

‘Different Routes To Relationship Recognition Reform: A  
Comparative Discussion Of South Africa And Australia’

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## **Abstract**

Relationship recognition has profound implications for the dignity, equality and property rights of disadvantaged groups. The paper will consider the often intertwined interests of women and gay men and lesbians in relationship recognition reform. It will also address situations where these interests sometimes diverge depending on how the reform debate is framed. It will compare South Africa's recognition of same-sex marriage and its failure to protect the rights of domestic partners with recent proposals in Australia to remove discrimination against gay and lesbian couples and their children in federal legislation. The paper will focus on the varied roles played by law reform bodies, legislators and the courts in these two separate processes as well as touching on the approaches of some of the social movements in lobbying for changes. It will conclude with the caution that relationship recognition through law must challenge conservative legal and social categories if the rights and interests of people in choosing the forms of family appropriate for them are to be advanced.

**Key words:**

de facto relationships, domestic partnerships, women's rights, gay and lesbian rights, same-sex marriage

## Introduction

Since the law has generally been written by white middle class men, women, gay men and lesbians, the poor and other disadvantaged groups have often found themselves outside of the law's positive embrace. Family law, in particular, has been based historically on the narrow concept of heterosexual marriage. Over the last two decades, many harmful assumptions about which families properly deserve recognition have been challenged and the law has begun to reflect the idea that families take many different forms. The UN Declaration of Human Rights requires equal recognition and protection of the law without discrimination (Articles 2, 6 and 7) and promises equality between men and women in marriage (Article 16). The family is seen as 'the natural and fundamental group unit of society and is entitled to protection by society and the state' (Article 16). Sixty years since the Declaration, these rights are gaining expanded meaning as new categories of discrimination are being developed and new ideas of family are being fought for by gay men and lesbians, women in non-marital partnerships, single people and others.

In Australia, the legal recognition of non-marital couples or 'de facto' relationships began in the 1980s through a series of law reforms in states and at the federal level. Since 1999, led by reforms in NSW, all states and territories have introduced far reaching legislative recognition of same-sex partnerships or are in the process of doing so (Millbank 2006). Many of these reforms have involved extending the definition of de facto partners to include same-sex couples. Following pressure on government from lobby groups as well as an important Human Rights and Equal Opportunities Commission (HREOC) (now known as the Australian Human Rights Commission) report on the human rights violations involved in excluding gay men and lesbians from a large number of federal laws, a set of reform bills was put before parliament by the Rudd government. These bills have now been passed. The new laws address outstanding discrimination on the basis of sexual orientation against a significant number of Australian families. These important changes have occurred despite the lack of a constitutionally entrenched rights framework, through various law reform processes. The issue of same-sex marriage, a pressing concern in many countries, assumes less significance (if not symbolically, then at least practically) since the reforms offer comprehensive legal protection for gay men and lesbians and their children. The paper points to some of the interventions into the law reform process that led to such successful outcomes.<sup>1</sup>

In contrast, South Africa has recently joined a handful of countries that provide for same-sex marriage. This resulted from a court ruling that required legislative action to provide the benefits and status of marriage to gay men and lesbians. A number of other changes to the position of same-sex couples and their children had preceded this, also often following litigation. A law reform process that had dealt with the issues of same-sex marriage together with the recognition of non-marital domestic partners ran concurrently with the same-sex marriage litigation. While reforms that drew on NSW de facto partnership legislation were proposed, these have not yet resulted in any legislative reform. Hence, the disadvantaged position of often poor

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<sup>1</sup> Graycar and Morgan (2007) argue that law reform in the absence of an entrenched rights framework can still result in important legal changes in the interests of disadvantaged groups. By contrast, they suggest, even where countries have bills of rights, progressive legal changes are by no means guaranteed.

women in domestic partnerships in South Africa remains unchanged despite the momentous developments for gay men and lesbians. The paper considers why women were less successful in their struggles for legal change than were gays and lesbians.

### **Incremental Reform: Australia**

Australian relationship recognition law has seen significant change over the last 20 years. Starting with the *De Facto Relationships Act 1984* (NSW), heterosexual domestic partners have been given extensive rights that have put them on an almost equal legal footing with married couples (Graycar & Millbank 2007).<sup>2</sup> The presumption-based approach to de facto relationships (rather than requiring registration) is a progressive and practical model that focuses on the functions of particular relationships rather than their form. It was this functional approach that informed the next set of reforms in the late 1990s and 2000s to include same-sex couples within de facto relationships (Graycar & Millbank 2000; Graycar 2000). Again, led by changes in NSW, all states and territories went on to equalise the position of same-sex couples with heterosexual couples in a range of areas including property division, inheritance and many others (Millbank 2006). Organisations representing gay men and lesbians played a key role in lobbying for these changes (Graycar and Millbank 2007). The remaining obstacle for the legal recognition of these relationships was at the federal level where a large number of laws continued to retain a heterosexist definition of de facto relationships. It should be noted that in the midst of all this progress at state level, the Howard government, in 2004, introduced an amendment to the Marriage Act of 1961 which contained a statutory definition of marriage as a union of between a man and a woman. This definition mirrored the existing common law definition of marriage so appears to have been unnecessary other than as an exercise in asserting the ‘special’ nature of heterosexual marriage to the exclusion of lesbians and gay men (Graycar & Millbank 2007).

The impetus for change at the federal level came from HREOC which, on 3 April 2006 launched an inquiry into the unequal treatment of same-sex couples and their children with regard to financial and employment related entitlements and benefits in commonwealth legislation. The need for an inquiry emerged from various complaints of discrimination received by the Commission. Mindful of the contention surrounding same-sex marriage, HREOC took a calculated decision to focus on financial benefits of partnerships alone and to thus avoid the issue of marriage (interview with Vanessa Lesnie and Kate Temby of HREOC, 5 September 2008). This was strategically wise as the reforms that followed the report failed to generate significant homophobic ire.

HREOC employed Emily Gray, a member of the NSW Gay and Lesbian Rights Lobby who resigned from the lobby to work on this project. It also commissioned a study by Professor Jenni Millbank, an expert on same-sex relationship recognition, to identify a list of discriminatory commonwealth laws. The inquiry produced an initial Discussion Paper (I) and then a later Discussion Paper (II) which contained the research prepared by Professor Millbank. The inquiry received 680 submissions from individuals and organisations in response to both Discussion Papers. HREOC also held 7 public hearings and 18 community forums during the second half of 2006 and held meetings with various individuals and groups such as parliamentarians and

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<sup>2</sup> Although these changes assisted disadvantaged women, it does not seem that the organized women’s movement played a significant role in securing them. The role of individual feminist reformers may, however, have contributed.

retirement bodies. There was also significant media coverage of the public hearings. The Commission said that the hearings served as ‘a useful community education and public awareness-raising tool’ (HREOC 2007: 27). Various government departments and bodies provided the inquiry with information via the Attorney-General’s Department despite a Cabinet direction that no federal department should provide written submissions to the Commission (HREOC 2007: 30).<sup>3</sup> Arising from the inquiry, HREOC produced a final report entitled ‘Same-Sex: Same Entitlements’ which identified 58 federal laws that discriminate against same-sex couples and their children.

The HREOC inquiry was conducted relatively quickly. The final report was published in May 2007 just over a year after the commencement of the Inquiry.<sup>4</sup> The timing of the report was good as an election was coming up and the Commission hoped that some of the parties would respond to the report in their campaigns. This did in fact occur – Labor supported the report within its election campaign and specific Liberal MPs such as Malcolm Turnbull also mentioned it during the election (interview with Vanessa Lesnie and Kate Temby, of HREOC, 5 September 2008; interview with Emily Gray of the Gay and Lesbian Rights Lobby of NSW, 15 September 2008). Following the publication of the HREOC report, organisations such as the Gay and Lesbian Rights Lobby of NSW worked hard to lobby parties and campaigned in communities towards implementation of the report’s recommendations.

The new Labor government under Kevin Rudd quickly moved to address the discrimination listed in the HREOC report. After the election, the Attorney-General’s office undertook an audit of all legislation that discriminated against same-sex couples and their children including in areas not covered by the HREOC report. A series of Bills were passed in November this year that change the definition of de facto relationship to include same-sex couples across a long list of legislation. The new Acts also improve the position of children and their parents in various family relationships. The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* also assists heterosexual de facto partners as it extends the financial regime available to married couples to de facto partners and extends the jurisdiction of federal family courts to include these couples which will enable them to have financial and child-related matters heard at the same time, in more specialized

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<sup>3</sup> In June 2006, Cabinet directed federal departments not to send submissions to the HREOC Inquiry. But in July 2007, the Attorney-General informed HREOC that his Department would assist in obtaining relevant information from government departments (HREOC 2007: 30).

<sup>4</sup> The speed and nature of the HREOC process can be contrasted with the Law Reform Commission of NSW’s inquiry into relationship reform. The latter inquiry had been referred to the Law Reform Commission in 1999 and was only completed in 2006 (Report 113 (2006) Relationships). The report of the inquiry was only released publically in 2008 when the Attorney-General tabled it in Parliament. Many of the NSW Law Reform Commission Report’s recommendations have been overtaken by events. This illustrates the problem that law reform commissions sometimes face in moving speedily and responding to changing political conditions. HREOC, as a human rights body, was able to position itself more explicitly in favour of change that would address the human rights of groups facing discrimination and was able to do this speedily and strategically. A human rights commission is expected to take a more explicit stance in favour of change that will advance human rights and it has the flexibility to use a range of strategies to promote its programmes. Law Reform Commissions are traditionally more conservative in terms of their procedures and tend to present a more ‘neutral’ public profile. (See further Graycar and Morgan (2005) for a discussion of the limitations and possibilities of law reform bodies for addressing disadvantages faced by women and other groups).

courts.<sup>5</sup> The other Acts in the series are the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws Superannuation) Act 2008* and the compendium legislation, the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*.

These new Acts, which go further than the recommendations in the HREOC report, create one of the most far-reaching relationship recognition regimes in the world (despite the 2004 prohibition of same-sex marriage in Australia). The incremental approach to relationship recognition reform has meant that a comprehensive set of laws has been put into place to address a range of different family forms. Because of its ‘add on’ nature, this law reform has been relatively uncontentious politically and has thus been able to proceed without major public debate or opposition.<sup>6</sup>

### **Struggle in the Courts and Parliament: South Africa**

South African family law was shaped by its colonial and Apartheid past. A system of customary law for Blacks ran parallel to ‘civil’ law (largely) for Whites and both were extremely patriarchal. Some reforms to improve the position of women in marriage were introduced in the 1970s and 1980s but it was only with the advent of democracy in 1994 and the adoption of a Bill of Rights that greater changes began to occur.

While some legislative benefits were broadened to include domestic partners, these relationships were not provided with any coherent recognition or protection with regard to the distribution of property on death or dissolution or maintenance. This lack of legal provision for domestic partners operates particularly harshly on women as they are usually the ones to leave the partnerships without assets or support (Goldblatt 2003). Women’s rights groups followed two parallel approaches. First, they tried to influence a South African Law Reform Commission inquiry and second, they assisted a woman whose partner had died to bring a court challenge for maintenance to be paid out of his estate. The case resulted in a severely criticised (majority) decision of the Constitutional Court (South Africa’s highest court) which held that maintenance for survivors was properly available only to married spouses and not to unmarried domestic partners because marriage has a ‘central and special place’ (*Volks N.O. v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 52). The Law Reform Commission, after a very lengthy period, produced a report calling for a system of registration of domestic partnerships alongside the recognition of de facto partnerships (heavily influenced by the NSW De Facto Relationships Act 1984) (South African Law Reform Commission 2006). This report led to draft legislation that was included in the first version of the Civil Union Bill.

Before discussing this Bill, some background on the development of the legal recognition of same-sex couples is necessary. The equality right in South Africa’s Bill of Rights prohibits discrimination on the basis of sex, gender and marital status, and more unusually, on the basis of sexual orientation. The latter ground was won

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<sup>5</sup> The states have had to refer their legislative powers to the federal parliament to enable this change to occur.

<sup>6</sup> There were of course, differences in Parliament over the terms of the new laws. Both Liberal and Australian Greens’ senators differed with Labor on a number of definitions in the Bills. For examples of some of these differences see the *Report of the Senate Standing Committee on Legal and Constitutional Affairs on the Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Bill 2008 [Provisions]*, October 2008.

through the efforts of a strong and organised gay and lesbian rights movement. This movement then used the right in lobbying and in a carefully formulated and systematic litigation strategy to remove various elements of discrimination against gay men and lesbians (Berger 2008). One of the major features of the lesbian and gay rights struggle was a 'recognise our relationships' campaign that attempted to bring about substantial legal change for same-sex couples. While some of the activists involved in these struggles were critical of the institution of marriage (because of its patriarchal, heterosexual character) they appreciated the desire by many in their constituency for the right to marry.

In brief, the litigation strategy that was followed involved first challenging laws that criminalized homosexual sexual conduct; thereafter, partner benefits for same-sex couples were fought for; issues relating to children of same-sex couples followed; and the struggle for same-sex marriage became the pinnacle battle in the courts and Parliament (Louw 2004).<sup>7</sup> The same-sex marriage challenge was unsuccessful in the first court but on appeal, the Supreme Court of Appeal found that the heterosexist definition of marriage in the common law, as existing between a man and a woman, was no longer valid. It developed a new common law definition to include same-sex partners (*Fourie v Minister of Home Affairs*). The case then proceeded to the Constitutional Court where the judges found that the exclusion of same-sex couples from the status, benefits and responsibilities afforded to heterosexual couples was unfairly discriminatory. The court ordered the government to enact legislation within one year of the date of the judgment that would remedy this situation, failing which, the definition in the common law and sections of the Marriage Act would automatically change to include same-sex couples (*Minister of Home Affairs v Fourie*).

Following the judgment, the government (at the eleventh hour) produced a Civil Union Bill that created a new legal institution called a civil partnership with identical content to that in marriage but different in name. The clear intention was to reserve marriage for heterosexuals (Barnard & De Vos 2007: 808). As mentioned, the Bill also included provisions dealing with the recognition and regulation of domestic partnerships. A huge public outcry from gay and lesbian groups followed with them arguing that the Constitutional Court's decision had not been observed and accusing the government of sexual Apartheid (Barnard & De Vos 2007: 810-11).<sup>8</sup> A new draft of the Civil Union Bill was introduced very shortly before the Constitutional Court's one year deadline. The new version allowed same-sex couples to enter into civil partnerships or marriages. This version was passed and was followed by great celebration in the gay and lesbian community. While some are critical of the fact that heterosexual couples can use the original Marriage Act as well as the new Act, while same-sex couples have access only to the latter, the fact that gay men and lesbians can now marry in South Africa is widely seen as a major development in democratising relationship recognition and equality of families.

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<sup>7</sup> A number of church groups and other conservative organizations strongly opposed same-sex marriage in court and within the wider debate.

<sup>8</sup> The public hearings held to discuss the Bill were a platform for homophobic hate speech. There was also condemnation of the Bill from opposition parties in Parliament and tense contestation within the ruling party itself.

During the drafting of the second Civil Union Bill, the Parliamentary Portfolio Committee responsible for the Bill recommended that because of the shortage of time and the complexity of the issues, the chapter of the Bill on domestic partnerships should be removed. The Committee promised that a Domestic Partnership Bill would be tabled the following year (in 2007). Nothing was done in that period and it was only in early 2008 that a Draft Domestic Partnerships Bill was tabled for public comment. It was hoped that a final Bill would reach Parliament some time during the course of this year but the legislative agenda filled up (in the run-up to elections in 2009) and the Bill never reached Parliament. Despite the efforts of women's groups, human rights organisations and gay and lesbian bodies for change, reforms remain elusive.

Without negating the symbolic and practical importance of the same-sex marriage victory, there are many gay and lesbian couples who are unlikely to formalise their relationships due to stigma and fear of 'coming out' in their communities and families. For these people, as well as for millions of cohabiting women, the fuss and fanfare has achieved nothing in addressing their material disadvantage and lack of rights.

The same-sex marriage cases and the passing of legislation indicate some courage on the part of the courts and legislature. But they were also more easily understood as necessary in terms of a formal equality framework. The *Volks* case (discussed above) which failed to assist domestic partners, reflects the difficulties of getting courts to move beyond formal equality to a more nuanced and substantive understanding of discrimination against poor and vulnerable women (Albertyn 2005: 229-30).<sup>9</sup> In addition, it is practically harder for courts to address the needs of domestic partners since they require a whole new legal regime and cannot simply be 'added on' to existing legal provisions. The lack of pressure from the courts for reform made it more difficult for women's groups to demand legislative reform. Despite some promises from government, other issues (being promoted by stronger lobby groups) took precedence over women's issues which points to the need for better organisation, more pressure and greater ingenuity if this issue is to succeed. The parallel struggle for gay and lesbian equality put the focus on marriage and may, unwittingly, have detracted from the struggle for new forms of relationship recognition and women's equality.

## **Conclusion**

The paper points to two very different relationship recognition processes. Where Australia succeeded in creating a legal framework for families that assists disadvantaged women and lesbians and gay men, South Africa has yet to achieve this combination. While South Africa is lauded internationally for its strong sexual orientation and gender equality rights, women are yet to see improvements in this important area of domestic partnerships. Possible reasons for the variation between the two countries include quite different histories, social, economic and political contexts, constitutional systems and the strategic choices of the social movements involved. While a detailed exploration of these differences is beyond the scope of this paper, this is an issue that merits further consideration and research.

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<sup>9</sup> This is not to suggest that women's organizations have failed to secure legal changes in other arenas. Since democracy, a wide range of important laws including abortion, customary marriage, domestic and sexual violence and others have flowed from the efforts of women's groups.

It seems possible that the next struggle for gay and lesbian relationship recognition in Australia will centre on marriage. In South Africa, the same-sex marriage struggle was at one and the same time subversive in its contestation of the institution of marriage and conservative in its need to compare gay and lesbian relationships to a heterosexual comparator. Ruthann Robson (2007: 420-1) has warned that the 'sameness' approach to sexual orientation discrimination often leads to lesbians and gay men having to conform to the model of a married, heterosexual couple. This has 'the potential to separate sexual minorities into those who are acceptable and assimilated from those who are deemed not acceptable' (421). She also points to the dangers of linking particular forms of sexual expression to state sanction and democracy given the historically contingent nature of such expression (431). She warns elsewhere (Robson 2008) against the insertion of the state as a third party into relationships and alerts us to the possibility that the law does not follow a progress narrative – the role of the state in controlling our relationships and limiting our freedom may change and increase in the future.

It is also important to realise that legal recognition (whether marriage or other relationships) is not the end point in struggles to challenge sexual orientation discrimination or end intolerance of difference. In both Australia and South Africa, positive gains must be defended and new areas of struggle must be identified if the law is to be responsive to the human rights of all its peoples to choose the form of family that is appropriate for them.

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*Fourie and Another v Minister of Home Affairs and Another* 2005 (3) BCLR 241 (SCA).

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