

Lesbian and gay claims to relationship recognition are transforming both what we think of as family, and the domain of family law. While some have claimed that legal recognition of same sex couples forms a 'slippery slope' into immorality or social disintegration, reform in this area is increasingly being accepted as an equal and just treatment of all citizens by the law.

## Legal recognition of gay and lesbian families



In Australia through the 1980s and 1990s there has been considerable discussion and debate about the scope of many laws that define family, such as de facto property division statutes, inheritance laws, guardianship, superannuation, and compensation laws. These laws are often not identified as 'family law' but they make up a range of legal regimes, in addition to the Family Law Act 1975, which recognise, and regulate, who our families are. I argue here for a rethinking of both 'family' and of what is 'family law'.

The question of the extent to which laws should be accessible to 'non-traditional' families in Australia has been raised mostly by lesbian and gay communities, rather than by those in other largely unrecognised relationships (for instance, close friends or heterosexual couples who don't live together).

While the Australian Capital Territory in 1994 chose to implement a 'domestic relationship' model in property division, focusing on emotional and financial interdependence rather than cohabitation or a sexual relationship, most Australian reforms and debate have been centred much more around what should happen with 'other couples' – same sex couples. Recent reforms in New South Wales and, to a lesser extent, Queensland, recognise same sex cohabiting couples across a range of laws as 'de facto partners' on the same footing as heterosexual couples. The recent initiation of a broad based inquiry into relationships and the law in New South Wales suggests that this trend may be set to continue.

Will the law broaden further, to be a more flexible and dynamic regime in the future? And will family law ever catch up?

To illustrate what I mean by these two points and why I think they matter so much, I'd like to offer a real life example – one which found its way into the English law reports.

In 1976 Martin Fitzpatrick and John Thompson, having met and fallen in love at some earlier time, moved in together in a rented flat in London, in Mr Thompson's name. Ten years later John Thompson had a stroke which paralysed him, and Martin Fitzpatrick, among other things, cared for him for the next eight years until John died in 1994. Martin wanted to remain living in the flat that they had shared, but the landlords refused.

This example shows both the variety of areas of life that can be affected by legal definitions of family, and the devastating impact that non-recognition can have. If Martin was the 'spouse' or a 'family member' of John under the relevant UK tenancy statute, he had a 'protected tenancy' and could have stayed. If not, he would be forced to move from his home of 20 years. 'Spouse' under the Act was defined as someone living with the tenant 'as his or her wife or husband'. 'Family' was not defined by the Act at all, although there was precedent that the term should be construed as changing with the times.

At first instance and in the Court of Appeal (by majority), it was held that John and Martin were neither spouses nor family to each other. Legally

speaking, they were strangers. Ward LJ, who was in dissent in the Court of Appeal argued that they should be considered both spouses and family. At the conclusion of his judgment he added:

'I have been persuaded that the discrimination would be thought of by the broad mass of people to [be] unsustainable . . . To conclude otherwise would be to stand like King Canute, ordering the tide to recede when the tide in favour of equality rolls relentlessly forward and shows no signs of ebbing. If I am to be criticised – and of course I will be – then I prefer to be criticised, on an issue like this, for being ahead of the times, rather than behind the times. My hope, to reflect the intent of this judgment, is that I am in step with the times.' *Fitzpatrick v Sterling Housing Association* (1997) per Ward LJ in dissent at 1024.

Only two years later, in the House of Lords, the tide crept a little further when three of the five Lords decided that Mr Fitzpatrick was indeed a member of Mr Thompson's family, because the meaning of family had changed over time to include same sex couples (although all five agreed that he was still not a spouse). One of the Lords said that in deciding what family meant in the 1990s:

'The hallmarks of the relationship were essentially that there should be a degree of mutual inter-dependence, of the sharing of lives, of caring and love, of commitment and support.' *Fitzpatrick v Sterling Housing Association* [1999] per Lord Slynn.

The decision indicates a shift away from the traditional indicia of biology and marriage relationships (and its more recent counterpart, 'marriage-like' relationships) towards a more flexible or purposive definition of family.

**T**his shift is also taking place in Australia, although it has mostly occurred at a legislative rather than a judicial level. Recent reforms in New South Wales recognise same sex cohabiting partners across more than 20 pieces of legislation and other close cohabiting relationships across a smaller number of laws.

The Property (Relationships) Legislation Amendment Act 1999 (NSW) amended the existing definition of de facto partner to include same sex cohabiting couples in the statutory property regime and numerous other areas of New South Wales law, most notably those concerning family provision, intestacy, accident compensation, stamp duty, and decision-making in illness and after death. As a secondary change it also introduced the concept of 'domestic relationships' for the first time into New South

Wales laws. This was intended to cover some other forms of close relationships in a few laws such as statutory property division, family provision, bail, and stamp duty. (The Act also somewhat confusingly renamed the De Facto Relationships Act 1984 as the Property (Relationships) Act 1984.)

The former definition of de facto partner was:

(a) in relation to a man, a woman who is living or has lived with a man as his wife on a bona fide domestic basis although not married to him; and (b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her. *De Facto Relationships Act 1984* s 3.

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

a relationship between two adult persons: (a) who live together as a couple, and (b) who are not married to one another or related by family. *Property (Relationships) Act 1984* s 4.

The new definition represents a break with traditional definitions of partners which rested upon a comparison to marriage, or used marriage as the central reference point, although strangely it also makes lesbian and gay partners family for legal purposes by defining them as not related by family. At the heart of the new definition is the need to live 'as a couple'. The Attorney General's Second Reading Speech made clear that the new non-gendered definition of de facto spouse was specifically intended to include lesbian and gay couples (Shaw 1999).

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

(1) (a) a de facto relationship, or (b) a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

(2) For the purposes of subsection (1) (b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care: (a) for fee or reward, or (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation). *Property (Relationships) Act 1984* s 5.

This definition is distinct from, and a narrower than, the one used in Australian Capital Territory

law (which does not require cohabitation), although the latter part of the definition about what is *not* a domestic relationship is almost identical to the ACT legislation.

While these reforms represent a significant break with the past and place New South Wales (along with Canadian jurisdictions such as Ontario) at the forefront of common law legal regimes in terms of recognition accorded to same sex relationships, it is equally significant that they were not greeted with the outraged opposition that has, perhaps, kept governments from instituting reforms in earlier times. The Liberal/National Coalition in New South Wales agreed not to oppose the law, and while several Coalition MPs spoke against the legislation (or against parts of it), there were only three votes against it – from the ‘Call to Australia’, ‘One Nation’, and ‘Outdoor Recreation’ parties. I suggest that the justice of such reforms is being increasingly recognised by both sides of Australian politics.

There have been a number of other developments in Australia in recent times. In 1999, Queensland introduced a property division regime for unmarried couples which covered same sex and opposite sex couples equally, and amended industrial relations and domestic violence legislation to include same sex couples as ‘de facto partners’. In New South Wales the Legislative Council Standing Committee on Social Issues issued a report in late 1999 which called upon the state government to extend recognition of same sex couples to all other areas of New South Wales law not yet amended. It also suggested that the recognition of ‘domestic’ relationships be broadened further.

The New South Wales government has not yet responded to the report, but it has initiated a reference by the New South Wales Law Reform Commission. This reference is a broad based inquiry into relationships law that is expected in the coming years to examine, among other things, laws relating to children raised by non-biological parents (such as the co-parent in lesbian couples who have a child using donor insemination), and laws relating to couples and other relationships where the parties do not live together.

Federally, a Senate Select Committee recently held an inquiry into discrimination against same sex partners in superannuation law. The Committee had expected to report in early March 2000 but was swamped by over 1000 submissions supporting equality for same sex couples and has now delayed its reporting date until early April. These developments give some sense both of the diversity of law about families, and of the increasing range of possibilities being examined.

I strongly believe that laws about families exercise an enormous influence over us at times of greatest crisis in our lives (such as death and relationship break-up) and that influence is most felt by those whom the law excludes. There is no reason to establish hierarchies of relationships which are ‘in’ or ‘out’ of the law based on outdated moral codes, and no support for the argument that doing so will make people alter their ways of life to conform to such morality. People are not simply born into families – they choose them. The law as a system of dispute resolution and presumptive rules should reflect and serve families, not seek to create, or exclude, who those families are.

The Chief Judge of the Family Court has said that:

‘One of the fundamental misconceptions which plagues me is the failure to understand that heterosexual family life in no way gains stature, security and respect by the denigration or refusal to acknowledge same-sex families. The sum social good is in fact reduced, because when a community refuses to recognise and protect the genuine commitment made by its members, the state acts against everybody’s interests.’ (Nicholson 1997: at 24).

Later in the same article, the Chief Justice notes that when he first made remarks of this nature he met with some hostile media responses. Conservative Catholic spokesperson B.A. Santamaria and other commentators argued that this was a ‘slippery slope’ into promiscuity, debased morals and anarchy.

I do think that the reforms I have outlined mean more than simply that lesbians and gay men are now ‘in’ at last, and agree in a sense that they reflect a series of broader social changes. However, I argue that these changes are not a ‘slippery slope’ of decline and lost values but rather, as Ward LJ said, a ‘turning tide’ toward equality. This, I hope, is only the beginning of a turning tide toward respect for human dignity which is effected in a more inclusive, and therefore more responsible, legal system.

## References

- Justice Alastair Nicholson (1997), ‘The changing concept of family: the significance of recognition and protection’, *Australasian Gay and Lesbian Law Journal*, vol. 6, p.11.
- Fitzpatrick v Sterling Housing Association* (1997), 4 All ER 991 (CA) and [1999] 3 WLR 1113 (HL).
- Shaw, Hon J.W. (1999), Parliamentary Debates, Legislative Council of New South Wales, *Hansard*, 13 May, at 229.

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