Cross-jurisdictional Comparison of Legal Provisions for Unmarried Cohabiting Couples

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Following the ‘Parents and Children’ White Paper in 2000 and consultation in 2004, research was undertaken to further inform the development of family law reform in Scotland. Drawing on documentary review, web based evidence and interviews with family law experts, this research finding focuses on describing some key features of legal provisions for non-marital cohabitants in a small number of jurisdictions.

Main Findings

- The experiences in France, the Netherlands, Australia and New Zealand demonstrate the breadth of approaches that have been adopted with regard to provisions for non-marital cohabitants.

- Approaches to provision for cohabiting relationships can be broadly divided into 3: the registration approach, the presumptive approach and the contractual approach. Within these classifications there is scope for significant variation and a number of approaches may co-exist within the same legal system.

- A variety of factors may affect which approach is adopted. These include the legal system and tradition, demographic trends, political climate and ideology in relation to the family.

- The Netherlands, predominantly adopting a registration approach, formally recognises marriage and registered partnership. These institutions are open to both same-sex and opposite-sex couples. The rights and responsibilities placed upon married and registered couples are virtually identical.

- France, also adopting a predominantly registration approach, recognises two types of relationships formally: marriage and civil unions (pacte civil de solidarité). The former provides the most extensive set of rights and responsibilities and is reserved to opposite-sex couples, whilst the latter is open to both opposite-sex and same-sex couples but confers fewer rights and responsibilities. Individuals who cohabit outside of these two institutions have limited legal protection.

- New South Wales operates a presumptive approach to legal provision for non-marital cohabitants. The majority of States and Territories in Australia recognise either two or three types of relationship: marriage (which is reserved to opposite-sex couples), de facto relationships (both opposite-sex and same-sex couples), and, variously, ‘close personal relationships’.

- New Zealand, currently adopting a presumptive approach, is in the process of introducing reform which will recognise marriage (reserved to opposite-sex couples), registered civil unions, and de facto relationships, with the latter two options open to opposite- and same-sex couples.

Introduction
The numbers of individuals choosing to form relationships outside of marriage have increased throughout industrialised countries in the last 30 years, including Scotland. Research has shown that this trend towards non-marital cohabitation is widely accepted within the UK as both a partnering and parenting structure. Despite continuing support for marriage, cohabitation is seen as an increasingly acceptable life choice.

The development of cohabitation has in turn led to the need for legislatures to consider the issue of legal provision for individuals in cohabitations, and the issue has been the subject of much discussion and debate at an international level.

This summary describes some of the key features of the legal provisions in place in a small number of jurisdictions, in order to explore the range of approaches adopted. The jurisdictions examined are:

- the Netherlands and France (jurisdictions adopting a registration approach)
- Australia (focusing on New South Wales, a presumptive approach) and New Zealand (to date grounded in a presumptive approach).

While not providing an exhaustive account of possible approaches to legal provision for cohabitants, this review of a sample of jurisdictions demonstrates the breadth of approaches that have been adopted and provides some insight into how these systems have developed. Discussion is limited to description, and does not seek to evaluate the different approaches. This review draws on key documentary sources, web based evidence and interviews with family law experts.

Approaches to cohabitation provision
Approaches to legal recognition of cohabitants can be broadly separated into:

- the registration approach,
- the presumptive approach,
- the contractual approach.

Broadly speaking, under the registration approach cohabitants opt in to a formal scheme. Under presumptive schemes, there is no need for a relationship to be formally registered, rather relationships become entitled to certain rights and responsibilities through the satisfaction of certain criteria. Under the contractual approach, couples may regulate their relationship through private contracts. Given the level of legislative activity required to create both a registration and a presumptive approach, these two can be described as being pro-active approaches. The contractual approach, on the other hand, may be a default position when a jurisdiction has made no other provision specifically for cohabiting couples. However, it may also be used in addition to other approaches within the same jurisdiction. Both contractual and registration approaches rely on the parties making autonomous arrangements, arguably presupposing rational actors.

However, within these broad classifications, there is scope for significant variation. Under the presumptive approach, for example, the criteria to be satisfied may vary (there may or may not be a duration requirement), or the types of relationship to which the provisions extend may vary (in some jurisdictions, rights extend to same and opposite sex couples only, while in others rights may extend to those living in any kind of ‘close personal relationship’). Further, it may be possible for two or three approaches to co-exist within the same legal system - for instance, where there is both a system of registration and provision for couples choosing not to register through the operation of a presumptive scheme. There may be further possibilities through a contractual approach and the use of private law.

Various factors will impact upon and inform the decision to adopt a particular approach. These include the legal system and tradition, demographic trends, political climate, and ideology in relation to the family. Policy objectives will be a key influence in shaping the choice of approach. Primary objectives underpinning approaches to the provision of rights for cohabitants are concerns about equality and non-discrimination and protection of the vulnerable, both within the relationship and upon relationship breakdown.

4 In the remainder of the text, any references to cohabitants or cohabitation refers to unmarried cohabiting couples.
6 Morrison et al. (2004).

The desire to confer status on cohabitation may be associated with a registration approach (for example, the French PACS system), whereas concerns with the function of relationships may be associated with a presumptive approach (for example, New South Wales). However, it is important not to create a dichotomy between status-based and functional approaches.

These findings focus on the first two approaches outlined above: presumption and registration. The position in relation to contractual agreements available to cohabitants under the sample jurisdictions is not described in any detail.

The Registration Approach

Relationship types

Legislating for cohabitants using a registration approach may result in the creation of new legally recognised relationships. However, provision for those choosing not to register their relationship may be very limited.

The Netherlands formally recognises relationships by marriage and by registered partnership. Both of these institutions are open to both opposite-sex and same-sex couples. Same-sex marriages were instituted by the ‘Act Opening Marriage to Same-Sex Couples 2000’9, and the registration system was set up in 1998. Couples can also enter into cohabitation agreements. However there is no formal registration of these agreements. Unlike marriage or registered partnerships, a cohabitation agreement only has legal consequences for the contracting parties.

Cohabitations that are not registered are neither regulated as an institution of family law nor in the field of contract law. However, with the exception of property and financial relations of partners, where provision is undeveloped, in almost all other fields of law (excluding family and inheritance law) cohabitation has been recognised. A variety of provisions have been introduced in the last three decades (for example in tenancy and social security law), resulting in the practical equation of married and unmarried couples in many fields of law.

In France, unlike the Netherlands, marriage is reserved to opposite-sex couples. The legal framework for cohabitants (the pacte civil de solidarité or ‘civil union PACS’) is open to both opposite and same-sex couples, as well as to caring relationships of ‘solidarity’10. Those who do not register their relationship are termed under the PACS legislation to be living in concubinage. The legislation does not confer new rights on these cohabitants11.

Access to rights and responsibilities

Under registration schemes couples must register their relationship in order to be allocated the rights and responsibilities in question.

Jurisdictions that provide rights and responsibilities for cohabitants upon the registration of their relationship tend to do so in one of two ways: either they create a framework that mirrors marriage and is largely confined to same-sex couples, or they create a framework that offers a substantive alternative to marriage for heterosexual couples, as well as a means by which same-sex couples may formalise their relationships12.

The Netherlands have (as have a number of Nordic jurisdictions) taken the first of the above two paths, yet the Dutch legislation is open to both same-sex and opposite-sex cohabitants. Once registered by a notary, a partnership may be converted into a marriage (and vice versa) by an ‘act of transformation’ by the civil status registrar. A partnership may also be dissolved on the application of one partner without the intervention of the court. Evidence suggests that significant numbers of Dutch couples are transforming their marriage into a partnership in order to obtain a ‘lightning divorce’13. This means data on registered partnerships are misleadingly high. Reforms are under way to remedy this situation.

France has taken the second of the above two paths, creating a registration system that is clearly distinct from the institution of marriage. In the civil union PACS system it is the contract governing the rights of the parties that is registered, rather than the relationship14. Only couples that do not have another formally recognised relationship may register a PACS15, which limits its use to persons registering a caring ‘solidarity’

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12 ibid.
15 ibid.
relationship but who are also party to a non-marital sexual relationship. It is difficult to access detailed data on the uptake of the PACS scheme. However, it is estimated that just over 131,650 PACS were signed between November 1999 and the end of 2004.16

Nature of the rights and responsibilities

The rights and responsibilities placed upon registered partners and married couples are virtually identical in the Netherlands17. The limited differences between the rights and responsibilities inherent in the two institutions are primarily found in relation to children, where differing presumptions of paternity apply to the different relationship types.

Under the French PACS system, the extent of the rights and responsibilities imposed on the parties may vary from couple to couple since the legislation essentially leaves the content of the obligations to be decided by the parties themselves18. There is, to some extent, a minimum framework of rights under which parties are to provide ‘mutual and material’ assistance for one another. There are also certain provisions that property should be divided equally in the absence of an agreement to the contrary19. Despite parties having agency to create their own agreements under a PACS, the rights and responsibilities under this form of civil union tend to be more limited than those attached to marriage20. A Working Group was established in June 2004 to review the current law.

The Presumptive Approach

In Australia, National, State and Territorial governments have different powers in relation to family law. National government has power to pass laws relating to marriage and divorce; State or Territory governments deal with laws relating to unmarried couples. However, national laws apply to all disputes over custody and maintenance of children whether or not the parents are married or living together21. Consequently, different laws in relation to unmarried couples apply in the different states. None of the Australian states has followed the registration approach, with the exception of Tasmania, which introduced registration of ‘personal relationship agreements’ in 2004. However, presumptive criteria still apply, with the primary purpose of registration being to make proof of non-marital relationships easier.

The approach of New South Wales (NSW) has provided the model for approaches adopted subsequently by other States and Territories, who have since modified and expanded the scope and content of the early NSW legislation22.

The first major reforms of the law relating to unmarried cohabiting couples in New Zealand23 were introduced relatively recently, in 2002. The presumptive approach adopted in 2002 (described as ‘radical’ in its time24) has been developed rapidly, with, at the time of writing, further reform in its final parliamentary stages introducing a registration system for civil unions for both sexes, in addition to the presumptive de facto scheme already in force25.

Relationship types

Marriage remains reserved to opposite sex couples in Australia. However, New South Wales (NSW) was the first state to make legal provision (of the presumptive type) for unmarried opposite-sex cohabitants. Reform was prompted by increasing numbers of heterosexual couples living in domestic situations resembling marriage, and by criticism of the lack of legal protection for these ‘de facto’ partners compared to married partners. Legislation recognising opposite-sex cohabiting couples in ‘de facto’ relationships was introduced in New South Wales in 198526.

Thereafter, the NSW legislation has been subject to amendment through a widening of the variety of non-marital relationships covered. In 1999 it was extended to same-sex couples by redefinition of ‘de facto relationship’ through removal of the requirement for heterosexuality. NSW legislation now defines a de facto

19 ibid.
20 ibid.
22 ibid.
23 The majority of information on provision in New Zealand is drawn from the Atkin article cited below.
25 Descriptions of the New Zealand reforms are drawn from web based sources at the time of writing, and may have been subject to amendment or change.
26 De Facto Relationships Act 1984 (NSW), now Property (Relationships) Act 1984 (NSW).
relationship as ‘a relationship between two adult persons (a) who live together as a couple and (b) who are not married to one another or related by family’.

In recognition of new dynamics and the reality of domestic and family relationships (especially those involving substantial time and domestic contribution), it was further extended to include ‘close personal relationships’ other than marriage or de facto relationships, where the (adult) parties are living together ‘one or each of whom provides the other with domestic support and personal care’ - whether or not they are related by family.

In New Zealand, marriage is also reserved to opposite-sex couples. Prior to 2002, rights were given to de facto couples on an ad hoc basis, with some pieces of legislation defining ‘spouse’ to include de facto partners, and others not. The difference in treatment had been most marked in relation to property rights.

However, in 2002, a single property law applying to married, and opposite- and same-sex unmarried couples was introduced, applying on separation, divorce, and death.

The new law (The Property (Relationships) Amendment Act 2001) was a unifying piece of legislation on property rights, dealing with married and unmarried couples. Prompted in the main by increasing numbers of cohabiting couples, and rising demands for de facto relationships to be recognised by law, the legislation introduced rights for both opposite-sex and same-sex de facto couples, as well as amending the law relating to married couples.

Statute defines a de facto relationship as ‘a relationship between 2 persons over 18 who live together as a couple’.

Firmly grounded in the government’s objective of ‘creating a positive human rights culture’, coupled with the desire to provide equality of relationship status and remove discriminatory provision, the forthcoming New Zealand reforms noted above will apply equally to all relationships and across virtually all areas of law, to marriages, de facto relationships, and opposite-sex or same-sex civil union relationships. Marriage is nevertheless still reserved to opposite-sex couples.

This development of relationship law in New Zealand contrasts with the gradual, developmental presumptive approach seen in New South Wales and other parts of Australia.

The New Zealand reforms are being introduced through two pieces of legislation: a Civil Union Bill (passed in late 2004), and a Relationships (Statutory References) Bill (still before the House at the time of writing). The Civil Union Bill aims to establish registered civil unions for opposite- and same-sex couples, giving rights to opposite-sex couples who do not wish to marry, and providing a mechanism for same-sex couples to solemnise their relationship and acquire status. Registered relationships will exist alongside provision for de facto couples, embodying both registration and presumption as approaches within the same system. The provisions are to be based on marriage, but have been modernised to ‘reflect current law and practice’.

The government is clear in its intention to retain marital status - the legislation will be stand-alone ‘to reinforce Parliamentary intention that marriage is available solely to a man and woman’.

The government proposes to recognise civil unions through a Relationships (Statutory References) Bill which will amend numerous pieces of legislation, bringing them into line with the new civil union regime. This second Bill will also confer rights on de facto couples, to avoid discrimination on the grounds of relationship status. It is expected that the largest group affected will be opposite-sex de facto relationships. However, any discrimination against married couples is also to be removed (for example, in tax and social security legislation).

Accessing rights and responsibilities

Under the presumptive approach, rights and responsibilities are essentially conferred by default upon couples whose relationship demonstrates certain characteristics. Presumptive systems may differ according to whether rights and responsibilities relate only to parties themselves (for example the division of property) or also extend to third parties or to the State. Couples do not need to be aware of these characteristics to benefit from legal provisions applicable to their relationship, nor are they required to register the relationship. In some presumptive systems it may be possible to make a contract to opt-out of the

27 Property (Relationships) Act 1984, s 4 (1).
29 Property (Relationships) Act 1984 NSW, s 5 (1) (b).
31 The New Zealand Human Rights Act 1993 defines ‘marital status’ as including relationships ‘in the nature of marriage’, as well as prohibiting discrimination on grounds of sex orientation.
32 Property (Relationships) Act 1976, s 2D.
34 ibid.
35 ibid.
rights and remedies conferred by the legislation. One difficulty with this approach is the need to ‘prove’ the existence of such relationships.

When introduced in 1985, the NSW legislation contained no fixed criteria for determining the existence of a de facto relationship, but the courts subsequently developed a list of factors that may be relevant in determining whether such a relationship exists. This includes the length of the relationship; nature and extent of common residence; whether or not a sexual relationship exists; the degree of financial interdependence or financial support; ownership and use of property; having and caring for children; performing household tasks; degree of mutual commitment and support; and matters of public reputation and use of names36.

In addition, there is the general requirement that the relationship should have a minimum duration of two years. However, courts have the discretion to consider shorter relationships where there is a child, and also where substantial contributions that have been made would otherwise go uncompensated, resulting in serious injustice37. The requirement that the relationship has lasted at least two years is not concerned with proving that the relationship exists, but rather is necessary in order to qualify to bring an action for property adjustment orders and/or maintenance. Other qualifying factors include a requirement that the parties be resident at the time of bringing the application (with some exceptions) and that the application be brought within two years of separation.

As is common across Australian States and Territories (with the exception of Victoria)38, the NSW Act provides that domestic partners may opt out of the property division regime under the Act by way of specific agreement.

Current New Zealand law treats married and unmarried couples (same- and opposite-sex) almost identically in relation to property, maintenance, and inheritance, although there are some differences in the thresholds that will apply before courts have jurisdiction over a relationship. Courts will still deal with issues relating to marriages of a short duration, although they will modify the rules applied39 (distribution of property, for instance, will not necessarily be equal). However, a de facto relationship must have lasted for at least three years, otherwise courts will not intervene in disputes.

However, similarly to, and modelled on, the law in New South Wales, there are exceptions to the duration requirement in New Zealand law. The relationship may be seen as de facto (resulting in entitlement to bring a claim) if there is a child, or if a party has made substantial contribution to the relationship, and if in either case non-intervention would result in serious injustice40. In addition, the duration requirement may not apply where parties require an order in respect of a specific item of property, rather than global division.41 Statute also contains a list of criteria (borrowed from NSW law) to assist courts in deciding whether a de facto relationship exists, and when that relationship began or ended.

Treatment also differs in situations involving the death of a partner, where short marriages are treated in the same way as longer marriages unless this would be unjust. However, non-marital relationships of less than three years cannot be considered by the courts unless the exceptions outlined above exist.

The rationale for the different treatment is seen to be that short de facto relationships might not have been intended or perceived as serious commitments, whereas the public commitment associated with marriage implies higher degrees of commitment42.

In situations where a de facto relationship is not established, couples in New Zealand, as in other jurisdictions, rely on common law provision and equity43. However, as in most Australian states, the system in New Zealand provides that couples who do not wish legislative provision to apply to them may opt out of these rights and responsibilities.

**Nature of rights and responsibilities**

The different relationship forms that exist across Australia, such as marriages, ‘de facto’ relationships, and ‘close personal relationships’, are not equated in terms of legal recognition, protections or provision under different laws. A number of NSW laws apply different definitions of de facto relationship to that which applied under the Property Relationships Act.

36 Jessep, O. (2004); now PRA (NSW) 1984, s 4(2).
38 In Victoria, s. 285(1)(c) of the Property Law Act provides that the court is to have regard to any written agreement entered into between the parties. The existence of such an agreement is merely a matter for consideration by the court.
39 If a couple cohabit before marriage this time will be taken into account when working out the overall length of their marriage (s2B Property (Relationships) Act 1976).
41 ibid s 14A (4).
43 ibid.
following the 1999 amendments - with some statutes still limiting their definitions to heterosexual partners. In 2002, a number of these laws were amended to include same-sex couples, but there are still exceptions (one being the Adoption Act 2000). Accordingly, the term ‘de facto relationship’ itself is subject to different interpretations in different statutes.

Under the 1985 NSW legislation, de facto partners were given what is seen as an ‘in between or intermediate’ status. A key example of different laws applying to marriage and de facto relationships in NSW are the laws that regulate the distribution of property and financial resources on the breakdown of a relationship. Courts are given discretionary power to adjust the property interests of the unmarried partners after separation where it is just and equitable to do so, although the criteria for doing so are more limited than those set out in the federal law applicable to married couples. In particular, unlike the law relating to married couples, courts will not look into future circumstances (such as responsibility for children) when deciding on property adjustment on breakdown of de facto relationships. Likewise, in relation to maintenance, de facto partners can bring claims but in more restricted circumstances than married spouses under national law. Several States and Territories do not allow maintenance claims by de facto couples at all.44 This discrepancy in approach between marriage and de facto relationships is still evident in NSW, although newer models of property division in other Australian jurisdictions have veered away from the NSW approach and adopted a broader range of discretionary criteria similar to those contained in the national legislation applying to married persons.

Currently in New Zealand, de facto couples have similar status to married couples for some but not all purposes, and are recognised in some but not all legislation. All couples are treated essentially the same in relation to property, maintenance, and inheritance. Prior to 2002 the difference in treatment between married and de facto partners had been most marked in relation to property rights45. However, since 2002, the law has treated de facto relationships largely on the same basis as married relationships in relation to division of property on separation, for inheritance purposes, and in relation to payment of maintenance46. Under the proposed reforms to the law on relationships, in most situations the same legal rights and responsibilities will apply to married, de facto, and civil union relationships. Marital status and sexual orientation will no longer define rights and responsibilities of couples in New Zealand under the new law.

Concluding Remarks

These findings show that there are significant variations in relation to the legal provisions provided for non-marital cohabitants in different jurisdictions. These variations may be reflections of the different political, social and legal environments, as well as the demographic trends and ideologies in place in different countries. Family law reform needs to take into account these environments and trends.

44 South Australia, Victoria and Queensland.

46 ibid.

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