' in Robert Wintemute, above n6.

9 *Registered Partnership Act*, Act No 373, 1 June 1989.

10 See Caroline Forder, 'Models of Domestic Partnership Laws: The Field of Choice' (2000) 17(1) *Canadian J of Family L*, forthcoming.

11 *Act on Registered Partnership for Homosexual Couples*, Act No 40, 30 April 1993, in force 1 August 1993.

12 *Cohabitees (Joint Home) Act* 1998.

13 *Confirmed Cohabitation Act*, Law and Ministerial Gazette A No 97/1996.

14 See Kees Waaldijk, above n6.

15 *Ibid.*

16 Hawaii's scheme is not couple based, and covers all adults who cannot legally marry: *An Act Relating to Unmarried Couples*, 1997 HI HB 118.

17 See Caroline Forder, above n10.

18 See Craig Lind, "Pretended Families" and the Local State in Britain and the USA' (1996) 10 *International J of Law, Policy and the Family* 134 and Paula Ettelbrick, 'Wedlock Alert: A Comment on Lesbian and Gay Family Recognition' (1996) 5 *Journal of Law and Policy* 107.

19 See Caroline Forder, above n10.

20 See generally, Caroline Forder, *Ibid.*

21 See Kees Waaldijk, above n6.

22 *Hungarian Civil Code*, sections 578/G and 685/A..

23 The decision of the Supreme Court of Canada in *M v H* (1999) 171 DLR (4th) 577 led to the Parliament of Ontario passing legislation which amended 67 acts to cover cohabiting same sex couples where heterosexual cohabiting couples were also covered: see *An Act to Amend Certain Statutes Because of the Supreme Court of Canada decision in M v H*, Bill 5 1999.

2. *The Australian Context*

In Australia, the recognition of same sex relationships has taken a number of forms through the mid to late 1990s. Legislative inclusion has rested on categories such as 'de facto partner', 'de facto spouse', 'domestic relationship', 'same sex partner', relationship of 'interdependence' and relationship of 'responsibility'.

In contrast to the popularity of registration based systems in Europe, particularly Scandinavia, the variety of approaches taken in Australia are unified by the use of presumptive rather than opt-in mechanisms. This has occurred in a local framework in which there is widespread recognition of cohabiting heterosexual couples. Marriage has not been sought by gay and lesbian advocates.²⁸

Non-specific inclusion of same sex partnerships as 'other' relationships appears to have been in favour in early reform efforts in Australia. Such an approach has the advantage of discretion for legislators, as there is no specific acknowledgment of lesbians and gay men and it may pass unnoticed by political opponents or the public. This kind of legislation has used unsexed categories such as 'dependant', 'interdependent' or 'domestic' relationship, unaccompanied by any specific definitions. Within these laws there have been two distinct strands. Firstly, there are those that make a 'catch-all' category separate to, and harder to use than those available to comparable heterosexual relationships. Such laws provide access to rights or benefits by married and de facto spouses and additionally but with more

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- 24 *An Act to Amend Various Legislative Provisions Concerning De Facto Spouses*, Bill 32 1999.
- 25 *An Act to modernize the Statutes of Canada in relation to benefits and obligations*, Bill C-23 2000 was introduced into federal Parliament in Canada on 11 February 2000. Notably the legislation in Hungary, as well as that passed in Ontario and introduced at federal level in Canada, was in direct response to Constitutional challenges which struck down prior legislation as discriminatory. For a discussion of the situation in Hungary, see Lilla Farkas, 'Nice on Paper: Legislation vs Practice in Hungary' in Wintemute, above n6.
- 26 *Joint Household Act*, Act No 45, 4 July 1992.
- 27 See for example, the following acts which cover same sex cohabiting couples as 'spouses' on the same footing as opposite sex cohabiting couples: *Adoption Act*, RSBC 1996, c5, s29; *Criminal Injury Compensation Act*, RSBC 1996, c85, s1; *Medicare Protection Act*, RSBC 1996, c286, s1; *Victims of Crime Act*, RSBC 1996, c478; *Family Relations Amendment Act*, 1997, SBC 1997, c20; *Family Maintenance Enforcement Amendment Act*, 1997, SBC 1997, c20. The range of coverage in Canada is gradually extending as a response to court challenges and commitment to on-going reform by various governments. Litigation challenging 58 pieces of federal legislation that confer rights and duties on spouses and opposite sex cohabittees was launched in an attempt to prompt federal legislative change: see *Foundation for Equal Families v Canada* [1999] Ont. Sup CJ LEXIS 619. The tactic appears to have been successful in that federal parliament introduced legislation to amend over 70 acts to cover same sex cohabiting couples: see n 25.
- 28 For instance, neither the Gay and Lesbian Rights Lobby of NSW nor the Australian Council for Lesbian and Gay Rights have supported or sought marriage as a relationship recognition option. See Hayley Katzen and Madeline Shaw for the Lesbian and Gay Legal Rights Service, *The Bride Wore Pink* (2nd ed, 1994) (available from GLRL, and accessible from <<http://www.rainbow.net.au/~glrl/>> under discussion papers) and ACLGR letter to the Prime Minister, Mr Howard, appended to ACLGR media release 'Howard Set Straight over Gay Super' 21 December 1999.

stringent, expensive or hard-to-use requirements, to 'others', including cohabiting same sex couples. For example, the dependant category in NSW family provision law introduced in 1982 (prior to the 1999 amendments) had presumptive eligibility for spouses and de facto partners but had another 'catch-all' category used by same sex couples.²⁹ This category required proof of some form of financial dependence in order to qualify, and placed the applicant at greater risk of a costs order if the finding was adverse, compared with the heterosexual de facto category.³⁰ In contrast, some regimes use a truly general category without distinction between couples and 'others'. For example, the Australian Capital Territory property division regime covers all (unmarried) 'domestic relationships' equally. Domestic relationships are defined in section 3(1) as:

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.³¹

Other legislative reforms have included same sex partners specifically as couples and on an equal footing with heterosexual cohabiting couples. Generally speaking these reforms have been more recent and, like the earlier approach, usually limited to one or two pieces of legislation at a time in various jurisdictions. Through the 1990s such reforms have occurred in a number of Australian jurisdictions.

In the ACT, amendments were made to family provision and intestacy laws in 1996, to define an eligible partner as someone 'whether or not of the same gender'

29 Somewhat reluctantly, as the eligibility of same sex couple was only established after a NSW Court of Appeal decision: see *Ball v Newey* (1988) 13 NSWLR 489.

30 See *Family Provision Act* 1982 (NSW) s6(1) and s33. Another example of second rate 'other' inclusion of same sex couples are interdependency visas in federal migration law introduced in 1995: see *Migration Regulations* (Cth), Reg 1.09A Interdependent Class BI. While this law is significant in that it does provide some access to migration for same sex partners, the conditions are more stringent than those for opposite sex partners, for instance there were longer waiting periods initially. The 'cap' of the number of visas granted under this category has been steadily cut in recent years by the Liberal-National federal Coalition Government. In 1995-1996 there were 650 interdependency visas granted. This dropped to 400 visas in 1996-1997 and went down to 390 in 1997-1998: see Department of Immigration and Multicultural Affairs, *Annual Report 1995-1996* (1996), Department of Immigration and Multicultural Affairs, *Annual Report 1997-1998* (1998).

31 See *Domestic Relationships Act* 1994 (ACT). Another example of truly general non-couple based categories is the *Administration and Probate Act* 1958 (Vic) s91 (amended in 1997) making any person eligible for an order if in the court's view they were 'a person for whom the deceased had responsibility to make provision'. Factors to be taken into account include, among other things: (e) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship; (h) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future; (k) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased or the family of the deceased; (l) any benefits previously given by the deceased person to any applicant or to any beneficiary; (m) whether the applicant was being maintained by the deceased person before that person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased had assumed that responsibility; (n) the liability of any other person to maintain the applicant; (o) the character and conduct of the applicant or any other person; (p) any other matter the Court considers relevant.

who lived with the deceased 'as a member of a couple on a genuine domestic basis'.³² In NSW in 1996, amendments to criminal procedural legislation (to permit victim impact statements) and new victims' compensation legislation both used a definition of a family victim as 'the victim's de facto spouse, or partner of the same sex, who has cohabited with the victim for at least two years.'³³ In 1998 amendments to workers compensation legislation introduced an un-gendered definition of de facto partners which required, 'a mutual commitment to a shared life' in a 'genuine and continuing' cohabiting relationship.³⁴

In 1993 the Queensland Law Reform Commission (QLRC) had recommended the introduction of a statutory property division regime in that state (with de facto relationships defined as both same sex and opposite sex couples),³⁵ and the Act implementing that report was passed in December 1999.³⁶ Also in 1999, Queensland introduced industrial relations legislation which defined a spouse as, 'a de facto spouse, including a spouse of the same sex as the employee.'³⁷ Amendments to domestic violence legislation were passed in late 1999 to include same sex partners as eligible applicants for court protection orders.³⁸

This series of amendments, although piecemeal and spread across various jurisdictions, suggests a trend in Australia of moving away from defining de facto relationships as 'marriage-like' (and thus requiring them to be so)³⁹ to focus on more purposive and less overtly gendered and heterosexually based criteria. This trend is indicated in the move from a draft NSW Bill in 1996 which defined a de facto relationship as:

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- 32 *Administration and Probate Act 1929 (ACT) s44 and Family Provision Act 1969 (ACT) s4*. In addition, non-couple 'domestic relationships' were also included in *Family Provision Act 1969 s4*.
- 33 See *Criminal Procedure Act 1986 (NSW) s23A and Victims Compensation Act 1996 (NSW) s9*.
- 34 The *Workplace Injury Management and Workers' Compensation Act 1998 s4* defines de facto relationship as '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.'
- 35 *De Facto Relationships*, Report 44 (1993). In the same year the QLRC recommended extending the intestacy provisions to same sex and opposite sex partner who had cohabited for five years: see Queensland Law Reform Commission, *Intestacy Rules*, Report 42 (1993).
- 36 See *Property Law Amendment Act 1999 (Qld)*. Note however, that it used a different definition from the report: s260 (1) 'A de facto spouse is either of two persons, whether or not of the same or opposite sex, who are living or have lived together as a couple. (2) For subsection (1) – (a) two persons are a couple if they live together on a genuine domestic basis in a relationship of intimacy, trust and personal commitment to each other; and (b) two persons are not a couple only because they are cohabitants.'
- 37 *Industrial Relations Act 1999 (Qld) Sch 5*. The Act extends carer's leave, parental and adoption leave provisions to same sex partners.
- 38 The *Domestic Violence (Family Protection) Act 1989* was amended by the *Domestic Violence (Family Protection) Amendment Act 1999*. The new section 12(1) defines spouse as '(a) either one of a male or a female who are or have been married to each other; or (b) either one of the biological parents of a child, whether or not they are or have been married or are residing or have resided together; or (c) either one of two persons, whether of the same or the opposite sex, who are residing or have resided together as a couple.'
- 39 Such definitions possibly exclude relationships which do not closely mirror marriage (or its image): see examples in the discussion of *Light v Anderson* and *Dorman v Beddowes* below, n56.

the relationship between a man and a woman who live together as husband and wife on a bona fide domestic basis although not married to one another, or a *comparable relationship* between persons of the same sex,⁴⁰ [our emphasis]

to the 1999 amendments which define such a relationship by contrast as that between two persons who 'live together as a couple.'⁴¹ Even more pronounced is the shift from the 1993 QLRC Report on property division to the 1999 legislation. The report defined a de facto relationship as:

the relationship between two persons (whether of a different or the same gender) who, although they are not legally married to each other, have lived in a relationship *like the relationship* between a married couple for at least two years⁴² [our emphasis].

In the Act implementing that report, the definition of de facto spouse had changed to:

either of two persons, whether or not of the same or opposite sex, who are living or have lived together as a couple

with the addition that,

two persons are a couple if they live together on a genuine domestic basis in a relationship of intimacy, trust and personal commitment to each other.⁴³

In 1999, NSW became the first state in Australia to enact comprehensive reform covering same sex relationships in a wide range of laws. Unlike the ACT *Domestic Relationships Act* 1994, the NSW Government chose to cover same sex couples and other forms of close relationship separately, rather than simply including same sex couples within a general non-couple based category.

3. *The NSW Reforms*

The *Property (Relationships) Legislation Amendment Act* 1999 amended the existing definition of de facto spouse to include same sex cohabiting couples in the state based statutory property division regime.⁴⁴ It also amended numerous other areas of NSW law, most notably those concerning family provision, intestacy, accident compensation, stamp duty and decision-making in illness and after death. As a secondary change the Act introduced the concept of 'domestic relationships' for the first time into NSW laws. This was intended to cover some other forms of close relationships⁴⁵ in a smaller number of NSW laws, notably those concerning

40 Domestic Relationships Draft Bill 1996 cl 4.

41 *Property (Relationships) Act* 1984 s4.

42 See above n35.

43 See above n36.

44 The property matters of unmarried couples are excluded from federal family law for constitutional reasons: see *Commonwealth of Australia Constitution* s51(xxii) and (xxiii) (providing the Commonwealth with power to legislate with respect to marriage, divorce and matrimonial causes). See Stephen Parker, Patrick Parkinson and Juliet Behrens, *Australian Family Law in Context: Commentary and Materials* (2nd ed, 1999). The *De Facto Relationships Act* 1984 (NSW) provided a guided discretion for courts to adjust the property interests of separating heterosexual partners in NSW.

45 These not need be, and frequently will not be, sexual relationships.

statutory property division, family provision, bail, and stamp duty (see table below). The Act also somewhat confusingly renamed the *De Facto Relationships Act 1984* as the *Property (Relationships) Act 1984*.⁴⁶ Amendments to other acts are generally made by reference to the new definition of de facto relationship contained in the *Property (Relationships) Act*.

TABLE Acts Which Have Been Amended⁴⁷

<i>Anatomy Act 1977</i>	<i>Inebriates Act 191</i>
<i>Bail Act 1978*</i> ▲	<i>Insurance Act 1902</i>
<i>Compensation to Relatives Act 1897</i>	<i>Judges Pensions Act 1953</i>
<i>Coroners Act 1980</i> ▲	<i>Law Reform (Miscellaneous Provisions) Act 1944</i>
<i>Criminal Assets Recovery Act 1990</i>	<i>Legal Aid Commission Act 1979</i>
<i>De Facto Relationship Act 1984*</i> ▲	<i>Mental Health Act 1990</i>
<i>District Court Act 1973*</i>	<i>Motor Accidents Act 1988</i>
<i>Duties Act 1997*</i>	<i>Protected Estates Act 1983</i>
<i>Family Provision Act 1982*</i> ▲	<i>Trustee Act 1925</i> ▲
<i>Guardianship Act 1987</i>	<i>Wills, Probate and Administration Act 1898</i>
<i>Human Tissue Act 1983</i>	
* includes domestic relationship	
▲ includes the child of domestic relationship	

46 This may suggest the existence of a 'property relationship', a term used by some parliamentarians during debate on the Bill: see the section below 'The Parliamentary Process'. Although some other terminology is changed (for instance 'cohabitation' and 'separation' agreements have become 'domestic relationship' and 'termination' agreements, see ss44-52), the content of the Act remains the same as does the numbering of sections.

47 The listed amendments do not include those acts which were amended in the legislation to preserve the status quo of an exclusively heterosexual definition. Those acts are: *Conveyancers Licensing Act 1995*; *Dentists Act 1989*; *Legal Profession Act 1987*; *Local Government Act 1993*; *Retirement Villages Act 1989*. Note however that a new Act, the *Retirement Villages Act 1999* has since been passed, repealing the *Retirement Villages Act 1989*. In the 1999 Act, the definition of de facto partner in section 4 is taken from the *Property (Relationships) Act 1984*, suggesting ongoing reform.

With the exception of the amendments relating to the *Wills, Probate and Administration Act 1898*, all changes commenced on 28 June 1999. They do not apply to relationships that terminated before that date.⁴⁸ Changes to the *Wills, Probate and Administration Act* commenced on 24 September 1999.

The former definition of de facto partner was:

(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.⁴⁹

The definition of de facto relationship in the amended laws is now:

a relationship between two adult persons:

(a) who live together as a couple, and
(b) who are not married to one another or related by family.⁵⁰

The new definition represents a clean break with traditional definitions of partners which rest upon a comparison to marriage or use marriage as the central reference point.⁵¹ At the heart of the new definition is the need to live 'as a couple'. Gone are such terms as 'marriage-like', 'as his wife' or 'as her husband' and the frequently convoluted explanations of how one could be not married yet married. The Attorney-General's Second Reading Speech made clear that the new non-gendered definition of de facto spouse was specifically intended to include lesbian and gay couples.⁵² The remarks of the Attorney-General also suggest that incorporation of the term 'as a couple' was not intended to alter considerably the nature of the inquiry undertaken by a court to determine the existence of a relationship, nor alter the application of prior case law on property division under the Act.⁵³

48 *Property (Relationships) Act 1984* s6.

49 *De Facto Relationships Act 1984* s3.

50 *Property (Relationships) Act 1984* s4.

51 On a symbolic level the definition that the members of the couple are 'not related by family' is less pleasing. While it is simply intended to exclude blood relatives (a step required by the abandonment of marriage as a point of reference in the definition of de facto partner), it reinforces the notion that lesbians and gay men do not form families and that such relationships are appropriately excluded from the concept of family. Moreover, the amending Act introduces a new s62 to the *Property (Relationships) Act 1984* providing that, 'Nothing in the *Property (Relationships) Legislation Amendment Act 1999* is to be taken to approve, endorse or initiate any change in the marriage relationship, which by law must be between persons of the opposite sex, nor entitle any person to seek to adopt a child unless otherwise entitled to by law.' This section was the result of an amendment moved by Fred Nile, the leader of the small and rather extreme 'Call to Australia' Christian-Right party.

52 See Hon JW Shaw, Legislative Council of NSW, *Parliamentary Debates (Hansard)*, 13 May 1999 at 229.

53 *Id* at 229–230.

Another amendment to the Act was to introduce a list of non-exhaustive factors which a court may take into account when determining the existence of a de facto relationship. Section 4(2) provides that:

In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:

- (a) the duration of the relationship,
- (b) the nature and extent of common residence,
- (c) whether or not a sexual relationship exists,
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,
- (e) the ownership, use and acquisition of property,
- (f) the degree of mutual commitment to a shared life,
- (g) the care and support of children,
- (h) the performance of household duties, and
- (i) the reputation and public aspects of the relationship.

NSW courts have also been formulating and using indicia of this nature since the passage of the *De Facto Relationships Act* in 1984.⁵⁴ The rationale for the introduction of an amended version of these criteria into the legislation is unclear.⁵⁵ Presumably the legislation was intended to indicate that the previous approach is no longer applicable (resting, as it did, on defining what was 'marriage-like' about a relationship), yet the list of factors to be considered is very similar to the one the courts had developed.

The problem with such a list is that it is fundamentally influenced by the origins and history of de facto law, which had as its starting point a comparison with marriage – for example, the 'procreation of children' and 'reputation and public aspects of the relationship'. There has already been considerable variation in the interpretation of the factors and the weight put on them in decisions under several NSW laws. For instance, in one case under the *Family Provision Act* 1982, considerable emphasis was placed upon the 'public reputation' aspect (as a result, a woman living with a man in a situation of semi-secrecy was held not to be a de facto partner because the man did not 'hold out' the woman as his wife.)⁵⁶ Such an emphasis would be clearly disadvantageous to lesbian and gay couples who

54 See *D v McA* (1986) 11 Fam LR 214 at 227 where the list of factors set out by Powell J is:

1. The duration of the relationship;
2. The nature and extent of the common residence;
3. Whether or not a sexual relationship existed;
4. The degree of financial interdependence, and any arrangements for support between or by the parties;
5. The ownership, use and acquisition of property;
6. The procreation of children;
7. The care and support of children;
8. The performance of household duties;
9. The degree of mutual commitment and mutual support;
10. Reputation and public aspects of the relationship.

may not acknowledge their relationship to their families, or indeed to many other people at all.

However, section 4(3) makes it clear these factors are indicia, not requirements, and this may be the key to both the inclusion of the list and the task of interpreting and applying this part of the definition. Section 4(3) provides that:

No finding in respect of any of the matters mentioned in subsection (2)(a)–(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a *de facto* relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

The significance of including the list in the legislation may therefore be that it amends the common law by mandating that any or all of the factors are *not required*.

55 Note that the De Facto Relationships Amendment Bill 1998 (discussed below) sought to introduce a different list of criteria to help determine the existence of either a *de facto* or a domestic relationship. The Bill provided in Sch 1, cl 13 that in determining the existence of a *de facto* or domestic relationship, the Court must have regard to all the circumstances of the relationship, including, but not limited to:

- 5 (A) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship, and
 - (ii) the length of time during which the persons have lived together, and
 - (iii) the degree of companionship and emotional support that the persons draw from each other, and
 - (iv) whether the persons themselves see the relationship as a long-term one, and
- (B) the social aspects of the relationship, including:
 - (i) the opinion of the persons' friends and acquaintances about the nature of the relationship, and
 - (ii) any basis on which the persons plan and undertake joint social activities, and
 - (iii) whether the persons represent themselves to other persons as being in an interdependent relationship, and
- (C) the nature of the household, including:
 - (i) any joint responsibility for care and support of children, if any, and
 - (ii) the persons' living arrangements, and
 - (iii) any sharing of responsibility for housework, and
- (D) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets, and
 - (ii) any joint liabilities, and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments, and
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other, and
 - (v) the basis of any sharing of day-to-day household expenses.

Note that the Social Issues Committee Report indicated a clear preference for 'the more expansive indicia contained in the DFRA Bill 1998' as it 'would provide the Courts with greater flexibility': Social Issues Committee, above n4 at 53, and Recommendation 8.

'Domestic relationships' are defined to include people who have a cohabiting relationship of interdependence but are not in a couple. The definition of domestic relationship in section 5(1) is:

- (a) a de facto relationship, or
- (b) a 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.

Section 5(2) clarifies that:

For the purposes of subsection (1)(b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:

- (a) for fee or reward, or
- (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

This definition is distinct from, and narrower than, the one used in ACT law (which does not require cohabitation), although the latter part of the definition about what is *not* a domestic relationship is almost identical to the ACT legislation.⁵⁷

A. *History of the Reform Process in NSW*

This legislation, although passed speedily, without opposition, and with a minimum of public comment and media coverage, has a long history. This section outlines a brief chronology of reform proposals (and attempts) in NSW before discussing in more detail various aspects of the reform process.

56 Their friends and neighbours knew of the relationship and she was known as 'Mrs Anderson', but his adult children did not know of the relationship. The couple's finances were also separate. The decision that the woman was not a de facto wife was made at first instance and supported by Handley JA on appeal. The other two judges on appeal, Kirby P and Priestley JA, did not consider it necessary to make a final decision on this point (although Kirby P's judgment disapproves of the use of Scottish common law cases) as they agreed with Handley JA that Ms Light was 'dependent' on Mr Anderson and therefore eligible under the Act on that basis: see *Light v Anderson* (1992) DFC 95-120. In a later case under the DFA Handley JA (for the Court) stressed again he attached 'considerable importance in cases under this Act' to 'the question of reputation and any public aspects of the relationship' in determining the existence of a de facto relationship: see *Dorman v Beddowes* (1997) (NSW Court of Appeal, BC 9703073, 14 April 1997).

57 The definition in the *Domestic Relationships Act 1994* (ACT) is '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:' s3(1). Section 3(2) clarifies that, '(a) a personal relationship may exist between persons although they are not members of the same household; and (b) a personal relationship shall not be taken to exist between persons only because one of them provides a service for the other: (i) for fee or reward; (ii) on behalf of another person (including a government or body corporate); or (iii) on behalf of an organisation the principal objects or purposes of which are charitable or benevolent.'

- 1981** The NSW Law Reform Commission was given a reference into the law and unmarried relationships. They focused upon heterosexual cohabiting couples, and recommended that such relationships be recognised in several areas of law, including property division and inheritance. The 1983 Report did not cover same sex couples or non-couple relationships and suggested that there should be separate consideration of those issues at a later date.
- 1984** The NSW government passed statutes implementing the Report, including the *De Facto Relationships Act 1984 (NSW)*. Through the 1980s and early 1990s almost all NSW laws were changed to recognise opposite sex cohabiting couples as 'de facto spouses'.
- 1992** The Gay and Lesbian Rights Lobby of NSW raised the issue of relationship recognition for same sex couples and held public consultations.
- 1993** The Gay and Lesbian Rights Lobby published a discussion paper, *The Bride Wore Pink*, exploring different methods of relationship recognition.
- 1994** More consultations were held and a second, revised edition of *The Bride Wore Pink* was published which recommended broad based presumptive recognition of same sex couples who live together and more limited recognition of other relationships, which need not be couple based or cohabiting.
- 1995** Key members of the NSW Opposition (Labor) promised some recognition of same sex relationships if they won office. Labor won government a few months later but did not table any legislation in its first term of office.
- 1997** Independent MP Clover Moore introduced a private members Bill into the NSW Legislative Assembly (Lower House). The Significant Personal Relationships Bill 1997 (NSW) sought to avoid a couple focus and was centred upon emotional interdependence rather than a sexual relationship as its key concept. The Bill was not debated, and lapsed.
- 1998** The Australian Democrats (NSW) introduced a Bill into the NSW Legislative Council (Upper House). The Bill was intended to enact the recommendations of *The Bride Wore Pink* by amending 53 Acts. Towards the end of 1998 the Government referred the Bill off to a parliamentary committee (the Legislative Council Social Issues Committee). The Committee was given a reporting deadline some months after the state election and this removed the Bill from parliamentary business until after the 1999 election.
- 1999** Labor won a second term of office. The *Property (Relationships) Legislation Amendment Act* was introduced by the Government. The Act did not cover as many areas as the earlier Democrats' Bill, amending only 20 Acts. It passed both houses in June, with the support of the Liberal-National Party Coalition.

The review into the 1998 Bill by the Legislative Council Social Issues Committee was renewed. The Committee reported in December, recommending that more comprehensive changes be made in the near future, covering same sex and opposite sex couples on an equal footing in all areas of NSW law.

A broad ranging reference into relationships and the law was given to the NSW Law Reform Commission.

In 1981, the NSW Law Reform Commission commenced an inquiry into de facto relationships.⁵⁸ While the terms of reference of the inquiry referred to 'the law relating to family and domestic relationships', and specifically to de facto relationships, the Law Reform Commission decided to focus exclusively upon heterosexual de facto relationships and not extend its inquiry or recommendations to 'other domestic or household relationships, such as those constituted by parents and adult children siblings, homosexual couples or larger groups living in a common household.'⁵⁹ While the Report added that, '[t]here may well be a case for change in other areas of law affecting domestic relationships, but we think the necessary investigations can and should be undertaken as a separate exercise',⁶⁰ no such separate inquiry was initiated by the NSW government in following years. Through the 1980s a wide range of NSW laws were amended to cover heterosexual de facto couples on an equal footing with married spouses.

Recognition of same sex relationships was again raised by the Lesbian and Gay Legal Rights Service, a project of the Gay and Lesbian Rights Lobby of NSW (GLRL), in 1992. This was identified as a key area as a result of the Service being approached on a weekly basis by lesbians and gay men in relationships with problems in areas such as housing, health, property ownership, income, children, and employment. These problems could not be satisfactorily resolved under existing law, as they were caused in whole or in part through laws and regulations

58 The Terms of Reference for that inquiry required the Commission to: '[I]nquire into and review the law relating to family and domestic relationships, with particular reference to the rights and obligations of a person living with another person as the husband or wife de facto of that other person, and including the rights and welfare of children of persons in such relationships': see NSW Law Reform Commission, *De Facto Relationships*, Report 36 (1983) at para 1.1.

59 Id at paras 1.3–1.4. A number of reasons were provided for this decision. These included that the law as it then stood distinguished between de facto and other forms of domestic relationships; hence it was 'consistent with past practice' to examine the law of de facto relationships without concurrently considering 'other domestic relationships'. It was also argued that an inquiry into the broader issues implicit in the terms of reference would require extensive investigation and delay the report. Further, the Commission noted that, 'The distinction drawn by the law accepts that de facto relationships resemble marriage to a certain extent, although not in all respects. It is this partial resemblance which has prompted legislators and policy makers specifically to confer rights and impose obligations on de facto partners in certain situations. Other domestic relationships bear less resemblance to marriage.' The Commission recommended that the definition of a de facto relationship should be 'the relationship between a man and a woman who, although not legally married to each other, live together as husband and wife on a bona fide domestic basis': id at para 17.19.

60 Id at para 1.1.

which themselves did not recognise the relationships that lesbians and gay men had with their partners and partners' children.⁶¹

From 1992 until 1994, the NSW GLRL conducted community consultations around two versions of the discussion paper, *The Bride Wore Pink*,⁶² which detailed the issues and options for reform. The final version of *The Bride Wore Pink* produced in 1994 recommended comprehensive recognition of de facto relationships and recognition of domestic relationships⁶³ in some areas. That is, the paper recommended that the recognition of both live-in sexual relationships and other forms of important interdependent relationships should take place simultaneously but distinctly.

Recognition of cohabiting couples through the de facto category was favoured because it offered breadth and certainty of coverage, as well as the symbolism of formal equality. This was never envisaged as sufficient however, and there was a critical evaluation of the existing system, both in terms of exclusion and privileging of couples over other relationships and the privatisation of social costs into family units. Support for broader, non-couple focused relationship recognition was very strong within the community, as was concern that couples who did not cohabit should be afforded some measure of recognition.⁶⁴ Within the GLRL itself, support for broader based recognition was strongly informed by feminist analysis of marriage and family.

The category of domestic relationship, encompassing emotional and financial interdependence in a relationship that need not be sexual nor cohabiting, was proposed as some redress for these concerns.⁶⁵ The consultation process of *The*

61 Attempts to challenge such discriminatory treatment through case based challenges in the absence of constitutional equality guarantees have met with comprehensive failure around Australia: see Wayne Morgan in Jenni Millbank and Wayne Morgan, 'Let Them Eat Cake, and Ice Cream: Wanting Something 'More' from the Relationship Recognition Menu' in Robert Wintemute, above n6.

62 See *The Bride Wore Pink* (2nd ed, 1994) above n28.

63 Although called 'significant person' in the discussion papers, the model is now called 'domestic relationship' following reforms in the ACT which had not taken place at that time.

64 There has been concern throughout the many years of debate over same sex relationship recognition that when the law recognises some relationships and not others, a hierarchy of inclusion and exclusion is established. Many gay men and lesbians don't want to be 'in' if others are still left 'out': see for example, Paula Ettelbrick, above n18, and Nancy Polikoff, 'We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'dismantle the legal structure of gender in every marriage'' (1993) 79 *Virginia LR*1535.

65 See *The Bride Wore Pink*, 2nd ed, above n28, 'Our Agenda'. Also discussed in Jenni Millbank, 'The De Facto Relationships Amendment Bill 1998 (NSW): The Rationale for Law Reform' (1999) 8 *Australasian Gay and Lesbian LJ*1. This concept has been developed and implemented in another jurisdiction, the Australian Capital Territory (ACT). See Attorney General's Department, *A Proposal for Domestic Relationship Legislation in the ACT*, Discussion Paper (1993). This led to the inclusion of 'domestic relationships' in two areas of law – property division and family provision: see *Domestic Relationships Act* 1994 (ACT) and *Family Provision Act* 1969 (ACT) (amended in 1996). See also: Queensland Law Reform Commission, *Shared Property: Resolving Disputes Between People Who Live Together and Share Property*, Discussion Paper 36 (1991). This paper suggested a property division regime open to all cohabitants, regardless of their relationship, but this was not carried through in the final report.

Bride Wore Pink revealed that while members of the lesbian and gay communities were anxious to avoid excluding various kinds of relationships, they did not wish to see their own partner relationships identified by law as 'other' than partner relationships. Nor did they believe that other relationships should always or automatically receive recognition in all the same areas as de facto relationships.⁶⁶ In short, the bundling up of same sex relationships with 'other' relationships was considered undesirable from both a symbolic and practical viewpoint. It was therefore proposed that couple and non-couple relationship recognition be identified and pursued as separate issues.

Concerns about the disadvantageous aspects of couple based social policy, particularly the privatisation of welfare involving reductions of payments to parents and the unemployed when they have a 'spouse in the house' could not be so readily addressed. As these matters are controlled by the federal government, the paper called upon the federal government to base social security upon individuals rather than couples. The bulk of the paper was directed to state law, however.⁶⁷

The Bride Wore Pink recommended that the NSW state government:

1. immediately amend the *De Facto Relationships Act* (1984) to extend its definition of 'de facto relationships' to include lesbian and gay relationships, thereby extending all provisions of the Act to de facto partners in lesbian and gay relationships;
2. amend all Acts (see below) conferring rights or benefits on persons on the basis of their relationship with someone else so as to
 - i. extend the definition of 'de facto relationships', where this expression is used, to include lesbian and gay relationships, and
 - ii. confer these same rights or benefits upon those who can legitimately claim to have been involved with a person in a '[domestic] relationship'.
3. allocate money and resources to the training of the judiciary and other decision-makers who will be responsible for making determinations based on these amendments, to address ignorance of, or prejudice against, gays, lesbians and our relationships.

66 For these reasons the model proposed by a progressive independent MP, Clover Moore, in a private members Bill did not achieve major support. Ms Moore introduced the Significant Personal Relationships Bill 1997 (NSW) into the NSW Legislative Assembly (Legislative Assembly), where in the absence of government support, it was not debated and lapsed. The Bill was centred upon emotional interdependence rather than a sexual relationship as its key concept. It was premised upon a twin model of presumption and registration, and used very general non-couple-based categories. See further discussion, below n80.

67 The Australian federal constitutional structure divides areas of legislative power between the federal and state governments. As noted earlier, the property division of married couples comes under federal jurisdiction and the *Family Law Act* 1975 (Cth) while property division of unmarried couples is governed by state law. Taxation, superannuation (private pensions) and social welfare are all controlled by the federal government, while inheritance, guardianship, coronial and compensation law are all state-based. See further: Jenni Millbank, 'If Australian Law Opened Its Eyes to Lesbian and Gay Families, What Would it See?' (1998) 12 *AJFL* 99 and Reg Graycar and Jenni Millbank, 'The Bride Wore Pink ... to the Property (Relationships) Act' (2000) 17 (1) *Can J of Family L*.

4. Amend the *Anti-Discrimination Act 1977* to include lesbian and gay relationships under the definition of marital status
5. allocate funds to an appropriate agency (such as the Law Reform Commission) to consider the question of relationships generally, including:
 - i. the appropriateness or otherwise of bestowing entitlements on the basis of relationships,
 - ii. the focusing on monogamy, exclusivity and blood relations,
 - iii. the need to replace the *De Facto Relationships Act (1984)* with an Act which bestows rights and entitlements on a broader concept of 'relationships', and
 - iv. the need to ensure that all people with disputes which are based on rights and obligations arising from relationships have access to an inexpensive and accessible forum for the resolution of these disputes...⁶⁸

Both the de facto and domestic relationship recognition were premised on a presumption based, rather than a registration, system. This decision was made through consultation which led to the evolution of two editions of *The Bride Wore Pink*. It has been explained elsewhere in some detail why this method of recognition was favoured,⁶⁹ but in brief it was felt that a presumptive regime was likely to cover those who need it the most when they need it the most.

Although in many European jurisdictions registered partnerships are the dominant mechanism of relationship recognition, their usage rates are in fact very low.⁷⁰ Paula Ettelbrick discusses one of the most famous examples of the hardship that lack of same sex partner recognition can produce, *In Re Kowalski*,⁷¹ and argues that a registered partnership regime would not have assisted the lesbian couple in that situation. When Sharon had a car accident and suffered severely debilitating head injuries, her relationship with her partner was not recognised. Sharon's father became her legal guardian, refused to accept that she was in a lesbian relationship, tried to prevent Karen (Sharon's partner) from seeing her, and moved Sharon to an inferior medical facility at a greater distance from her home than the one Karen favoured. It took Karen eight years to finally be appointed as

68 *The Bride Wore Pink* (2nd ed, 1994), above n28, '2. Recommendations'.

69 See Jenni Millbank, 'The De Facto Relationships Amendment Bill', above n65. That article relates to the Bill introduced by the Australian Democrats in 1998 which was not passed, (see below) but as the government Act is similar in form, using both de facto and domestic relationships and a presumption based system, much of the discussion remains applicable.

70 Overseas experience of registered partnerships show extremely low rates of usage, with a much lower rate of take up by women, and a high urban concentration. In Denmark for example, only around 3500 partnerships were registered in total in the nine years 1990 to 1998, with men outnumbering women more than two to 1. This proportion of registrations was equal to less than 1 per cent of the number of marriages which took place during that period in Denmark: see Ingrid Lund-Anderson, 'The Danish Registered Partnership Act, 1989 – Has the Act Meant a Change in Attitudes?' in Wintemute, above n6. See also figures for Norway, Sweden, Iceland and the Netherlands in Kees Waaldijk, '20,000 Registered Partnerships in Europe' in Wintemute, which despite its optimistic tone shows a similarly low rate of take up relative to population and marked gender disparity.

71 478 NW 2d 790 (Minn Ct App 1991).

her partner's guardian. Sharon Kowalski and Karen Thompson were 'desperately closeted'⁷² and would not have registered their relationship. Likewise in NSW, Matthew Howard's partner, Maurice Andrews, died intestate and Matthew had to make a family provision claim in the NSW Supreme Court (and then defend that judgment in the Court of Appeal) in order to remain in the home that he had shared with his partner for 14 years.⁷³ Maurice had not made a will in favour of Matthew for fear of his elderly mother discovering their relationship. It is, therefore, also very unlikely that they would have utilised a registration system had it been available.⁷⁴

Homophobia, discrimination and homophobic violence remain pervasive in Australian society and are powerful disincentives to widespread use of a registration system.⁷⁵ Moreover, Australia has extensive recognition of heterosexual couples through presumptive laws for the very reason that declining numbers of heterosexual people were 'registering' their relationships through marriage – yet in times of crisis and dispute they still required access to the law.⁷⁶ Our bride, therefore, is now dressed in her every-day clothes, with the law recognising her on the basis of her lived experience, rather than on the basis of formalities that she may, or more likely may not, have undertaken.

Broad support for the proposed model among the gay and lesbian community was confirmed at public meetings. The GLRL, with the support of a range of other individuals and organisations, conducted a campaign for recognition based on *the Bride Wore Pink* model continuously from 1994.

In 1995, prior to the State election, then opposition leader Bob Carr promised that if elected the NSW Labor Party would pursue legislative reform:

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- 72 In the words of Paula Ettelbrick: see n18 at 125. For a fuller description of Karen's lengthy battle to be recognised as Sharon's guardian: see Karen Thompson and Julie Adrejewski, *Why Can't Sharon Kowalski Come Home?* (1988).
- 73 See *Howard v Andrews* (1998) (NSW Supreme Court, Macready M, 31 July 1998) affirmed on appeal, *Andrews v Howard* [1999] NSWCA 409.
- 74 Indeed the existence of intestacy necessitating the development of complex legislation is sufficient in itself to highlight the deficiencies of a registration system. People who do not make wills do so for a multiplicity of reasons (for instance they may be closeted, planning on doing it later, did not perceive the need to, and so on) and are unlikely to use a more complex and more public device such as a registered partnership system. Additionally, some would reject this system on ideological grounds as too much like marriage.
- 75 See for example, Jewly Sandroussi and Sue Thompson, *Out of the Blue: A Police Survey of Violence and Harassment Against Gay Men and Lesbians* (1995); Gail Mason and Stephen Tomsen (eds), *Homophobic Violence* (1997); Chris Cunneen, David Fraser and Stephen Tomsen (eds), *Faces of Hate* (1997); Anna Chapman and Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21 *Syd LR* 525. A 1999 report of the Australian Centre for Lesbian and Gay Studies and the NSW Gay and Lesbian Rights Lobby found that of 900 lesbians, gay men and transgender people surveyed, 59 per cent reported discrimination on the basis of sexuality or gender identity in their current or previous workplace: see Jude Irwin, *The Pink Ceiling is Too Low: Workplace Experiences of Lesbians, Gay Men and Transgender People* (1999) (available <<http://www.rainbow.net.au/~glrl/>>).

Labor is committed to reform of legislation around same sex relationships so that same sex partners have the same rights and responsibilities as heterosexual de factos when their partner is hospitalised or incapacitated. We will also ensure that same sex partners are not discriminated against in the operation of the wills and probate and family provisions.⁷⁷

Following the election of Labor to Government in 1995, Ministers subsequently indicated that comprehensive reform would be pursued, for instance the Attorney-General was reported 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.⁷⁸

The Government began development of an omnibus Bill, but no proposal passed cabinet or was made public during that first term of office.⁷⁹ The NSW Liberal Party had offered no support either when in government or later in opposition, and their coalition partner, the National Party, was actively hostile. During this period, two private members' Bills were placed before NSW parliament, but neither was debated or voted upon.

In 1997, Clover Moore, the independent MP for Bligh, introduced a private member's Bill into the NSW Legislative Assembly (Lower House). The Significant Personal Relationships Bill 1997 (NSW) sought to avoid a couple focus and was centred upon emotional interdependence rather than a sexual relationship as its key concept.⁸⁰ It was premised upon a twin model of presumption and registration, both of which were not couple based but would cover same sex partnerships. The Bill was not debated, and lapsed.

Frustrated with the Government's lack of action, the GLRL decided to develop its own Bill. The De Facto Relationships Amendment Bill 1998 (NSW) was drafted by the GLRL in consultation with the Australian Democrats. This legislation attempted to express the vision of *The Bride Wore Pink* as well as incorporating

76 Note that the three proposals to have a registered partnership scheme in Australia have also recommended the implementation of presumption based recognition simultaneously: see *The Bride Wore Pink* (1st ed, 1993) 3 *Australian Gay and Lesbian LJ* 65; Equal Opportunity Commission of Victoria, *Same Sex Relationships and the Law* (1998); Significant Personal Relationships Bill 1997 (NSW). Note also that the option of a 'nominated significant person' in the 1st ed of *The Bride Wore Pink* was considerably different from most registered partnership schemes, for example it allowed different people to be nominated for different purposes, and was not confined to partners, thus reflecting the purposive approach to relationship recognition that informed both versions of *The Bride Wore Pink*. The Legislative Council Social Issues Committee recently recommended that a registration system should *not* be introduced in NSW as a mechanism for same sex relationship recognition: see above n4, Recommendation 5.

77 Letter to Mr Bruce Meagher, (then) President of the AIDS Council of NSW, 22 February 1995, quoted by Hon Dr B Pezzutti, Legislative Council, *Parliamentary Debates (Hansard)*, 25 May 1999 at 317–318.

78 'A Shaw thing: same-sex and tranny reforms before Cabinet' *Sydney Star Observer*, No 270 (21 September 1995), quoted in The Legislative Council Social Issues Committee Report, see n4 at 1.

79 Domestic Relationships Draft Bill 1996 (NSW). But see notes 33 and 34 above regarding the small number of changes that were made to individual Acts during that government's first term of office.

developments since then by amending some 53 NSW Acts.⁸¹ That Bill was introduced into the NSW Legislative Council (Upper House) by Democrat Leader Elisabeth Kirkby in June 1998. In October 1998, the Government referred the De Facto Relationships Amendment Bill to the Legislative Council's Standing Committee on Social Issues which did not have a chance to report before Parliament was prorogued and an election held in early 1999.⁸²

The Labor Government won the 1999 election with a substantially increased majority, and the composition of the Upper House changed with the election of 7 cross-benchers bringing the total to a record 13⁸³ (many of whom were progressive). Thus the Government took up 'controversial' reforms such as same sex relationship recognition very early in its second term. However, the Government did not reintroduce the GLRL/Democrats' Bill, preferring a watered-down version with somewhat more traditional relationship definitions and a more limited scope of coverage.⁸⁴ At the last minute the Liberal led Coalition Opposition agreed not to oppose the Bill.

(i) *The Parliamentary Process*

The debate process was an interesting one. The tone was set by the name of the Bill itself which signalled the Government's intention to present the Bill as minor, uninteresting, and concerned primarily with property; not equality, and certainly not with lesbian and gay rights.⁸⁵ Those few Labor MPs who were present in the Upper or Lower House gave a carefully orchestrated series of brief speeches that presented the Bill as concerned solely with changes to the property division regime, and did not mention the breadth of reform, the history of reform efforts, or lesbian and gay community involvement in devising the law at hand.

80 The Bill utilised a twin model of non-couple relationship recognition; the 'recognised relationship', an opt-in system, formalised by documents sworn before a solicitor or local court, and the 'domestic relationship', a presumption-based system. Either could exist even if parties were not members of the same household, didn't share finances or have a sexual relationship. All that was required for a 'domestic relationship' to exist was (a) a continuing relationship of 'emotional interdependency' or in which one provides fellowship or support plus (b) either cohabitation or a somewhat vaguely worded 'shared life'. For a discussion of this Bill, and of the GLRL preference for a presumption based de facto/domestic model over any form of opt-in recognition see Jenni Millbank: 'The De Facto Relationships Amendment Bill' above n65. Moore's approach, by sidestepping sexual relationships in favour of a focus on emotional connection in our view also falls prey to the dilemma of de-sexing and thus silencing lesbian and gay relationships.

81 The Bill reflected developments such as the inclusion of domestic relationships in the ACT and the category of 'interdependence' in federal migration law, see above n30 and n31. These developments are also discussed in Jenni Millbank, 'If Australian Law' above n67.

82 After passage of the *Property (Relationships) Legislation Amendment Act 1999*, the reference was renewed by the Attorney General. The Committee reported in December 1999, see discussion below.

83 The same number as the Coalition Opposition.

84 The *Property (Relationships) Legislation Amendment Bill 1999 (NSW)*. The differences between the Act and earlier Bill are discussed below.

85 See generally Legislative Council, *Property (Relationships) Legislation Amendment Bill 1999, Parliamentary Debates (Hansard)*, 13, 25 & 26 May 1999 at 228-230, 294-300, 311-322 and 393-398; Legislative Assembly, *Property (Relationships) Legislation Amendment Bill 1999, Parliamentary Debates (Hansard)*, 26 May & 1 June 1999 at 534-535, 708-716 and 735-744.

The approach of the majority of MPs in the parliamentary debates is exemplified by statements such as:

One would think that the Bill does not require a huge debate because it is simply about equitable principles and making sure that people are entitled to property because of their relationships and contributions of both cash and kind should be recognised by the law.⁸⁶

The Government's discursive strategy of constantly naming the Bill as 'about property' and not 'about sexuality' or 'about marriage' seemed to have an almost hypnotic effect. The expression 'property relationship' is not a term in common usage (as opposed to, say, 'sexual relationship' or 'cohabiting relationship'), yet it became a frequently used term in the debate – as though gay and lesbian couples had relationships with their property rather than with each other, and that made it acceptable. The triumph of discourse over substance is well captured by this remark from an Opposition MP:⁸⁷

If this Bill were about sexuality I would not be able to support it. However, as no-one is arguing that this Bill is about sexuality, I will not oppose it.⁸⁸

This emphasis on property and the portrayal of an important human rights reform as a rather dull and routine piece of legislation was apparently a deliberate tactical decision in order to secure Coalition support.⁸⁹ This strategy almost certainly contributed to the stunning lack of media interest⁹⁰ and secured a quiet and swift passage of the law. However, it also rendered invisible the key role that the gay and lesbian community had played in developing the law. One of the most distinctive things about this law was the extent to which it was a community achievement. *The Bride Wore Pink* is undeniably the blueprint for the new law, but the Government made no mention of it during the debates.⁹¹ Indeed it made little mention of the gay men and lesbians who would benefit from the change.⁹² Having presented the law as one which tidied up anomalies regarding property, it clearly

86 Hon Janelle Saffin (Lab) Legislative Council at 298. See also Hon Jan Burnswood (Lab), 'The Bill is called the Property (Relationships) Legislation Amendment Bill because it mostly deals with property': Legislative Council, id at 298. However, Burnswood was one of the few to acknowledge the measure as law reform benefiting same sex couples on 'relationship breakdown, the death of a partner, and various other situations': Legislative Council, id at 297.

87 There were some exceptions to the property focus of debate, most importantly from the progressive minor parties and independent MPs who discussed the broad reaching effects of the Bill and connected these developments both to international human rights norms and to the work of local lesbian and gay communities. See for example, Hon Ian Cohen (Greens), Legislative Council, above n85 at 295–297; Hon R Jones (Ind), Legislative Council at 298–299, Hon Dr A Chesterfield Evans (Dem), Legislative Council at 299, Ms Moore (Ind), Legislative Assembly, above n85 at 710–713.

88 Mr O'Doherty (Lib), Legislative Assembly, above n85 at 739.

89 Although in a compromise within the Coalition this was grudgingly expressed as 'not opposing' the Bill.

90 The passage of the Bill did receive some coverage, most of it brief but positive – see, for example, 'NSW paves way for gay rights', *Sydney Morning Herald* (27 May 1999).

91 The Attorney General has since done so, see Jeff Shaw QC, 'Same-Sex Relationships: Law Reform Happens' (1999) 24 *Alternative LJ* 247.

92 Hon Jan Burnswood (Lab) and Sandra Nori (Lab) were the exceptions to this general trend.

did not want to acknowledge that it was actually doing something which lesbians and gay men *wanted*. To do so would perhaps open it to claims of bowing to 'minority group pressure' and make the law 'about' sexuality rather than 'about' property.⁹³

By the time the Bill had reached the Lower House, the Coalition had divided in its support for the Bill, and there was much more talk of god, morality, marriage and 'the' family. No Coalition members voted against the Bill, but several spoke against it in the Lower House.⁹⁴ Two threads in the speeches against the Bill are worthy of comment – one is the manner in which domestic relationships were reconfigured from a version of alternative family life to conform rigidly to the nuclear family, and the other is the overarching themes of male and female sexuality as active and passive throughout the debates.

The concept of a domestic relationship is in some senses a radical departure from traditional laws about the family, because it redefines family obligations around love, interdependence and choice, rather than blood and marriage or 'marriage like' relationships. In doing this it arguably destabilises heterosexuality and the hetero-nuclear family. But the category can also be presented and received as far less radical than *de facto* relationships, because it is unsexed. In the Attorney General's second reading speech he gave the example of a domestic relationship being a 'woman caring for her elderly father'.⁹⁵ This line was seized on by several coalition MPs who denounced the Bill in general but supported the 'aspects that relate to carers' and spoke warmly of adult children (usually daughters) caring for their elderly parents (often fathers) in rural areas of Australia. Many of these speeches stressed what a good thing it was to 'finally' legally recognise such 'carer' relationships.⁹⁶

93 It was deeply ironic that acknowledgment of the role of the gay and lesbian community by the major parties came not from supportive government members, but instead from a number of Liberal and National Party MPs – who spoke from GLRL briefing notes, cited individual case studies provided by the GLRL, quoted GLRL spokespeople and traced the history of the GLRL's efforts to achieve law reform in NSW: see for example, Hon Dr B Pezzutti (Lib), Legislative Council, above n85 at 317; Hon J Samios (Lib), Legislative Council at 294; Mr R Turner (NP), Legislative Assembly, above n85 at 740; and Mr Richardson (Lib), Legislative Assembly at 715.

94 See for example, Mr Fraser (NP), Legislative Assembly at 736–7. See also Mr Page (NP), Legislative Assembly 738, Mr Glachan, Legislative Assembly at 740, Mr Souris (NP), Legislative Assembly at 714.

95 Legislative Council, Hon JW Shaw at 229.

96 References are made to the caring daughter by Mr Fraser (NP), Legislative Assembly at 736 and 737, Mr Page (NP), Legislative Assembly at 738, Mr Smith (Lib), Legislative Assembly at 739, Mr Glachan (Lib), Legislative Assembly at 740, Mr Turner (NP), Legislative Assembly at 740. Mr Kerr (Lib) also drew on maidenly virtue in his speech, Legislative Assembly at 742.

In fact such a woman, and her father, ailing or otherwise, were already covered by virtually all of the laws concerned, as they are blood relations – and it is exactly these relationships which are already privileged in current law.⁹⁷ The symbolic presence of the caring daughter, and the attention she received in the debates about laws that did not alter her legal position showed a real concern to ‘preserve’ a vision of the heterosexual nuclear family, presided over by fathers and served by daughters.

Interestingly, all of the women who spoke were in favour of the Bill, so the dissenting viewpoints were all male – and it is through their expressions of disapproval and discontent that one can see a vision of male and female sexuality as polar opposites. A ‘stock story’⁹⁸ of the danger of the legislation emerged: gay men were a threat to the family as seducers of husbands. In contrast to other recent parliamentary debates over legal protections to gay men and lesbians in Victoria,⁹⁹ only one member argued that gay men were seducers/abusers of children.¹⁰⁰ However, gay men were still portrayed as ruthless seducers of innocents and the destroyers of ‘real’ families.¹⁰¹ Men would be lured away from their wives and children, and the new gay partner – grasping, undeserving, his pockets already stuffed with pink dollars – could as a result of the legislation now get his hands on the money and property which ought rightfully to belong to ‘the family’.¹⁰² For example:

... the homosexual partner, who may be quite wealthy, could make a legitimate claim on the estate of the father of the children. That claim would adversely impact on the children and, indeed, the inheritance of the mother of the children.¹⁰³

97 A child or other family member is entitled to automatic inheritance in order of the line of descent: see *Wills, Probate and Administration Act* 1898 (NSW) Pt 2, Div 2A. A wide range of family members are entitled to make a claim on the property under family provision law if they have not been adequately provided for: see *Family Provision Act* 1982 (NSW) s6. The only area where such a daughter would be excluded under the previous law is if she wanted to make a claim on the parent’s property while they were still alive. In that situation she would have been forced to use the Supreme Court’s equitable jurisdiction. The likelihood of a court ordering a share of property to a caring daughter while the ailing parent was still alive must appear slim and a family provision claim after death would be the likely option.

98 See Lisa Sarmas, ‘Storytelling and the Law: A Case Study of *Louth v Diprose*’ (1994) 19 *MULR* 701.

99 See Wayne Morgan’s discussion of the passage of equal opportunity law in Victoria: Wayne Morgan, ‘Still in the Closet: The Heterosexism of Equal Opportunity Law’ (1996) 1(2) *Critical InQueeries* 119.

100 Mr Fraser (NP) said, ‘I have a strong belief from personal experience over the years that the gay community can influence young people. A [man] committed suicide over a relationship that he formed when he was a very young lad in a church situation. I suggest that that young fellow was pushed into a homosexual relationship and in the end he was not sure of his sexuality. That is sad. I do not want Bills introduced and passed that give an opportunity for some people who are very base – this is a fairly emotive debate – to prey on young men and affect them to the extent that they contemplate suicide or self-mutilation because of the confusion they have with regard to their own sexuality’, NSW Legislative Assembly at 737.

101 The married man-in this story who has taken the place usually occupied by a child as the victim of the predatory gay man is rendered uncharacteristically sexually passive.

Women, when they appear in this story at all, are passive and relational.¹⁰⁴ They exist only in relation to men, as daughters and mothers, and this relation is a financial rather than sexual one (as they are helplessly left by their adventuring husbands or impoverished after caring for dear old dad). Women are also incapable, dependent in an undifferentiated bundle with the children needing (and, perhaps unusually in the current climate, *entitled to*)¹⁰⁵ men's money. They are sexless, not seducing the wives of other men or husbands of other women (and thereby getting their hands on money and property that ought rightfully to belong to that other 'real' family, the woman and children). Lesbians do not appear at all. The only mention of women unconnected to men in the debates was unsexed in a manner bordering on caricature, as one coalition MP struggled for an example of a non-couple relationship, and produced, 'two female deaconesses who are living together' (and who, he stressed, after laughter from the gallery, have a relationship with 'no sexual element').¹⁰⁶

The dutiful daughter providing care, the abandoned wife and the philandering (bisexual? gay?) husband in the debates express fundamentally conservative propositions about what families ought to be. In such a context a radical re-envisioning of the family appears unlikely.

B. Success?

This new law, while broad-ranging, reflected a more restricted focus than the earlier De Facto Relationships Amendment Bill 1998. The Act amended fewer laws to include same sex de facto partners, and it also used a more restrictive definition of domestic relationships than earlier proposals had favoured.

(i) Coverage of de factos

While the *Property (Relationships) Legislation Amendment Act 1999* ('the Act') amended some 20 pieces of legislation, the De Facto Relationships Amendment Bill 1998 ('the GLRL/Democrats' Bill') would have amended 53 separate Acts.¹⁰⁷ The impact of this lesser coverage is mixed, as most of the unamended Acts were clearly beneficial, but some imposed obligations of disclosure.

Several NSW Acts include some provision for the disclosure of interest (including the interest of a partner) in a variety of contexts frequently related to sitting on the board of a statutory body. Such Acts, if amended to cover same sex

102 See for example, Mr Fraser (NP), Legislative Assembly at 737, 'It is a concern to many that those children will in some way be denied an inheritance that they rightly deserve'. Mr Smith (Lib), Legislative Assembly at 739 'A man in a heterosexual relationship might decide to have a homosexual relationship. If that man dies, his homosexual partner has as much right to his estate as have his wife and children. That is not right.'

103 Mr Page (NP), Legislative Assembly at 738.

104 This positioning of the (heterosexual) woman and her husband's sexual passivity in this portrayal works to position (male) homosexuality as more powerful than heterosexuality.

105 See Miranda Kaye and Julia Tomie in 'Fathers Rights Groups in Australia and their Engagement with Issues in Family Law' (1998) 12 (1) *AJFL* 19.

106 Mr Kerr (Lib), Legislative Assembly at 742.

107 See Jenni Millbank, 'The De Facto Relationships Amendment Bill', above n65, Appendix.

relationships, would have required disclosure of a partner's financial interests, and therefore in a sense compelled outing for some gay men and lesbians.¹⁰⁸ The GLRL/Democrats' Bill had included a number of these Acts on the basis of a formal equality approach, but this was felt to be premature in a climate where homophobia is still widespread and they were not included in the government Act.¹⁰⁹

However, most of the other Acts left unamended would have been greatly beneficial to same sex partners. Notable omissions were in areas of employment, such as laws enabling payment of unused long-service leave to a partner in case of death,¹¹⁰ provision of death or injury benefits to the partner of an employee or insured person,¹¹¹ and access to unpaid parental leave.¹¹²

The Act also did not include changes in the GLRL/Democrats Bill intended to clarify the application of anti discrimination law to same sex partners. The provisions of the NSW *Anti-Discrimination Act* relating to marital status discrimination¹¹³ have been held not to include the status of being in a same sex relationship.¹¹⁴ While the provisions on homosexuality¹¹⁵ could, and should, cover someone in a gay or lesbian relationship being treated disadvantageously compared to someone in a heterosexual relationship, a very questionable NSW decision has held otherwise.¹¹⁶

In many cases there is no obvious underlying rationale or basis for inclusion or exclusion of amended Acts in the *Property (Relationships) Legislation Amendment Act*. There is now a major inconsistency in the approach to defining de facto couples taken in different pieces of legislation with several different uses of 'de facto relationship' across NSW law. There are over twenty statutes in which a specifically gendered definition is still used, there are about twenty statutes

108 Acts which require disclosure of a partner's interests by a committee or board member include: *Albury-Wodonga Development Act* 1974; *Co-operatives Act* 1992; *Financial Institutions Commission Act* 1992; *Growth Centres (Development Corporations) Act* 1974; *Local Government Act* 1993; *Sydney Cricket and Sports Ground Act* 1978.

109 The Social Issues Committee Report (discussed below) accepted the GLRL proposal that if recognition is to be extended to obligations in the future some protections would need to be in place and recommended that, 'The Government review and amend all legislation imposing responsibilities and obligations to require similar compliance by those in same sex relationships, but adequate mechanisms to protect the privacy of those making disclosures regarding their same sex relationships must be put in place': above n4, Recommendation 11.

110 *Electricity (Pacific Power) Act* 1950; *Public Sector Management Act* 1988; *Sydney Cove Redevelopment Authority Act* 1968; *Teaching Services Act* 1980; *Transport Administration Act* 1988; *Waste Recycling and Processing Service Act* 1970.

111 *Police Service Act* 1990; *Sporting Injuries Insurance Act* 1978. The *Police Service Act* may be implicitly consequentially amended, however, as spouse is defined to include de facto partners while the term de facto partners itself is left undefined in that Act (and may, therefore, be drawn from the *Property (Relationships) Act* 1984 as a matter of statutory interpretation).

112 *Industrial Relations Act* 1996 (NSW). Note that Queensland extended parental leave to same sex partners in 1999, see n37.

113 *Anti-Discrimination Act* 1977 (NSW) s39. Marital status is defined in s4 as including the status or condition of being 'in cohabitation, otherwise than in marriage, with a person of the opposite sex'.

114 See *Wilson v Qantas Airways Ltd* (1985) EOC 92-141.

115 *Anti-Discrimination Act* 1977 (NSW) s49ZG.

116 See *Wilson v Qantas Airways Ltd* (1985) EOC 92-141. Doubted in: *Hope v NIB Health Funds Ltd* (1995) 8 ANZ Insurance Cases 61-269; *NIB Health Funds Ltd v Hope* (1996) NSW LEXIS 3962.

where the 1999 (ungendered) definition is used, three more where same sex partners are included but the language used is different from that in the *Property (Relationships) Act*,¹¹⁷ while several other statutes use the category of de facto relationship with no definition at all.¹¹⁸

(ii) *Coverage of Domestic Relationships*

The Act also has a more restricted coverage of domestic relationships than that in the GLRL/Democrats Bill (and indeed, than that envisaged in *The Bride Wore Pink*).¹¹⁹ The reduced coverage of domestic relationships in the Act is mainly due to the definition used, but is also a result of the lesser number of Acts covered in comparison with the GLRL/Democrats Bill.

The definition of a domestic relationship in the GLRL/Democrats Bill was:

a relationship between two 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.¹²⁰

While the GLRL/Democrats Bill was consistent with the definition of domestic relationship in use in property division legislation in the ACT,¹²¹ the NSW Act is deliberately more restrictive, excluding non-cohabittees.¹²² Why this was done is unclear, as there have been no problems of over-inclusion in the ACT legislation to date.¹²³

There are many relationships where people are financially interdependent without living together or providing domestic support or care. The need for cohabitation is possibly the greatest flaw of the NSW Act definition, as in many

117 See *Criminal Procedure Act* 1986 (NSW) Sch 2 and *Victims Compensation Act* 1996 s9: both define a family victim as 'the victim's de facto spouse, or partner of the same sex, who has cohabited with the victim for at least two years'. The *Workplace Injury Management and Workers' Compensation Act* 1998 s4 defines de facto relationship as '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.'

118 See for example, *Police Service Act* 1990 s216. In addition, various federal laws that also apply to residents of NSW use a variety of other definitions of spouse and de facto spouse for such purposes as social security, taxation, immigration, federal education allowances and family law.

119 *The Bride Wore Pink* recommended inclusion of de facto and domestic relationships in many areas, and cited some 16 pieces of NSW legislation: see n28, Recommendation 2.

120 De Facto Relationships Amendment Bill 1998 Sch 1, Cl 4.

121 Although arguably somewhat more cautious in that there had to be financial interdependence. See the ACT definition of 'domestic relationship' above n31.

122 Even so, some members of the legal profession have reacted with alarm: see for example the histrionic tone of Robert Benjamin as he discusses the 'enormously broad category of persons who are entitled to seek property adjustment' in 'Far Reaching Consequences of De Facto Legislation' (1999) 37 (6) *LSJ* 62 at 62. Elsewhere he refers to the 'extraordinarily wide range of people who may now use the Act' and says 'The list can be as wide as one's imagination' at 62 and 64.

123 Specifically, the court has not once been asked to declare the existence of a relationship under the *Domestic Relationships Act* 1994 in the period up to May 1999: see Jenni Millbank, 'Domestic Rifts: Who is using the *Domestic Relationships Act* 1994 (ACT)?' (2000) 14 (3) *AJFL* (forthcoming).

cases it could mean nothing is gained for people in non-traditional relationships. For example, couples who have longstanding close relationships but do not cohabit (or do not meet the two year requirement in the property division provisions) will gain no added access to legal recognition under the domestic relationship definition. Even carers who do not live together are not covered. Only those who live together who are not blood relatives or de factos stand to gain increased access to the range of laws which now cover domestic relationships.

The definition proposed in the earlier GLRL/Democrats Bill was preferable to the one used in the Act because it was purposive and flexible. Cohabitation may be an indicator of financial and emotional interdependence in a relationship (and therefore the need to access legal avenues such as a statutory property division regime) or it may not. Such a criterion should not be used in an under-inclusive manner any more than it ought to be used in an over-inclusive manner (by covering, for example, all cohabitantes regardless of their relationship). Moreover the GLRL/Democrats Bill had taken an additional precaution against over-inclusion by including a list of factors to be considered in making a declaration of a domestic relationship. This list was drawn from the federal migration regulations where it had been in use for several years in the interdependent category.¹²⁴ The *Property (Relationships) Legislation Amendment Act* did not include any list in relation to the domestic category. This was puzzling given that it had been present in the earlier Bill. Moreover, such a list was included in relation to de factos even though this was an established area of law and domestic relationships were more likely to be the focus for any concern about over-inclusiveness.

In addition to the problems with an overly restrictive definition, the utility of recognising domestic relationships has been seriously undermined by the fact that they have only been included in a few pieces of legislation. In particular where the GLRL/Democrat Bill had included domestic relationships in amendments to intestacy provisions (which would have allowed automatic inheritance rights if there had been no spouse, partner or close relatives), this provision was dropped in the Act.¹²⁵ While those in a domestic relationship are now able to make a family provision claim, with the definition of domestic relationship confined to cohabitants, it is doubtful whether it expands upon the category of eligible claimants from the pre-existing 'dependant' category (which requires cohabitation at some stage).¹²⁶

(iii) *What the Act Does and Doesn't Do for Children*

There are very few areas of law in which children's relationships with a non-biological parent (co-parent) are recognised by the law of NSW.¹²⁷ For instance,

124 See n30. Note also that the Social Issues Committee strongly supported the extension of the domestic relationship definition to non-cohabitantes: above n4, Recommendation 7.

125 De Facto Relationships Amendment Bill Sch 2, Cl 2.50 (10). Domestic relationships would have come below married spouses, de facto partners, children and parents, but above siblings.

126 Those who had been at some time a member of the deceased's household and had been 'at any particular time, wholly or partly dependant' on the deceased were already eligible: see n30. Those in close personal relationships who have not lived with the deceased remain ineligible regardless of the degree of dependence.

127 See generally, Jenni Millbank, 'If Australian Law' above n67.

if a lesbian couple choose to have and raise a child together, and use donor insemination to do so, there is only one legal parent of that child (the biological mother)¹²⁸ unless specific statutes make provision for non-biological parents.¹²⁹ This is so even if the co-parent is the main carer of the child. So, for example, if a co-parent died, the child would have no rights to automatic inheritance under the *Wills, Probate and Administration Act 1898* – even aunts and uncles would take precedence. While joint parenting orders under the federal *Family Law Act 1975* (Cth) can accord a co-parent a range of rights,¹³⁰ they do not necessarily impact upon the definition of ‘parent’ and ‘child’ under NSW laws. Nor do such provisions assist children whose parents have not successfully completed this process.

The NSW Act introduces limited changes for these parenting relationships in some areas of NSW law, through defining children of a relationship under the *Property (Relationships) Act* as including, ‘a child for whose long-term welfare both parties have parental responsibility’.¹³¹ This change primarily has implications for child maintenance under the Act itself. It is also important in that the definition is carried through into the *Bail Act 1978*, *Family Provision Act 1982*, *Coroner’s Act 1980* and *Trustee Act 1925* which therefore recognise the relationship of children and co-parents for specific purposes.

Prior to the NSW Act, a mother seeking child support from a female co-parent would not have access to statutory child support regimes (though, paradoxically, if the co-parent retained residence of the child, she would have access to the federal child support scheme to seek a contribution from the biological mother).¹³² In 1996 child maintenance was claimed by a parent against a co-parent under the common law using the doctrine of promissory estoppel.¹³³ However, as such actions must be brought in the Supreme Court using equitable principles, this is not an accessible or likely avenue for most, if not all, lesbian mothers.

128 See *Status of Children Act 1996* (NSW) and decisions of the NSW Supreme Court and Family Court on this point respectively in *W v G* (1996) 20 Fam LR 49 and *B v J* (1996) 21 Fam LR 186. For a general overview of this area of law in NSW see Inner City Legal Centre, *Talking Turkey: A Legal Guide to Self Insemination* (1999).

129 Exceptions include some statutes that utilise the concept of ‘*loco parentis*’, for example *Workers Compensation Act 1987* s25(5). In that Act the non-biological child of a co-parent who died at work could receive benefits. Likewise, a co-parent whose non-biological child died at work could also receive benefits if she or he was wholly or partly financially dependent on the child. See also *Compensation to Relatives Act 1897* (NSW) s7(1).

130 Parenting orders under the *Family Law Act 1975* (Cth) can cover residence, contact and ‘specific issues’. So, for instance, the court may declare that the child is to reside with the co-parent, and that the co-parent has responsibility for areas of day to day decision-making, or for medical or educational decisions. If there is a legal father and he opposes the application, an order may still be made jointly in favour of a mother and co-mother, although it would make the process more difficult as it would have to go to a full hearing. If there is no legal father, or the father consents, the matter can be dealt with relatively simply by a Registrar: *Family Law Act 1975* (Cth), s65G.

131 *Property (Relationships) Act 1984* s5(3)(d).

132 See *Child Support (Assessment) Act 1989* (Cth) s5, s25 and see Jenni Millbank, ‘An Implied Promise to Parent: Lesbian Families, Litigation and *W v G* (1996) 20 Fam LR 49’ (1996) 10 *AJFL* 112; Danny Sandor, ‘Paying for the Promise of Co-Parenting: A Case of Child Maintenance in Disguise?’ (1996) 43 *Family Matters* 24.

133 *W v G* (1996) 20 Fam LR 49.

The *De Facto Relationships Act* 1984 had provisions for spousal maintenance which hinged upon the care of a child under the age of 12.¹³⁴ They were, in effect, the statutory child support provisions for unmarried heterosexual couples prior to referral of powers over ex-nuptial children to the Family Court in 1987,¹³⁵ and the introduction of the *Child Support (Assessment) Act* 1989 (Cth). The *De Facto Relationships Act* 1984 provisions were rendered obsolete by the inconsistent (and far broader) federal provisions (covering children to the age of 18) but they were not subsequently removed. The effect of the 1999 amendments is to make that section of the *Property (Relationships) Act* available to parents who wish to seek support from non-biological parents not covered by the federal provisions. The provisions of the *Property (Relationships) Act* would be considerably easier to use than the common law if a concurrent property matter were being heard. The *Property (Relationships) Act* also provides access to courts of lower jurisdiction – although it has the disadvantage of only providing for support of children to the age of 12 (whereas the common law, like federal law, covers children to adulthood).

The other impact that the NSW Act has on the relationships of co-parents and children is more indirect. The definition of ‘domestic relationship’ itself could and should cover such relationships, so they are arguably now included in all the areas of NSW law which extend to domestic relationships.¹³⁶

Taken together, the Act confers rights to the children of unrelated co-parents in a small number of areas: property division, family provision, (limited) child support, bail, some trusts, coronial matters and stamp duty. These areas are clearly of a considerably lesser scope than the full range of parental rights and obligations under NSW law.¹³⁷

4. Future Reforms?

A. NSW Law

There remain several areas in state law where the relationships of gay men and lesbians are still treated unequally in comparison with heterosexual relationships. Firstly, cohabiting same sex couples have not yet been recognised as de facto partners in many remaining areas of state law – for example lesbian and gay couples are not eligible to jointly adopt a child.¹³⁸ In 1997 the NSWLRC recommended that

134 Prior to the Act, a woman could claim ‘preliminary expenses’ associated with the birth of an ex-nuptial child (hospital and ‘confinement’ expenses) from the father under the *Maintenance Act* 1964 (NSW) ss 7(1), 17. The court could also make orders for support of ‘illegitimate’ children under section 15 although the mother’s evidence as to the father of the children would generally not be accepted unless corroborated.

135 See the *Family Law Amendment Act* 1987 (Cth).

136 This extends further than the direct recognition of the co-parent child relationship. So, for example, while the child of a co-parent is included as an eligible applicant under the *Family Provision Act* 1982 by virtue of the Act adopting the definition of ‘child’ used in the *Property (Relationships) Act* 1984, that change would not render the parent an eligible applicant regarding the child’s estate. In that situation, the parent could argue that she or he was in a domestic relationship with the child.

137 See Jenni Millbank, ‘If Australian Law’ above n67, for discussion of some other areas, such as compensation legislation.

138 Even if this is in the best interests of the child: see *Adoption of Children Act* 1965 s19.

this law should be amended to include same sex couples.¹³⁹ Changes to adoption legislation to cover same sex couples as de facto partners would not simply make lesbian and gay couples eligible to adopt unrelated children. More importantly, it would permit same sex couples to jointly adopt the biological child of one of the partners so that both partners would be full legal parents. This is of considerable significance for lesbian couples where children are born into the relationship through the use of donor insemination and currently have only one legal parent.¹⁴⁰ As noted earlier, applying for joint parenting orders under the *Family Law Act* gives only a limited range of rights, which, for example can be terminated by a later court order, and cease when the child reaches 18. Second parent adoption in such situations is now available in Canada¹⁴¹ and several states in the US.¹⁴²

Secondly, gay men are not treated equally with either heterosexual men or with lesbians by criminal laws concerning the sexual age of consent. While the age of consent for heterosexual and lesbian sex is 16, the age of consent for sex between men is 18. Moreover, there continues to be an entire set of provisions in the *Crimes Act* dealing exclusively with sex between men and offences against boys with different defences and harsher penalties to those that apply to general offences and offences against women and girls.¹⁴³ (This is despite the fact that the general provisions also cover sex between males.) In 1997, the Wood Royal Commission considered the disparate penalties and offences and argued that there were no cogent reasons for maintaining the anomalies, which, in addition to being

139 NSW Law Reform Commission, *Review of Adoption of Children Act 1965 (NSW)* Report 81 (1997) paras 6.104–6.123.

140 An alternative method of granting such children two legal parents would be to amend the *Status of Children Act 1996 (NSW)* to render the definition of de facto partner gender neutral. The Act currently deems a consenting husband or male de facto partner of a woman who conceives a child by donor insemination to be the legal father of the child.

141 See for example, *Re K* (1995) 15 RFL (4th) 129 (Ont. CJ) in Ontario and *Adoption Act*, RSCB 1996, c5, s29 in British Columbia.

142 See Nancy Polikoff, 'The deliberate construction of families without fathers: is it an option for lesbian and heterosexual mothers?' (1996) 36(2) *Santa Clara LR* 375.

143 See *Crimes Act 1900 (NSW)* ss78G–78T. For the purposes of these sections, s78G defines, 'homosexual intercourse' as:

(a) sexual connection occasioned by the penetration of the anus of any male person by the penis of any person;

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another male person; or

(c) the continuation of homosexual intercourse as defined in paragraph (a) or (b).

Despite the fact that Roden J quite sensibly tells us that, 'It is very difficult to make meaningful comparisons between different provisions of the *Crimes Act* relating to sexual offences' (*Chard v Wallis* (1988) 12 NSWLR 453 at 457), compare s66A (intercourse with child under 10, maximum penalty 20 years imprisonment) with s78H (homosexual intercourse with child under 10, maximum penalty 25 years); s66C (intercourse with child between 10 and 16, maximum penalty 8 years or 10 if child under authority of offender), s73 ('carnal knowledge' of girl between 16 and 17 by her schoolmaster, teacher, father or step-father, maximum penalty 8 years) with s78K (homosexual intercourse with child between 10 and 18, maximum penalty 10 years) and s78N (maximum penalty 14 years if offender is teacher, father or step-father). For a table comparing child sex offences in all Australian jurisdictions see: Royal Commission into the NSW Police Service, *Final Report, Volume VI, The Paedophile Inquiry* (1997), Appendices, Appendix P17.

unnecessarily complex 'place less value on the protection of young females compared with young males' and 'operate in a way that is discriminatory against male homosexuals'.¹⁴⁴ In 1999 the Model Criminal Code developed for the Standing Committee of Attorneys General recommended that there be no specific offences relating to homosexual conduct (and therefore, among other things, an equal age of consent).¹⁴⁵

In 1999, a private member's Bill was introduced into the NSW Legislative Council which sought to equalise the age of consent and render all sexual offences gender neutral.¹⁴⁶ It would have done so by repealing some of the sections of the *Crimes Act* that relate solely to sex between males, replacing some of them with gender neutral offences and replacing the sections that related solely to girls with gender neutral sections. There was a conscience vote and the Bill was defeated by one vote in November 1999.¹⁴⁷ Therefore, despite various inquiries, recommendations and reform efforts in recent years, an unequal age of consent remains the law in NSW.

The coverage of non cohabiting couples and non-couples in NSW law through the domestic relationship category remains scant following the 1999 reforms.¹⁴⁸ The blanket exclusion of non-cohabitees means that legislation does not necessarily achieve its objective, for example passing an intestate's estate to those whom the intestate would most likely have wished it passed to, or a deceased workers' entitlements on to their dependants – because the law is constrained by categories that are not flexible or purposive in their operation. The Canadian case of *Obringer v Kennedy Estate* illustrates the injustice that can result from such

144 Id at 1071. The Royal Commission received over 45 submissions on the question of an equal age of consent. The Report summarised the arguments against change as follows:

- physical and emotional development was said to occur about two years later in boys than girls, so that extra time should be allowed for boys to develop their sexual identity and preference;
- amendment of the law would be seen as an encouragement of paedophiles, and would mark the beginning of a progressive relaxation or erosion of child sexual abuse laws;
- lowering the age of consent would increase opportunities for paedophile networks to expand; and
- homosexuals were suggested to be more likely to seduce boys if the age of consent was lowered, a proposition which assumes that laws can modify behaviour and that adolescent males are less capable of resisting sexual advances than their female counterparts': at 1078–1079.

The Commission rejected all of these arguments.

145 Model Criminal Code Officers of the Standing Committee of Attorney Generals, *Model Criminal Code, Chapter 5 Sexual Offences Against the Person* (1999) at 15–18.

146 Crimes Amendment (Sexual Offences) Bill 1999.

147 See Legislative Council of NSW, Crimes Amendment (Sexual Offences) Bill 1999, *Parliamentary Debates (Hansard)*, 21 October 1999 at 1723–1727, 11 November 1999 at 2737–2745, and 18 November 1999 at 3189–3198, 3210–3215. The vote was on the second reading motion.

148 During the course of debates Clover Moore (Ind) called for increased recognition of non-couples and Sandra Norrie (Lab) for increased recognition of non-cohabiting couples: see Legislative Assembly at 711 and 736 respectively.

exclusions.¹⁴⁹ In that case the partner of a gay man who died intestate argued for a share of the estate (under family law and the Ontario equivalent of family provision and intestacy provisions).¹⁵⁰ The men had been partners for 20 years, and spent their weekends and holidays together but did not live in the same house (they lived in cities close to the border, but on opposite sides, as one of them was American and the other Canadian). The court held that as he was unable to establish cohabitation, Mr Obringer could not be a spouse. As a result the daughter of the deceased man's first cousin inherited the estate. The result would be similar under NSW intestacy and family provision legislation, despite the recent amendments, because the partners did not cohabit.

B. Federal Law

Federal legislation has not been affected by the changes in NSW. Areas of federal law such as superannuation, immigration¹⁵¹ and taxation¹⁵² still do not cover same sex relationships.

Continuing discrimination in superannuation is particularly serious because it comprises an increasingly large portion of wages and contribution to superannuation schemes is now compulsory.¹⁵³ The purpose of superannuation is not only to provide for workers upon retirement but also to provide for their dependants in the event of their early death. These funds discriminate against lesbian and gay contributors in a number of ways, due to the operation of federal superannuation and taxation legislation and the discretion inherent in trustee decisions.¹⁵⁴

149 (1999) Ont CJ LEXIS 3342, discussed in Shelley Gavigan, 'Legal Forms, Family Forms, Gendered Norms: What is a Spouse?' (1999) 14 *Canadian J of L and Society* 127.

150 To do this, Mr Obringer needed to bring a Canadian Charter challenge to the opposite sex definitions of 'spouse' contained in those Acts. Following the decision of the Ontario Court of Appeal in *M v H* (1996) 142 DLR (4th) (subsequently upheld by the Supreme Court of Canada: (1999) 171 DLR (4th) 577), this would have been likely if he had satisfied the cohabitation requirement.

151 Note that the limited access for same sex couples through the interdependent category does not flow through to other 'spousal' categories of visa: see Rohner & Tineo v Scanlan & Minister for Immigration and Multicultural Affairs (1998) 157 ALR 24 and [1998] IRTA 12979.

152 For an incisive critique of the role of familial ideology in contemporary Australian tax policy, see Miranda Stewart, 'Domesticating Tax Reform: The Family in Australian Tax and Transfer Law' (1999) 21 (3) *Syd LR* 453.

153 See generally, Therese MacDermott 'Linking Gender and Superannuation' (1997) 2 *International Journal of Discrimination and the Law* 271.

154 There are also a number of less serious ways in which funds operate in a discriminatory manner, such as failure to pay a joint pension.

Same sex partners are ineligible for spousal pensions which are paid to married and heterosexual de facto partners on the death of the contributor.¹⁵⁵ They are also excluded from the provision of 'death benefits'. On the death of a contributor prior to retirement, vested superannuation contributions are distributed as 'death benefits' by the trustees of individual superannuation funds.¹⁵⁶ If the fund is a 'complying fund' (which gains the fund substantial tax advantages)¹⁵⁷ federal law requires death benefits to be paid to a 'dependant' or to the deceased's estate, and defines 'dependant' as meaning legal and heterosexual de facto spouses and biological, adoptive and step-children.¹⁵⁸ Heterosexual partners, therefore, are presumed to be 'dependants', while same sex partners must prove financial dependence to the trustees in order to receive benefits (and will not be eligible if there is a legal spouse or other recognised dependant). In the absence of proof of financial dependence, the benefits pass to the contributor's estate, attracting a much higher rate of taxation, and all the difficulties associated with succession law that may exclude a same sex partner.¹⁵⁹ Trustees may make such decisions despite the fact that the contributor has nominated their same sex partner as the beneficiary under the fund rules.

Neither private funds nor state run public funds will change their definitions of 'spouse' and 'dependent' (through trust deeds and state legislation, respectively) because to do so could result in those funds being declared non-complying or inconsistent with federal superannuation and taxation law. This would attract a rate of 47 per cent tax for all member and employer contributions to these funds instead of the complying rate of 15 per cent.¹⁶⁰

In 1995 and 1997, Senate Committees reported that superannuation law was discriminatory and recommended that federal legislation and regulations be amended to treat same sex couples and opposite sex couples equally in regard to pensions and vested death benefits.¹⁶¹

155 See *Re Brown v the Commissioner for Superannuation* (1995) 21 AAR 378.

156 This distribution is discretionary and is governed by the trust deeds of the funds in question. Contributors can nominate a 'preferred beneficiary' who should receive this money but the trustees of each superannuation fund do not necessarily have to obey these instructions. In 1999 the federal Government made it possible for funds to alter their rules to make the nomination of beneficiaries binding. However, these can only be made in favour of the member's legal personal representative or a dependant or dependants: see *Superannuation Industry (Supervision) Act* 1993 (Cth) s59(1)A (hereinafter *SIS Act*). In effect, the change has only made it easier for lesbians and gay men to successfully nominate their partner *if* their fund changed its rules, *if* they have a will and *if* there are not competing recognised dependants. It has since been claimed that the legislation is seriously flawed; that any such change in rules may be invalid as it is inconsistent with other sections of the *SIS Act* (s58) and that the legislative requirements are unduly complex and difficult to administer: see Jane Paskin, 'Binding Death Benefit Directions – Are they Worth the Trouble?' (1999) 11(1) *Superannuation Law Bulletin* 1; Michael Vrisalis, 'Death Benefit Nominations: Has the Dust Settled?' (1999) 6 *Australian Super News* 93. These legal and administrative difficulties raise the possibility that few funds will make the necessary changes.

157 For a fuller and up to date explanation of the tax impact of funds' compliance, see the Opinion of the NSW Crown Solicitor's Office, 15 October 1999, attached to the Social Issues Committee Report as an appendix, n4.

In 1999 the Human Rights and Equal Opportunity Commission examined the issue of discrimination in government superannuation schemes.¹⁶² In its report the Commission found that current federal government superannuation schemes are inconsistent with the provisions of the International Covenant on Civil and Political Rights on sex and other discrimination (Articles 2 and 26) and provisions of the International Labor Organisation Discrimination (Employment and Occupation) Convention on sexual preference discrimination.¹⁶³ The Commission recommended that the legislation be amended to:

remove provisions which impair equality of opportunity in employment and deny equal protection before the law. In particular, gender specific terms such as 'husband', 'wife' and 'spouse' which are used to determine eligibility for a spouse benefit, should be replaced with gender neutral terminology so that the benefits apply equally to opposite sex and same sex partners.¹⁶⁴

In 1998 a private member's Bill was introduced into the House of Representatives by Mr Albanese (Lab).¹⁶⁵ The Superannuation (Entitlements of Same Sex Couples) Bill 1998 aimed to amend the Superannuation Industry (Supervision) Act (Cth) 1993 by inserting a new definition of de facto partner which covered same sex couples, and a new definition of dependants which covered the child of a de facto partner.¹⁶⁶ In addition, the Bill inserted a section directing funds not to discriminate against a beneficiary.¹⁶⁷ (It related only to federal legislation dealing with private superannuation schemes and did not attempt to amend government schemes because private member's Bills cannot impact on government spending.) The Bill was reintroduced in 1999 and lapsed.¹⁶⁸ In 2000 the same Bill was introduced into the Senate by Senator Conroy (Lab). It was then referred to a

158 *Superannuation Industry (Supervision) Act 1993* (Cth) ss 10, 40, 45, 62; *Superannuation Industry (Supervision) Regulations 1994* R 6.22; *Income Tax Assessment Act 1936* (Cth) Part III, Div 2, Subdivision AA, Part IX, Div 2. Definitions are found in s10 of the (*SIS Act 1993*) which provides that 'dependant', in relation to a person, includes the spouse and any child of the person. 'Spouse', in relation to a person, includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person and 'child', in relation to a person, includes an adopted child, a step-child or an ex-nuptial child of the person.

159 For instance, if the deceased was intestate, the same sex partner may not be eligible to inherit. The same sex partner may also face a family provision claim from another relative if he or she is able to claim under either a will or intestacy.

160 This is fully explained by the NSW Crown Solicitor's Office, above n157.

161 See Senate Select Committee on Superannuation, *Super and Broken Workforce Patterns*, 17th Report (1995); Senate Legal and Constitutional References Committee, *Inquiry into Sexuality Discrimination* (1997).

162 The Acts it examined were the: *Superannuation Act 1976* (Cth), *Superannuation Act 1990* (Cth), *Defence Force Retirement Death Benefits Act 1973* (Cth) and *Military Superannuation and Benefits Act 1991* (Cth).

163 See HREOC, *Superannuation Entitlements of Same Sex Couples, Report of the Examination of Federal Legislation*, HRC Report 7 (1999).

164 Id at page 12.

165 House of Representatives, Superannuation (Entitlements of Same Sex Couples) Bill 1998, *Parliamentary Debates (Hansard)*, 7 December 1998 at 1441-1442.

Senate Committee which received over 1100 items of correspondence, only five of which were opposed to the Bill. The majority of the Committee concluded that, 'discrimination against same sex couples can no longer be tolerated' and recommended that the Bill be passed after a brief period of consultation with the superannuation industry.¹⁶⁹

C. *The Social Issues Committee Report*

The NSW Legislative Council Standing Committee on Social Issues was asked by the Attorney General in 1998 to inquire into, and report on:

- The rights and obligations of persons in interdependent personal relationships other 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* introduced into the Legislative Council on 24 June 1998.

The inquiry was given a renewed reference in 1999 after the election and the passage of the *Property (Relationships) Legislation Amendment Act 1999*.

The Committee noted that the majority of submissions it received were supportive of the reforms proposed in the GLRL/Democrats Bill.¹⁷⁰ The Report of the Committee was unanimous. It recommended that immediate steps be taken by the government to implement all of the 'gaps' between the Act and the earlier GLRL/Democrats' Bill, covering de facto couples in more Acts,¹⁷¹ and broadening the definition of domestic relationship to cover non-cohabitantes¹⁷² as well as the number of Acts in which they are covered.¹⁷³ The Committee also

166 The Bill would replace the definition in section 10(1) of the *SIS Act 1993* with the following definition of de facto partner: 'a person who, whether or not of the same gender as the person, lives with the person on a genuine domestic basis as a partner of the person' and the following definition of dependant: 'includes the spouse, de facto partner, and any child of the person or of the person's spouse or de facto partner'.

167 The Bill would have added a new section 52(2)(i) 'not to discriminate, in relation to a beneficiary, on the basis of race, colour, sex, sexual preference, transgender status, marital status, family responsibilities, religion, political opinion or social origin.'

168 See House of Representatives, *Superannuation (Entitlements of Same Sex Couples) Bill*, *Parliamentary Debates (Hansard)*, 22 November 1999 at 12241–12242.

169 See Select Committee on Superannuation and Financial Services, *Report on the Provisions of the Superannuation (Entitlements of Same Sex Couples) Bill 2000* (2000), paras 6.1, 6.4 and 6.24. the minority report by Government Senators stressed the 'opposing views' of the Bill's five detractors (notably the Festival of Light and the Australian Family association, both religious-right organisations with a long history of anti-gay and lesbian rhetoric and campaigns) and argued that any reform of federal law must take into account 'the likely impact on traditional families and traditional values': see para 1.19. The minority report therefore recommended that the Bill not be passed: para 1.22.

170 Of 138 submissions, 114 supported the changes, 12 were opposed, four were not relevant and eight either were unclear or supported another model of recognition: see Report, above n4, para 1.4.

171 Recommendations 10 and 11.

172 Recommendation 7.

173 Recommendations 14 and 15.

recommended amendments to the *Anti-Discrimination Act 1977* (hereinafter *ADA*) to specifically cover same sex and domestic relationships, and the replacement of the ground of 'marital status' discrimination with 'relationship status'.¹⁷⁴

The Committee also went considerably further than the earlier Bill by recommending:

- Repeal of the general exemption provisions in the *Anti-Discrimination Act 1977* (which exempt otherwise discriminatory acts done under statutory authority from the provisions of the Act) with the expectation that over time all legislation should be made consistent with the *ADA*.¹⁷⁵
- A review of all legislation and awards conferring employment benefits and entitlements where a different application of law is evident between married couples and those in de facto and domestic relationships to achieve consistency.¹⁷⁶
- A general drafting instruction be issued to Parliamentary Counsel that in all new legislation the definition of 'de facto relationship' be consistent with the *PRA*.¹⁷⁷
- Amendments to the *PRA* to bring the state property division principles in line with federal family law.¹⁷⁸
- A full examination of the laws relating to children and their non-biological parents to ensure that such children are not disadvantaged.¹⁷⁹
- A request to the federal government to amend federal child support legislation to cover same sex co-parents in the same way that opposite sex parents and step-parents are covered.¹⁸⁰
- A request to the federal government to amend superannuation and taxation legislation to ensure that Australia is complying with its obligations in relation to international human rights conventions.¹⁸¹

174 Recommendations 1 and 2. The NSW LRC also recently recommended that the 'marital status' ground be renamed 'domestic status' and that 'domestic status' be defined to include, inter alia, being 'in cohabitation with another person in a domestic relationship other than marriage': see NSW LRC, *Review of the Anti-Discrimination Act 1977*, Report 92 (1999), Recommendations 32 and 33 respectively.

175 Recommendation 4. The NSW LRC also recently recommended the repeal of the general exception for Acts done under statutory authority (with the proviso that there be a 12 month delay after commencement) and that all new legislation be scrutinised for compliance with the *ADA*: see NSW LRC, *Review of the Anti-Discrimination Act 1977*, id at Recommendations 43 and 44 respectively.

176 Recommendation 10.

177 Recommendation 13.

178 Recommendation 18. Currently the NSW approach under s20 of the *PRA* is a contribution based assessment, while the *Family Law Act 1975* (Cth) s79 enables the court to also consider future needs.

179 Recommendation 22.

180 Recommendation 23.

181 Recommendation 24.

D. *The NSW Law Reform Commission*

After the passage of the *Property Relationships (Amendment) Act* 1999, the Attorney General asked the NSW LRC to inquire into and report on the operation of the *Property (Relationships) Act* 1984, with particular regard to:

- the financial adjustment provisions of the Act and in particular:
 - (i) the effectiveness of section 20 in bringing about just and equitable adjustments of the parties' respective interests; and
 - (ii) whether the current legislation is able to take into account superannuation entitlements effectively;
- the process of decision-making or determination of rights;
- the Commission's Report No 36, *De Facto Relationships* (1983);
- the 1999 amendments incorporating the *Property Relationships (Amendment) Act* 1999 and the matters referred to the Legislative Council's Standing Committee on Social Issues regarding the rights and obligations of persons in interdependent personal relationships; and
- any related matter.

The scope of this review is clearly a broad one. It is anticipated that it will, for example, undertake a wide review of laws relating to non couples and non-cohabitees, and also issues relating to children and co-parents (which the Social Issues Committee identified as important issues but about which it did not make specific recommendations concerning NSW laws).

5. *Conclusion*

While many overseas reforms have focused upon registered partnerships as the primary method of relationship recognition, all Australian reforms to date have utilised presumptive laws, often by defining same sex cohabiting couples as 'de facto partners' and treating them in a like manner to opposite sex cohabiting couples under the same laws. This trend appears set to continue.

Despite its uninspiring name, the *Property (Relationships) Legislation Amendment Act* 1999 is a major human rights reform, introducing sweeping changes to the status and rights of cohabiting same sex couples in NSW. These changes have the potential to affect gay men and lesbians in every aspect of their lives. At first blush, the relative comprehensiveness of this reform is in stark contrast to the more limited reforms made in other Australian states through the late 1990s. However, these jurisdictions may well be testing the waters, as NSW itself did, by first attempting piecemeal reform and then introducing wider change to laws regulating the status of relationships.

Concerns raised in *The Bride Wore Pink* that other forms of relationships not be excluded or disadvantaged have been partially dealt with in NSW reforms, and have provoked greater consideration, and questioning, of why and how relationships are recognised in law. Perhaps the most revolutionary aspect of the Act is the fact that non-couple relationships are accorded some legal recognition in NSW. Arguably, this shift in conceptualising family has the potential to alter the traditional privileging of heterosexual nuclear families in law. However, the

cautious nature of the reform and its conservative presentation has tended to undermine this potential. Moreover, the very limited recognition of the relationships of children with their non-biological lesbian and gay parents is likely to be a source of continuing disadvantage to those children and their families. It is possible that the recommendations of the Social Issues Committee and further inquiry by the NSW LRC will lead to legislative reform recognising a broader range of non-traditional families, including children and co-parents. Certainly the process of questioning and reconceptualising 'family' should continue with the NSW LRC inquiry.

Finally, recognition of same sex relationships is not the only legal issue facing lesbians and gay men in Australia. Basic formal legal equality is still not present in a number of areas, with, for instance, discriminatory superannuation and age of consent legislation. Nor is formal legal equality a guarantee of the enjoyment of real equality in Australian society. Issues such as high levels of homophobic violence,¹⁸² gay and lesbian youth suicide¹⁸³ and homelessness,¹⁸⁴ and discrimination in the workplace¹⁸⁵ (and elsewhere) remain pressing concerns which have yet to be fully addressed.

182 Research done by the Lesbian and Gay Anti-Violence Project, a project of the Gay and Lesbian Rights Lobby, and the NSW Police Service has shown a high incidence of violence and verbal harassment against gay men and lesbians. Gay men are four times more likely to be assaulted than other men while lesbians are six times more likely than other women to be assaulted: see Jewly Sandroussi and Sue Thompson, above n75.

183 See Ritch Savin-Williams, 'Verbal and Physical Abuse as Stressors in the Lives of Lesbians, Gay Male, and Bisexual Youths: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide' (1994) 62(2) *Journal of Consulting and Clinical Psychology* 261, for a review of American literature about suicide and depression to date. In particular, he notes that the 1989 *Report of the Secretary's Task Force on Youth Suicide* found that as a result of homophobia, gay and lesbian youth in America are two to three times more likely to kill themselves than are heterosexual youths; that lesbians, gays and bisexuals constitute 30 per cent of all adolescent suicides; and that suicide was in fact the leading cause of death for lesbian and gay youths: at 266. Savin-Williams notes that various American empirical studies of lesbian, gay and bisexual youths found a (reported) suicide attempt rate of between 20 per cent and 40 per cent: at 266. For a small sample Australian study: see Vic Barbelier, *The Young Lesbian Report* (1992).

184 Jude Irwin & Ors for the Australian Centre for Lesbian and Gay Research, *As Long as I've Got My Doona: A Report on Lesbian and Gay Youth Homelessness* (1995).

185 See Jude Irwin, above n75.