

# Leading the way: recognition of same sex and domestic relationships in NSW

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Various sorts of relationships, mainly those of couples and blood relatives, receive legal recognition in a surprising range of areas. These include inheritance, worker's compensation, superannuation, decision-making in incapacity, organ donation, bail applications, accident compensation, disclosures of interest and stamp duty as well as property division on relationship breakdown. Historically, same sex couples have not been recognised in any of these areas - making gay men and lesbians perhaps the last remaining group to be denied formal legal equality in Australia. This finally began to change in NSW on 1 June 1999 with the passage of the *Property (Relationships) Legislation Amendment Act* giving same sex couples many of the same rights enjoyed by heterosexual de factos. The changes are sweeping and will affect most areas in which plaintiffs' lawyers practice.

## Background

Moves to recognise same sex relationships have been made in Denmark, Norway, Sweden, Iceland, the Netherlands, many US cities and parts of Canada.

Reform has also been proceeding in Australia, most notably in the ACT. In 1994, the *Domestic Relationships Act 1994* (ACT) gave access to a statutory property division regimen to those in a variety of close personal relationships. It was passed with bipartisan support and open acknowledgment that an important effect of the changes would be to include gay men and lesbians. In 1996, the *Administration and Probate Act 1929* (ACT) and *Family Provision Act 1969* (ACT) were amended (again with bipartisan support) to provide access to inheritance for heterosexual and homosexual de facto partners on an equal footing. A

spouse was defined as a partner, whether or not of the same gender, "who had lived with the deceased as a member of a couple on a genuine domestic basis". Family provisions legislation was broadened in Victoria in 1997 to allow any person "for whom the deceased had responsibility to make provision" to make a claim.<sup>1</sup> Limited recognition has occurred in Commonwealth laws with same sex couples recognised as interdependent relationships for the purposes of immigration. However, no other Australian jurisdiction has conferred broad recognition on same sex couples.

The lesbian and gay community has been fighting to have same sex relationships recognised in NSW since 1993. This had resulted in some tinkering at the edges of the problem but no major reforms until late last year when the Carr Government amended worker's compensation legislation to include co-habiting adults who have a mutual commitment to a shared life.<sup>2</sup>

## The *Property (Relationships) Legislation Amendment Act 1999*

The basic scheme of the Act is to amend the *De Facto Relationships Act 1984*, which is renamed the *Property (Relationships) Act*, so that those in 'domestic relationships' may apply for property adjustments or maintenance under that Act.

Domestic relationships include de facto relationships, as redefined, and co-habiting carers. There are then amendments to many other acts, generally by reference to the definitions contained in the *Property (Relationships) Act*. Taken together these make up a fairly comprehensive reform conferring a wide range of property and non property rights on same sex

couples.<sup>3</sup> Carers are included in a much more limited range of areas.

With the exception of the amendments relating to the *Wills, Probate and Administration Act 1898*, all changes commenced on 28 June 1999.<sup>4</sup> They do not apply to relationships that terminated before that date.<sup>5</sup>

## Acts which have been Amended

Anatomy Act 1977  
Bail Act 1978\*  
Compensation to Relatives Act 1897  
Coroners Act 1980\*  
Criminal Assets Recovery Act 1990  
De Facto Relationship Act 1984\*  
District Court Act 1973  
Duties Act 1997\*  
Family Provision Act 1982\*  
Guardianship Act 1987  
Human Tissue Act 1983  
Inebriates Act 1912  
Insurance Act 1902  
Judges Pensions Act 1953  
Law Reform (Miscellaneous Provisions) Act 1944  
Legal Aid Commission Act 1979  
Mental Health Act 1990  
Motor Accidents Act 1988  
Protected Estates Act 1983  
Trustee Act 1925\*  
Wills, Probate and Administration Act 1898

\* includes domestic relationship

## De Facto Relationships

'De facto relationship' is redefined for most legislative purposes in NSW as "the relationship between two adult persons who live together as a couple" and are not married or related by family.<sup>6</sup> In effect "as a couple" replaces the rather archaic "as husband and wife on a bona fide domestic basis".

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The Act introduces a list of factors to be taken into account so far as they are relevant when determining whether a de facto relationship exists:

- duration of the relationship;
- nature and extent of common residence;
- whether or not a sexual relationship exists;
- degree of financial dependence or interdependence, and any arrangements for financial support;
- ownership, use and acquisition of property;

- degree of mutual commitment to a shared life;
- care and support of children;
- performance of household duties; and
- reputation and public aspects of the relationship.

None of these factors are to be regarded as necessary for the existence of a de facto relationship nor is the list exhaustive. A court may have regard to such matters, and attach such weight to any matter, as is appropriate in the circumstances.<sup>7</sup>

It is apparent from the remarks of the Attorney General in his second reading speech that there is no intention to alter the content of the term other than to extend access to the statutory scheme to same sex couples. It simply adds another definition to the several statutory formulations already used fairly interchangeably around the country. Pre-existing case law will apply and courts may continue to look to other jurisdictions for guidance except where this is in conflict with the intention to make the definition gender neutral.

**Domestic Relationships**

Domestic relationships include people who live together “one or each of which provides the other with domestic support and personal care”. Domestic support may include attending to shopping, cleaning, washing and the like, whilst personal care is ensuring the physical and emotional comfort of the other and may include assistance with mobility or personal hygiene.<sup>8</sup> Flatmates<sup>9</sup> and paid carers<sup>10</sup> are not intended to be covered.

This gives rights to co-habiting carers. It does not address other close personal relationships. It is quite different from and much narrower than the concept of “domestic relationships” pioneered in the ACT which is “a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage” - *Domestic Relationships Act 1994 (ACT)*, section 3(1). ▶

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Of course, while it may be intended that carers and flatmates form separate categories, there may be some difficulty saying into which category an individual relationships falls. It is easy to envisage flatmates who provide some or even substantial domestic support. At what point do they stop being a flatmate and become the other party to a domestic relationship?

If flatmates are not to be included, the dividing line will have to be drawn so that there would have to be provision of a great deal, perhaps most, domestic tasks before a relationship is considered to be a domestic relationship. The provision of personal care may be more significant. Again more than a little assistance with emotional or physical comfort will probably be required. If a person is providing assistance with mobility or personal hygiene the relationship does begin to look like more than a friendly arrangement between flatmates.

### Children

Prior to the *Property (Relationships) Legislation Amendment Act*, children of gays and lesbians did not generally have their relationship with their non-biological parent ("co-parent") recognised. For example, if a lesbian had a child and brought it up with her partner the child's relationship with this partner was not recognised for most purposes - even if she was the main carer. For example, if the co-parent died, the child had no rights to automatic inheritance under the *Wills, Probate and Administration Act 1898* - even aunts and uncles would take precedence.

This situation led to financial and other disadvantage for these children, particularly in the event of breakdown of their parents' relationship or death of a parent. Failure to recognise the relationships of their parents can also indirectly disadvantage children as it may have a profound effect on the financial circumstances in which children are raised.

Section 5(3) of the *Property (Relationships) Act* now provides that children of a domestic relationship include children for whose long-term welfare both members of the couple accept parental responsibility.

The expanded definition of children of the relationship is carried through into

some of the other acts which are amended<sup>11</sup> but this is not comprehensive and children will still be excluded in many areas.<sup>12</sup> However, since much Commonwealth legislation, including that governing superannuation, does not recognise either same sex partners or the children of co-parents, this will be a major source of continuing disadvantage for some children.

### The Impact of Reform

The Act is one of the most important pieces of human rights legislation passed by an Australian Parliament in recent years. Its practical impact is likely to be large as it recognises same sex couples across a range of areas of law - far beyond the limited property rights implied in its name.

The inclusion of same sex couples should also influence the development of the law over time - perhaps profoundly. The way in which many heterosexual couples live their lives has already challenged the preconceptions of some judicial decision makers. The trend will be increased and strengthened by the inclusion of same sex couples. Courts will be confronted more often with relationships in which there may not be a power imbalance or inequality of financial resources. It will no longer be safe to assume that couples take gender-defined roles. But the change is likely to be incremental, building on pre-existing case law.

The Act is part of an Australian and worldwide trend and brings change in other jurisdictions closer. Shortly after the *Property (Relationships) Legislation Amendment Act* was introduced, Queensland introduced into its Parliament industrial relations legislation recognising same sex couples.<sup>13</sup> Premier Beattie has since announced plans to include same sex couples in de facto laws dealing with property and domestic violence. It is hoped that relationships recognition in NSW will prove to be a watershed in the fight for legal equality and full acceptance for gay men and lesbians. ■

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### Footnotes:

- <sup>1</sup> *Wills Act 1997*
- <sup>2</sup> *Workers Compensation Legislation Amendment (Dust Diseases And Other Matters) Act 1998*, Schedule 5. The changed definition appears in section 4 of the *Workplace Injury Management and Workers' Compensation Act 1998*.
- <sup>3</sup> In a few cases, these acts did not previously include de facto at all.
- <sup>4</sup> These are expected to commence shortly, possibly during September.
- <sup>5</sup> Section 6 of the *Property (Relationships) Act 1984*. This is made clear in the other acts that are amended either by explicit provision being made or from the fact that they only deal with relationships that are on foot.
- <sup>6</sup> Section 4(1) of the *Property (Relationships) Act*
- <sup>7</sup> Section 4(3) of the *Property (Relationships) Act*
- <sup>8</sup> Attorney General's Second Reading Speech, *Hansard, Parliamentary Debates*, Parliamentary Council, 13 May 1999, at 229
- <sup>9</sup> Attorney General's Second Reading Speech, *Hansard, Parliamentary Debates*, Parliamentary Council, 13 May 1999, at 229
- <sup>10</sup> Section 5(2) explicitly excludes paid carers and situations where care is provided "on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation)".
- <sup>11</sup> Some already included those standing 'in loco parentis'.
- <sup>12</sup> Importantly, children of co-parents do not have rights to automatic inheritance in case of intestacy (*Wills, Probate and Administration Act*) although they may be able to make a family provisions claim.
- <sup>13</sup> *Industrial Relations Bill 1999* tabled on 25 May 1999.

## APLA Membership at 30 September 1999

NSW	585
Queensland	369
Victoria	267
South Australia	78
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