SAME-SEX RELATIONSHIPS & THE LAW

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Comments on The Victorian Equal Opportunity Commission's discussion paper.

Why is legal recognition of gay and lesbian relationships needed?

In Victoria the Equal Opportunity Commission (EOC) has recently released a discussion paper focusing on same-sex relationships and the law. In particular, the paper focuses on the failure of the law to recognise same-sex relationships in almost all situations.[1] While the *Equal Opportunity Act 1995* (the Act) protects individuals from discrimination based on their 'lawful sexual activity' (including sexual preference), the Act includes within it a number of invidious exceptions and exemptions (some of which were discussed in this journal in 'Except for you ...and you ...and you' (1995) 20 *Alt.LJ* 196). One such exception covers 'anything done in compliance with another Act'. This would not be problematic if it were not for the heterosexist bias of our legal system, which has resulted in legislative recognition of relationships being confined to heterosexual couples. Lesbian and gay relationships are expressly excluded from recognition in numerous areas, from intestacy to IVF, superannuation to social security. In some areas of the law, this can benefit lesbians and gay men. For example, social security payments are reduced or removed where one has a legally recognised 'spouse' — currently limited to a person of the opposite sex. However, in many areas gay men and lesbians are detrimentally affected by discriminatory legislative regimes, which produces not only financial but social effects. Continued denial of same-sex relationships continues social prejudice against lesbians and gay men, sending the age-old message that 'your relationships are not as good as ours'.

It should be noted that sexuality and, in particular, same-sex relationships, is the one area of life where the law remains expressly discriminatory. In relation to other important aspects of an individual's identity, legislation no longer expressly excludes people from access to benefits or services on the basis of gender, race, ethnicity or disability, except where special needs services are set up for disadvantaged groups. Indeed, it would generally be regarded as abhorrent to legislate to exclude, for example, interracial couples from access to IVF, or to exclude people with disabilities from access to their partner's superannuation benefits. Yet, in these two areas, as in many others, people in same-sex relationships are excluded from access to benefits and services simply on the basis of their sexual preference. Such discriminatory legislative regimes need to be altered to put all Victorians on an equal footing under Victorian law, regardless of their sexual preference. The EOC's discussion paper is thus welcome as a first step in Victoria to address these issues. (At the Commonwealth level, the first step was taken with the introduction of the Sexuality Discrimination Bill into the Senate by Senator Sid Spindler. That Bill is now under consideration by the Senate Legal and Constitutional References Committee).

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The EOC's discussion paper

Problems with the current legislative position

The EOC's discussion paper is short and to the point. It identifies at least 26 State Acts and 17 Commonwealth Acts which exclude gay and lesbian relationships from their ambit — including the *Equal Opportunity Act* itself, which protects people from discrimination on the basis of their 'marital status', but defines 'de facto spouse' as 'a person who is living with a person of the opposite sex as if they were married although they are not'. The EOC acknowledges that this legislative discrimination undermines the ability of the *Equal Opportunity Act* to protect lesbians and gay men from discrimination. The discussion paper goes on to outline a number of areas where lesbians and gay men suffer discrimination with respect to their relationships: death of partner, issues involving children, superannuation, taxation, relationship breakdown and the criminal law.

Arguments for and against recognition of same-sex relationships

The EOC canvasses in a thoughtful fashion the arguments for and against legal recognition of same-sex relationships. The arguments for are fairly standard:

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

What is not said is that many lesbians and gay men want to have their relationships recognised (perhaps this is assumed). The arguments against are more interesting and commendable, in that the arguments against fail to trot out the usual homophobic prejudice raised by the Right:

- the definition of de facto relationship is generally based on financial dependence and a requirement that the parties live together — these factors may not be present in many lesbian and gay relationships;
- simple comparison of same-sex relationships with opposite-sex relationships may fail to recognise differences between these forms of relationship;
- recognition of same-sex relationships in a way modelled on heterosexual relationships may be seen as an endorsement of a patriarchal mode of relationship;
- recognition of same-sex relationships may disadvantage many lesbians and gay men, particularly those already economically disadvantaged through loss or reduction of social security benefits; and finally
- many lesbians and gay men do not want their relationships recognised by the state.

The possible ways in which recognition could occur

The EOC discussion paper outlines a number of legislative regimes recognising same-sex relationships in other jurisdictions, including the ACT, some US municipalities, the Scandinavian countries and The Netherlands. These models generally use a relationship register (where recognition is optional), rather than a de facto model (where recognition is automatic upon fulfilling certain criteria). The EOC itself suggests four possible models for recognition of lesbian and gay relationships: de facto recognition (modelled on heterosexual de facto regimes); piecemeal reform of all discriminatory legislation; a relationship register; and marriage.

Comment

Different people will, of course, take different views on the issue of legal recognition of lesbian and gay relationships. Even within the lesbian and gay community (if such an entity can be identified), views differ. Some lesbians and gay men want the works — the right to marry and recognition in exactly the same ways in which heterosexual relationships are recognised. Others are distrustful of the state, or see no need for state validation of their significant relationships. These differences need to be taken into account in formulating reform strategies for addressing same-sex relationship recognition.

It is convenient, in assessing the options put forward by the EOC, to address each in turn, although not in the order in which they are dealt with in the discussion paper.

Marriage

Marriage is a convenient place to begin, as it is the most easily rejected suggestion of those put forward by the EOC. Marriage as a solution should be rejected for three primary reasons: first, because of the legal difficulties associated with a state regulating marriage; second, because of the strategic difficulties I foresee in obtaining same-sex marriage rights; and third, because of the strong ideological arguments against adopting a model so imbued with heterosexual, gendered and religious overtones.

First, it must be emphasised that marriage is a Commonwealth matter, regulated by the *Marriage Act 1961* (Cth) and thus not one that can be dealt with by the States.[2] Furthermore, even at the Commonwealth level there are some suggestions that s.51(xxi) would not permit the Commonwealth to legislate for recognition of lesbian and gay marriage, as this is outside the notion of 'marriage' used in that section. In my view, such an interpretation of s.51(xxi) is incorrect, but there is certainly a degree of doubt on the issue. Second, from a practical point of view the battle to achieve inclusion in the traditional, often religious institution of marriage would be a fraught one, which probably would not only produce a backlash from the conservative and religious Right, but also divide the lesbian and gay community. This division would result from the ideological objections to marriage.

The ideological objections to lesbian and gay marriage are several. Some are arguments used both against marriage and against legal recognition generally, and are mentioned above. Many arguments, however, are specific to marriage. For example, it is often argued from a feminist perspective that marriage is an inherently patriarchal institution that has oppressed women for centuries, and that lesbians and gay men should not buttress the legitimacy of that institution by seeking to join it.[3] Furthermore, it is pointed out that marriage has by definition excluded lesbians and gay men and so is inherently discriminatory. The counter argument is that by including previously excluded relationships, we might fundamentally alter the oppressive nature of marriage;[4] however, those who see marriage as a problematic institution rarely believe that it can be reformed simply by including gay and lesbian relationships which mimic straight married relationships in terms of monogamy, life-time commitment and interdependence.[5]

Other ideological objections include the privileging of certain relationship forms that will result from adopting

marriage as an institution. Marriage will favour those whose relationships look like heterosexual relationships, and create a hierarchy of relationships within the gay and lesbian community.[6] It might be argued that such a hierarchy already exists; but marriage will enshrine such a hierarchy in law and, possibly, preclude unmarried couples from various legal benefits.

For these legal, strategic and ideological reasons, then, marriage is not an attractive option at present.

Piecemeal change

Piecemeal change should also be rejected, in my view, because although it may be attractive in that it would allow us to consider in each particular instance what form of relationship recognition is desirable, it would probably be a slow and fragmented process, achieving some gains but leaving many areas untouched. While this is also a problem with a strategy involving a single legislative regime, in that Parliament can provide for exceptions in various areas, a single legislative regime at least requires those who oppose recognition to justify any exceptions that are provided. Piecemeal change, on the other hand, would not necessarily place the same pressure on the Government to justify its failure to change certain legislative regimes, simply because action must be defended, but governments often succeed in avoiding justifying inaction.

Thus the choice is narrowed down to two options: a de facto or presumptive regime, which imposes recognition on certain relationships by virtue of certain criteria (generally cohabitation and emotional and economic interdependence); or a relationship register, which provides for legal recognition only of those who choose to register their relationships. In my view, this choice is a difficult one. There are persuasive arguments on both sides, which I will now address.

De facto recognition

The attraction of the de facto model is that it treats lesbian and gay relationships in the same way as unmarried heterosexual relationships. It takes an existing, working model and utilises it, without any need to propose an entirely new and untried approach, which is attractive in terms of being practically achievable. Furthermore, it does not require lesbians and gay men who want relationship recognition to take any step (other than asserting their relationship); if their relationship exhibits the relevant criteria, it will be recognised. This may be particularly useful for people who do not wish to make a public statement about their sexuality, but do wish to have legal protection in situations where relationship recognition is important, such as death or relationship breakdown. It will also be useful for those who simply do not get around to registering, or who do not understand what a failure to register might mean (given the large numbers of people, both heterosexual and lesbian or gay, who do not make wills out of inertia or lack of knowledge, this latter point is practically significant). Such a model will also potentially protect people who are in an economically weaker position within a relationship — for example, those who do not legally share ownership of a joint home, yet who should have some claim to such property on the breakdown of the relationship. If relationship recognition were entirely voluntary, it would be possible for a person in an economically more powerful position to refuse registration, thereby denying their partner legal protection in the event of a break-up. We cannot pretend that, unlike heterosexual relationships, such power differences just do not exist in lesbian and gay relationships.

On the other hand, de facto recognition, at least if we adopt the existing heterosexual model, will be both under and over-inclusive. It will catch lesbian and gay couples who simply do not want state intervention in their relationship (as it currently does with some heterosexual couples). And it will not catch lesbian and gay couples who do want legal recognition but who do not live together or have shared finances or exhibit traditional interdependency. In addition, it will require people to 'come out' to claim the benefit of legal recognition — and in a potentially intrusive fashion, in that a person will need to prove in a court a long-term, sexual relationship with their lover.

Furthermore, some of the ideological objections to relationship recognition mentioned above will be pertinent: we will be mimicking heterosexual relationships and we will create a relationship hierarchy within the lesbian and gay community.

Relationship register

A relationship register is a solution that provides a voluntary system of relationship recognition. To that extent, it answers some of the objections to de facto recognition. It would also allow us to develop a more open model of relationship recognition, as there need be no set criteria for recognition: legal consequences would flow simply from a choice to nominate a particular relationship as significant, whether that relationship was 'heterosexual-like' or not, whether we live together or not, whether we have sex or not. Indeed, a more sophisticated system could allow us to nominate different people for different legal purposes: X could be my 'significant other' for the purposes of medical issues, but Y might be for my superannuation benefits, although the likelihood of such a flexible system being included in legislation is remote. Furthermore, a relationship register offers a straightforward way for people to prove their relationship, without having to resort to intrusive and perhaps difficult issues of evidence of sexual and financial connections and, possibly, litigation that would be required under a de facto recognition regime.

The disadvantages, however, are those identified as advantages for a de facto model: some, perhaps many, people would not register; those with less economic power might be even further disadvantaged; and, a factor not mentioned above, a relationship register, even if open to all people and all sorts of relationships, might come to be seen as a second best option to marriage for lesbians and gay men: different and not equal. Finally, a relationship register involves the provision of information to an already powerful state and its surveillance apparatus — an option not appealing to many in the lesbian and gay community. This last problem could be ameliorated, but not overcome, by the inclusion of careful confidentiality provisions.

A solution?

My suggested solution is a combination of de facto recognition and registration. This suggestion is put forward as an attempt to avoid the under-inclusive features of both systems. Put simply, registration of relationships would be the recognition mechanism during the life of a relationship. If, during the life of a relationship, we are willing to assert that relationship before the law and to the state, this can best be done by voluntary registration, rather than by a presumptive mechanism requiring often lengthy and intrusive attempts to prove that we satisfy certain criteria.[7] However, there should also be a safety net for those who do not register their

relationships. This could be done by providing for de facto recognition when a relationship ends. For, as mentioned above, we cannot assume that there are no economic inequalities in lesbian and gay relationships; nor should people be penalised for failing to register their relationship, for whatever reason. If a relationship ends without registration, then de facto recognition should be accorded in areas such as division of property, child support and parenting,[8] intestacy and testator's family maintenance. Registration would provide the easiest method of proving the existence of a recognised relationship at the end of a relationship — but it would not be the only method.

Under this model, a relationship register would be established for people to register any relationship, whether that relationship conformed to heterosexual relationship patterns or not. De facto status, on the other hand, is probably most easily achieved if we aim for simple inclusion in the existing heterosexual model. I suggest this not because I think that model is appropriate, but because I think that form of recognition is achievable; and more achievable than seeking at this point to broaden the definition of de facto recognition, either for lesbians and gay men only or more generally.

This proposal is not perfect; indeed, I have misgivings about buying into the dominant model of couple-recognition that prevails in our social and legal systems. However, it seems to me that this is achievable (though not without struggle), while to seek a revolution in social attitudes so as to achieve a radically different legal approach to relationship issues is not achievable, at least in the short term. And, in the meantime, there are many lesbians and gay men who are seriously disadvantaged by the refusal of the state to recognise their relationship.

The *Significant Personal Relationships Bill 1997* (NSW)

In NSW, Clover Moore, independent member for Bligh, has put forward a private member's Bill which seeks to do something similar to that which I have proposed. It provides for legal recognition of two kinds of relationship: a 'recognised relationship', being one where two people register their relationship in a way similar to marriage (no other criteria need be satisfied) (see cl.6 and Part 2, Division 2); and a 'domestic relationship', being a relationship where two people live together or, if living apart, do not live apart on a permanent basis or share a common household for significant periods of their lives or otherwise share their lives (see cl.7). The Bill then provides that both forms of relationship (whether heterosexual or homosexual) will be granted the same rights and responsibilities presently granted to heterosexual de facto relationships, and the current *De Facto Relationships Act 1984* (NSW) will be repealed.[9] However, there is one key exception: same-sex couples will not be granted the right to adopt children.[10]

The Bill sets out a detailed regime governing the recognition, consequences and termination of significant personal relationships. It is beyond the scope of this article to assess this regime here, but it certainly provides a useful model, save for its exclusion of adoption.

Conclusion

The EOC's review of discrimination against people in same-sex relationships is to be welcomed. However, it is just the beginning of the process and will not produce instant change; indeed, with a coalition government in control of both Houses of the Victorian Parliament, a degree of scepticism about the likelihood of change is permissible, particularly given that new legislation was recently enacted which permits de facto heterosexual couples access to reproductive technologies, but continues to exclude lesbian couples from accessing such services.[11]

Ultimately, it is my view there are problems with all the models for relationship recognition proposed by the EOC in its discussion paper; indeed there are problems with the emphasis our legal system places on sexual coupledom in its recognition of relationships generally, and these problems will not be alleviated by adding in gay and lesbian sexual couples to the existing system. However, the pragmatist in me recognises that this broader problem will not be easy to change; and in the meantime, lesbians and gay men are suffering because of a lack of legal recognition. Hence, I support change to recognise our relationships, but I do not see such change, once achieved, as the end of the struggle.

I also think that we need to be sensitive to the diversity of views in the lesbian and gay community about whether and how to recognise our relationships. And I think we need to be aware of power imbalances that occur in most, if not all, relationships which may mean that the more vulnerable members of our community may be disadvantaged by a totally voluntary regime. Hence, my proposed solution is a combination of de facto or presumptive recognition, applicable in times of relationship breakdown, death or medical emergency, and relationship registration, applicable at any time while the relationship is in existence.

It must be acknowledged, however, that the Victorian Parliament, even if it demonstrates a willingness to effect legislative change, cannot affect areas where the Commonwealth has legislated, such as superannuation, immigration, taxation and child support and access after a relationship breaks down. Furthermore, it is likely that, in the current political climate, the Victorian Parliament will not extend relationship recognition to lesbians and gay men in areas within its jurisdiction involving children, such as reproductive technologies and adoption. Nonetheless, we should push for full recognition — and we must continue to place pressure at the Commonwealth level for changes to areas within the Commonwealth's control.

References

1. In NSW, Clover Moore, independent MP for Bligh, has recently introduced a private member's bill dealing with relationship recognition, the *Significant Personal Relationships Bill 1997* (NSW); this is discussed briefly in this article. In the ACT, there exists the *Domestic Relationships Act 1994* (ACT), which offers limited recognition to same-sex couples in areas concerning finance. The ACT legislation will not be discussed here.
2. The power over marriage in s.51(xxi) is a concurrent power, but it seems likely that the Commonwealth *Marriage Act* covers the field on the issue and so any State legislation purporting to extend the concept of marriage would be indirectly inconsistent with the Commonwealth legislation and hence invalid under s.109 of the Constitution. A more detailed consideration of this argument is beyond the scope of this piece.
3. See, for example, Gavigan, Shelley, 'Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement With Law' (1993) 31 *Osgoode Hall Law Journal* 589, 594.
4. See, for example, Hunter, Nan, 'Marriage, Law and Gender: A Feminist Inquiry' (1991) 1 *Law and Sexuality* 9, 18; Wolfson, Evan, 'Crossing the Threshhold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique' (1994) 21 *Review of Law and Social Change* 567, 588.
5. See, for example, Duclos, Nitya, 'Some Complicating Thoughts on Same-Sex Marriage' (1991) 1 *Law and Sexuality* 31, 47.
6. Duclos, Nitya, above, p.47.

7. The exception to this relates to visiting one's partner in hospital and consenting to medical treatment when he or she is unable to do so; in such circumstances, de facto recognition in the absence of registration is appropriate.
8. Although I note that it might not be possible for the Victorian Parliament to regulate certain issues concerning children that fall under the Commonwealth's purview.
9. Notably, in NSW heterosexual de facto couples' rights and responsibilities are dealt with by a single Act, the *De Facto Relationships Act 1984* (NSW). This is not the case in Victoria, where individual pieces of legislation govern which relationships are recognised for particular purposes.
10. Adoption is dealt with by separate legislation (the *Adoption of Children Act 1965* (NSW)) which will not be amended: cl.8(2) and Sch 1. Nor will superannuation arrangements be affected, because of the overriding Commonwealth scheme which is discriminatory and cannot be altered by State legislation.
11. Indeed, the extension of access to heterosexuals came about only because it was apparent that their exclusion was constitutionally invalid by virtue of the Commonwealth's *Sex Discrimination Act*, which prevents discrimination on the basis of marital status, and s.109 of the Constitution: see *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

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References

1. Gilligan, J., *Violence,* G.P. Putnam's & Sons, New York,1996, p.159.
2. See Sykes, G., *The Society of Captives,* Princeton University Press, New Jersey, 1958, pp.63–78, where he outlines what he terms the 'pains of imprisonment'. Those pains according to Sykes are: deprivation of liberty, deprivation of goods and services, deprivation of heterosexual relationships, deprivation of security, and deprivation of autonomy. While this list is not exclusive and probably does not comprehend totally the physical and psychological effects of imprisonment, it does tend to lay bare what we do when we imprison someone.
3. The word 'flogging' and the consideration of it as a specific penal practice is now relatively neglected in the sociology of prisons. Floggings and the beating of prisoners are now historical relics of previous times when our prisons were more brutal and the power of prison officers more capricious. For an example see Spierenburg, P., 'The Body and the State: Early Modern Europe' in Morris, N. and Rothman, D. J. (eds) *The Oxford History of the Prison,* Oxford University Press, Oxford, 1995, pp.49–76. For an account of the floggings and beatings that still figure in the repertoire of the state in its dealings with populations that it finds threatening, see Millet, K., *The Politics of Cruelty,* Penguin, 1994. For prisoners' own accounts of this violence and the floggings that still occur see Abbott, J., *In the Belly of the Beast,* Vintage, 1981, pp.57–62; Eastwood, E., *Focus on Faraday and Beyond,* Coeur de Lion, 1992, pp.79–85; Anderson, T., *Inside/Outlaws: A Prison Diary,* Redfern Legal Centre Publishing, Sydney, 1989, pp.86, 102–3.
4. There are, of course, exceptions. See Bowker, L., *Prison Victimisation,* Elsevier North Holland, New York, 1980, ch. 7; Wright, M., *Making Good: Prisons, Punishment and Beyond,* Burnett, London, 1982, pp.60–6; Bowker, L., 'An Essay on Prison Violence', (1983) 63 *Prison Journal* 24; Johnson, R., *Hard Time: Understanding and Reforming the Prison,* Wadsworth, California, 1987, ch. 7.
5. See Hawkins, G., *The Prison,* Chicago University Press, Chicago, 1976, pp.83–5.
6. For arguments of this kind see, Jupp, V., *Methods of Criminological Research,* Unwin and Hyman, London, 1989, pp.138–9; Morgan, R., 'Imprisonment' in M. Maguire, R. Morgan and R. Reiner (eds), *The Oxford Handbook of Criminology,* Oxford University Press, Oxford, 1994, p.927.
7. Cohen, S., 'Human Rights and Crimes of the State: The Culture of Denial', (1993) 26 *ANZJ Crim* 97. See also, Sullivan, R., 'The Tragedy of Academic Criminal Justice', (1994) 22(6) *Journal of Criminal Justice* 549.
8. See ref. 3. Also, Orland, L., *Prisons: Houses of Darkness,* Free Press, New York, 1975; Franklin, B., *Prison Literature in America: The Victim as Criminal and Artist,* Oxford University Press, New York, 1989; Norman, F., *Bang to Rights,* Hogarth Press, London, 1987; T. Parker (ed.), *The Violence of Our Lives,* Harper Collins, London, 1995.
9. For examples of researchers utilising prisoners insights see, Sim, J., '"We Are Not Animals, We Are Human Beings": Prisons, Protest, and Politics in England and Wales, 1969–1990', (1991) 18(3) *Social Justice* 107; Sowle, S., 'A Regime of Social Death: Criminal Punishment in the Age of Prisons', (1994) 22 *New York University Review of Law & Social Change* 497.
10. See George, A., 'Sexual Assault by the State' (1993) 18(1) *Alternative Law Journal* 31. For the legislative authority for strip searches see *Corrections Act 1986* (Vic.), s.45.
11. *Corrections Act 1986* (Vic.), s.23(2). In respect of police gaols a similar provision applies. See *Corrections Act 1986* (Vic.), s.9CB.
12. Corrections Regulations 1988 (Vic.), reg. 74. Note, however, the broadness of some of the offences under this Regulation and, in particular, reg. 74(i), (k), and (l).The breadth of these provisions gives considerable flexibility to prison officers in determining not only if an offence has allegedly been committed, but also 'feeds' back into s.23(2) of the *Corrections Act 1986* (Vic.) in grounding a basis for the use of force by prison officers.
13. See generally, Johnson, R., 'Institutions and the Promotion of Violence', in Campbell, A. and Gibbs, J. (eds), *Violent Transactions: The Limits of Personality,* Basil Blackwell, London, 1986, pp.181–205. Also see, Kelman, H., 'Violence without Moral Restraint: Reflections on the Dehumanisation of Victims and Victimisers', (1973) 29(4) *Journal of Social Issues* 25.
14. Glover, J., *Causing Death and Saving Lives,* Penguin, London, 1977, pp.286–97.
15. For an account of the methods of these 'goon squads', see above, ref. 4, Bowker, 1980, p.102.
16. For some examples see, Bedau, H., 'How to Argue About Prisoners' Rights: Some Simple Ways', (1981) 33 *Rutgers Law Review* 687; Zellick, G., 'The Case for Prisoner's Rights', in Freeman, J. (ed.), *Prisons Past and Future,* Heinemann, London, 1978, pp.105–20; Richardson, G., 'Time to Take Prisoner's Rights Seriously' (1984) 11(1) *Journal of Law and Society* 1; Hawkins, G., 'Prisoner's Rights' (1985) 18 *ANZJ Crim* 196.
17. See Hill, I., 'The Professional Role of Prison Officers', in Biles, D. (ed.), *Current Australian Trends in Corrections,* Federation Press, 1988, pp.8–14.