

Families in Australia take many and varied forms – blended families, sole-parent families, families headed by same-sex couples, with children conceived from donor sperm ... How is the law responding to accommodate diversity in relationships and family structure?

## Relationship diversity and the law



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Rapid social change in the developed world, with higher divorce rates, fewer marriages, greater acceptance of same-sex relationships, and advancements in reproductive and gender assignment technology, has resulted in an increasingly diverse range of family forms existing outside the traditional nuclear family model.

In the Australian context, the law's response in redefining the construct of the "family" to accommodate relationships in all their diversity has been inconsistent in pace and approach, and lacking a coherent policy focus.

Over the last three years there has been an extraordinary degree of legislative activity at the state level, reforming the numerous laws in which the prescription of rights and responsibilities depends on the nature of one person's relationship with another. The end result is a complex and fragmented system of laws straddling numerous jurisdictions, the applicability of which can depend on one's sexual orientation, relationship and reproductive choices, and geographic location.

An analysis of all these laws is beyond the scope of this article. What follows then, is a broad overview of state and Commonwealth "family" law, in particular focusing on recent developments in laws relating to family relationship breakdown.

### Social trends

The 1970s and 1980s saw a significant increase in the incidence of cohabitation outside marriage, either as a conscious life choice or as a prelude to marriage. The percentage of heterosexual de facto couples as a proportion of all married and de facto couples was 6 per cent in 1986, increased to 8 per cent in 1991 and by 2001 had reached 12.4 per cent (ABS 2000, 2002). The 1996 census data of registered marital status by relationship indicates that roughly three per 1,000 of all couples describe themselves as same-sex couples, rising to five per 1,000 in 2001 (ABS 1998, 2002; *Fridae Magazine* 2002). However, estimates remain unreliable given that it is likely that some same-sex couples may be less willing than heterosexual couples to reveal their relationship status.

Together with the rising incidence of different and less formalised relationships is the apparent increase in social acceptance of non-traditional family groupings. Significant social acceptability of family formation outside the institution of marriage was evident from the results of the Australian Family Values Survey conducted by de Vaus in 1995 (de Vaus and Wolcott 1997) with 62 per cent of those interviewed feeling that it was acceptable for a man and a woman to live together outside wedlock. However, only 45 per cent felt that it was "all right to have children without being married".

The degree of social acceptance of same-sex unions and the raising of children within those households has yet to be tested by research in Australia. However, recent polls in the Netherlands, where same-sex marriage has been recognised since 1999, show a high level of support for homosexual marriage with 64 per cent of city residents approving of legal recognition of such unions (Hosek 1997).

### Historical background

The history of the development of family law in Australia has been covered in depth in previous *Family Matters* articles (Nicholson 2000; Fogarty 2001) and does not need to be repeated at length here. However, a brief outline of the constitutional issues at play is essential to understand the state/Commonwealth and state/state divide that exists today.

In summary, the Constitution vested in the Commonwealth the power to legislate in relation to families only where the parties were or had been married. Other laws impacting on families, including child protection laws, remained the domain of the states<sup>1</sup>. The most significant exercise of federal power in this area was the passing of

the Family Law Act in 1975. The impact of this legislation was far-reaching, establishing as it did a specialist federal court applying uniform and comprehensive laws governing areas including divorce, children, property and maintenance. The difficulty was that it did not apply to a growing number of families who did not conform to the model contemplated by the drafters of the Constitution at the end of the 19th century. Nor did it apply in Western Australia which was alone amongst the states in opting to establish its own family court system funded by the federal government.

Ten years into its operation, measures were taken to bring all children under the provisions of the Family Law Act. This required agreement from the states to refer their power to legislate on ex-nuptial children to the Commonwealth. By the late 1980s all states (except Western Australia) had done so. As a consequence, the provisions of Part VII of the Family Law Act apply to *all* children, regardless of their parents' marital status. Western Australia, the only state to retain jurisdiction over ex-nuptial children, passed legislation similar to provisions of the Commonwealth Family Law Act relating to residence and contact.

While de facto couples have access to the Family Court to resolve disputes in regard to their children,<sup>2</sup> they are still required to institute separate proceedings in a different jurisdiction to settle their financial affairs. Prior to the enactment of state de facto property legislation, disputing couples only had recourse to equitable remedies<sup>3</sup> such as constructive and resulting trusts and promissory estoppel (that is, acting on the promise of another and thereby suffering financial detriment), a notoriously fraught area of law viable only where the property in dispute warranted the high legal costs. From 1988, cross-vesting provisions allowed for de facto parties with children's matters before the Family Court to also have property issues determined in the same forum. This was the case for 11 years until the High Court decision of *Wakim; ex parte McNally* (1999) HCA 27 found the cross-vesting provisions to be unconstitutional.

Between 1984 and 1999 all states and territories except Western Australia passed legislation allowing for property adjustments and (in some cases) spousal maintenance for de facto couples. New South Wales took the lead in 1984 with the passage of the De Facto Relationships Act, and all other states followed suit with schemes which were largely modelled on that Act. However, until the passage of the Australian Capital Territory's Domestic Relationships Act in 1994, none of these legislative schemes was available to same-sex couples or people in other domestic relationships.

Amendments to legislation in the Australian Capital Territory (1994), Queensland and New South Wales (1999), Victoria (2001), and Western Australia (2002), bring to five the number of jurisdictions that include same-sex couples under laws regulating financial interests following separation. The Australian Capital Territory and New South Wales legislation has gone further in extending the operation of these laws to people in non-sexual or "domestic relationships" that involve some degree of personal commitment and domestic support<sup>4</sup>.

While moves to broaden the application of such laws have been applauded, doing so on a state by state basis only adds to the anomalous situation that exists nationally in the area of family law, with wide variation in the legal status of relationships from one border to another.

For example, same-sex spouses in long-term, marriage-like relationships in the Northern Territory can not apply for a judicial resolution under a statutory scheme of a financial dispute when their relationship breaks down. However, a person living in the Australian Capital Territory who provides domestic support for a friend, even while maintaining a separate residence, can use the same laws as heterosexual de facto couples to settle property in dispute and to seek financial support.

The unique position of Western Australia, unfettered by constitutional restraints, is a study in paradox. Amendments to the Family Court Act 1997 (WA), assented to on 25 September this year and due to come into operation in January 2003, include de facto couples under the jurisdiction of the state Family Court. In one fell swoop, Western Australia, long considered the aberrant state in the area of family law, will become the first jurisdiction to establish uniform laws applying to married, heterosexual and same-sex de facto couples regarding property disputes (with the exception of provisions for the "splitting" of superannuation entitlements), spousal maintenance, children's issues, financial agreements, and injunctive powers. These reforms, coupled with legislation passed on 20 September 2002 which amended a range of Acts containing a definition of spouse or kin to include same-sex relationships, have catapulted the state from being arguably the most discriminative jurisdiction in terms of sexual orientation to one of the most progressive.



## Current status of family law

The following provides a snapshot of family law as it currently applies in Australia. "Family law" in the context of this article has a broader definition than just matters arising under the Family Law Act and refers to laws relating to relationship formation and rights and duties following relationship dissolution.

### Marriage

Same-sex couples cannot enter legally recognised marriages in Australia as the Marriage Act 1961 (Commonwealth) defines marriage as a union between a man and a woman.

The Netherlands has recognised civil marriage for same-sex couples since 1999, and countries such as Denmark, Iceland, Norway and Sweden provide for registration of partnerships as a form of legal recognition. The United States has moved in the other direction, with 34 states and the US Congress passing legislation or making constitutional amendments to bar same-sex marriage.

### Children – residence/contact

As outlined above, the provisions of the Commonwealth Family Law Act relating to residence and contact of children apply to all children including adopted children and children who have been conceived by artificial insemination. However, they do not apply equally to those who may see themselves as parents (either in fact or in function) of these children.

Under s.60H of the Family Law Act, the consenting male partner (married or de facto) of a woman who undergoes an artificial conception procedure is deemed to be a parent of the child. But this presumption does not operate in the case of the lesbian partner of a woman who conceives a child in the same way. Nor can she achieve legal recognition as a parent of the child by adoption as the definition of step-parent in s.60D of the Family Law Act requires that parties who seek to adopt their partner's children are or have been married.

The exception to the above is Western Australia. The more inclusive definition of de facto, contained in the Acts Amendment (Lesbian and Gay Law Reform) Act 2002 (WA), brings the legal status of lesbian parents in line with heterosexual couples. That is, where women in a same-sex relationship agree to conceive a child by way of artificial insemination, both are automatically considered to be the legal parents of the child, and both can be listed on the child's birth certificate. Where a woman with a child enters a "marriage-like" relationship with another woman, her new partner can achieve legal recognition as a parent of the child through step-parent or carer adoption. The Australian Capital Territory government has recently announced plans to enact similar reforms (McLennan 2002).

The parental status of sperm donors in contact cases was first considered by the Family Court in the recent case of *Re Patrick* (2002) FLC 93-096. In that case a child was born to a lesbian couple following privately arranged artificial insemination with donor sperm. The donor subsequently sought to establish greater involvement in the child's life, which the mother and her partner opposed. The court held that the donor would only be deemed a parent for the purposes of s.60H(3) of the Family Law Act if the relevant state or territory law conferred that status on sperm donors. This was not the case for the applicant as, at the time of the decision, there was no such prescribed law in Australia. Nonetheless, given the man's commitment to the conception process and the relationship he had established with the child, an order for contact was made. This case had a tragic postscript when the biological mother took her child's life and her own, several months after the decision.

As this case illustrates, while neither the man who provides the genetic material for the conception of a child nor the non-biological lesbian mother who raises a child with her same-sex partner is legally a "parent" for the purposes of the Family Law Act, both have standing to apply to the Family Court for orders in relation to the child as "any other person" concerned with the welfare of the child. Nonetheless, the legal confusion surrounding the status of the various players in "unorthodox" conception procedures such as in Patrick's case, and in disputes arising from surrogacy arrangements, from mismatched eggs and sperm in IVF clinics, and from conception procedures undertaken post mortem or after separation, is something the courts will be grappling with for years to come.

In determining issues concerning children under the Family Law Act, regardless of the circumstances of their birth, the best interests of the child will always be the paramount consideration for the court. There have been no known cases that have viewed a parent's homosexuality as a presumption of unfitness in itself in determining residency of or contact with a child. In past cases, however, conditions were sometimes attached

prohibiting the display of affection between the parties in front of children. In line with the "best interest" principle, the real or anticipated discrimination faced by a child of gay or lesbian parents may be deemed a relevant factor in resolving a residence dispute.

### **Children – financial support**

The obligation to provide for children financially, either under the old court-based regime or via the Child Support Agency, applies to all "parents", including those who have never lived together. However, neither the Family Law Act nor the Child Support Assessment Act contains a comprehensive definition of "parent." What then is the obligation, in the case of a child conceived by artificial means, of the non-biological lesbian parent, and – the other factor in the equation – the sperm donor?

In the case of *Re B and J* (1996) FLC 92-716, a man who had donated his sperm to a lesbian couple who subsequently gave birth to two children, sought a declaration from the Family Court that he was not liable to pay child support. The court held that the donor was not considered a parent for the purposes of the Child Support Assessment Act even though his name appeared on the birth certificate and the insemination process was unlawful (that is, not conducted by way of the proscribed medical procedure). The later case of *Tobin v Tobin* 1999 150 FLR 185 confirmed that the class of people who are parents for the purposes of the Child Support Assessment Act is restricted to legal parents (that is, biological, adoptive or presumptive parents by virtue of conception procedures).

As a result, alternative methods have been sought to secure financial support from partners for children conceived in these circumstances. In the New South Wales case of *W v G* 1996 20 FLR 49 the biological mother of two children, conceived by way of artificial insemination of donor sperm, sought a settlement from her ex-partner. The lesbian couple had been together for a total of eight years. The co-parent, who agreed to having children, and participated in the insemination process, was not recognised as a parent under the Child Support Assessment Act and therefore not required to pay child support. In proceedings for a property settlement the plaintiff also claimed "equitable compensation" for the cost of raising the children, arguing promissory estoppel (as defined earlier) She was awarded \$150,000 "compensation" from her ex-partner's assets. It should be noted that since the 1999 reforms to the Property (Relationships) Act in New South Wales, the plaintiff in this case could apply for spousal maintenance, albeit limited in duration.

Heterosexual and same-sex de facto partners in all states except Western Australia cannot be held liable to provide financial support for step-children under s.66M of the Family Law Act as the section requires that the parties are or have been married. The recent amendments in Western Australia mean that lesbian parents have the same right as heterosexual parents to apply for child maintenance through the Family Court.

### **Adoption**

The general requirement for adoptions outside the child's extended family (that is, "stranger" adoption) is that the application be made jointly by a "husband and wife." In all states except Tasmania, Queensland and

the Northern Territory heterosexual de facto couples can adopt in limited circumstances. As of September 2002, Western Australia is the only state that allows for same-sex couples to adopt children, with the Australian Capital Territory recently expressing its intention to follow suit (McLennan 2002). Provisions in state legislation providing for “stranger” adoption by single people do not prevent lesbian women or gay men from applying to adopt a child.

When the amendments to the Family Court Act 1997 (WA) are proclaimed, Western Australia will be the first state to allow for those in same-sex relationships to adopt their partner’s children (that is, step-parent adoption), including children the couple agree to conceive by way of artificial means. In 1997 the New South Wales Law Reform Commission recommended that proposed amendments to the Adoption of Children Act NSW (1965) extend step-parent adoption to include same-sex relationships, but this recommendation was not implemented. Step-parent adoption is available to same-sex couples in some overseas countries, including Denmark, Iceland, Navarra (Spain), Norway and in some Canadian provinces.

### Property redistribution

The passage of the first laws relating to the division of property of de facto spouses in New South Wales in 1984, although largely modelled on the provisions of the Family Law Act, in no way purported to replicate the rights available to separating married couples. The 1983 report

of the New South Wales Law Reform Commission that highlighted the need for the legislation nevertheless reflected the mores of the time in expressly stating that less formal relationships should be accorded less value than marriage. In applying the new legislation, state judges reiterated this view and adopted a restrictive approach in its interpretation. Since the mid-1990s the *interpretation* of state legislation is now more in line with Family Court principles. However, differences continue to exist between the various state Acts and, in a number of significant regards, fewer opportunities to seek financial redress following separation are afforded to de facto couples than their married counterparts.

First, de facto parties must generally satisfy a number of threshold criteria including the length and nature of their relationship, the presence of children, the extent of their common residence, and the amount of time spent in the state. The threshold criteria under the Family Law Act are that the parties are or were married and that there is property in existence to be divided.

Second, some state laws relating to de facto parties are more limited in scope than those applying to parties that have been married. In allowing for the future needs of the parties to be taken into account, the provisions of the Family Law Act give the judge a greater ability to protect the interests of the more financially vulnerable party. While state law also allows for recognition of the contributions made as homemaker, the degree to which this is valued can to a certain degree depend on the approach of the individual judge, and in four states

**Table 1 State and territory law relating to de facto property and maintenance**

	Kinds of relationships covered			Property adjustment		Provision for:	
	Heterosexual De facto	Same-sex de facto	Other Relationships	Past contributions	Future needs	Enforceable cohabitation agreements	Spousal Maintenance
<b>ACT</b> <i>Domestic Relationships Act 1994</i>	“Domestic relationships”- de facto marriages (irrespective of gender) and non-sexual relationships involving personal or financial commitment and domestic support. No requirement that parties live/d together.			✓	✓	✓	In limited circumstances
<b>NSW</b> <i>Property (Relationships) Act 1984</i>	“Domestic relationships”- de facto relationships (irrespective of gender) and “close personal relationships” involving cohabitation, domestic support and personal care.			✓	✗	✓	In limited circumstances
<b>NT</b> <i>De Facto Relationships Act 1991</i>	Heterosexual de facto relationships (live/d together on a bona fide domestic basis)	✗	✗	✓	✗	✓	In limited circumstances
<b>QLD</b> <i>Property Law Act 1974</i>	De facto relationship (live/d together as a couple) irrespective of gender.			✓	✓	✓	✗
<b>SA</b> <i>De Facto Relationships Act 1996</i>	Heterosexual de facto relationships (live/d together on a genuine domestic basis)	✗	✗	✓	✗	✓	✗
<b>TAS</b> <i>De Facto Relationships Act 1999</i>	Heterosexual de facto relationships (live/d together on a genuine domestic basis)	✗	✗	✓	✓	✓	In limited circumstances
<b>VIC</b> <i>Property Law Act 1958</i>	“Domestic relationships” includes de facto relationships (live/d together) irrespective of gender.			✓	✗	Court may “have regard to” written agreements	✗
<b>WA</b> <i>Family Court Act 1997</i>	Amendments to the Family Court Act which come into effect in early 2003 will mean that provisions relating to property, maintenance and financial agreements applying to married couples will now apply to de facto couples, including same-sex couples (but not other domestic relationships.)						

the future needs of the parties are not specifically required to be taken into account.

In relation to the enforceability of “pre-cohabitation” agreements, state laws are in accord with the 2000 amendments to the Family Law Act, which allow for couples intending to marry to enter into legally binding pre-nuptial agreements. The increased prevalence of such agreements may reflect the changing nature of the family with partners in blended families in particular intending to keep assets acquired prior to the relationship separate, primarily to protect the interests of children from a previous relationship.

Until the recent amendments in Victoria, legislation in that state only allowed for the adjustment of interests in real property, leaving sometimes substantial assets – such as superannuation – out of the picture. The treatment of superannuation entitlements, which are in effect future interests rather than “property,” causes state judges as much difficulty as Family Court judges. However, amendments to the Family Law Act scheduled to come into operation in December 2002 will give the Family Court far greater powers to split the superannuation entitlements of married couples. The same powers will not be available to state judges in adjusting the property interests of *de facto* couples.

In addition to the differences in the substantive law, separating couples who have been married benefit from having access to a specialist court with excellent dispute resolution services, case management practices and established case law.

The accompanying Table 1 provides an overview of the variations between the states.



### *Spousal maintenance*

Where parties are or have been married, the Family Law Act makes provision for financial support via spousal maintenance. The primary determinants in making an order for maintenance where parties have been married is the extent of one party's need and the other party's ability to pay. State law, with the exception of Queensland, South Australia and Victoria also allows for *de facto* spouses to be awarded maintenance in very limited circumstances. In New South Wales this is restricted to spouses who have the care and control of a child of the relationship who is under the age of 12 at the time of the application (or age 16 if the child has a disability). An application for maintenance under the Australian Capital Territory legislation does not require cohabitation as a prerequisite.<sup>5</sup> Western Australian *de facto* couples, including same-sex couples, will soon have recourse to the more generous provisions relating to spousal maintenance available to married couples.

As discussed earlier, biological mothers of children conceived in same-sex relationships cannot seek maintenance for the child under the Child Support Scheme. Indirect means to secure financial support for the child from their ex-partners – that is, by way of an award of spousal maintenance under state Acts – is only available in three of the eight jurisdictions, and are limited in scope in the rest.

Women who have a child to a man in the “old fashioned way” can apply for limited maintenance and the expenses related to childbirth under s. 67B of the Family Law Act. Western Australia will soon become the only state that also allows for women who conceive a child with their lesbian partner by way of artificial means to claim such expenses from their estranged partner.

### *Other laws*

There is a plethora of other legislative provisions in which people's marital status and sexual orientation affect their rights and responsibilities.

These include: criminal law governing sexual behaviour between consenting adults; protection from vilification on the basis of sexual orientation; age of consent; access to reproductive technology; the legal status of people who undergo gender assignment procedures; spousal immunity from giving evidence; superannuation benefits; intestacy; rights in coronial investigations; leave and other entitlements; medical decisions; accident and crimes compensation; tort claims; tax benefits; and exemption from payment of stamp duty.

The Victorian Statute Law Amendment (Relationships) Act 2001 amended more than 40 Acts to recognise the rights and obligations of partners in domestic relationships, irrespective of their gender. Legislative overhauls of varying degrees have also occurred in New South Wales and Western Australia. Up to 70 Acts and regulations in the Australian Capital Territory have been identified as containing potentially discriminatory provisions and the first of a two-phase amendment process to replace references to “spouse” with the new definition of “domestic partner” will be introduced in the autumn sittings (McLennan 2002). However, the application of a number of Commonwealth laws, in areas such as taxation, marriage, superannuation and social security, continue to apply to heterosexual couples only.

Some argue that, aside from moral reasons, it is essential that the remaining jurisdictions, including the Commonwealth, follow suit in adopting a more inclusive definition of “*de facto*”. Exclusion from the operation of particular laws is seen as discrimination by omission, which puts Australia in breach of its international human rights obligations – in particular, the provisions of two treaties to which Australia is a signatory (the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights). Recourse under state and Commonwealth anti-discrimination legislation is one way to lobby for change in the law but has largely proved inadequate to achieve redress in individual cases of discrimination.

### *Further reforms*

Notwithstanding the recent developments in some states, there still remains a lot to be done to remove the anomalies that exist between the legal status of married and non-married couples, between *de facto* parties living in different parts of the country, and between heterosexual and homosexual couples.

Policy considerations concerning the need to protect the institution of marriage have been substantially superseded by new concerns. These include the argument that wholesale regulation of all relationships robs people of the ability to make conscious life choices in the kinds of relationships they form. This is especially true in the gay and

lesbian community where issues of privacy and perceived independence from the mainstream are important.

If uniformity of laws is the goal, one way of achieving it is to follow the Western Australian example and include all relationships under the Family Law Act. This would require either a Constitutional amendment to broaden the Commonwealth's powers to legislate over non-marriage relationships, or a reference of powers from the states to do so. The Federal Attorney-General is keen to pursue the latter course. At a meeting of the Standing Committee of Attorney-Generals in July this year all state and territory Attorneys-General indicated their support for a referral of power to enable uniform family laws for de facto couples, on the condition that same-sex partnerships be included. The rejection of this condition indicates that such a proposal is not acceptable to the current Federal Government.

If the state-based system is retained, what model should be adopted by all states? Should these laws aim to mirror the provisions of the Family Law Act? Should the requirement for cohabitation be maintained in the definition of de facto? Should there be wholesale application of all legislative provisions to different kinds of relationships? Or should Australia consider implementing a relationship registration system to allow for formal recognition of unmarried couples? Such questions indicate that future reform should proceed from a considered and coherent policy basis.

Intimate human relationships are, for most of us, the vehicles in which we navigate the sometimes difficult terrain of life. As the structures within which personal meaning is sought, children are raised, and resources are pooled, they form the very foundation of society. The degree to which the legal system of any given society fosters the formation of relationships, supports people at the time of relationship breakdown, and extends civil, social and economic rights to individuals without discrimination, provides a window into its core values and is a test of its commitment to democratic principles. The degree to which this is possible is the challenge.

## Notes

1. Note, however, that the Family Court has the power under s.67ZC of the Family Law Act to make orders regarding the welfare of a child. This power is generally exercised in decisions concerning medical procedures. For a discussion of the jurisdictional overlap in this area, see Kelly and Felhberg (2002).
2. As at 2000, of all applications to the Family Court for parenting orders, 38 per cent involved ex nuptial children (Nicholson 2000: 25).
3. These common law remedies are still available where threshold issues under statutory regimes cannot be satisfied or by same-sex couples in states with a narrow definition of de facto relationship. It has been the only recourse available to heterosexual de facto couples in Western Australia until amendments past on 25 September 2002 come into effect.
4. In the Australian Capital Territory there is no requirement that the parties even lived together.
5. This theoretically means that a "mistress" could claim spousal support from her married lover. A recent Canadian case may lead to clandestine lovers being recognised as common-law spouses for the purposes of claiming spousal maintenance. In that case, a woman who had an affair with a married man for more than 20 years was granted leave to appeal the decision striking out her claim for spousal support. Unbeknown to his wife, the man had paid child support for a child born of the relationship (Schmitz 2002).

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