

What's new in The Family

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The Law Council of Australia has proposed that model de facto relationships legislation be enacted by each State and Territory as soon as practicable. As the Federal Constitution does not give power to the Commonwealth to make laws in relation to unmarried couples, since the early 1980s most States (with the exception of Western Australia, Tasmania and Queensland) have enacted some form of provision to recognise and regulate the interests of a party to an unmarried relationship upon its termination.

The fact that the relevant legislation varies from State to State in its scope, in its definitions as to what form of relationship attracts legal recognition, and in other aspects, is a major source of concern and confusion. The submission prepared by the Law Council refers to what it describes as an 'appalling lack of uniformity' in existing legislation, both as regards an overall approach and in its treatment of specific provisions.

Giving any formal legal recognition to cohabitants has always generated controversy. The original policy debates centred around concerns that formal marriage would be prejudiced by attempts to increase the rights of those in de facto relationships or, alternatively, that those who deliberately avoided marriage should not be required to acquire any marital rights or obligations.

Now arguments are more likely to focus on the extent, if any, to which those in same sex relationships should also acquire some protection; an issue which has been addressed in the ACT legislation only.

As the Law Council's submission explains, New South Wales was the first State to enact specific legislation for non-married couples. Its 1984 De Facto Relationships Act was heavily influenced

by (but is not the same as) Part VIII of the Family Law Act which deals with property, spousal maintenance and agreements made between husband and wife. However, New South Wales jurisprudence has developed in a quite different manner from that of the Family Court, particularly in relation to property adjustment. The Law Council points out that this is partially attributable to what is seen as 'a significant difference of opinion between individual judges of the Court of Appeal', some of whom take a broad approach to the issue and would prefer decisions which are more likely to resemble those of the Family Court, whereas others would limit adjustment rights significantly (see Sandor in this issue of *Family Matters*).

Victoria has no discrete legislation, only amendments to the Property Law Act, which provide no entitlement to maintenance, no recognition is given to cohabitation or separation agreements, and no rights to anything other than real property land and buildings) are given.

The South Australian Act and the proposed Tasmanian legislation define property as including superannuation, a course of action which goes beyond the Family Court approach where such a form of future payment is referred to as a financial resource.

Another issue revolves around jurisdiction to bring actions under the current patchwork of legislation. The New South Wales Act, for example, requires at least one of the parties to be resident in that State on the day an application for property adjustment or maintenance is made. Given the increased mobility of Australians, such a requirement is not always possible. The situation is even more difficult in the ACT, given its size and proximity to New South Wales. The

present (frequently artificial) limitation provided by State boundaries provides an important rationale for the need for uniform, and ultimately Federal, treatment of unmarried relationships.

The Law Council identifies two disparate approaches to de facto relationships legislation; the minimalist and comprehensive approaches, as illustrated respectively by South Australia and the Tasmanian proposals on the one hand, and New South Wales, the Northern Territory and the ACT on the other.

The Council ultimately supports a referral of powers from the States to the Commonwealth in the area of de facto relationships (as occurred with respect to ex nuptial children in the late 1980s), so that model uniform legislation would be an interim measure. However, given the complexities and political sensitivities involved in any referral of powers, such 'interim' laws would be expected to be in place for many years.

The proposal which the Law Council advocates is that dependent relationships would be included in the uniform Acts, thus adopting the ACT approach and reducing the requirement that the relationship be a sexual one, whether heterosexual or homosexual. The proposal suggests that there should be some limited right of partner maintenance; it provides for the making of cohabitation agreements; and it puts forward a definition of property which excludes resources such as superannuation.

The issue is unlikely to attract immediate attention, although the Law Council is hoping to have its submission included in the agenda for the next meeting of the Standing Committee of Attorneys-General. The Commonwealth Attorney-General's Department is expected to release some material soon on the treatment of superannuation in family law, and a revamped property bill for married couples is also on the agenda. In these circumstances it is

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important that some consistency be retained between the relevant Family Law Act provisions and any possible uniform State legislation.

Chief Justice Nicholson has expressed concern at the limited availability of indigenous court interpreters in the Northern Territory. This is restricting access to justice for Aboriginal people, particularly those involved in criminal and family law matters who live in more remote areas, and whose English language skills may be limited. The Family Court has become aware that for many indigenous people English is a second language, and it has made significant efforts to train indigenous interpreters. However, a lack of funding by the Territory government is preventing their usage.

The Family Court has announced the appointment of two additional indigenous family consultants, this time in Northern Queensland. An Aboriginal and a Torres Strait Islander staff member have commenced work in the Cairns registry. As with their counterparts in Alice Springs and Darwin, the consultants will play an important role in liaising between their respective communities and the Court, and particularly with the counselling service.

The Family Court has recently endorsed a policy on 'Guidelines for Court Counsellors Regarding the Involvement of Children in Conciliation Counselling'.

The Guidelines explain that children may be seen in conciliation counselling in order to: provide them with information about the separation experience and an opportunity to ask questions and express themselves; allow counsellors to assess and respond to concerns about children's adjustment that may be related to parental separation or conflict; and allow Counsellors to gain an understanding of the child's

needs or wishes in order to assist the parents' decision-making or the formulation of an appropriate case plan for the family.

When counsellors are deciding whether to involve children in conciliation counselling they are required to consider the possible effects of exposing them to further family conflict; this needs to be weighed against the possibility that, if they are excluded, children may feel their views have not been heard and they have been denied relevant information and support. Counsellors are also required to consider children's age, stage of cognitive and emotional development, personality, and other situational factors which may apply in their family.

It is desirable that children are seen by counsellors within the context of a counselling relationship with the parent/s to ensure that there is a forum in which their particular expressed needs and difficulties can be addressed. Seeing children separately may isolate one member or group of family members, it focuses on family members with the least influence over adult relationships, and it prevents the counsellor being able to address in a holistic way the family difficulties of concern to the child.

Where it is of benefit to involve children in conciliation counselling, the Guidelines propose that a contract be drawn up with family members. This can be informal and should address the goals of including children, the parents' understanding of these goals, issues of confidentiality, appointment arrangements, and any other relevant matters.

The Guidelines state that it should be explained to the adults involved that the purpose of interviewing children is to gain a greater understanding of their wishes and needs, and to provide them with an opportunity to be heard. It should be made clear to all family members that the child is not expected to be responsible for decisions about with whom they will live and what contact they should have with the non-resident parent.

Counsellors should not involve children in the process without the knowledge and consent of their parents, except where children themselves seek counselling or where a Court has recommended their inclusion.

At the beginning of a session with a child, counsellors should discuss with them what information will be provided to their parents about the session, and the way this information will be given. While the counsellor can legitimately agree that certain concerns or feelings of the child are not conveyed to the parents, the implications of such an agreement need to be discussed with the child. The Guidelines caution counsellors to be careful not to give blanket guarantees of confidentiality which may then be compromised if the child makes an allegation of abuse.

Counsellors are also advised to ensure that children are never placed in a situation where they feel personally responsible for the decisions that need to be made by their parents about their future.

If a child expresses wishes, the counsellor is responsible for assessing these in the context of her or his age and cognitive and emotional development; dependency on one or other parent; the nature of the pre- and post-separation relationships between children and parents; the level of conflict in the family and the extent to which this is affecting what the child is saying; the extent to which a child may be blaming a parent; and the circumstances within which a preference is being expressed.

The Guidelines also include a discussion of children's needs, and how they may be helped to understand their reactions to the parental separation, the role of children's groups, and of post-decision counselling.

The Family Court now has its own web site which can be accessed via www.familycourt.gov.au

The Family Court's homepage contains recent reportable judgments, court forms, case management guidelines, practice directions, and the Melbourne and Sydney Court lists, with the lists of other registries to be added in the near future. It also contains links to other family law-related sites.

The site has apparently attracted a good deal of interest, recording approximately 6,000 'visits' in its first few months of operation.

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