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H. Minns*



Justice

Statutory Review

*Relationships Register Act 2010
(NSW)*

June 2018

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Statutory Review of the *Relationships Register Act 2010 (NSW)*

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Glossary

BDM – Registry of Births, Deaths and Marriages

Board – Anti-Discrimination Board of New South Wales

Law Society – Law Society of New South Wales

Relationships Register Act or Act – *Relationships Register Act 2010 (NSW)*

Executive Summary

- 0.1 The *Relationships Register Act 2010* (NSW) (**Relationships Register Act**, or **Act**) enables two adults in a relationship as a couple, regardless of their sex, to register their relationship with the Registry of Births, Deaths and Marriages (**BDM**).
- 0.2 The Department of Justice has reviewed the Relationships Register Act on behalf of the Attorney General in accordance with section 21 of the Act. The review considered whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives. The policy objective of the Act is to provide for the legal recognition of persons in a relationship as a couple, regardless of their sex, by registration of the relationship.
- 0.3 The Review considered seven submissions on the Relationships Register Act from interested individuals and organisations, as well as information and statistics provided by the BDM.
- 0.4 After considering all submissions and evidence carefully, the Review has concluded the policy objectives of the Act remain valid.
- 0.5 The Review has also concluded that the terms of the Relationships Register Act generally remain appropriate, but has made one recommendation to improve the Act's operation and better secure its policy objectives. This proposed change relates to the inclusion of formal ceremonies so that persons entering into registered relationships in New South Wales have this option as part of the registration process.

Recommendations

The Review recommends that:

Recommendation 1

It is recommended that the Relationships Register Act be amended to include optional ceremonies as a means of providing formal recognition and celebration of the commencement of registered relationships.

1. Introduction

- 1.1 The Relationships Register Act enables two adults in a relationship as a couple, regardless of their sex, to register their relationship with the BDM.
- 1.2 The purpose of registration is to create a mechanism by which to provide legal recognition and certainty in terms of identifying parties to a relationship for the purposes of certain NSW and Commonwealth legislation. Couples in registered relationships are recognised as 'de facto partners', meaning they can rely on their certificates of registration to access various rights, entitlements, services and records where evidence of a relationship may be required (for example, in relation to certain Medicare and Centrelink entitlements). Registration also demonstrates that a person is in a de facto relationship for the purposes of access to the Family Court of Australia under the *Family Law Act 1975* (Cth). In situations not governed by legislation, service providers may choose to accept registration of a relationship as proof of the legitimacy of the relationship.
- 1.3 The NSW Relationships Register was modelled on key provisions underpinning relationship registers in Victoria, Tasmania and the Australian Capital Territory and complemented the Federal Government's legislative enactments to remove discrimination against same sex couples.
- 1.4 The Relationships Register Act also created a new definition of 'de facto partner' for the purposes of the *Interpretation Act 1987* (NSW). The new definition is the standard definition for the purposes of most NSW laws and aimed to achieve greater consistency in determining de facto relationships in a range of contexts. It recognised two different types of de facto relationship: the first is based on the test for establishing a 'de facto relationship' which applies in most NSW legislation (that is, by reference to the definition in the *Property (Relationships) Act 1984*); and the second is a partner in a registered relationship or interstate registered relationship. The Act made consequential amendments to over 120 pieces of NSW legislation by applying this new definition of 'de facto partner'.

Requirements for registering a relationship

- 1.5 To be eligible to register a relationship on the Relationships Register:
 - couples must be in a committed, exclusive relationship
 - couples must not be married or in another relationship which is registered or registrable (either under the Act or a corresponding law of a State or Territory)
 - couples must not be related by family
 - couples must be 18 years of age or older
 - one person must be a resident of NSW.
- 1.6 A couple is not required to live together to be eligible to register their relationship. There is no requirement that the couple live together, nor that they prove any particular form of personal or financial commitment to each other. The legislation provides for 'interstate relationships' so that couples do not need to re-register in another state should they move to another state.
- 1.7 To apply, both partners make a statutory declaration stating they:

- wish to register the relationship
 - are in a relationship as a couple with the other person
 - are not married or in a relationship as a couple with anyone else and that they are not related to each other by family
 - are not in another registered relationship whether in NSW or in another Australian jurisdiction
 - do or do not reside in NSW (at least one member of the couple must reside in NSW).
- 1.8 In applying, proof of identity (for example, birth certificate and two other forms of identification) is required for each person along with payment of a fee. Couples who apply do not have to provide any further documentary evidence or proof of their relationship (noting it is an offence to wilfully make a false statutory declaration). Once an application is made, there is a 28-day cooling off period in which either party can withdraw the application. After that time, the Registrar will register the relationship and issue the couple with a certificate recording the event.

Revoking a registered relationship

- 1.9 There is a fee for making an application to revoke a registered relationship. Either or both parties can apply and it is not necessary for both parties to agree. If only one partner is revoking the registration, they must provide proof that notice has been served on the other. If the notice cannot be served, the Registrar has discretion to dispense with the notice requirement. There is then a cooling-off period of 90 days before the registration is revoked by the Registrar. Registration of a relationship may also be revoked by law on the death or marriage of a person in the relationship.

Voiding of registration

- 1.10 A registration is considered void if:
- the agreement of one or both persons in the relationship to registration was obtained by fraud, duress or other improper means
 - when the relationship was registered, either party was mentally incapable of understanding the nature and effect of registration
 - the relationship was prohibited (for example, one of the persons was married).

Terms of reference for the review

- 1.11 Section 21 of the Relationships Register Act provides that the Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- 1.12 The Act received assent on 19 May 2010 and commenced in full on 1 July 2010.

Conduct of the review

- 1.13 The review was conducted on behalf of the Attorney General by the Department of Justice.
- 1.14 The Department placed an advertisement for the review on its website and in the *Sydney Morning Herald*. The Department also sent consultation letters to the following stakeholders, inviting written submissions:
- Chief Justice, Supreme Court of New South Wales
 - Chief Justice, Family Court of Australia
 - President, NSW Civil and Administrative Tribunal
 - NSW Trustee and Guardian
 - President, Anti-Discrimination Board of NSW
 - Commonwealth Department of Human Services
 - NSW Department of Premier and Cabinet
 - NSW Department of Family and Community Services
 - Commonwealth Attorney General's Department
 - Commonwealth Department of Immigration and Border Protection
 - President, Australian Human Rights Commission
 - Gay and Lesbian Rights Lobby
 - AIDS Council of NSW (ACON)
 - President, NSW Bar Association
 - President, Law Society of New South Wales
 - Director, Community Legal Centres NSW
- 1.15 Seven brief submissions were received, none of which raised major concerns relating to the policy objectives of the Act. A list of submissions is at **Appendix 1**.
- 1.16 The Department also requested that BDM provide information and statistics on the operation and administration of the Act.

Operation of the Act

- 1.17 From the commencement of the Relationships Register Act to 15 June 2018, BDM has registered 35,648 relationships.

Objectives of the Act

- 1.18 The object of the Act is to provide for the legal recognition of persons in a relationship as a couple, regardless of their sex, by registration of the relationship. In his second reading speech for the Relationships Register Bill 2010, the then Attorney General stated that the legislation was a step towards removing discrimination for unmarried couples, whether they are in heterosexual or same sex relationships.¹

Do the objectives remain valid?

- 1.19 The Review considers that the objectives of the Act remain valid and generally the terms of the Act remain appropriate for securing those objectives. The Review received submissions noting that the Act is operating well and has improved the status of relationships, regardless of sex.²
- 1.20 The relationship register historically played an important role in recognising same sex relationships, and particularly benefitted same sex couples in the absence of any legislative provision for same sex marriage.³ The Commonwealth *Marriage Act 1961* (the **Marriage Act**) was amended in December 2017 to extend the right to marry to any two adults, including same sex couples in Australia and recognise same sex marriages solemnised overseas.
- 1.21 The Review is also required to consider whether the terms of the Act remain appropriate for securing its objectives. The Review has received some submissions which address various aspects of the Act relating to general policy, drafting and other practical issues. These issues are examined in further detail in Part 2 of this report, and one recommendation is made to improve the operation of the Act.

2. Issues raised in relation to the Act

Provision for formal ceremonies

- 2.1 The Act does not provide for any celebratory aspect to the registration of a relationship, including provision for optional civil partnership ceremonies. Mr Alastair Lawrie submitted that the Act should be amended to allow people entering into civil partnerships to hold a formally recognised civil partnership ceremony if they choose.
- 2.2 Mr Lawrie noted that the New South Wales legislation is different to the approach taken in relation to other state and territory relationship registration schemes as follows:

¹ The Hon. John Hatzistergos, Second Reading of the Relationships Register Bill 2010, Legislative Council, 12 May 2010, *Hansard* at 22492.

² See submissions from Anti-Discrimination Board of New South Wales, and The Law Society of New South Wales.

³ See submissions from The Law Society of New South Wales, NSW Gay & Lesbian Rights Lobby, ACON, and The Law Society of New South Wales.

- Tasmania provides for ceremonies to formally recognise and celebrate the commencement of a deed of relationship.⁴
 - Under the ACT's civil partnership scheme, couples may wish to have a ceremony performed prior to registration or after registration.⁵
 - Since October 2016, Victoria has provided for the Registrar of Births Deaths and Marriages to enter into an arrangement for the provision of additional services in connection with a ceremony to celebrate the registration of a registrable domestic relationship.⁶
- 2.3 Mr Jamie Gardner submitted that there should be no requirement for an 'official ceremony' and that couples should be able to declare their own date of the relationship's commencement and include that date in their registration certificate. Mr Gardner noted that inclusion of commencement of relationships on certificates in New South Wales would be consistent with the situation in Victoria.
- 2.4 NSW Gay & Lesbian Rights Lobby argued that the inclusion of a provision for 'legally binding' ceremonies would provide symbolic recognition for relationships and would also bring legislation in New South Wales into line with other jurisdictions.
- 2.5 The Review agrees that the Act should be amended to include provision for optional ceremonies to provide formal recognition and celebration of the commencement of registered relationships. Couples who wish to have a formal ceremony could nominate to the BDM the day on which they intend to hold their ceremony, with a view to the BDM registering their registration certificate that same day. This would bring New South Wales into line with other relevant States and Territories and would provide important symbolic recognition for registered relationships.

Recommendation 1

It is recommended that the Relationships Register Act be amended to include optional ceremonies as a means of providing formal recognition and celebration of the commencement of registered relationships.

Overseas same sex marriages

- 2.6 In its submission, the Law Society of New South Wales (**Law Society**) argued that section 5(3) of the Act, which prohibits the registration of a relationship where either party is already married, would capture and prevent a same-sex couple from registering their relationship where the couple has been married overseas under foreign marriage laws. While noting that the BDM 'has adopted a policy since November 2014' to register same-sex relationships in which couples have been married overseas', the Law Society argued that the 'current policy direction taken by BDM is easily subject to change due to 'the lack of legislative protection'.

⁴ See Tasmanian Births, Deaths and Marriages website:
<http://www.justice.tas.gov.au/bdm/relationships/ceremonies>, accessed 22 February 2016.

⁵ See Access Canberra website:
https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1694#tabs-2, accessed 22 February 2016.

⁶ *Relationships Act 2008* (VIC) s.27(1)(ab). See Victorian Legislation website:
<http://www.legislation.vic.gov.au/>

- 2.7 This issue now appears to have been resolved as the Marriage Act was amended on 9 December 2017 to recognise same sex marriages solemnised overseas. As a result, same sex couples can no longer register a relationship if they entered into a same sex marriage overseas, given that their marriage is now recognised under Australian law.
- 2.8 In June 2018, the *Miscellaneous Acts Amendment (Marriages) Act 2018* made consequential amendments to NSW legislation, arising from the changes to the Marriage Act. The Relationships Register Act was amended to provide that if a party to a registered relationship had, on 9 December 2017, been a party to an overseas same sex marriage, the registered relationship was revoked on that day.

Inclusion of 'caring relationships'

- 2.9 There was some criticism of the NSW Register at the time of its introduction. The spokesperson for the Tasmanian Gay and Lesbian Rights Group stated that the NSW scheme was a result of federal pressure to address issues emanating from advocates of same sex marriage by fulfilling a promise to have nationally consistent relationship recognition schemes. Further, the spokesperson argued that the legislation failed to address diverse companionship and familial relationships despite their recognition for a number of years in Tasmania and Victoria.⁷
- 2.10 In his Second Reading Speech for the bill, the then Attorney General noted that the NSW Government was introducing legislation for a relationships register in response to a request from the Commonwealth Attorney General that all States and Territories have such schemes in place; however, the Commonwealth's request did not extend to the registration of caring relationships. The Attorney General also noted that, at that time, there had been little use of the 'caring relationship' provisions in Tasmania and Victoria (and few were anticipated). The Attorney General noted further that concerns about the legal implications of registering caring relationships means that in both Tasmania and Victoria parties are required to seek independent legal advice before registration takes place.
- 2.11 This issue was not raised in the context of the Review and the Review does not consider that there are any compelling administrative or evidential reasons for facilitating proof of caring relationships by registration in the same way as de facto relationships. Accordingly, no change to the Act is recommended.

Recognition of gender diverse relationships

- 2.12 The Law Society submitted that the Act should be amended to clarify that people in gender diverse relationships are recognised. The Law Society defined such relationships as including a person who identifies as transsexual or intersex, where the definition of 'intersex' includes a person who does not wholly identify as either female or male or who identifies as a combination of female and male.
- 2.13 The Review notes that this definition would usually pertain to the term 'intersex', while the term 'gender diverse' relates to a person's social and personal identity.
- 2.14 The decision of the High Court of Australia in *NSW Registrar of Births, Deaths and Marriages v Norrie* 250 CLR 490 means that the Births, Deaths and Marriages

⁷ Rodney Croome, 'NSW squibs on relationship recognition', *Sydney Morning Herald*, 17 May 2010.

legislation recognises only male or female as registrable classes of sex, so that a person's sex may be recorded only as male, female, or neither ('non-specific'), depending on the medical evidence.

- 2.15 Although section 5 of the Relationships Register Act provides that two adults in a relationship as a couple, regardless of sex, may apply to register their relationship, the Act is otherwise silent on matters relating to sex and gender. Clause 11 of the Births, Deaths and Marriages Registration Regulation 2011 requires the sex of each party to relationships registered under the Relationship Register Act to be recorded in the Register. The application form for registering a relationship used to only include only two specification boxes for selection – 'male' or 'female'.
- 2.16 However, the forms were changed from 30 August 2016 to provide for three options, 'male', 'female' or 'other'. The term 'other' was adopted in preference to 'non-specific', because it allows for a range of alternative terms that might be used in other jurisdictions, rather than the NSW term.

Defining 'legal recognition'

- 2.17 The Anti-Discrimination Board of New South Wales (**Board**) submitted that the term 'legal recognition' in section 3 of the Act is not defined; therefore, there is no guidance as to what that term means and the effects of having legal recognition of a relationship in New South Wales. The Board argued that this could lead to couples making assumptions about registering their relationships and this uncertainty could be resolved by including the meaning of legal recognition of a relationship in section 4 of the Act ('Definitions').
- 2.18 The Act provides only for the legal recognition of relationships and does not set out the legal consequences of registration. The legal consequences and effects of registration are located in other legislation, either directly or indirectly. The Review considers that inclusion of a definition of 'legal recognition' in the Act may have a limiting effect on any future expansion or changes to the rights and entitlements of registered couples and, accordingly, does not recommend any changes to the Act.

Appendix 1 - List of submissions to the Review

- A.1 ACON
- A.2 Alastair Lawrie
- A.3 Anti-Discrimination Board of New South Wales
- A.4 Jamie Gardiner
- A.5 NSW Gay and Lesbian Rights Lobby
- A.6 The Honourable TF Bathurst AC, Chief Justice of New South Wales
- A.7 The Law Society of New South Wales

