

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

DOMESTIC RELATIONSHIPS BILL 1994

EXPLANATORY MEMORANDUM

**Circulated by authority of
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OUTLINE

This Bill applies to those who have been in a domestic relationship for at least two years. If they have provided personal or financial commitment and support of a domestic nature to the material benefit of another person over a period of two years, they may be entitled to adjustment of the ownership of property which belongs to the other person to reflect the value of their contribution. It should be made clear that the relationship is to involve a commitment which goes beyond friendship and 'neighbourbourliness' - flatmates, people living in group houses, employed live-in housekeepers and other domestic employment. Those living in halls of residence for employees or students would also not normally be entitled to seek relief.

Financial Considerations: Any additional demand on the courts involved will be absorbed within the current budget allocation at this stage. It is, however, considered important that the situation is monitored in the future, and the operation of the legislation will be reviewed in 12 months' time. This should include a review of the effects of the legislation on the resources of the Courts, the Legal Aid Office and other agencies.

PART 1 - PRELIMINARY

Clauses 1 and 2 are formal requirements. They refer to the short title of the Bill, and commencement of the Bill, which is to be on a day fixed by the Minister by notice in the Gazette, or in six months, whichever occurs first.

Clause 3 is an interpretation clause.

It includes a definition of 'domestic relationship', which is a 'personal relationship between 2 adults (other than a married couple) in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other.' It includes partners to a *de facto* marriage.

Paragraph (2) goes on to say that the parties to a domestic relationship need not live under the same roof, however such a relationship will not include a person who is paid to provide a service for another, or who provides it on behalf of another person or body (including a government body or body corporate), or a charitable or benevolent organisation.

The clause includes a definition of 'child of the parties'. Children of the parties are to be considered by the court in determining maintenance orders (clause 19). Where a party to a domestic relationship has the care and control of a child of the parties, and because of this is unable to maintain him or herself, the court may order maintenance for that party. A 'child of the parties' includes:

- a child of whom the parties are the parents;
- a child of whom the parties are presumed, by virtue of the *Artificial Conception Act 1985*, to be the father and mother;
- a child adopted by both parties; and
- a child for whom both parties have assumed responsibility for his or her long-term welfare.

It is considered that the legislation should include children accepted into families as part of them because of the increasing number of 'blended' families occurring today. The Commonwealth Government attempted to recognise the desirability of including among those children those who may be unrelated to one or both of partners in a household in the *Family Law Act 1975*, but was unable to do so because of Constitutional restrictions. This approach entitles a person to recognition for their contribution to the relationship overall, and the obligations of both parties to any child for whom they have assumed responsibilities.

It is intended that the Bill should not exclude the responsibilities of parents for maintenance of their children. However the intention is to provide maintenance for the party who cares for a child of whom a person assumes responsibility. This is seen to be separate from any maintenance claim on a parent under child maintenance legislation or the Family Law Act. The provision is not to exclude claims under such legislation, and a court would presumably take such claims into account.

A '**domestic relationship agreement**' is defined in this clause to mean an agreement between 2 persons that is made on entering into a domestic relationship or during its existence. It makes provision with respect to financial matters or varies an earlier domestic relationship agreement. It does not matter when it is made, whether there are other parties involved, or whether it deals with non-financial matters.

A '**termination agreement**' is a similar agreement made on the termination of a domestic relationship.

Application of Act - clause 4: The Bill does not apply to domestic relationships that ended before the commencement day or to anyone who was in such a relationship.

Other Relief or Remedies not affected- clause 5: Clause 5 preserves the right to apply for existing common law and equitable remedies. There may be reasons for a person to consider an application based on these remedies, rather than under this legislation, more appropriate to their circumstances.

PART II - MEDIATION AND ARBITRATION

This Part is a recognition of the fact that the use of courts and the consequent expense to the parties involved could be minimised by encouraging mediation by relevant mediation agencies as the normal means of settling disputes. To give effect to this fact, the Bill alerts parties to an action, those advising them and the courts exercising jurisdiction under it, to the desirability of a resolution of the dispute by alternative means. It also empowers the court (if it forms the opinion that there is a reasonable possibility of resolution of the matter by alternative dispute resolution) to adjourn the proceedings to allow the parties to pursue this approach to resolving the matter.

Advice about facilities - clause 6: On request by a party to a domestic relationship or to proceedings under the legislation, the Registrar of a court shall advise on the availability of mediation or arbitration facilities available in the court or elsewhere, and how the parties can avail themselves of these services.

Conciliation - clause 7: The court and each legal practitioner representing a party to the proceedings has a duty to allow the parties to settle a dispute, and to encourage them to seek the assistance of mediation and arbitration facilities. This duty applies only to the extent that it is practicable to discharge it.

Referral of matters for mediation or arbitration - clause 8: The court is empowered to refer all or any of the matters in dispute before it to a mediator or arbitrator.

Admissions made to mediators- clause 9: Admissions made in mediation are inadmissible in any court or tribunal. It is not intended that this clause would prevent the application of the common law principle that a mediator could disclose, to someone other than a court or tribunal, etc., information obtained in a mediation session where the parties consent to disclosure, or disclosure is considered necessary to protect third parties or property, or where required by or under another law.

PART III—ADJUSTMENT OF PROPERTY INTERESTS AND MAINTENANCE

Division 1 - Preliminary

Institution of proceedings - clause 10: This clause bestows jurisdiction on both the Supreme Court and the Magistrates Court to hear proceedings under the Bill. It preserves the monetary limit on matters which can be heard by the Magistrates Court to that set by the *Magistrates Court (Civil Jurisdiction) Act 1982* (currently set at \$50,000). It also preserves the operation of section 10 of the *Magistrates Court (Civil Jurisdiction) Act* which excludes jurisdiction to hear and determine proceedings in which the title to land is genuinely in question. However it provides that the Magistrates Court may hear a matter exceeding the above

jurisdictional limits where the parties agree, and the court thinks it desirable to do so. The effect of this clause is thus to give the Magistrates Court unlimited jurisdiction in those circumstances. This is considered desirable as a means of improving access to the courts.

Prerequisites for relief - residence, etc. - clause 11: To be eligible to make a claim either or both of the parties to the domestic relationship must be resident when the application for the order is made.

Additionally, either both parties must have lived in the Territory for at least one third of the period of their relationship, or substantial contributions of the kind required by the legislation must have been made in the Territory by the applicant.

However, even where the above is the case, the court may make or refuse to make an order because of facts and circumstances even though they, or some of them, took place before the commencement day or outside the Territory.

The requirement that substantial contributions have been made to the property in the ACT is proposed as an alternative to the one-third period for residence adopted by other jurisdictions for de facto relationships. This provides an avenue of relief for those who have not lived in the ACT for one-third of the period of the relationship. The meaning of the term 'substantial contributions' is not defined: it is a matter of fact and degree in the circumstances of each case.

Prerequisites for relief - length of relationship etc. - clause 12: A court shall not make an order relating to property or maintenance unless it is satisfied that a domestic relationship has existed between the applicant and the respondent for not less than 2 years. This requirement may be waived where there is a child of the relationship (see pages 2-3) or the person applying -

- has made substantial contributions of the kind described in clause 14 for which the applicant would not be adequately compensated if the order were not made; or
- has the care and control of a child of the other party;

and the failure to make the order would result in serious injustice to the applicant.

Time limit for making applications - clause 13: An application for an order under this Part by a party to a domestic relationship that has ended must be made within 2 years of the day on which the relationship ended. However the court may allow the applicant more time if it is satisfied that she or he would suffer greater hardship if it imposed the time limit than the other party would suffer if it extended it.

Court to end financial relations - clause 14: The court is required, as far as is practicable, to make orders under this Part that will end the financial relationship between the parties and avoid further proceedings between them. This is an

important requirement, as it encourages the court to make orders about maintenance of a kind which would be unlikely to call for subsequent variation, (perhaps containing provisions for the changing cost of living), and for both maintenance and property orders to make orders which result in a severing of ties between those involved, to free them from the past and allow them to live independent lives.

Division 2 - Adjustment of Property

Property Adjustment - clause 15: Provisions relating to property adjustment are similar to those of NSW and the NT. Clause 14 of the Bill provides that when an application is made by a party to a domestic relationship, a court may make an order adjusting the interests in the property of either or both of them that seems just and equitable. It is to do this having regard to:

- the nature and duration of the relationship;
- the financial and non-financial contributions made directly or indirectly by or on behalf of either or both parties to property or financial resources of either or both of them. Examples of such contributions are where someone
 - foregoes an income from work to provide personal care, child care or home maintenance by a person, or
 - pays of domestic expenses, such as food or clothing, with the result that another person benefits by having available income for acquisition of property or some other financial benefit in his or her name;
- the contributions (including any in the capacity of home-maker or parent), made by either of the parties to the welfare of the other or any child of the parties;
- matters listed in clause 19(2) (e.g. needs, resources, responsibilities); and
- other matters the court considers relevant.

The court can do this whether or not it has made a declaration regarding the title or rights of a party in respect of the property.

The requirement that the order is to be one which is 'just and equitable' invokes principles of justice and equity. It introduces considerations of the states of mind of those in the relationship, and would enable the court to consider such matters as:

- whether some expectation on the part of the contributor as to his or her future entitlement to the property was reasonable under the circumstances (e.g. promises or assurances by the other party);
- whether the contributor had suffered real detriment in making the contribution; and

- whether the other party would be unjustly enriched by the denial of the contributor of any entitlement in the property.

This provision is thus aimed at making the intention of the legislation to require more than just contribution to property, but also a reasonable expectation by the contributor that he or she would share in it, or that some injustice would result if it is not shared.

The requirement that the court consider the nature and duration of the relationship goes further than NSW legislation on *de facto* relationships. It involves consideration of such matters as:

- the degree of mutual commitment, interdependence and arrangements for support;
- whether there were children of the relationship and their care;
- whether the parties lived under the one roof or otherwise;
- the ownership, use and acquisition of property; and
- the performance of household tasks.

Deferment of order - clause 16: Where a court is of the opinion that a party to a domestic relationship is likely to become entitled soon to property that may be applied in satisfaction of an order under this Part, it may defer the operation of the order until a date, or the occurrence of an event, specified in the order.

Death of party - effect on proceedings - clause 17: This clause applies where a party to proceedings dies before the proceedings are completed, and the proceedings are continued by or against the deceased person's legal personal representative. The court may make an order under this Part if it is of the opinion that it would have adjusted interests in respect of property if the person hadn't died, and despite the death, it is still appropriate to adjust those interests.

Division 3 - Maintenance

No general right to maintenance - clauses 18, 19: A party to a domestic relationship is not liable to maintain the other party to the relationship, however the court may order one party to a domestic relationship to pay another party where:

- "childcare related maintenance" the applicant for maintenance is unable to support himself or herself adequately because of having the care and control of a child of the parties or a child of the other party, who is under 12 years old, or, if the child has a physical or mental disability, under 16 years old; or
- "compensation based maintenance"
 - the applicant's earning capacity has been adversely affected by the circumstances of the relationship;
 - the applicant is therefore unable to support himself or herself adequately;
 - the court is satisfied that a maintenance order would enable the applicant to undertake a program of education or training; and
 - it is a reasonable order, having regard under the circumstances.

Matters to be considered - clause 18(2): In making a maintenance order, the court shall have regard to the following matters:

- the income, property and financial resources of each party, and their financial needs and obligations (including their responsibilities to support any other person);
- their physical and mental capacity for appropriate gainful employment;
- the terms of any order made or proposed to be made under clause 15 with respect to the property of either or both parties; and
- child maintenance responsibilities of the applicant.

An applicant is to retain any pension allowance or benefit entitlements.

Interim and urgent maintenance - clauses 20 & 27: Clause 20 states that where an applicant for an order under this Part is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the other party to the domestic relationship to pay to the applicant whatever maintenance is considered reasonable. Under clause 27, in a matter of extreme urgency an interim maintenance order can be made in the absence of the respondent.

Death of party - effect on application - clause 21: An application for an order for maintenance cannot be continued after the death of either party to the domestic relationship.

Periodic maintenance orders - duration - clause 22: A childcare-related periodic maintenance order can only last until the child attains the age of 12 years or, if the child suffers from a physical or mental disability, 16 years.

A compensation-based periodic maintenance order shall not be for more than three years, and must be made within a year of the end of the domestic relationship.

Periodic maintenance orders - variation, etc. - clause 23: A court may alter or discharge, suspend, revoke or vary a periodic maintenance order.

The court may *discharge* or *vary* the order only if it is satisfied that since the order was made or last varied the circumstances of either partner, or the cost of living, has changed to such an extent as to justify it so doing. In varying the order it must consider the matters listed in subclause 19(2), the time limits given in clause 22 and the care and control of a child as outlined in clause 25.

The court is not to have regard to a change in the cost of living unless at least 12 months have passed since the order was made or last varied because of a change in the cost of living.

An order decreasing the periodic sum payable under an order may be retrospective, going back to such date as the court thinks fit.

Periodic maintenance orders - cessation - clause 24: A childcare-related periodic maintenance order ceases when the person no longer has the care and control of the child. An order for periodic maintenance would also cease to have effect on the death of either party to the domestic relationship. The cessation of an order would not effect the right to recover arrears of maintenance which were due when the order ceased to have effect.

Note: Marriage or remarriage and its effect on maintenance. Legislation in other jurisdictions provides that a maintenance order ceases on marriage or remarriage of one of the parties to a domestic relationship. This provision is based on the presumption that obligations assumed on marriage or remarriage automatically cancel out obligations to another person, and conversely that marriage or remarriage automatically cancel out a person's entitlement to maintenance. Given that under this legislation maintenance is based not on the fact of a relationship alone, as it is in the case of marriage, but on need brought about by the relationship, it is considered that marriage or remarriage should be considered as a change in circumstances.

Division 4 - General

Orders - general provisions - clauses 25 - 30: Provision is made in clause 25 for the types of orders which can be made regarding property adjustment and maintenance. These are similar to the NSW and Northern Territory legislation. The court will have the power to make orders involving :

- the transfer or sale of property and the distribution of the proceeds of sale in such proportions as it thinks fit;
- the payment of a lump or periodic sum;
- an order or injunction which relates to the property or financial resources of either or both parties or which aids enforcement of any other order made in respect of an application;
- any other order or injunction that it considers is necessary to do justice.

The court can also impose terms and conditions, make an order by consent or in the absence of a party, order the execution of deeds and instruments and other necessary things ancillary to an order, and appoint or remove trustees.

Execution of Instruments by order of a court - Clause 26: Where a person fails to carry out a court order in relation to the disposition of property, the court may appoint an officer of the court or someone else to act in the name of that person.

Urgent Orders - clause 27: The court can make an interim maintenance order or grant an injunction in the absence of a party in urgent cases and appoint a person to carry out its orders where necessary. Application must still be in writing unless this is not feasible. Orders under this clause are temporary.

Variation and setting aside of orders - clause 28: An order may be varied or set aside where there has been a miscarriage of justice, fraud, duress, suppression of evidence or false evidence, or where, in the circumstances that have arisen it becomes impracticable or inequitable for the order to be carried out.

Transactions to defeat claims - Clause 29: On application a court may set aside or restrain an action that will have the effect of defeating an existing or anticipated order relating to an application such as the sale of property. Any proceeds from such an action may be used as monies payable under a court order, or as court costs, or paid into court to await its order. Anyone acting in collusion under this section can be ordered to pay the costs of a bona fide purchaser of the property.

Clause 30: requires the court to have regard to, and to protect, the interests of any purchaser in good faith, or any other interested person.

PART IV—domestic relationship agreements and termination agreements

Parties to a domestic relationship who wish to regulate their financial affairs according to their own wishes may enter into an agreement, (called a 'domestic relationship agreement') or an agreement on termination of the relationship (a 'termination agreement'). The provisions relating to these agreements are similar to those in other jurisdictions. That means that the agreements are enforceable in accordance with the law of contract, and those which involve living together are not void as offending public policy.

Interpretation - Clause 31: This clause simply establishes that the word 'agreement' refers to a domestic relationship agreement or a termination agreement, and that 'solicitor' refers to a practising solicitor.

Validity of agreements - clause 32: Unless the legislation provides otherwise, an agreement is to be treated in law as a contract. However an agreement cannot eliminate the power of a court to make an order with respect to any matter involving a child of the parties, including such matters as custody or access, which would be dealt with by the Family Court, or maintenance, which is dealt with by the Commonwealth Government (or Family Court in some circumstances).

Effect of agreements in proceedings under Part II - clause 33: Where there is an agreement between the parties fulfilling certain requirements, the court shall not (except as provided by clauses 34 and 35) make an order relating to property or maintenance that would be inconsistent with the terms of the agreement.

The requirements to be fulfilled are:

- the agreement must be in writing;
- the agreement must be signed by the person against whom it is sought to be enforced;
- before the agreement is signed each party must have been furnished with a certificate (to accompany the agreement) which states that the solicitor has advised that party, independently of the other party, as to the following matters:
 - the effect of the agreement on the rights of the parties under the Bill;
 - if it was advantageous, financially or otherwise, or prudent for that party to enter into the agreement;
 - if the agreement was fair and reasonable in the light of the circumstances that were reasonably foreseeable at that time.

Where there is an agreement between the parties to a domestic relationship, and any of the above requirements have not been met, the court may nevertheless

have regard to the terms of the agreement in making any order under this part of the Bill.

Variation of agreements - clause 34: A court may vary or set aside all or any of the provisions of an agreement notwithstanding that the requirements referred to above are satisfied, but only if it is satisfied that the enforcement of the agreement (whether in the proceedings under Part II or in proceedings under any other Act or Law) would result in serious injustice.

Revocation, etc., of agreement - clause 35: A court must not give effect to the terms of the agreement if the court is of the opinion that the parties have, by words or conduct, revoked the agreement or consented to its revocation, or it has otherwise ceased to have effect.

Death of party - effect on periodic maintenance under agreement - clause 36: The provisions of an agreement requiring a person to pay periodic maintenance cease to have effect on the death of the person, unless the agreement provides otherwise. The provisions of an agreement providing for a person to receive periodic maintenance cease to have effect on the death of that person. However this does not affect the right to recover arrears of periodic maintenance due under the agreement at the time of the party's death.

Death of party—effect on property under agreement - clause 37. Unless an agreement provides otherwise, the provisions relating to property or lump sum payments may, on the death of a person, be enforced on behalf of, or against their estate, as the case may be.

MISCELLANEOUS

Declaration existence of domestic relationship - clause 38: A court may, on application declare that a domestic relationship exists or has existed between specified persons as at a specific date or during a specific period. It may also declare that a domestic relationship does not exist as from a certain date. A declaration has effect as a judgment of the Court. Those involved need not be alive, and the parties would, for all purposes, be presumed conclusively to be, or to have been, parties to a domestic relationship at the specified time.

Annulment of declaration - clause 39: The Supreme Court may, by order, annul a declaration under section on application by a person who applied for, or is affected by, the declaration. The court must be satisfied that new facts or circumstances have arisen that have not, and could not have, previously been disclosed to the court despite the exercise of reasonable diligence. The court can also make ancillary orders (including orders varying rights with respect to property or financial resources) to place any person affected by the annulment, as far as practicable, in the position that person would have been in if the declaration had not been made.

A declaration ceases to have effect on the making of an order of annulment but the annulment does not affect anything done in reliance on the declaration while it remained in force.

Declaration of interests in property - clause 40: In proceedings between parties to a domestic relationship with respect to existing title or rights in respect of property, a court may declare the title or rights, if any, that a party has in respect of the property and make orders as to possession.

An order under this section is binding on the parties to a domestic relationship but not on any other person.

Enforcement by Magistrates Court of Supreme Court orders for payment of money - clause 42: Regulations may make provision in relation to the enforcement by the Magistrates Court of orders of the Supreme Court being orders that could have been made by the Magistrates Court. This is to provide more accessibility to the legal system for the enforcement of orders that could have been made by the Magistrates Court.