

# Round-up of developments in family law

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## Restructure of federal family courts announced

The Australian Government has announced the acceptance of the recommendations of the 2008 report *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance*, a review into the structure and coordination of the federal family courts. The report, also known as the Semple report, concluded that the two-tier system consisting of the Family Court of Australia and the Federal Magistrates Court creates unnecessary complexity, confusion and competition for resources and is not financially sustainable in the long term. While recommending that the two courts merge, the report stressed the need to preserve the “service culture” of the Federal Magistrates Court (i.e., their ability to deal with a large volume of less complex cases in an efficient and timely manner).

Six months after the release of the report, the government has announced that, as recommended, the Family Division of the Federal Magistrates Court will merge with the Family Court of Australia into a single Federal Family Court, with two divisions. Similarly, the general division of the Federal Magistrates Court (which deals with non-family law matters) will merge with a restructured Federal Court, also consisting of two divisions.

In relation to family law matters, the first tier of the Federal Family Court, staffed by existing Family Court judges, will hear appeals and more complex matters, while the bulk of matters will be handled by former Federal Magistrates (re-named “judges”) in the second tier.

The restructure is expected to produce anticipated savings of \$7.8 million over four years. In the interim, a joint management board of executives from both courts has been established to ensure that current resources are used as effectively as possible.

For a copy of the report, go to: <<http://tinyurl.com/6rbvlr>>.

## Greater judicial powers for decisions about children at risk?

There has been some discussion in the media about mooted changes to the *Family Law Act 1975*, that allow judges greater options in relation to the placement of children considered at risk of harm (Nader, 2008). The Chief Justice of the Family Court, Diana Bryant, has indicated that serious consideration should be given to extending judicial powers to allow orders to be made, in appropriate cases,

for children to be placed in state care. At present, judges are unable for constitutional reasons to make an order that a child be taken into care by a state authority. As such, they are sometimes faced with the situation where both parents are effectively dysfunctional and arrangements are made for the child to reside with the parent deemed to be the “least worst option”. The vision of a more unified family law and child protection system has long been championed by the former Chief Justice of the Family Court, Alastair Nicholson.

The involvement of grandparents and other family members in the lives of children who are the subject of contested proceedings has the potential of providing alternative options when deciding issues of residence and contact. In January 2009, the Federal Attorney-General announced measures to assist grandparents to maintain positive involvement with their grandchildren following parental separation (Attorney-General of Australia, 2009). These will include a review of the ways in which Family Relationship Centres (FRCs) and a range of other post-separation services can promote the role of grandparents in children’s lives and is in addition to funding provided to Legal Aid Commissions in 2008 to help facilitate the involvement of grandparents and other family members in disputes over children, where appropriate.

The Australian Institute of Family Studies has also been commissioned to conduct a study on the impact of the 2006 family law reforms on grandparents. For more information about the AIFS study, go to: <[www.aifs.gov.au/familylawevaluation/grandparents](http://www.aifs.gov.au/familylawevaluation/grandparents)>.

## Financial impact of child support formula changes

An Australian Government study on the financial impact of changes to the child support formula was released in August 2008. The findings were based on the child support liability as assessed (but not necessarily paid) under the new formula in a total of 691,000 cases, and modelling of the amount of Family Tax Benefits (FTB) that would be payable on these assessments. The results indicate a reduction in the total amount of child support as assessed to be transferred between parents and an increase in FTB payable. Thirty-seven per cent of payees and 51% of payers were found to have net increases as a result of the reforms (i.e., they received more overall) and around 49% of payees and 33% of payers had net reductions (i.e., they received less overall). The magnitude of the loss or gain was \$20 per week or less in the majority of cases and less than \$10 per week in a large proportion of cases.

The level of child support and FTB payable to around 13% of payees and 16% of payers remains unchanged by the reforms.

A copy of the report on the population impact of the new child support formula is available at: <[www.fahcsia.gov.au/sa/childsupport/pubs/PopulationImpact/Documents/child\\_support\\_scheme\\_stage3\\_report.pdf](http://www.fahcsia.gov.au/sa/childsupport/pubs/PopulationImpact/Documents/child_support_scheme_stage3_report.pdf)>.

### New accreditation and registration requirements for family dispute resolution practitioners

From 1 July 2009, all family dispute resolution (FDR) practitioners (including those authorised to provide FDR services on behalf of a registered family dispute resolution organisation) who are seeking new or continued registration with the national Family Dispute Resolution Register must meet the new accreditation standards, as set out in the Family Law (Family Dispute Resolution Practitioner) Regulations 2008. The register is maintained by the Federal Attorney-General's Department.

Subsidised assessments and training will be provided to all practitioners included in the register at 28 February 2009 by the Australian Family Dispute Resolution Training Group. Under the new scheme, all practitioners must demonstrate competency in three key areas, namely:

- responding to family and domestic violence;
- creating an environment that supports the safety of vulnerable parties in dispute resolution; and
- operating in a family law environment.

Practitioners will be unable to issue section 60I certificates until they have met these competency standards. For more information on the accreditation scheme, go to: <[www.ag.gov.au/www/agd/agd.nsf/Page/Families\\_FamilyRelationshipServicesOverviewofPrograms\\_ResearchandEvaluation\\_ForPotentialFamilyDisputeResolutionPractitioners](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ResearchandEvaluation_ForPotentialFamilyDisputeResolutionPractitioners)>.

For more information regarding the training process, go to: <[www.fdrtraining.edu.au](http://www.fdrtraining.edu.au)>.

In addition, draft guidelines on the working relationship between Family Relationship Centres and Legal Aid Commissions are being prepared by National Legal Aid.

### Referral of conflictual Child Support Agency clients to FRCs

Under a recently announced federal scheme, Child Support Agency clients who are in dispute over the care arrangements for their children will be referred to Family Relationship Centres for assistance in reaching agreement. Each month, approximately 700 child support decisions on

the care of children are considered problematical, as parents are unable to reach agreement (Minister for Human Services, 2009).

### Movement towards a national approach on surrogacy

The release of a discussion paper in January 2009—by a joint working group consisting of the Standing Committee of Attorneys-General (or SCAG) and ministerial councils for Community Services and Health—has paved the way for further consideration of a national approach to surrogacy. The paper, *A Proposal for a National Model to Harmonise Regulation of Surrogacy*, marks the beginning of a period of public consultation on a range of proposals that may make it easier for heterosexual and same-sex couples to have children via surrogacy. These include the ability of couples using surrogacy to be registered as parents, and making provision for the medical costs of the surrogate mother (while continuing to outlaw commercial surrogacy).

The discussion paper can be obtained from <[www.scag.gov.au/lawlink/SCAG/11\\_scag.nsf/vwFiles/Surrogacy\\_consultation\\_paper\\_FINAL.doc/\\$file/Surrogacy\\_consultation\\_paper\\_FINAL.doc](http://www.scag.gov.au/lawlink/SCAG/11_scag.nsf/vwFiles/Surrogacy_consultation_paper_FINAL.doc/$file/Surrogacy_consultation_paper_FINAL.doc)>; however, the deadline for submissions has passed.

### Developments in same-sex relationships legislation

#### Federal

Four significant pieces of federal legislation affecting same-sex couples were assented to in late 2008. The most significant of these, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*, which brought all de facto couples,<sup>1</sup> regardless of their gender mix, under the umbrella of federal laws relating to spousal maintenance and property settlement (including superannuation splitting), came into operation (in their entirety) on 1 March 2009.

A de facto relationship is defined as one where two people of any gender combination who are not legally married or related by family are living as a couple on a genuine domestic basis. The factors that may be considered in determining whether a de facto relationship exists (or existed) are listed at s 4AA of the *Family Law Act 1975*, as amended by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*. The laws apply to couples who separated after the first of March 2009. See a previous Family Law Update (Caruana, 2008) for a more detailed discussion of this legislation.

Two other pieces of legislation, the *Same Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* and the *Same Sex Relationships*

(*Equal Treatment in Commonwealth Laws—General Law Reform*) Act 2008, were assented to in December 2008. These Acts have the effect of removing discrimination against same-sex couples that currently exists in a myriad of areas governed by federal laws. The majority of the changes to the 84 Commonwealth laws effected by this legislation will take effect on 1 July 2009 (unless otherwise indicated). These include:

- social security and family assistance: recognition of same-sex relationships and the children arising from them to provide the same access to social security and family assistance payments as heterosexual couples;
- child support: changes to the child support legislation to enable same-sex parents who separate to apply for child support;
- taxation: same-sex couples to receive the same relationship-dependent tax concessions as married couples;
- superannuation: partners and children from same-sex relationships to be eligible for reversionary or death benefits under private and Commonwealth superannuation schemes;
- medical safety nets: same-sex partners and their dependent children are, as of 1 January 2009, recognised as a family for the purposes of the Medicare and Pharmaceuticals Benefits safety nets;
- immigration: same-sex couples and their children will be considered members of a family unit for visa purposes;
- citizenship: children of same-sex and opposite-sex couples who are the product of artificial conception procedures or approved surrogacy arrangements to be recognised in relation to citizenship—this came into effect 15 March 2009;
- aged care: same-sex couples will be treated the same as opposite-sex couples under the aged care income and assets test; and
- veterans affairs: same-sex couples will no longer be excluded from entitlements in relation to assistance to buy a home, access to pensions and death benefits (Attorney-General's Department, 2009).

Also assented to in December 2008, the *Evidence Amendment Act 2008* amends the *Evidence Act 1995* (Cth) by replacing the term “de facto spouse” with “de facto partner” to allow same-sex couples the same immunity from being compelled to give evidence against their partner in criminal matters.

### State

Other developments around the country affecting same-sex couples include the following:

- Victoria has joined Tasmania and the ACT (*Relationships Act 2003* (Tas) and *Civil Partnerships*

*Act 2008* (ACT)) in the establishment of a relationship register under the *Relationships Act 2008* (Vic.).

Registration with the Registrar of Births, Deaths and Marriages removes the requirement to provide proof of the relationship for the purposes of a number of Victorian and Commonwealth laws. The Act also broadened the scope of provisions relating to financial settlement following separation for heterosexual and same-sex de facto couples. However, these provisions have been largely eclipsed by the introduction of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* outlined above.

- A Bill currently before the Victorian Parliament opens the way for single women and women in same-sex relationships to access assisted reproductive treatment. The Assisted Reproductive Treatment Bill 2008 (Vic.) will come into effect on proclamation, which is anticipated to be no later than 1 January 2010.

## New certificate to allow exemption from mandated family dispute resolution

From 3 March 2009, family dispute resolution practitioners have additional grounds on which to issue a certificate exempting a party from being required to participate in mediation. Amendments to the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth) now allow for certificates to be issued where the FDR practitioner becomes aware during the course of the family dispute resolution that it would be inappropriate to continue given factors already contained in regulation 25(2), such as the presence of violence, concerns about safety, power balances, risk to the child of abuse and the physical and/or psychological health of the parties.

### Endnotes

- 1 Except those ordinarily resident in the only non-referring states, South Australia and Western Australia. Same-sex couples resident in Western Australia, however, have had access to the state family court since 2003.

### References

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