

Why de facto relationship status is the most important immediate goal for all equality seekers including marriage advocates.

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Although I have been a member of the Lobby for many years, and worked with them on relationship reform in the 1990s and parenting recognition in the 2000s, I want to be very clear that today I am not speaking for the lobby or representing a lobby view. I am giving my own personal view based upon my professional work as an academic on national and international same-sex relationship recognition.

Firstly want to acknowledge that I don't personally support marriage, for straight people or for gay people, and I'll say a few words about why.

When my mother married, marriage was an institution that deprived women of their legal status as individuals, including the right to their own names, their citizenship, the ability to work in the public service and other professions, and their right to say no to sex with their husbands. Now I accept Luke's point that marriage is not static, and by the time my mother divorced 27 years later, all of the above had changed. But nonetheless for me, as for many other feminists, thinking of marriage as the ultimate **equality** goal is difficult. I also find it hard to accept the argument that marriage is an expression of individuality and free **choice**. For many heterosexual people today, marriage remains a coerced choice, through family, religious, or economic pressure. Finally, I find attributing marriage a higher **status** as a relationship form, as something more committed or more valuable than other relationships, to be disrespectful even oppressive of diversity. It is something that I really hoped gay men and lesbians, even those who would like to marry, would never be a part of propagating.

However, I also accept that some lesbians and gay men really do want to marry and I do agree with them that the denial of the right to marry is discriminatory. The Marriage Ban last year was appalling; it was a deliberate entrenchment of inequality in federal law when all other law in Australia has been progressing in the other direction, and was a pointedly divisive bit of gay-bashing. So I want to also make it clear that although I am and will remain critical of gay and lesbian attempts to seek marriage, I deeply and profoundly oppose conservatives who tell us that we don't deserve marriage and can never have it.

So what I want to talk about today is, why if marriage is sought by gay men and lesbians, comprehensive de facto relationship recognition at federal level must come first. There are 2 reasons for this, the first is **substantive equality** and the second is **achievability**.

Equality

My view is that a commitment to equality and access to justice means that de facto status must come first. Marriage meets the goal of formal equality, they have it we have it, therefore appearances are equal. But we must also ask of any recognition

system, who is covered, what do they get, how are they covered? And does this meet the goal of substantive equality?

Many heterosexual people never marry. To ensure that they were not disadvantaged by this, de facto status was created in NSW in the 1980s.

Many same sex couples will never register their relationships or marry when those options become available, for a wide variety of reasons, some of which will include personal choice, but many of which will also be a result of homophobia. Prior to relationship recognition in NSW in 1999 there were a lot of cases in the courts where gay men and lesbians had died and their partner was left with nothing, or couples had broken up and a partner had been deprived of their share of property or of child support. In each of those cases the couple, earlier in their relationship, **could** have signed wills or contracts or taken some formal steps to have their relationship recognised – but they didn't. They never formalised their relationship, because they were intimidated by lawyers, or afraid that their families would find out they were gay, or because they just never imagined a future in which they would die suddenly or break up bitterly.

In Australia we have two registration systems at the moment, in the City of Sydney (formerly South Sydney) and in Tasmania. In Sydney in nearly a year only 6 same-sex couples have registered. In Tasmania after 18 months only 40 same sex couples have registered. There is also a separate provision in Tasmania for non-couples to register. So far no one has done so.

Overseas experience tells us that of those who do not register, it is overwhelmingly women, those who are economically disadvantaged and those who live outside cities. Middle class gay men, mostly living in big cities, make up around two thirds of those who marry or register. Again I stress that I am not urging anyone to stand in their way if that is what they want. What I am urging is that we ensure that there are legal protections in place for everyone else, for what may in fact be the **majority** of lesbian and gay couples who don't formalise their relationship but who still need rights.

I also think it is vital that we don't help to create a system whereby unmarried same sex couples are doubly disadvantaged - by being granted less rights than straight unmarried couples and less rights than married or registered same sex couples. This point is particularly important when it comes to parenting rights. In Tasmania only the 40 registered same sex couples can apply to adopt a related child (ie step parent adoption), other lesbian and gay couples are ineligible to apply. But straight couples don't have to marry to be able to adopt any child. Furthermore straight couples anywhere in Australia don't have to marry to have access to fertility services and if they have a baby with assisted reproduction they don't have to marry to both be granted full parental status. It would **entrench** and not **remedy** inequality if we required same sex couples to marry or register in order to have access to those same rights.

Substantive equality means access to a full range of rights with no disadvantage because of your sex, sexuality, relationship status or economic status. It means equality with married and unmarried couples, with single people and with parents. It

means that if we pursue any form of opt-in system we must have comprehensive de facto recognition first.

The second reason to pursue de facto recognition at federal level, and I mean this for those who support or prefer marriage, is that it without de facto recognition marriage is not achievable.

Achievability

Gay men and lesbians are now able to marry in the Netherlands, Belgium, Canada, the US state of Massachusetts and Spain. “Civil unions” or “registered partnerships” granting most - but not all - of the same rights as marriage are available in many more European countries, NZ and the UK and 3 states in the US.

We should pay a lot of attention to how this happened if we want to achieve the same end.

In US jurisdictions change was effected through court based challenges, in Europe it was through legislative process, while in Canada it has been a mix of both. What is common to every single jurisdiction that has granted same-sex marriage is a process that has been described by a dutch expert **as the law of small change.**

That is, over a period of many years, a series of changes that build incrementally on one another. Generally progress has gone along the following sequence:

- decriminalisation of gay sex,
- anti-discrimination protections,
- limited recognition of relationships in some areas,
- and then through one or more stages a move to broader relationship recognition,
- then (usually) some parenting recognition,
- then a status exactly giving the same legal rights as marriage but called something else
- and then some years later, marriage.

This is the sequence that has been followed, and is being followed, in literally dozens of other countries over the past 15 years. Simply put, we are not far enough into this sequence for marriage to happen. We have made great progress at State level, although we have some way to go with parenting rights. At federal level we have very limited rights (in immigration and superannuation) but of that handful they are only back door rights, based on interdependency. We are not recognised as couples in those areas and are not equal to either married or unmarried heterosexual couples. In no federal law do we yet have rights as couples. (There is one exception, in the *Anti-Terrorism Act*, which you may not have heard about because it passed on the same day as the marriage ban. So it kind of got bumped from the front page. The good news is that although it is usually an offence to associate with a terrorist, family members are exempted, and thanks to amendments in 2004, we are now ok to have terrorist partners. Well it was a big relief to me.)

Another important thing to take account of is the context in which change occurs. It is always under progressive governments and it usually occurs when unmarried couples are treated equally with married couples first.

The example I want to draw attention to is the contrast between Canada and the US.

In the US, after 15 years and millions and millions of dollars worth of litigation, same sex couples have registered partnerships in three states, marriage in one state, and face marriage bans in 38 states and federally. 11 constitutional referenda to prohibit same sex marriage were posed and all passed at the last federal election in the US. Massachusetts, the only state to have gay marriage, at the moment, is also facing a constitutional amendment to ban it. The US has gone backwards – not just that there is no same sex marriage, but now no way to bring it about through courts or parliament in the future without first amending the various state constitutions that now ban it. Our press is full of stories on American marriage struggles, but in my view we should not be looking to them for ideas. The US is a model case study of **failure** to achieve same sex marriage.

In Canada, by contrast, court based challenges led to some recognition of same sex couples as de facto partners in provincial law in the mid 1990s. This became widespread across all of the provinces and then was introduced into federal law through legislative reforms in the late 1990s. So by 2000 same sex couples in Canada had exactly the same range of legal rights as married and unmarried heterosexual couples, including a full range of parenting rights. In 2001 court challenges based on the Canadian Charter equality principles were brought to the refusal to issue marriage licences in British Columbia and Ontario. These lead to BC and Ontario granting same sex marriage licences in 2003, then in 2004 Quebec, Manitoba, Nova Scotia and the Yukon made similar decisions. In 2004 the federal government asked the Supreme Court of Canada whether it had the power to alter marriage to include same sex couples and whether Civil Unions instead of marriage would be in breach of Charter equality guarantees. The Supreme Court answered yes unanimously to both questions. Federal legislation to grant same sex marriage to all Canadians (and visitors to Canada) is currently before parliament and will pass in 2005.

So why did Canada succeed where the US has failed? One reason is that there was already widespread recognition of unmarried straight relationships in Canada; this provided not just a stepping stone for recognition efforts but a cultural context in which a broader range of relationships are valued and accorded status both socially and legally. In the US there is virtually no recognition of unmarried relationships, and in the states that introduced registered partnerships for same sex couples some of them actually *stripped* rights from cohabiting couples who did not register. It is a very all-or-nothing context in America. I am not underestimating other factors such as the disproportionate influence of religious lobbies in the US. But I also think that the US did not follow the law of small change and so has ended up polarising positions rather than shifting them.

Now Australia is more like Canada in that it has widespread recognition of unmarried relationships, a recent history of progressive gay law reform, and greater acceptance of sexual diversity in the community. We have a path of small change that we can follow. But unlike Canada we cannot look to the Courts to push reform along because

we have no equality guarantees and no constitutional basis to challenge discriminatory laws. **Parliamentary reform is the only thing we have**, and that puts us in a **far weaker position**. Parliaments are more cowardly with unpopular decisions than courts. Simply put it will be a slower haul here, in my view by around 10 years.

For marriage to be passed by parliament, it needs first to be popular, or at the very least, seen as uncontentious.

Same sex marriage has been uncontentious in the countries that have introduced it partly because public opinion shifted over time, partly because their governments were very progressive but also, importantly, because by the time same-sex marriage happened it did not change very much at all.

In Australia marriage is federal, and the states have gone almost as far as they can go with de facto recognition. So state based marriage – even if it were constitutionally valid which I very much doubt- would be largely irrelevant and ineffective at granting lesbian and gay couples any **additional** rights to the ones they already have. State based marriage is a red herring, *not* a stepping stone.

Any campaign for marriage must focus first on deposing the current federal conservative government – as they have stood in the way not just of marriage but of any form of federal relationship recognition, and when they gain control of the senate are also poised to attack the few parenting rights we have.

We must extract promises of a reform process from opposition and minor parties, who I would really hope could work together on this. Through them we will achieve comprehensive de facto relationship recognition at federal level (covering rights in immigration, tax, medicare and social security). At that stage if civil unions or registration is what people want, they should pursue that goal (and if marriage is what people want then they should also support registered partnerships as an interim step towards marriage). Then, when everyone begins to think of it as inevitable and minor rather than enormous and controversial, marriage will be an achievable goal.

So my two cents, for what it is worth, is that whether we favour de facto, registration or marriage, to have any hope of achieving them we must all work together and we must pursue them in that order.