




Gay & Lesbian Rights

OVERVIEW OF PROPERTY (RELATIONSHIPS) LEGISLATION AMENDMENT ACT 1999

This paper provides an overview of the legal effect of the changes to some 25 pieces of NSW legislation made by the *Property (Relationships) Legislation Amendment Act 1999* which was passed by the NSW Parliament on 1 June 1999 and commenced on 28 June 1999. More concise information is available on the Lobby's fact sheet on the Act.

SUMMARY

The Act introduces two key changes in NSW law.

Firstly, same sex cohabiting couples are included in the definition of "de facto relationships" in various acts - extending the rights already enjoyed by heterosexual de factos to same sex couples.

Secondly, "domestic relationships" are included in a few areas, to provide access to legal redress for some people who have a close relationship that may not be 'couple-like'.

Most of the changes took effect on 28 June 1999. Relationships which ended before that time are not covered and come under the old law. Changes to the *Wills, Probate and Administration Act* were not in force at the time of writing.

WHO IS INCLUDED?

De Facto Relationships

De facto relationship is redefined as "the relationship between two adult persons who live together as a couple" and are not married or related by family.

The key requirements, therefore, are the need to co-habit and the need to live "as a couple". In most cases, couples will have to live together for a 2-year period although this varies depending on the act and the right which is involved. To decide who is in a

de facto relationship (or living “as a couple”) all the circumstances are to be taken into account.

In particular regard will be had to the following:

- (a) The duration of the relationship;
- (b) The nature and extent of common residence;
- (c) Whether or not a sexual relationship exists;
- (d) The degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- (e) The ownership, use and acquisition of property;
- (f) The degree of mutual commitment to a shared life; the care and support of children;
- (g) The performance of household duties; and
- (h) The reputation and public aspects of the relationship.

None of these individual factors are essential. For example, many couples will not have children but this will not preclude them from accessing rights and protections. Similarly factors which are not on the list can be considered. However, it does provide guidance on the sorts of matters that courts will regularly look at.

Most key areas affecting couples such as inheritance; property division; stamp duty; decision-making in illness and compensation have been covered. However, as outlined below, there are some important omissions.

Domestic Relationships

Domestic relationships are defined to include:

1. de facto relationships (as defined above); and

2. close personal relationships (other than a marriage or a de facto relationship) “between two adult persons, whether or not related by family, who are living together, one or each of which provides the other with domestic support and personal care”.

There are thus 3 main elements to the second (carer) type of domestic relationship. It is between 2 people who have:

1. a close personal relationship;
2. live together; and
3. one provides the other with domestic support and personal care

The second part of this definition is clearly intended to mainly (if not exclusively) cover carers. Examples are a son or daughter caring for an elderly parent. It is not intended to cover flatmates or paid carers.

Domestic relationships will be covered in the areas of property division; concessions from stamp duty where the two people own property together; bail and family provisions claims where one person dies.

WHAT RIGHTS HAVE BEEN CHANGED?

The following acts have been changed so as to include same sex couples and, in some cases, carers.

With the exception of the amendments relating to the *Wills, Probate and Administration Act* 1898, all changes commenced on 28 June 1999. They do not apply to relationships that terminated before that date¹.

Property division on relationship breakdown

1. *De Facto Relationships Act* 1984; *District Court Act* 1973 – amended so as to provide access to a property division regime on relationship breakdown for people in domestic relationships (de factos and carers) who have lived together for 2 years or

¹ 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 which are on foot.

have a child together. It also allows a claim for child maintenance where both parties to a domestic relationship have taken parental responsibility for a child's welfare. In line with the change, the *De Facto Relationships Act* has been renamed the *Property (Relationships) Act*. Provisions for those wishing to opt out now apply to domestic relationships.

2. *Duties Act 1997* - amended to extend duty concessions to same sex de facto partners and others in domestic relationships sharing property who transfer property at the end of a relationship in accordance with an order of the court or a separation agreement (section 68).

Provide for or protect a partner on death or injury

1. *Wills, Probate and Administration Act 1898* - amended to extend rights relating to the distribution of intestate estates to same sex de factos (section 61B). They will usually inherit if have lived with the deceased continuously for 2 years before their partner's death or the couple had a child together. They will inherit in any case if there is no other spouse and no issue. Where they had not co-habited for 2 years or had a child, a surviving wife or husband and other children take precedence². The amendments were not in effect at the time of writing but are expected to commence in September.
2. *Family Provision Act 1982* – amended to extend the class of eligible claimants to include same sex partners, other parties to domestic relationships and children of domestic relationships. There is no qualifying period of co-habitation.
3. *Compensation to Relatives Act 1897, Law Reform (Miscellaneous Provisions) Act 1944, Motor Accidents Act 1988*³ – amended to allow same sex partners to sue in negligence for the wrongful death of a partner, and make claims for nervous shock and psychological injury on the same basis as heterosexual partners. There is no qualifying period of co-habitation.
4. *Insurance Act 1902* – amendments exempt insurance proceeds left to de facto partners (heterosexual and homosexual) of 2 years duration from the estate. The proceeds do not form part of the estate.

² These provisions continue to be complicated and rather convoluted. Legal practitioners will need to work through section 61B and other provisions carefully in each case.

³ Children are included, as before, in the *Compensation to Relatives Act 1897* and *Law Reform (Miscellaneous Provisions) Act 1944* where the injured/deceased stands in loco parentis to them. Children of co-parents do not appear to have any rights under the *Motor Accidents Act 1988*.

Decisionmaking in incapacity and after death

1. *Guardianship Act 1987* – amendments include a same sex partner as someone who can make medical decisions in case of incapacity on the same basis as heterosexual partners. There is no qualifying period of co-habitation.
2. *Anatomy Act 1977, Human Tissue Act 1983, Coroner's Act 1980* – amendments include a same sex partner as next of kin who may lodge objections to anatomical examination or donation of the bodies of deceased person, request an inquest and make representations at an inquest. Children of domestic relationships also have rights under the *Coroner's Act*. There is no qualifying period of co-habitation.
3. *Mental Health Act 1990* – amendments include a same sex partner as someone who must be contacted or consulted regarding a patient. There is no qualifying period of co-habitation.
4. *Protected Estates Act 1983* - deals with management of the affairs and property of persons incapable of managing their own affairs. Section 28 deals with the ways in which the Protective Commissioner may apply monies of the protected person (eg towards his/her maintenance, clothing, payment of debts) and includes provision to make payments from the estate of a protected person to a spouse (or child or other person who is dependent). The amendments ensure a same sex de facto who has lived with the protected person for 2 years can be provided for.

Miscellaneous

1. *Bail Act 1978* – amended so that interest and protection of a same sex de facto and others in a domestic relationship is considered when a person in custody applies for bail. Relatives of the other party to a domestic relationship are also protected. There is no qualifying period of co-habitation.
2. *Duties Act 1997* - amendments extend duty concessions to same sex partners sharing property who extend title. Thus, transfer of property which is the couple's residence from one partner to both is exempt from duty (section 67). The couple must have lived together for 2 years.

3. *Trustee Act 1925* - amendments relate to protective trusts, which could previously have been made for the benefit of a wife/husband, children or remote issue of the principal beneficiary. They ensure they can be made for de factos (both heterosexual and homosexual) who have lived together for 2 years and children of the parties to a domestic relationship
4. *Criminal Assets Recovery Act 1990* – amendments ensure that hardship to a dependant, including a same sex partner, may be considered in a court's decision to make (or decline to make) a forfeiture order. There is no qualifying period of co-habitation.

Other rights which may be affected

A number of acts that have not been specifically included contain terms such as "member of family" or "de facto". Undefined terms will probably (almost certainly in the case of 'de facto') now include gays and lesbians as a matter of statutory interpretation. This legislative presumption is strengthened by the fact that in some cases the Act specifically preserves the status quo by changing back definitions made by reference to the definition contained in the old *De Facto Relationships Act* - it re-redefines de facto to include only heterosexual couples. This strengthens the presumption that same sex couples were intended to be included where such a re-definition was not done.

Acts which include undefined terms which should now be treated inclusively include the *Police Service Act 1990*; *Liquor Act 1982*; and *Local Courts (Civil Claims) Act 1970*.

WHAT REMAINS TO BE DONE?

Some acts have not been changed and there is now a major inconsistency in the approach to defining de facto couples taken in different pieces of legislation in NSW. Acts which have not yet been changed are still being considered by the Social Issues Committee of the Upper House which is due to report later this year. In addition, there are some areas in which the approach taken in the Act differ from that taken in the Bill that the Lobby drafted for the Democrats and may not completely meet the needs of the lesbian and gay community.

The following refer to NSW acts only. Federal legislation has not been changed and continues to discriminate but this is beyond the scope of this paper.

1. Omission of *Anti-Discrimination Act*. The definition of marital status in this act is not addressed in this Act but has been left for the Social Issues Committee to address. This is quite an important omission and means that employment related discrimination has not been addressed. The fact that homosexuality is a ground for a complaint under the *Anti-Discrimination Act* is not sufficient to protect same sex couples on current case law. Although it is possible that if a test case was run the outcome might be different the simplest solution is to include same sex couples (and probably rename it relationship status).
2. Definition of 'domestic relationship'. The definition is quite different from the one we advanced which was a relationship between two persons where there was emotional and financial interdependence. They did not have to live together and it was able to capture couples who were close but did not live together. Additionally and in some areas such as inheritance would have brought in those who had not lived together for 2 years. It would have been capable of including carers but not confined to them.

It also more clearly differentiates relationships which ought to be and are recognised from those that are not recognised making it easier to tell, for example, when someone is a flatmate and when s/he is a party to a domestic relationship.

3. A few other beneficial acts have been omitted including some others relating to employment. [More detail of individual acts which have been left out below].
4. Domestic relationships are not recognised at this stage in as many acts as we proposed. Most importantly, those in a domestic relationship that does not fall within another category will not have rights to automatic inheritance if the other person dies without a will. In the case of carers they will now be able to make a family provisions claim. In combination with the flawed definition of domestic relationship this leaves those in close personal relationship who do not satisfy the definition of de facto with no rights to automatic inheritance. This includes couples who have not lived together for 2 years (and probably those who are living apart for a period of time). Those most in need – those with financial dependence – will not necessarily be included (they will be able to make a family provisions claim in some but not all cases).
5. The many acts that confer obligations such as disclosure of the interests of a partner have been omitted. In the case of 7 acts which previously defined de facto by reference to the *De Facto Relationships Act*, the definition has been changed back ie it is redefined to ensure it includes only heterosexual de factos. On the whole

inclusion in these acts would not be beneficial to lesbians and gay men. As mentioned above, this strengthens the legislative presumption that we are intended to be included where this re-defining was not done. They may have been left out due to concern that it would lead to gay men and lesbians having to 'out' themselves if they served on statutory bodies, for example.

Beneficial Acts Which Have Been Omitted

These are in a very rough order of importance.

1. *Anti-Discrimination Act 1977*: would include discrimination against a same sex couple in certain circumstances as marital status discrimination. This would probably be re-expressed as relationship status and would prevent discrimination in employment and other areas based on having a same sex partner.
2. *Electricity (Pacific Power) Act 1950, Public Sector Management Act 1988, Sydney Cove Redevelopment Authority Act 1968, Teaching Services Act 1980, Transport Administration Act 1988, Waste Recycling and Processing Service Act 1970*: would extend right to inherit unpaid balance of a deceased spouse's unpaid long service leave. These acts all use the terms widow/er which would be unlikely to be changed by the new Act even where they are not defined. However, some also allow payment to a dependant relative and gays and lesbians may be included as dependant relatives.
3. *Police Service Act 1990, Sporting Injuries Insurance Act 1978*: would extend provision of death or injury benefits paid to employees or insured's partner. [Note that other worker's compensation has been amended separately.] The *Police Service Act* may be consequential as spouse is said to include de factos and de facto is undefined.
4. *Industrial Relations Act 1996*: would extend unpaid leave to non-biological parent of a child born to or adopted by a lesbian or gay man.
5. *Landlord and Tenant Act 1899, Retirement Villages Act 1989*: would extend a lease to a remaining partner if a tenant quits residential premises and to a partner who is resident in a retirement home: eg section 15 *Retirement Villages Act* gives a resident (which includes a de facto partner of the person with a residential contract) the right

of occupation) except in specified circumstances. The *Retirement Villages Act* is one of those that have been changed back to heterosexual.

6. *Health Insurance Levies Act* 1982: would give partners with children access to the family rate of contribution ie a single person contributes the prescribed rate and family contributes double the prescribed rate.
7. *Liquor Act* 1982: would allow a partner to carry on business for one month after death of licensee (s63) (or apply for license when s/he is disqualified (s69)) as can other members of the family and others. May be consequential.
8. *Local Courts (Civil Claims) Act* 1970: would extend to a partner the right to appear before a Local Court ie a person may appear in person, by solicitor or barrister or by a spouse or employee (the later 2 only if authorised in writing) (s11). [Not confined to circumstances of incapacity]. May be consequential.
9. *Adoption Information Act* 1990: to provide a partner with access to adoption records after the death of an adopted person or birth parent [does not give a 'right' to information as such but states that Director-General may give relatives (broadly defined and including de factos) information]. Not necessarily beneficial.

Where to from here?

The Social Issues Committee will report towards the end of the year and is expected to recommend that the remaining areas be reformed. However, this depends on it receiving supplementary submissions from people indicating they feel there is still more to be done. And favourable recommendations would have to be followed by further lobbying to ensure they were acted upon.

New legislation which comes before Parliament is now expected to be drafted in an inclusive manner. The Attorney General has indicated this is his intention and as the amendments are so broad, a critical mass has probably been reached to ensure this happens anyway. This is because drafters use standard definitions and refer to existing legislation. Similarly, it is likely that as other acts are reviewed and amended, definitions will become inclusive.