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Outlaws and their mortgages: an analysis of the Property (Relationships) Act 1984 (NSW)

Erin Elizabeth Cahill
University of Wollongong

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Outlaws and Their Mortgages:
An Analysis of the *Property (Relationships)*
Act 1984 (NSW)

A thesis submitted in fulfilment of the requirements for
the award of the degree

DOCTOR OF PHILOSOPHY

from

University of Wollongong

by

Erin Elizabeth Cahill, BA (Hons) (USyd)

Faculty of Arts

2005

Certification

I, Erin Elizabeth Cahill, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Faculty of Arts, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

Erin Elizabeth Cahill

8 February 2005

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List of Abbreviations

AAA:	<i>Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (WA)</i>
DRAB:	"De Facto Relationships Amendment Bill 1998 (NSW)"
GLRL:	NSW Gay and Lesbian Rights Lobby
IVF:	In Vitro Fertilisation
MARB:	"Miscellaneous Acts Amendment (Relationships) Bill 2002 (NSW)"
NSWLA:	New South Wales Legislative Assembly
NSWLC:	New South Wales Legislative Council
PRA:	<i>Property (Relationships) Act 1984 (NSW)</i>
PRLAB:	"Property (Relationships) Legislation Amendment Bill 1999 (NSW)"
SPRB:	"Significant Personal Relationships Bill 1997 (NSW)"
TBWP:	<i>The Bride Wore Pink: Legal Recognition of Our Relationships</i>

Abstract

This thesis is an exploration of the *Property (Relationships) Act 1984 (NSW)* (the PRA). This piece of legislation instituted what was, at the time, the most progressive and furthest reaching recognition of same sex relationships within the Australian legislative system. Whilst recognising the important implications of the PRA, there are two remarkable features of this legislation upon which this thesis focuses. First, it instituted a legally sanctioned hierarchy of relationship types within Australian law, in terms of legal rights and enablement. Marriage sits at the top of this hierarchy, governed at both the state and the federal levels in Australia. This is followed by heterosexual de facto relationships under NSW state law and then same sex de facto couples within the same jurisdiction. The second notable feature of the PRA is that its usage within the higher ranks of the NSW court system has been relatively limited. Specifically, there are no cases, in the court setting, of lesbian couples using the PRA. This thesis approaches these two issues by characterising the existence and effects of the PRA as contradictory. The PRA enables lesbians within the legal system in the same moment that it contains and prevents the application of full legal citizenship. It argues that the PRA produces a symbolic (homosexual) legislative figure characterised by contradiction in terms of legal coverage, citizenship rights and basic appearance in law. It argues too that although the gender neutral definition of de facto that the PRA produced allows same sex relationships to be recognised under NSW law, the Act also limits its applicability to same sex relationships (particularly lesbian ones).

This thesis counter poses two theoretical approaches to exploring and explaining the PRA- liberal democratic theory and lesbian outlaw theory. It argues that liberal democratic explanations of laws and legal systems rely on a specific avoidance of articulating contradiction whilst simultaneously producing this effect. Liberal democratic theory takes account of contradiction only in so far as it represents a temporary failure of the application of liberal democracy itself. Conversely, lesbian outlaw theory is taken to explore contradiction as a fundamental characteristic of knowledge production. Lesbian outlaw theory is developed throughout this thesis as a feminist Foucaultian framework. The critique of binary logic by both feminists and

Foucault enables an understanding of and a theoretical focus on contradiction that liberal democratic theory appears incapable of providing.

Through such explorations of contradiction two common notions- silence and truth- appear. This thesis examines the PRA by locating the sites of truth and silence involved in its production (the writing process, the parliamentary debates and the advertising campaign) and in its application (through a series of interviews with women in long term lesbian relationships). The project of this thesis then, becomes an exploration of the ways in which liberal democratic theory shaped the production of the PRA and the ways in which lesbian outlaw theory can account for and address the ramifications of this.

This thesis concludes that an outlaw interpretation of the PRA allows two primary things: the exploration of contradiction as a function and effect of the PRA and an encouragement of conceptualising this contradiction as productive in nature. This then has flow on effects to legal scholarship, which this thesis also explores. The thesis concludes that lesbian outlaw theory can influence legal theorising and practice in a manner that better accounts for the experiences of lesbians than does liberal democratic theory and hence advocates for its use in such a manner.

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* These are pseudonyms.

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