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Valuing our Differences: The Recognition of Lesbian and Gay Relationships*

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The law does not recognise lesbian and gay relationships. The result: the legal and consequent social and economic benefits enjoyed by heterosexual couples are not enjoyed by lesbians and gay men in relationships. This address considers the tangible consequences of this lack of recognition during relationships, when a partner dies, becomes ill or incapacitated or when a relationship ends. Options for reform are examined: domestic partnership legislation, de facto relationship recognition, property regimes, marriage and significant personal relationship. The address discusses the Lesbian and Gay Legal Rights Service's recommendation to lobby for de facto relationship recognition and to encourage all people to lobby for the recognition of significant personal relationships which recognise the significance of relationships, regardless of kinship or sexual connection.

Sue has been in a relationship with her partner for eight years. They have cared for three year old Jane together, either one of them might collect Jane from child care, make her dinner, take her to the doctor. They are one of the many families you will encounter at the supermarket or the local children's playground on a Sunday afternoon. They are invited places as a family, go on holidays as a family, are regarded as a family by their neighbours. Together they have knocked down walls, painted, decorated and gardened to create their home.

Sue's partner dies suddenly without a will. If Sue's partner had been a man, under NSW de facto law, Sue would have been entitled to a significant proportion of the estate of her deceased partner or to the matrimonial home. Sue and Jane could have remained in their home.

But Sue's partner was a woman Her name was Kate. Under the rules of intestacy, Kate's estate goes to her parents. Kate and Sue's relationship, although enriching

and supportive, although the most significant relationship either of them enjoyed, is not recognised by law.

The law does not recognise lesbian and gay relationships. Heterosexual couples have legal status if the couple marry or live together in a de facto relationship. In NSW, a de facto couple has virtually the same legal status as a married couple. A lesbian or gay relationship does not have legal status. The result: the legal and consequent social and economic benefits that accrue to heterosexual couples during their relationships, when a partner dies, becomes ill or incapacitated or when the relationship ends, do not accrue to lesbians and gay men in relationships.

At every turn Sue will be reminded that the law and mainstream society do not recognise her relationship with Kate.

WHAT WILL HAPPEN AFTER KATE'S DEATH?

Kate and Sue owned their home as tenants in common so they were each free to dispose of their property as they wished. Because Kate died without a will her property automatically goes to her 'next of kin'. Under the rules of intestacy, 'next of kin' does not include a lesbian partner.

Kate and Sue had talked of their wishes for funeral arrangements. Kate was estranged from her family and did not want a Christian burial. She wanted to donate her body to science. But the law prevented Sue from carrying out this wish. The *Human Tissue Act 1983*

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(NSW) gives the 'senior available next of kin' the right to make decisions about organ donation and post-mortem examinations. The 'senior available next of kin' excludes lesbian and gay partners. In this case, it was Kate's father who made the decisions. Even if Kate had left a will appointing Sue as her executor, her wish could still have been frustrated. Under this Act, the executor's discretion to control funeral arrangements and the disposal of the body is subject to the views of the 'senior available next of kin'.

If a heterosexual person dies with a valid will, but the surviving partner considers the inheritance unfair, they are automatically entitled to apply for a larger share of the estate under the *Family Provision Act 1982* (NSW). Surviving lesbian and gay partners are not automatically entitled to challenge the will. Sue will need to prove that she and Kate had a relationship. In particular, Sue will need to establish that at some time she was wholly or partly dependent on Kate and was at some time a member of Kate's household.

If Kate had died as a result of an act of violence, compensation of up to \$50,000 would have been payable to 'close relatives' under the *Victims Compensation Act 1987* (NSW). This definition does not clearly include lesbian or gay partners so Sue may not have been able to claim compensation. If she claimed compensation she would have to prove she had a relationship with Kate. Kate's parents could have claimed the compensation and Jane would be entitled to compensation. If Kate had died as a result of an injury sustained, arising out of or in the course of employment, her dependents would have been entitled to lump sum compensation under the *Safety Rehabilitation and Compensation Act 1988* (Cth). The definition of 'dependent' does not include a lesbian or gay partner, even when they have been dependent on the deceased employee.

Lesbians or gay men who make contributions to superannuation schemes may nominate their partner as their beneficiary. However, there is no guarantee that the partner will receive the benefit upon the death of the contributor. The trustees of each superannuation fund control payments of benefits. Under the *Superannuation Industry (Supervision) Act 1993* (Cth), the fund trustees must pay to a dependent or to the deceased's estate. The term 'dependent' is defined to include a spouse (including a de facto spouse or child). The term 'spouse' has been defined to exclude same-sex partners. If Kate was a contributor, when she dies, the trustees may not pay the superannuation entitlement to Sue. But they will pay the money to Kate's estate. In the case of Kate and Sue, Kate has not left a will so if the money is paid to her estate, Sue will not benefit from it.

So in addition to the grief she is experiencing and her concern about Jane, Sue will endlessly have to deal with experiences which deny that she and Kate were partners who loved each other, lived their lives together, cared for Jane together. Sue will endlessly be denied the validity of her grief.

Kate was Jane's biological mother. Jane was born by

artificial insemination. Sue and Kate shared the caring equally and Jane proudly tells the other children at play school that she has two mothers. Now Kate's parents want Jane to live with them. They want Jane to have a 'normal life'. They plan to pull her out of her play school, take her from her friends and home—take her from her mother Sue.

If Kate's partner had been a man, under the *Artificial Conception Act 1987* (NSW) he would be considered to be Jane's legal father. He would then be considered Jane's 'parent' under the *Family Law Act 1975* (Cth). In the absence of an order of the Family Court, he would be Jane's guardian and entitled to custody.

Kate has not appointed a testamentary guardian as she did not make a will before she died. Sue, as a co-parent, does not have a legally recognised relationship with Jane. There is no specific provision in the law for a co-parent to acquire rights and responsibilities in relation to the children of their partners. Sue could bring proceedings in the Family Court in relation to Jane as she would have an 'interest in the welfare of the child'. In previous cases, the Family Court has accepted that a co-parent has a 'sufficient interest' to bring an action for custody. Sue will have to argue her way through the family court system to gain guardianship and custody.

Lesbians and gay men can be granted custody of their children. The 'welfare of the child' is the basic principle underlying all custody, guardianship and access decisions made under the *Family Law Act 1975*. Until recently, the Family Court resisted granting custody to lesbians or gay men because of their sexual preference or if it did grant custody, discriminatory conditions were imposed upon the lesbian or gay man or their partner. Although the judiciary continues to discriminate against lesbian and gay parents in custody disputes, the discrimination is less blatant than it used to be. Custody has been awarded to lesbian mothers in a number of cases (*Schmidt*, 1979; *O'Reilly*, 1977; *Cartwright*, 1977). However, the Court may still take into account the parent's sexual preference and consider that a parent's lesbian or gay relationship will be detrimental to the child's welfare. In many cases, sexual preference has been considered when examining the 'moral, cultural or educational influences' the lesbian or gay parent may have on the child. In *L and L*, Baker J. (1983) noted a number of factors to be considered when a homosexual parent seeks custody. These factors included whether children raised by a homosexual parent may themselves become homosexual, whether the child could be stigmatised by peer groups, whether the homosexual parent would show the same love and responsibility as a heterosexual parent, whether the homosexual parents will give a balanced sex education to their children.

A number of fallacies and prejudices underlie these factors and the resistance to lesbian and gay parenting:

Myth 1: The child will grow up to be a lesbian or gay man

It is implicit in this objection that it is a misfortune for a child to be a lesbian or gay man. Needless to say, I

reject this assumption. But I also reject the prejudice. In addition, if sentiments about the suitability of parents rest on this objection, then they offend the basic tenets of NSW anti discrimination legislation which makes illegal discrimination on the basis of homosexuality.

Furthermore, this objection is unfounded. There is no evidence to show that children growing up in lesbian or gay homes are confused about their sexual identity or that their psychological development is inhibited (Green, Mandel, Hotvedt, Gray, and Smith, 1986). Research has confirmed that lesbian and gay parents, because of experiences of compulsory coercive heterosexuality, are less likely to seek to impose their way of life on their children. A number of studies have found that children of lesbians or gay men are no more likely to grow up gay than anyone else (Bozett, 1987; Tasker and Golombok, 1991; Cramer, 1986; Mandel et al., 1986). Lesbians and gay men do not indoctrinate their children. For example, Golombok, Spencer and Rutter (1983) compared 27 children from lesbian households with 38 children from single heterosexual households. The study examined the children's emotional development, peer group relationships and psychosexual development including sex role behaviour and direction of sexual interest. No significant difference was found between the two groups. Although most heterosexual parents raise their children to be heterosexual, there is no evidence that lesbian or gay parents raise their children to be lesbian or gay. Let's face it—most lesbians and gay men have heterosexual parents.

Myth 2: A lesbian or gay parent will reject a child of the opposite sex

There is no evidence that a lesbian or gay parent will reject a child of the opposite sex. Such an assumption is based on the fallacy that lesbianism or homosexuality is a form of rejection of heterosexuality rather than a separate but equally viable form of sexual expression. It seems a great deal more likely that a heterosexual parent will reject a lesbian or gay child.

Myth 3: A lesbian or gay home is not 'normal'

But then what is 'normal'? Most Australian families do not conform to that nuclear version of mum, dad and 2.2 children. This objection rests on the false assumption that children growing up in a lesbian or gay home may be more likely to experience emotional and behavioural problems. The assumption that influences directly related to parents' homosexuality lead to increased risk of psychiatric disorder, and that discord within the family relates to parent's homosexuality, is contrary to research in the area. There is no evidence that children who grow up in 'traditional families' are any better adjusted than other children.

Myth 4: Public prejudice against lesbianism and homosexuality will mean that the child is stigmatised by society

There is no evidence that children raised by lesbians or gay men are subject to harassment any more than other

children. Research actually indicates that children raised in lesbian households are not disadvantaged by this experience (Knight, 1983; Kirkpatrick, 1987; Gibbs, 1988; Falk, 1989; Green, 1978; Brown, 1991).

I am not suggesting that children with lesbian or gay parents will not face some discrimination. Children are victimised for a variety of factors: race, sex, disability, size, religious and cultural differences or for no reason at all. It would be counter-productive and contrary to the anti-vilification legislation to argue that people should change or hide the way they are to avoid bullying or harassment. It is the harassment itself which should be tackled.

So what will happen to Sue and Jane? Sue will have to deal with all these attitudes when she makes her application to the Family Court. She probably won't get legal aid and so will have to employ a solicitor to help her argue what could be a very difficult, trying case. The Family Court will decide whether custody of Jane should be awarded to Sue or to Kate's parents.

WHAT ABOUT DURING KATE AND SUE'S RELATIONSHIP?

Would Kate and Sue have had the same experience of the law and government decision-making as any heterosexual couple?

If Kate gave birth to Jane in a hospital, *hopefully* Sue would have been permitted to be present as her support person. *Hopefully*, Sue would have been able to visit outside general visiting hours. *Hopefully*, Jane's school teachers would have been co-operative about the fact that Jane had two mothers and called Sue in an emergency if Kate could not be contacted. If Jane was ever hospitalised, *hopefully* the hospital would have accepted Sue as a 'mother'.

But we can be sure that Sue, Kate and Jane would not have been able to gain admission as a 'family' for a ferry ride or an exhibition. If they chose to join a private health insurance scheme, they would not have been granted health cover at a family rate. Kate and Jane would be considered a 'family', but Sue could not be a part of it. Similarly, under the recently introduced *Child-care Rebate Act 1994* (Cth) where a 'family' can claim a rebate for a proportion of child care expenses, Kate and Jane would have been registered as a 'family'—but Sue could not be included in this registration.

If Sue and Kate had wanted to adopt a child they would not have been able to do so together. The *Adoption of Children Act 1965* (NSW) provides that adoption orders may only be made 'in favour of a husband and wife jointly' except in exceptional circumstances where an order may be made in favour of a heterosexual de facto couple who have lived together for not less than three years or in favour of a single person. In March 1993, a lesbian from Adelaide adopted a 'special needs' baby. This woman has only been able to adopt the child as a single person. Yet, she has been in a relationship for fourteen years. The risk faced by this family now is

should the couple split up, the partner of the adopter would legally have no rights to the child.

The NSW Law Reform Commission has recommended amendment to the Adoption legislation which would enable lesbian and gay couples to adopt children. If this recommendation ever passes into law, it will be a world first. Even in Denmark, the first country to introduce registered partnerships for lesbian and gay couples, adoption is not available to couples who have entered into a partnership.

If Sue and Kate had ended their relationship, they would not have been able to use the same mechanisms that a heterosexual couple could use to settle the distribution of the property. When a heterosexual married couple end their relationship, disputes about the distribution of property can be resolved under the *Family Law Act 1975* (Cth). Or if a heterosexual couple are not married but they have lived together for at least two years or have a child, the dispute can be resolved under the *De Facto Relationships Act 1984* (NSW). A married couple is also entitled to the mediation and counselling services provided by the Family Court Counselling Service. For a lesbian or gay couple, the only court for the resolution of a property dispute is the Equity Division of the Supreme Court of NSW. Such court cases are invariably more complex and expensive than those under the *Family Law Act* or *De Facto Relationships Act*.

There are some instances where Kate and Sue would not have suffered disadvantage. In the case of the child-care rebate, it may be to the financial advantage of a couple who have more than two children not to be registered as a family as the rebate is available to a 'family' for a maximum of two children. Similarly, the *Social Security Act 1991* (Cth) does not consider lesbians or gay men to be 'members of a couple'. Because social security entitlements are affected by whether the person claiming the entitlement is regarded as a 'member of a couple', this can be to the financial advantage of the lesbian or gay couple. The partners would be assessed as individuals and their partner's income and assets not taken into account for the assets or income test in calculating entitlement to allowances, pension or family payment. Sole parents pension would also be available to a parent in a relationship.

Although there are some advantages to this lack of recognition under the *Social Security Act 1991* (Cth), there are also a number of disadvantages. The Home Child Care Allowance which will replace the Dependent Spouse Rebate will not be payable to the 'stay at home' partner of a lesbian or gay couple. Similarly, the Wife's pension is not available to lesbians or gay men whose partner is receiving Age Pension or Disability Support Pension. Widowed Person Allowance is only payable to men or women whose heterosexual partner has died. This entitles the surviving partner to the married rate of pension for fourteen weeks after their partner's death to give them an opportunity to adjust their finances before being moved on to a single rate. The same entitlement is not available to a lesbian or gay partner unless they

have been receiving a carer's pension. This means that at no stage is the carer recognised as the partner of the ill person or as the widow or widower of that person.

These are but a few of the examples of the many situations where lesbians and gay men are discriminated against—LEGALLY. The legal system, and government policy, provides benefits to married people or people living in marriage-like relationships. Law privileges the traditional nuclear family by limiting access to benefits, rights and opportunities to individuals who choose the traditional, heterosexual family unit as their primary relationship.

WAS INTERNATIONAL YEAR OF THE FAMILY RELEVANT TO KATE, SUE AND JANE?

The National Council for International Year of the Family identified as one of its priority issues, 'the need to recognise the diversity of families in Australia in terms of their composition, life stage, culture and race, and to celebrate their central contribution to Australia's social and economic welfare and cultural heritage' (1994: 7). The National Council represented publicly and in its Discussion Paper that it prefers an inclusive definition of family life 'because it recognises the functions of care, nurturing, intimacy and support' and to do otherwise would 'exacerbate social division, marginality and disadvantage' (1994: 7). It talks of the diversity of family structures which may differ according to race, ethnicity, religious faith and cultural background.

Lesbian and gay families also fulfil the functions of 'caring, nurturing, intimacy and support'. But the National Council's Discussion Paper does not mention lesbian and gay families. Perhaps if specifically asked, the Council would say that their inclusive definition includes lesbian and gay families, that they could not name all the families included in their definition. But given the reluctance of the law and society to recognise lesbian and gay relationships and families, and given the danger identified by the Council that exclusion exacerbates 'social marginality and disadvantage', the absence of specific reference to lesbian and gay families is glaringly obvious and counter-productive. The Council has not taken the opportunity to contribute in a powerful way to the elimination of the endless harmful discrimination experienced by lesbians and gay men.

The law and society continue to tell us that we are not family, that we are not equal, that the relationships we form are not worthy, not to be encouraged. I am not talking about a theory, about ideology or esoteric concepts. I am talking about realities, human realities. Take the example of Sue and Kate and Jane. If Sue walked into a lawyer's office, the lawyer would have to say that little could be done to protect Sue's rights, three year old Jane's rights. If anything could be done, it would more than likely be at great expense, both financial and emotional, and with little certainty of success. If Sue then came to see you, the family therapist, after the loss of her partner Kate and possibly the loss of her

home and her child, would you be content to tell her that the law does little to protect her rights?

Change must occur. But what kind of change? Not all lesbians and gay men live as Sue and Kate have lived. For so long we have been denied recognition of our significant relationships, that we form a variety of relationships, and kinship networks. Can the realities of lesbians and gay men be accommodated by existing heterosexual models? How do you tell lesbians and gay men who have faced discrimination and violence that once the law changes, this discrimination and violence will end?

SO WHAT ARE THE OPTIONS FOR CHANGE?

There are a variety of options for recognition of lesbian and gay relationships: marriage, de facto relationship recognition, registered or domestic partnerships, individual status, significant personal relationship and extended anti-discrimination law.

The registered or domestic partnership option can be termed 'recognition by election'. Registered partnership legislation has been introduced in Denmark, Norway and Sweden. This registration is available only to same sex couples whether or not the partners are living together or in a sexual relationship. The key issue is that they wish to provide mutual security. This option is generally touted as the lesbian or gay equivalent to marriage, some call it a 'second class marriage'. The registration of the partnership provides for the same legal consequences as marriage, including the need for divorce when the relationship ends. Registered partners are included whenever Danish law refers to marriage or spouse. However, if the term 'husband' or 'wife' appears in a law, registered partners are not covered. The major difference between marriage and registered partnerships is that this partnership law precludes registered partners from adopting a child or obtaining joint custody in the event of a divorce.

The domestic partnership legislation which has been introduced in some American municipalities provides family benefits and imposes obligations on lesbian, gay and heterosexual couples who meet specified criteria, such as cohabitation and duration. Most of the partnership legislation in the USA has been enacted by local municipalities and so it only provides a limited number of benefits under local laws.

The advantages of these institutions is that they provide financial benefits during and at the end of the relationship. They also provide for some form of public validation of the relationship. However, these options require the partners to register the relationship. People often don't make wills, don't opt in. In the US and Denmark, only a small number of people have registered their domestic relationships. So an option that requires people to opt in won't necessarily resolve the problems that occur in crisis situations. Secondly, this option is probably not politically feasible. NSW already has two levels of relationships law: marriage, and recognition

under the *De Facto Relationships Act* 1984 (NSW). It is unlikely that a third type would be introduced.

What about extending marriage to lesbians and gay men? Many lesbians and gay men will not feel that discrimination has been removed until they are allowed access to this institution. They see marriage as the 'gold star' that signifies the desire for deep and permanent commitment. Many lesbians and gay men feel that without the availability of this option, one's individual relationship is trivialised and one's personal commitment deemed unworthy of public acceptance. Others consider that the extension of marriage to lesbians and gay men would disrupt the traditional gendered definition of marriage as a power hierarchy—the mere inclusion of lesbians and gay men in this institution would radicalise it and change it.

I cannot argue in favour of marriage. It is an institution loaded with the baggage of yesteryear, steeped in religious beliefs and grounded in the subjugation of women. Inclusion in it is unlikely to liberate lesbians and gay men. It will constrain us and force us to assimilate into mainstream society. It won't tolerate our difference, it won't transform society. It will merely provide entry to the 'gold star institution' for those lesbians and gay men who choose to live as married. It will not encourage choice of relationships nor encourage the diversity of families. Further, it seems somewhat purposeless to debate the marriage option when it is highly unlikely that it will ever be available to lesbians and gay men. Even in the Scandinavian countries where general moral tolerance is the important principle, lesbians and gay men are not allowed admission to the institution of marriage.

Another option is the establishment of a property regime for lesbians and gays. The Swedish legislation establishes a property regime with limited inheritance rights for lesbian and gay couples or heterosexual couples who cohabit. The ACT has recently enacted the *Domestic Relationships Act* 1994 which provides a mechanism for the resolution of property disputes between people in domestic relationships. Domestic relationships are personal relationships between two adults in which one person provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage.

Another option is inclusion of lesbian and gay relationships in the existing NSW *De Facto Relationships Act* 1984 (NSW). This statute governs distribution of property; many other statutes include de facto partners alongside spouses in the next of kin category of 'de facto' partners, couples who 'have lived or are living together on a bona fide domestic basis' would be covered by the legislation.

This phrase 'bona fide domestic relationship' was derived from Social Security law. Factors relevant to the determination of whether a couple has lived together as de facto spouses are whether the couple have lived together for at least two years, whether the relationship is sexual, financial interdependence, whether they care

for children together, have a mutual commitment and whether other people recognise the relationship.

There are a number of advantages to this approach. Think back to the example of Sue, Kate and Jane. Sue and Kate's relationship would be recognised. The legal and consequent social recognition would affirm and sanction relationships and equalise the position of lesbians and gay men with heterosexuals. Some lesbians and gay men will not feel proud of their relationships until they receive support and enthusiasm from their families and society. De facto relationship recognition could achieve this. Another powerful advantage is that it overcomes the problem presented by the registered partnership option. Couples would not have to register their relationships. They would be deemed by the law to be in a de facto relationship if they satisfied the various criteria.

However, there are a number of problems associated with this model. The term 'bona fide domestic relationship' is an invitation to compare the lesbian or gay relationship to a marriage. In the US, much litigation has been initiated where couples have sought to prove that their intimate relationship is qualitatively no different from that of a heterosexual couple. This reflects the desire for recognition based on the paradigmatic heterosexual couple and the ideal of the traditional family form. This suggests that lesbian and gay families and our interests are essentially identical to heterosexual family interests. This approach is problematic but it is also revealing: same sex marriage is not allowed but the requirements for recognition as a de facto couple mirror marital requirements.

However, this approach is also problematic because of the nature of the requirements. Cohabitation is required. Because people choose to live apart from their partner does not necessarily mean that those relationships do not exist or are not as important as relationships between people who live together or even between people who are married. A commitment can exist without external signs such as cohabitation. Financial oneness would be required. This is not a requirement for marriage. It is certainly not a reality of marriages as the research on intra-family wealth distribution has shown. Money brought into the heterosexual household by the male breadwinner is not automatically pooled and shared.

Definition to the outside world and representation as a couple would be required. We live in a homophobic society. We work in homophobic environments. We live in homophobic areas. There is always potential for discrimination, always potential for violence and abuse. We often come from families of origin who have had or may have difficulty with our sexuality and for whom we still care. In this context, to require lesbians and gay men to define ourselves to everyone in terms of our relationships is to require us to continually 'come out' and take the risks of so doing.

Only a couple would be recognised. This excludes all groups that provide the same type of support, caring, love and involvement with other family members

assumed to exist only in the traditional family. Many lesbians and gay men form extended family relations with supportive friends. A genuine expectation of support and commitment exists in these families of choice. De facto law fails to accommodate these valuable relationships. It privileges relationships where there is a sexual connection over deep committed friendships.

Another option is what is known as a 'disaggregation approach', an individual status approach. Instead of the couple being the base unit of law and society, the individual is the base unit. This is the position now for lesbians and gay men who are always individuals, whether or not we are in a committed relationship. Perhaps it would be preferable if all people were seen as individuals—it certainly would undermine the patriarchal legal system's determination to treat women as dependent. The problem with this option is that it is unrealistic. It is too expensive for governments to structure society in this way—governments need people to take responsibility for each other. And most importantly, we do live in relation to others. It is the way we have defined this 'relationship' and the way the relationship has been abused that is problematic, not the relationship itself.

SO WHAT IS THE PREFERRED OPTION?

Deciding which option to favour is a challenging process. It is challenging as an intensely personal process, and it is challenging when undertaken as part of a political process to end discrimination against lesbians and gay men.

All these options for legal recognition of relationships have one common feature: the existence of a sexual relationship is implicit. The law gives financial benefits and imposes obligations where there is an assumption of a sexual relationship.

It is unjust for a lesbian or gay couple to be denied the benefits of recognition to which a heterosexual couple would be entitled. But legal recognition is about more than money and entitlements to benefits. It is about ending discrimination. If the law and government treat our relationships as worthy of respect and acknowledgment, then, the argument goes, eventually there will be no more abuse, violence and hatred against us. Legal recognition is important for the self esteem of many lesbians and gay men. Legal recognition will promote public validation, validation from families of origin, validation from mainstream society. It isn't easy to always be different. It hurts to be denied recognition of what matters.

However, I believe that the debate cannot end with the mere recognition of lesbian and gay couples whose relationships are of a similar nature to those of the married or de facto heterosexual couple and the ideal of the traditional family. The debate needs to go beyond the desire to validate sexual relationships between two men or two women.

On a philosophical level, the debate raises numerous questions. What are relationships about? Why is coupledom based on sex the only valid option? Why are lover relationships privileged over friendships by the law and

society? Given our Western coupledness conditioning, can our Australian society ever really operate differently? And if not general Australian society, can the lesbian and gay communities operate differently?

As a law reform process to end discrimination for lesbians and gay men, the issue of legal recognition raises other questions. Will recognition of relationships end discrimination? Will discrimination only end when lesbians and gay men have the 'same' recognition as heterosexual couples? Can the diverse lesbian and gay communities ever agree on any one option, ever consider an option politically acceptable? Can a different form of recognition which meets the needs and realities of lesbian and gay lives ever be given the validation that is given to married or de facto couples? Can lesbians and gay men, who for so long have suffered discrimination, be the pioneers for a different type of recognition of relationships? And then I ask the practical questions: what option is legally possible? Can the law accommodate relationships where the shorthand of sex as proof is absent? What option will be viewed by government as politically acceptable and economically rational?

Having rejected marriage, suggested the unlikelihood of partnership legislation in NSW and indicated endless problems with de facto recognition—what option do I favour? Something new, something different, something challenging. Something which emphasises the quality of the relationship and not the form. Something which challenges the time-honoured privileging of sex as the determinant of worthwhile relationships.

Lesbians and gay men, because of the lack of acknowledgment and acceptance of our primary sexual relationships, have developed community and family models that rely upon the significance of the relationship regardless of kinship or sexual connection. This is not unique to lesbians and gay men. Most, if not all, people live as 'single people' at some stage of their lives and many people form deep ties with someone who is not a sexual partner. The law fails to acknowledge this reality. The law needs to redress the discrimination against all people (regardless of their sexual orientation) whose major source of support throughout their lives is not wholly dependent on a marriage-like union.

The law could do this by including a category of 'significant personal relationship' alongside the existing categories of spouse, next of kin or blood relative. Such a system would give legal status to relationships involving significant emotional interdependency. This may include financial interdependency but need not assume or rely on this aspect. It could cover sexual relationships, long term friendships, flatmates or any chosen family. It is not confined to lesbian and gay relationships.

Such a system could be implemented by amending specific legislation to include people in 'significant personal relationships' so that benefits given to and obligations imposed upon married or de facto partners, next of kin or close relatives could extend to a 'significant person'. People could choose to nominate a significant person by electing them for a specific benefit. In crisis

situations, in the absence of any nomination, the courts could consider whether the claimant is a significant person. The emphasis of the enquiry would be on the mutually supportive nature of the relationship.

I would like to maintain my idealism. I would like to advocate that the only option worth fighting for is recognition of significant personal relationships. It is only this option which overcomes the hierarchies of existing relationships law, where marriage is the gold standard, where coupledness based on sex is the only valid choice. I believe that the diversity of individuals' needs for intimacy could best be met by a broadly defined concept like 'significant person'. It could meet the needs of lovers or friends. It is not gendered, it is not sex-based. It needn't discriminate against anyone. Imagine a world without marriage, without de facto relationship—the only recognised form of relationship was 'significant personal relationship'.

Sadly, it is not going to happen. Marriage as the gold standard of coupledness is not going to go away. Even if the 'significant personal relationship' concept can be part of the answer, it cannot be the whole answer. It doesn't deal with the hardship experienced by Sue and Jane and Kate. It doesn't aid the battle to end discrimination.

NOW LET'S BE TOTALLY REALISTIC

That is what we of the Lesbian and Gay Legal Rights Service did. In February 1993, we produced the first edition of *The Bride Wore Pink*, a community discussion paper on the Legal Recognition of Lesbian and Gay Relationships. In this paper, we hoped to provide our community with information on the available options for recognition and to provoke and encourage debate. In this first edition, we recommended the introduction of registered partnership legislation, significant personal relationship recognition and extended anti-discrimination law. After community discussion and debate, we published a second edition of the paper in which we altered our recommendations. In this February 1994 edition, we rejected the domestic partnerships recommendation and advocated recognition as de facto relationships. The change in the recommendations was in accordance with what we perceived to be a general trend within the lesbian and gay communities and the unlikelihood of the NSW State Parliament ever enacting a third layer of relationships law.

We initially thought that recognition of de facto relationships would catch a wide range of relationships, such as friends living together. This model would impose a system on individuals who complied with the criteria of a bona fide domestic relationship. People could be deemed to be in a de facto relationship without ever intending the consequence. We initially thought it would be very difficult to know who would be deemed by the law to be in a de facto relationship.

This was unrealistic. De facto law is beneficial legislation. The State is not out to benefit as many people as it can. Only those who live in marriage-like relationships

would be included. Housemates would not be deemed to be in de facto relationships.

Inclusion under the *De Facto Relationships Act* would only affect those people who live in 'bona fide domestic relationships'. This recommendation was made not because we believe that only de factos should have those rights but rather because extension of the system would deem a whole range of people to be obligated without their ever intending this consequence or being aware of it. At least with 'traditional marriage-like relationships' being included under the existing *De Facto Relationships Act* 1984, those people could more easily be aware of the consequences of their relationship.

Inclusion under the *De Facto Relationships Act* would remove existing discrimination and at least ensure that those lesbians and gay men who live in de facto-like relationships have the same entitlements and obligations as heterosexual couples, and provide them with the legislative framework to resolve their disputes on the break up of their relationships. Although property disputes under the *De Facto Relationships Act* 1984 are costly, they are more certain and cheaper than cases which go before the Equity Division of the Supreme Court.

In recommending de facto inclusion, we suggested that the existing law should be amended so that there are clearer, more easily used provisions for those people who do not want to be deemed to be in a de facto relationship. We recognised the importance of legislative provisions which enable people to choose to state that they do not want to be deemed to be in a de facto relationship.

Although the legislation currently makes provision for cohabitation and separation agreements, these can be overturned by the court if the consequences are considered unfair, and these agreements have to be certified by a solicitor. This costs money and the commitment to drawing up the agreement. Few people think of entering contracts. So the amendment we proposed is that there is an education program telling people the consequences of inclusion under the legislation and then either the removal of the certification requirement or cheap facilities for people to get agreements certified.

It is pragmatic for lesbians and gay men in NSW to seek recognition of their de facto relationships under the *De Facto Relationships Act* 1984. We are not requiring the State to give us something different, something better. We are showing willingness to take both benefits and obligations. The ACT government has passed the *Domestic Relationships Act* 1994 which provides a mechanism for the resolution of property disputes between people in domestic relationships. The Queensland Law Reform Commission has recommended including same sex couples under de facto law. Recognition under the *De Facto Relationships Act* seems possible.

A separate issue is the recognition of lesbian and gay relationships that are not 'de facto like'. By recommending inclusion under de facto law, we did not totally resign ourselves to recognition of only those relation-

ships of people who live in 'de facto like relationships'. Recognition of relationships that do not fall under traditional couplet notions is not only a lesbian and gay issue. It is an issue that affects heterosexuals who don't choose to live in traditional couples. Our suggestion was that we join other communities to lobby for the amendment of specific legislation to give recognition to significant personal relationships, to give the benefits and entitlements and some of the obligations to people who regard themselves as emotionally, physically or financially involved with another person and who wish to be considered to be a person's most significant person.

We are all different. Lesbian and gay families do have a different family makeup from heterosexual families. The important issue is that it is acknowledged that lesbian and gay families are families, that lesbian and gay relationships are worthy of recognition. Traditional notions of family must be challenged. Individuals must be permitted by the law and society the freedom to choose to whom they wish to relate. Denial of the legal, social and economic benefits and obligations consequent upon legal recognition of relationships is the denial of this freedom to choose. I urge you to 'value our difference'.

Postscript: January 1997

So what has changed since July 1994?

The Federal and NSW State Parliaments have not yet enacted legislation which acknowledges the relationships of lesbians and gay men. However, rumours abound that a bill similar to the *Domestic Relationships Act* 1994 (ACT) will be introduced in the NSW Parliament early this year. Federally, there is no indication of any legislative amendment.

Some of the legislation discussed in the address has been amended in the last couple of years—but not to include lesbian and gay relationships. For instance, amendments to the *Family Law Act* 1975 (Cth) have introduced the concept of 'parental responsibility' and removed the concepts 'guardianship', 'custody' and 'access'. There have also been numerous amendments to the *Social Security Act* 1991 (Cth). Lesbians and gay men are not entitled to parenting allowance which is payable to partnered persons with dependent children under sixteen. Similarly, partner allowance is not payable to a lesbian or gay man whose partner is receiving disability support pension, age pension, mature age allowance, sickness allowance or special benefits.

Courts and tribunals are increasingly compelled to acknowledge the relationships of lesbians and gay men in the absence of legislative reform. Following the Australian Industrial Relations Commission's decision in the Family Leave Test Case, Australian workers are entitled to use sick leave entitlements to care for family members who are ill. The term 'family members' has been interpreted to include members of the employee's household, including their same-sex partner. The NSW Industrial Relations Commission has determined that employees are entitled to use sick leave to care for same-

sex partners who live with the employee as the de facto partner of the employee.

In *W v G* (1996) 20 Fam LR 49 the NSW Supreme Court held a lesbian co-mother liable to pay \$150,000 in child support for the children raised within a lesbian relationship. This decision does recognise a lesbian relationship and the responsibility a co-parent has for children. However, it fails to acknowledge the wider legal and social context in which the parties existed. In the context of the many inequities experienced by Kate and Sue, imposing a child support obligation on Sue seems a false and inconsistent kind of justice.

The Hope and Brown v NIB Health Funds Limited decision of the NSW Equal Opportunity Tribunal, upheld in the NSW Supreme Court, bestows a benefit on a gay couple and their child. In this decision, it was held that NIB had unlawfully discriminated against the complainants (a gay couple and their child) on the basis of homosexuality by refusing them a concessional reduced rate which is offered to other families.

These are examples of courts and tribunals imposing responsibilities or bestowing rights on the basis of a recognition of lesbian and gay relationships. The question remains, however, whether such decisions produce 'justice' in the absence of legislative reform addressing the many areas of disadvantage discussed above.

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Age 2 and Huckleberry Finn was diagnosed as having A.D.D. with hyperactivity and O.D.D. He was treated with Ritalin and was, from then on, a very compliant and respectful child giving no trouble to a living soul.....



A late 20th century Mark Twain has trouble with his new novel.