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is pressing for Commonwealth money.

The general impression is that now is a critical time for legal aid in Australia. The likely abdication of direct involvement by the Commonwealth, the establishment of State commissions, the negotiating for financial responsibility, the manoeuvres of the practising profession (who clearly recognize the value of legal aid to lawyers) are almost certain to produce a new system of legal aid. What advance can we expect in the new system? More co-ordination, less diversity? Is that an advance? Will we see a genuine attempt to structure and operate legal services in accordance with the needs of the community rather than the needs of lawyers and the profession? From the little evidence available to us it seems that community participation and involvement in decision-making is not valued very highly. The joint proposal of the Victorian Bar Council and the Law Institute suggests a nine-member Commission (to establish policy and administer legal aid in Victoria): five would be lawyers, three government appointees and one (yes, one) nominated by the Victorian Council of Social Services.

We want to emphasize three points: (1) Legal aid should meet the legal services needs of the community, particularly those members of the community who cannot purchase legal services on the open market. (2) Lawyers are not in the best position to assess those needs. (3) Legal aid should be for people, not for lawyers.

P.H.

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The Baxter Case:
Social security and cohabitation policy in practice

Mary Jane Mossman

Barbara Baxter is divorced from her husband, and has custody of two sons, aged seven and four. When she initially began to receive a widow's pension in 1972, she was living with her mother and step-father, but, after difficulties with them, moved to a unit with her sons in mid-1975. She had commenced a course at technical college, and had there met Roger Baxter, another student, who was separated from his wife but providing support for his children who were in his wife's custody. A close friendship developed between Barbara and Roger, and, because both were experiencing financial strain, they decided to live together; they moved to a unit in September 1975 where Barbara and Roger share one bedroom, and Barbara's sons another. At the time of this move, Barbara had decided to adopt a new surname to avoid the violence of her former husband, and, since she also wanted to avoid difficulties for her sons in the new unit, she chose to adopt Roger's surname. She notified the Department of Social Security of the change in her surname.

A field officer of the Department of Social Security visited Barbara at the unit on two occasions in November 1975, and obtained her signature on a statement that she had lived "on a man and wife basis" with Roger Baxter. The Department of Social Security notified her in early December that she was no longer entitled to a pension. She lodged an appeal with the Social Security Appeals Tribunal immediately and, after its intervention, the pension was restored pending the outcome of the appeal. In February and March 1976, the tribunal interviewed separately both Barbara and Roger, and in late April, Barbara received a letter from Senator Guilfoyle confirming her lack of entitlement. In late May, the Department officially notified her that her pension would terminate as of 10 June 1976.

On successful completion of her technical course in 1975, Barbara had gained a place at Macquarie University in the B.A. Dip.Ed. programme, which she commenced in March 1976. She is, at present, continuing this full-time course, and has undertaken a part-time job since June 1976 in order to provide for her family. Roger Baxter is also a full-time student and has no resources available to support Barbara. Moreover, Barbara and Roger do not regard themselves as man and wife; they have made no long-term commitment to one another and have no intention to marry.

THE DEPARTMENT'S COHABITATION POLICY

S.59 of the Commonwealth Social Services Act defines a "widow" to include: 

"(a) a dependent female; 
(b) a deserted wife; 
(c) a woman whose marriage has been dissolved and who has not remarried; 
(d) a woman whose husband is a mental hospital patient; and 
(e) a woman whose husband has been convicted of an offence and is imprisoned . . . ,

but does not include a woman who is living with a man as his wife on a bona fide domestic basis, although not legally married to him."

AUTHOR'S NOTE

A paper analysing the merits of a de facto marriage policy in social welfare was presented in August 1976 to the Australasian Universities Law Schools Association; the author is grateful to those whose contributions to the discussion of that paper are reflected in this note on the Baxter case.
There is no definition in the Act of the phrase "living with a man as his wife on a bona fide domestic basis"; (the same criterion is applied in the definition of "supporting mother" in s.83AAA(1) of the Act, but again without further definition of the phrase). In consequence, the Department has wide scope in practice in the application of the legislation.

The Department's policy is contained in its statement of March 1975, entitled "De Facto Marriage Relationships (Cohabitation)." In a letter dated 29 July 1976 to the N.S.W. Council for Civil Liberties about the Baxter case, Senator Guiffoye substantially confirmed that this policy statement accurately reflects the Department's policy at the present time. Senator Guiffoye stated: 

"... was established before this Government came to office and reflect policies which were developed over a period of several Governments. I am assured by the Director-General of my Department that his officers are aware of the relevant policy statements and of the need to guide their actions as public servants in accordance with them." 

The Departmental policy, described more fully in a previous issue of this Bulletin, (1974-5) 1 Legal Service Bulletin 257, indicates that the purpose of an enquiry into living arrangements is to:

"... be beyond all possible doubt that the couple reside together as husband and wife. This generally implies that the parties have so merged their lives and resources that the relationship is indistinguishable from marriage."

This general statement is subsequently amplified by reference to such indicia as support, the existence of a sexual relationship, and factors which indicate only a sharing arrangement between the parties. From these statements, it is possible to formulate three fundamental principles in the Department's cohabitation policy: (1) A de facto marriage involves a "merger of lives and resources"; and a "sharing of the costs of lodging, food, cooking and laundry" need not involve such a merger of resources. (2) A woman who is supported by a man as his wife on a bona fide domestic basis; whether the parties have represented themselves as man and wife or have used the same name, and whether the parties spend leisure time together; whether the parties are married couple; and whether there are "children of the association".

**APPLICATION TO THE BAXTER CASE**

There were two factors in the Baxter case which tended to indicate the existence of a de facto marriage. One was the sexual relationship, which admittedly exists, but which is not, according to the Department's policy, determinative by itself. The other factor was Barbara's adoption of Roger's surname for herself and her sons. However, this factor needs to be considered in the context of its peculiar circumstances. Adoption of Roger's surname was designed both to avoid Barbara's former husband (although, of course, any new surname might have accomplished this purpose), and to protect Barbara's sons from gossip in their new home unit. Barbara has never positively asserted to her neighbours that she is Roger's wife, although her use of his surname undoubtedly creates a misleading impression which she has not corrected. However, her use of Roger's surname has created no such false impression in the world at large, because she has positively asserted that she is not married on her records at Macquarie University, to all her friends, and at the bank where she maintains an account to which Roger has no access. She has explained to her sons that Roger is not their father and they do not refer to him as such; the boys are registered at school as being without a father.

Moreover, a comparison of these two factors with other "relevant factors" in the Department's policy indicates that its decision is suspect. Roger Baxter provides no support to Barbara and her sons (his income from a TEAS grant is needed to support his own children), thereby negating the possibility of a prima facie case on that ground. As well, a careful analysis of their living arrangements suggests a "sharing of lives" rather than a "merger of lives and resources". Roger's wife is named as the beneficiary in his will and the recipient of his life insurance policy, and he maintains a joint bank account with his wife and not with Barbara. The decision to live together was prompted to a significant extent by their separate financial difficulties, and each of them brought furniture to the unit which is used by both, although they regard its ownership as unchanged. They do not usually eat together because Roger spends each morning with his children preparing them for school, and each evening with them, each afternoon until 6 p.m. when his wife returns from work. Roger and Barbara do not spend holidays together and Roger does not join in outings with Barbara's children. They share household chores equally, and contribute equally to household expenses regardless of their individual resources; there is no "pooling of resources". Due to their other commitments, Roger and Barbara spend little time in social outings, but on such occasions, they are never regarded as husband and wife. They have no children and no plans to marry.

Taking all of the facts into account, the Department's decision is inconsistent with its stated policy. Having regard to the reasons of the tribunal and the transcript of Roger's interview, the sexual relationship and Barbara's use of Roger's surname were the essential factors relied upon in the determination of ineligibility. However, in view of the reliance on the use of Roger's surname, it is especially significant that the statement which Barbara signed before the field officer in November 1975 (which provided the initial evidence of disentitlement) was signed in her former surname rather than Baxter. Clearly, this statement could not be relied on as evidence of a bona fide domestic relationship. The sexual relationship,
which is not alone determinative according to Departmental policy, and the limited adoption of Roger’s name are the only factors favouring the decision in the Baxter case; by contrast, there are several other factors justifying a conclusion that Barbara and Roger do not live together “as man and wife on a bona fide domestic basis”.

It seems that the Baxter case was not decided according to stated Departmental policy, contrary to Senator Guilfoyle’s assertion that the policy statement of March 1976 is still effective. The policy applied in the Baxter case suggests that either the existence of a sexual relationship is itself sufficient to disqualify the widow, pensioner, or that the weight to be attached to the limited use of a man’s surname is far greater than that to be given to other “relevant factors”. The crucial problem is that the policy reflected in the decision of the Baxter case is unknown outside the Department, and that the Department’s stated policy is misleading.

THE DEPARTMENT’S ROLE

(a) A FAILURE TO COMMUNICATE: Departmental actions in the Baxter case were almost uniformly slow, unresponsive and inefficient. Barbara wrote to the Department on three occasions during December 1975 requesting an explanation of the reason for her disentitlement and a copy of the statement she had signed in the presence of the field officer. On 8th January, she received as an explanation of her disentitlement the curt information that she lived with “a male person on a husband and wife basis”. There was no attempt to explain the factors considered in this determination or the evidence upon which the Department relied. A month later, on 12 February, she was notified that the Department could not forward a copy of her statement to her because her file, including the statement, had been sent to the tribunal. There was no explanation for the failure to forward the statement to her prior to this date. The Department’s failure is especially significant because its guidelines expressly provide that claimants who request a review of the Department’s report are entitled to copies of any statements made by them or any documents furnished by them to the Department. After repeated requests, Barbara received a copy of her statement in July 1976, seven months after her initial request and also after the final determination of her case.

(b) REPORTING TO THE TRIBUNAL: The Department, pursuant to its guidelines on the tribunal’s procedures, prepared a report for the tribunal in the Baxter case; according to these guidelines, claimants are not entitled to access to the Departmental reports and there is no obligation on the tribunal to reveal their contents to claimants. In Barbara’s case the report alleged that Barbara had been (wrongly) receiving NEAT payments as well as a widow’s pension. Because Barbara requested an interview with the tribunal (which is routinely granted to claimants who make such a request), she was questioned about the contents of the Department’s report and the alleged NEAT payments by the tribunal, and was able to provide confirmatory evidence subsequently that the report was wrong. The case clearly demonstrates the vulnerable position of claimants who have no access to Departmental reports to the tribunal, especially where no interview is conducted. A claimant may be able to correct inaccuracy by requesting an interview with the tribunal; despite this fact, however, no interview is conducted in the majority of cases before the tribunal.

(c) THE FIELD OFFICER’S INQUIRY: The Department’s role in conducting the home visit is especially important; it clearly demonstrates the practical difficulties caused by the existing cohabitation policy. The procedures for conducting home visits are set out in the Departmental policy of March 1975, Paragraph 22 provides:

“As a general rule inquiries should not be pursued to undue lengths in an attempt to prove the existence of a de facto marriage relationship. It is preferable to determine a claim on incomplete information and allow the claimant the benefit of the doubt rather than risk the possibility of offending the parties concerned and creating embarrassing situations. Inquiries should not take on an inquisitorial or intrusive nature. Gratuitous observations reflecting on a person’s character, integrity or credibility should also be avoided.”

There is also an express direction in the guidelines that “direct or indirect questioning as to whether the claimant or pensioner has sexual relations with the other party should be avoided.” Barbara Baxter alleges that the field officer who visited her on two occasions in November 1975 and obtained the statement from her which resulted in her disentitlement, acted contrary to these Departmental directions. She alleges that he called her a “naughty little girl” and advised her that she could avoid the embarrassment of a public hearing by admitting that she lived de facto. He suggested that she should sign the statement in order to avoid a visit from other less friendly Departmental inspectors who might read a summons aloud at the door.

Barbara lodged a formal complaint with the Department concerning the field officer’s behaviour in December 1975, but, despite repeated requests for a response, the Department did not reply. Finally in her letter of 29th April, Senator Guilfoyle stated:

“I regret that you were not satisfied with the interview conducted by the Field Officer from the Department. The Field Officer concerned has stated he had no intention of creating the impression you gained and his recollection is that the interview was conducted in a friendly and courteous manner. The officer concerned is highly regarded by his senior officers and has a reputation of having established good relations with many of the Department’s clients. Please accept my sincere apologies and those of the officer concerned for any unwarranted discourtesy you may have experienced.”

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Senator Guilfoyle also apologised for the Department's failure to reply to Barbara's letters and reiterated the Departmental policy "to fully respond to all correspondence received." In her subsequent letter to the N.S.W. Council for Civil Liberties concerning the Baxter case, Senator Guilfoyle revealed that the particular field officer had been questioned and had denied Barbara's allegations; moreover, she suggested that since Barbara had admitted feeling ill at the time of the interview (she was recovering from chicken pox), "there is no justification for accepting completely Mrs. Baxter's version of the incident." Senator Guilfoyle did, however, admit that it was "impossible, in the absence if any third party, to establish precisely what was said at the interview," but concluded that the field officer, who had a good reputation among his senior officers, was equally entitled to be believed.

The Minister's remarks reflect a curious dichotomy in the Department's practices. She admits that, in the absence of a third party, it is difficult to determine exactly what occurred during the field officer's visit; at the same time, Barbara alleges that the field officer apparently waited until Roger Baxter had left the unit before making his visit. Moreover, she claims that he refused to allow her to call to Roger to return to the unit, thereby ensuring that no third party was present during the interview. The absence of a witness during the interview is very important for claimants because there is no opportunity during the review process for claimants to challenge the field officer's version of the facts. Moreover, if the Baxter case is representative, it seems likely that the Director-General will generally believe a reasonable explanation from a field officer if it differs from the claimant's. For these reasons, it is imperative for claimants to ensure that a witness is present during the initial interview. Since the home visits are generally conducted without warning, however, it will usually be necessary for the claimant, surprised by a sudden visit, to have sufficient foresight to deny admittance to the field officer on the initial occasion and attempt to make a specific appointment for a subsequent visit (when a witness may be present). The Department does recognise that home visits can be conducted only with permission; a polite but firm request for an appointment should not jeopardise entitlement to pension.

THE ROLE OF THE TRIBUNAL

(a) PAYMENT OF PENSION PENDING APPEAL: By contrast with the Department, the conduct of the appeals tribunal was responsive and facilitative; its role in the Baxter case well-illustrates the merits of a review process. The tribunal's intervention in December 1975 resulted in the reinstatement of Barbara's pension pending the outcome of her appeal. Even if restoration of pension is dependent on the existence of financial need, such as existed in Barbara's case, most social security claimants would qualify. The Baxter case is important as a precedent in these circumstances.

(b) THE SIGNIFICANCE OF THE INTERVIEW: Barbara requested an interview before the tribunal, and was interviewed by the tribunal members in February 1976. In her case, it was especially important to obtain an interview because the Departmental report, to which she had no access, contained potentially damaging but erroneous allegations. Her experience underlines the desirability of interviews before the tribunal which will be routinely granted on a claimant's request, but only in limited other cases. Roger took with him a shorthand stenographer and requested permission of the tribunal to make a record of the interview. The tribunal consented. Such a record of in camera proceedings is useful in relation to the subsequent decision of the tribunal and the Director-General, and may be of use in deciding whether to initiate judicial review proceedings.

(c) LEGAL ADVICE AND REPRESENTATION: Neither Roger nor Barbara obtained legal advice prior to appearing before the tribunal, and neither was accompanied nor represented during the interview by a solicitor. Their experience is a typical one, reinforced by the tribunal's procedural guidelines permitting claimants to be accompanied by a non-lawyer friend or represented by an M.P. (whether a lawyer or not). The guidelines expressly prohibit representation of claimants by legal practitioners, but it has been suggested that the phrase "legal practitioner" should be confined to those who regularly practise law, and permit others with legal training to appear before the tribunals. From a lawyer's point of view, it appears desirable that claimants have some assistance before the tribunal; however, it is likely that the reason for the lack of representation before the tribunal is due less to the tribunal's guidelines than to the unavailability of legal services to social security claimants. Particularly those claimants less articulate and capable than Barbara Baxter could benefit greatly from legal assistance.

(d) DECISION-MAKING BY THE TRIBUNAL: A significant departure from the tribunal's usual procedure occurred in the Baxter case. The tribunal's authority is confined to making recommendations to the Director-General whenever it decides to uphold an appeal (although it may decide to reject an appeal without confirmation from the Director-General). In the Baxter case, the tribunal voted 2-1 against upholding Barbara's appeal. Normally, that decision would have resulted in rejection of the appeal, and termination of the review process. However, in the Baxter case, the tribunal resorted to the unusual (and probably unprecedented) course of forwarding Barbara's file, with the tribunal's comments, but without its recommendation, to the Director-General for a determination. The tribunal's responsiveness to the need for a further consideration of the Baxter case, despite the decision of its own members, merits commendation. The Baxter case presented a hard choice for the tribunal, and its action indicates its ability and willingness to depart from normal procedure when the occasion demands it. Although it is possible to criticise the decision in the Baxter case, the tribunal's procedural flexibility deserves considerable praise.

CONCLUSION

The Baxter case is significant because it demonstrates aspects of the cohabitation policy in practice. It is also significant, however, because it illustrates the disadvantage of such a policy in the social welfare system. The operation of the cohabitation policy exposed by the decision in this case provides incentive for a re-evaluation of the merits of the policy itself in Australia.