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REPORT 113

Relationships

June 2006

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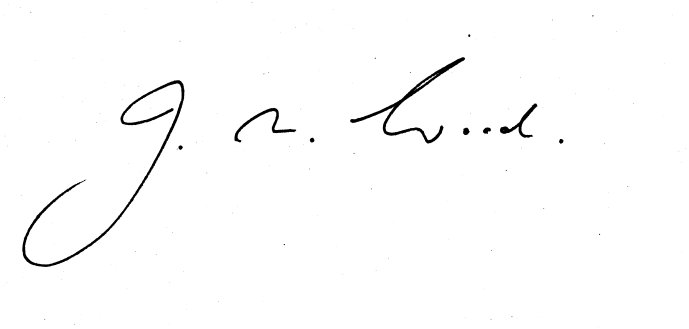
Letter to the Attorney General

To the Honourable Bob Debus MP
Attorney General for New South Wales

Dear Attorney

Relationships

We make this Report pursuant to the reference to this Commission received 6 September 1999.



The Hon James Wood AO QC

Chairperson

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The Hon. Justice Michael Adams (Commissioner-in-charge)

Professor Hilary Astor

Acting Judge Michael Chesterman

Professor Richard Chisholm

Master Joanne Harrison

The Hon Gordon Samuels AC CVO QC

Professor Michael Tilbury

The Hon James Wood AO QC

June 2006

Table of Contents

8. THE SCOPE OF THE ADJUSTMENT POWER

9. DOMESTIC VIOLENCE AND PROPERTY ADJUSTMENT

10. PARTNER MAINTENANCE

11. ASPECTS OF FINANCIAL ADJUSTMENT PROCEEDINGS AND ORDERS

TERMS OF REFERENCE

In a letter to the Commission dated 6 September 1999, the Attorney General, the Hon J W Shaw QC MLC, required the Commission to inquire into and report on the operation of the *Property (Relationships) Act 1984* (NSW), with particular regard to:

- the financial adjustment provisions of the Act and in particular:

  (i) the effectiveness of section 20 in bringing about just and equitable adjustments of the parties' respective interests; and

- (ii) whether the current legislation is able to take into account superannuation entitlements effectively;

- the process of decision-making or determination of rights;

- the Commission's Report Number 36, De Facto Relationships (1983);

- the 1999 amendments incorporating the *Property Relationships (Amendment) Act 1999* (NSW) and the matters referred to the Legislative Council's Standing Committee on Social Issues regarding the rights and obligations of persons in interdependent personal relationships; and

- any related matter.

PARTICIPANTS

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon. Justice Michael Adams (Commissioner-in-charge)

Professor Hilary Astor

Acting Judge Michael Chesterman

Professor Richard Chisholm

Master Joanne Harrison

The Hon Gordon Samuels AC CVO QC

Professor Michael Tilbury

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LIST OF RECOMMENDATIONS

CHAPTER 1

Recommendation 1 – see page 22

The PRA should provide for an objects clause in the following terms:

The objects of this Act are to:

- Recognise and respect the diversity of relationships covered under the Act;
- Promote the equal treatment of people living in diverse relationships and improve their access to the legal system;
- Recognise and respect people's rights to order their own financial affairs subject to certain safeguards to ensure any agreement reached between them is voluntarily made and fair;
- Facilitate a just and equitable resolution of financial matters at the end of a domestic relationship; and
- Provide a fair, timely, and affordable process for resolving financial matters at the end of a domestic relationship.

Recommendation 2 – see page 23

The PRA should be reviewed within five years of amendment to ascertain whether it is achieving its objectives.

Recommendation 3 – see page 24

The *Property (Relationships) Act 1984* should be renamed the *Relationships Act 1984*.

Recommendation 4 – see page 27

An education strategy should be implemented to raise awareness of rights and obligations under the PRA among those directly affected by it.

CHAPTER 2

Recommendation 5 – see page 41

The definition of "de facto relationship" in s 4(1) of the PRA should be amended to dispense with any suggestion that the parties to the relationship must cohabit.

Recommendation 6 – see page 49

Section 4(2)(i) of the PRA should be amended to require the Court to consider, where relevant, possible reasons for parties not holding themselves out publicly as a couple, arising from the social context in which their relationship existed.

Recommendation 7 – see page 50

If a system of registration of domestic relationships is implemented (see Recommendation 15), the PRA should be amended to provide that proof of registration of a de facto relationship is proof of the relationship.

Recommendation 8 – see page 58

The following statutes should be amended to include a party to a de facto relationship within the meaning of the PRA, or a de facto relationship within the meaning of the PRA, in their definitions:

Local Government Act 1993 (NSW)

Adoption Act 2000 (NSW)

Property, Stock and Business Agents Act 2002 (NSW)

Commercial Agents and Private Inquiry Agents Act 2004 (NSW)

Home Building Amendment Act 2004 (NSW)

Recommendation 9 – see page 59

Consistent PRA-referenced definitions of de facto partner, spouse and de facto relationship should be used in all relevant New South Wales legislation.

"De facto partner" should be defined as "the other party to a de facto relationship within the meaning of the *PRA".*

"Spouse" should be defined as "(a) a husband or wife, or (b) the other party to a de facto relationship within the meaning of the *PRA".*

"De facto relationship" should be defined as "a de facto relationship within the meaning of the *PRA".*

Existing legislation that deviates from this terminology, either in relation to the definition or to the term itself, should be amended to ensure consistency.

Where legislation uses the term de facto partner, spouse or de facto relationship without defining that term, the legislation should be amended to include the definition set out above.

CHAPTER 3

Recommendation 10 – see page 69

The definition of "close personal relationship" in s 5(1)(b) of the PRA should be amended to dispense with any suggestion that the two parties to the relationship must cohabit.

Recommendation 11 – see page 69

The PRA should be amended to provide that, for the purpose of s 5(2)(a), a fee does not include a carer's pension or allowance under the *Social Security Act 1991* (Cth) made to a party to a close personal relationship in respect of care provided by that party to the other party in the relationship.

Recommendation 12 – see page 70

The PRA should be amended to provide that, in determining whether two persons are in a close personal relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:

(a) the duration of the relationship;

(b) the nature, extent of and need for common residence;

(c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(d) the ownership, use and acquisition of property;

(e) the degree of mutual commitment to a shared life;

(f) the performance of household duties;

(g) the reputation and public aspects of the relationship;

(h) the level of personal care and domestic support provided by one or each of the partners to the other.

Recommendation 13 – see page 70

If a system of registration is implemented (see Recommendation 15), the PRA should be amended to provide that proof of the registration of a close personal relationship is proof of the relationship.

Recommendation 14 – see page 74

De facto relationships and close personal relationships should continue to be regulated by the same piece of legislation.

CHAPTER 4

Recommendation 15 – see page 87

The current presumptive approach in the PRA should be supplemented with an optional system of registration. This registration system should be integrated into the PRA, with a new Part being enacted to address registration and consequential amendments being made to other provisions.

Recommendation 16 – see page 87

New South Wales should seek the support of the Commonwealth for federal legislation that recognises that de facto relationships registered under State law will qualify as de facto relationships for the purposes of federal legislation.

CHAPTER 5

Recommendation 17 – see page 104

Section 5(3)(d) of the PRA should be amended to define "a child of the parties to a domestic relationship" as including a child for whose day-to-day care and long-term welfare both parties exercise responsibility.

Recommendation 18 – see page 113

The *Status of Children Act 1996* (NSW) s 14(1) and (6) should be reworded in gender neutral terms so as to extend the presumption of parentage to parties to a de facto relationship, as defined in the PRA s 4.

Recommendation 19 – see page 113

The amendments effected by Recommendation 18 should apply retrospectively, but should not affect the vesting in possession or in interest of any property that happened before the commencement of the amendments.

Recommendation 20 – see page 114

The law relating to sperm donation, including the legal status of known sperm donors, should be reviewed.

Recommendation 21 – see page 120

The *Adoption Act 2000* (NSW) s 30 should be amended so that the same sex partner of a child's legal parent is eligible to adopt the child in the capacity of step-parent.

Recommendation 22 – see page 122

The *Adoption Act 2000* (NSW) should be amended to provide that a co-mother is eligible to adopt her child immediately following the birth of the child. The relevant provision should contain a presumption in favour of adoption.

Recommendation 23 – see page 132

New South Wales should request the Commonwealth to amend FLA s 60H in gender neutral terms so that an automatic child support duty is imposed on co-mothers.

CHAPTER 6

Recommendation 24 – see page 136

Section 17(1) of the PRA should be amended to provide that, except as provided by subsection (2), a court shall not make an order under Part 3 unless it is satisfied that the parties to the application have been in a domestic relationship for a period of not less than 2 years.

Recommendation 25 – see page 142

PRA s 17 should not apply to domestic relationships that have been registered in accordance with the system proposed in Recommendation 15.

Recommendation 26 – see page 148

PRA s 15 should be repealed.

CHAPTER 7

Recommendation 27 – see page 197

PRA s 20 should be amended to authorise the court in its discretion to make an adjustment order that seems to it just and equitable, having regard to the circumstances listed in *Family Law Act 1975* (Cth) s 79(4), and including those matters listed in the *Family Law Act* s 75(2).

Recommendation 28 – see page 197

In reproducing in the PRA the matters listed in the *Family Law Act* s 75(2), matters related to vested bankruptcy property, as articulated in s 75(2)(n)(ii), should not be reproduced in the PRA.

Recommendation 29 – see page 198

In reproducing in the PRA those matters set out in the *Family Law Act* s 79(4) and s 75(2), the expressions "child of the marriage" and "children of the marriage" should be redefined as child or children of the relationship, in accordance with Recommendation 17.

Recommendation 30 – see page 198

In reproducing *Family Law Act* s 79(4) in the PRA, s 79(4)(f) should be redrafted to refer to an order under the PRA affecting a party to the relationship, or to an order affecting a child of the relationship made under Commonwealth or State law.

CHAPTER 8

Recommendation 31 – see page 208

New South Wales should pass legislation to mirror the FLA Part 8B (if constitutional difficulties can be resolved).

CHAPTER 10

Recommendation 32 – see page 247

PRA s 27(1)(a) should be amended to provide an age limit of 18 years for all children. PRA s 30 (1) should be amended consequentially.

Recommendation 33 – see page 249

PRA s 27(1)(b) should be amended to empower a court to award maintenance where it is satisfied that the applicant is unable to support himself or herself adequately by reason of age or physical or mental incapacity for appropriate gainful employment.

Recommendation 34 – see page 251

PRA s 27 (1) should be amended by inserting a new sub-paragraph (c) that empowers a court to award maintenance where it is satisfied that the applicant is unable to support himself or herself adequately for any other adequate reason. Consequentially:

- the words "either or both" in s 27(1) should be deleted and the words "any or all" inserted;
- PRA s 30(2) should be amended so that it applies additionally to the new s 27(1)(c); and
- section 30(3) should be amended to include a reference to the new s 27(1)(c).

Recommendation 35 – see page 257

PRA s 27(2) should be repealed and, with appropriate alteration of detail, the "s 75(2) factors" under the FLA should apply to the determination of maintenance orders under the PRA.

Recommendation 36 – see page 257

PRA s 29 should be repealed.

Recommendation 37 – see page 257

PRA s 32(1)(c) should be amended to provide that a maintenance order in favour of a party to a de facto relationship shall cease to have effect when that party enters into a marriage or remarriage or registered relationship with another person unless in special circumstances a court orders otherwise.

Recommendation 38 – see page 257

FLA s 75(2)(m) should be translated into the PRA as follows: "If either party has entered into a de facto relationship with another person – the financial circumstances relating to that relationship".

Recommendation 39 – see page 259

PRA s 27(3) should be replaced by a section that mirrors FLA s 75(3).

CHAPTER 11

Recommendation 40 – see page 269

The PRA should be amended to provide that a party to proceedings under Part 3 must make full and frank disclosure of all information relevant to the case in a manner prescribed by the Regulations.

Recommendation 41 – see page 269

The *Property (Relationships) Regulation 2005* (NSW) should be amended to provide a non-exhaustive list of what a party to proceedings under Part 3 of the PRA must disclose about his or her financial circumstances. The list should reflect the *Family Law Rules 2004* (Cth) Rule 13.04, with the qualification that "child" must include both legal and functional children. The Regulations should also provide a form of Financial Statement that the parties must file in support of such proceedings (including applications for consent orders). The Financial Statement should reflect that in Form 13 of the *Family Law Rules 2004* (Cth).

Recommendation 42 – see page 269

PRA s 41(1)(a) should be amended to make it clear that the suppression of evidence includes a failure to disclose relevant information as a ground for setting aside or varying an order under Part 3.

Recommendation 43 – see page 273

PRA s 24 should be amended to provide that an action under s 20 abates where both of the parties die before the proceedings are determined.

Recommendation 44 – see page 274

PRA s 25 should be amended to provide expressly that, where one of the parties dies after an order under s 20 is made, the order may be enforced by or against, as the case may require, the estate of the deceased party.

CHAPTER 12

Recommendation 45 – see page 297

PRA s 47 should be amended to provide that solicitors should have a duty to draw the attention of the parties to the desirability of seeking financial advice.

Recommendation 46 – see page 299

The PRA should be amended to provide that where proceedings are brought under the CRA to vary or set aside the terms of a domestic relationship agreement or a termination agreement, the proceedings must be brought within two years of the date of separation of the parties to a domestic relationship or termination agreement.

Recommendation 47 – see page 300

PRA s 49 should be amended to cover termination agreements as well as domestic relationship agreements.

Recommendation 48 – see page 305

Domestic violence should be included as a specific factor for varying or setting aside an agreement.

Recommendation 49 – see page 308

The PRA should be amended to allow the court to set aside or vary a domestic relationship or termination agreement where it is satisfied that the agreement was obtained by fraud or non-disclosure of a material matter.

Recommendation 50 – see page 311

The PRA should allow the court to set aside or vary a domestic relationship or a termination agreement where it is satisfied that circumstances have arisen since the time when the agreement was made making it impracticable for its provisions, or any of them, to be carried out. A note in the legislation should give examples of the sort of impracticability that is envisaged.

Recommendation 51 – see page 315

The PRA should be amended to provide that a court may make an order to set aside or vary a domestic relationship or financial agreement where either party entered the agreement for the purpose of, or for purposes that included the purpose of, defeating third party creditors, or made the agreement with reckless disregard for the interests of third party creditors. ‘Creditor’ should be defined to include a person whom a party to the agreement could reasonably have foreseen as being reasonably likely to become his or her creditor.

CHAPTER 13

Recommendation 52 – see page 321

PRA s 9 should be amended to confer jurisdiction on the District Court in PRA matters, in addition to the Supreme Court and the Local Court.

Recommendation 53 – see page 323

The *District Court Act 1973* (NSW) should be amended to increase the jurisdictional limit for PRA matters in the District Court to $750,000 and, consequentially, to repeal s 134(3).

Recommendation 54 – see page 327

The Judicial Commission of New South Wales should provide regular training and development sessions to court staff dealing with relationships matters, with specific emphasis on issues that affect couples in gay and lesbian relationships and close personal relationships.

Recommendation 55 – see page 327

The District Court should report judgments in relationship cases.

Recommendation 56 – see page 328

Courts should keep detailed statistics of the categories of PRA applications, that is the numbers of opposite sex, same sex, and close personal relationships applications.

Recommendation 57 – see page 331

The PRA should be amended to mirror FLA cost rules to provide for the parties generally to pay their own costs, subject to exceptions, as set out in FLA s 117 and 118.

CHAPTER 14

Recommendation 58 – see page 359

The PRA should provide that, before referring a matter under the PRA to mediation, a judicial officer must be satisfied that the mediation provider will undertake an initial assessment of the suitability of the matter for mediation.

Recommendation 59 – see page 365

The PRA should provide that the following factors must be taken into account in considering the suitability of any dispute under the Act for mediation:

(a) the safety of all parties to the mediation;

(b) any ADVOs or APVOs that may have been granted or that are pending;

(c) the degree of equality (or otherwise) in the bargaining power of the parties;

(d) the occurrence of violence and/or the risk of future violence between the parties or between one of the parties and a third party (including children of the relationship);

(e) the mental, physical and psychological state of the parties;

(f) the relationship between the parties;

(g) whether one of the parties may be using the mediation tactically to delay or gain some other improper advantage;

(h) the extent to which the issues in dispute are related to any violence between the parties;

(i) whether the party who has committed or threatened violence is a child;

and

(j) any other matter relevant to the proposed mediation and the parties.

1. Introduction

- Terms of reference
- Background to the Property (Relationships) Act 1984
- Reference of powers to the Commonwealth
- Overview of the Commission's approach to reform of the PRA
- Terminology
- The conduct of this review to date
- Raising public awareness
- Structure of this report

1.1 This Report marks the final stage of the Commission's review of the *Property (Relationships) Act 1984* (NSW) ("the PRA"). It contains our recommendations for changes to the law relating to the breakdown of de facto and close personal relationships, in particular the law regulating the adjustment and distribution of property. For reasons that will become apparent in this Introduction,[1] the focus of our review is now directed primarily to people in same sex de facto relationships, as well as close personal relationships. It is anticipated that issues arising from the breakdown of opposite sex de facto relationships will soon be dealt with by federal legislation, presumably the *Family Law Act 1975* (Cth) (the "FLA"), and thus lie outside the New South Wales Law Reform Commission's power to make recommendations for reform.

TERMS OF REFERENCE

1.2 By letter dated 6 September 1999, the then Attorney General, the Hon Jeff Shaw QC MLC, asked the Commission to inquire into and report on the operation of the PRA with particular regard to:

- the financial adjustment provisions of the Act and in particular:
- the effectiveness of s 20 in bringing about just and equitable adjustments of the parties' respective interests;
- whether the current legislation is able to take into account superannuation entitlements effectively;
- the process of decision-making or determination of rights;
- the Commission's Report No 36, *De Facto Relationships* (1983);
- the 1999 amendments incorporating the *Property (Relationships) Legislation Amendment Act 1999* (NSW) and the matters referred to the Legislative Council's Standing Committee on Social Issues regarding the rights and obligations of persons in interdependent personal relationships; and
- any related matter.

1.3 As a first step in this review, the Commission released a consultation paper, Discussion Paper 44, *Review of the Property Relationships Act 1984 (NSW)* ("DP 44"), in April 2002.

BACKGROUND TO THE PROPERTY (RELATIONSHIPS) ACT 1984

1.4 The Commission's current review marks the second time we have inquired into the law relating to de facto relationships. Our first inquiry was completed in 1983, with the release of our report on *De Facto Relationships* (Report 36, 1983) ("Report 36").

1. See para 1.15-1.37.

Report 36 culminated in the enactment of the *De Facto Relationships Act 1984* (NSW), which was the name originally given to the PRA.[2]

Report 36

1.5 Report 36 reviewed the law relating to family and domestic relationships, with particular reference to people living in opposite sex de facto relationships, and the rights and welfare of the children living in such relationships. Although the terms of reference were broad, the Commission decided to limit its inquiry to opposite sex de facto relationships. Two important consequences flowed from this decision. First, people living in same sex and other forms of interdependent relationships were not taken into account in constructing the legal regulatory frameworks that emerged from Report 36. Secondly, marriage remained the implicit benchmark for at least some aspects of the reform exercise.

1.6 Report 36 recommended that courts be given power to adjust the property interests of people living in de facto relationships where it considered it just and equitable to do so, having regard to the parties' contributions to the property and the welfare of the family. While the Commission recognised the similarities between de facto relationships and marriages, it considered marriages to be essentially, and inherently, different, with the parties to a marriage bearing greater rights and responsibilities with respect to their interests in property. The Commission recommended that the provisions of the *De Facto Relationships Act 1984* give more limited rights with respect to financial adjustment to de facto couples than were then available to married couples under the FLA.

Implementation of Report 36: De Facto Relationships Act 1984

1.7 The *De Facto Relationships Act 1984* (NSW) was the first legislation of its kind in Australia, and for that reason, despite what can now be seen as its limitations, it was considered to be a milestone.

1.8 Following on from the hierarchy of relationships set up in Report 36, the *De Facto Relationships Act 1984* gave more limited power to courts to adjust the property of people following the breakdown of their de facto relationships than the powers available under the FLA in relation to married couples. In property proceedings under the *De Facto Relationships Act* (and now, under the PRA), a court could consider matters relating to the parties' past contributions, but not their future needs or means. This was an essential difference from the regime that applied to the property interests of married couples under the FLA.

2. See *Property (Relationships) Legislation Amendment Act 1999* (NSW) Sch 1[2].

Property (Relationships) Legislation Amendment Act 1999 (NSW)

1.9 Significant amendments were made to the *De Facto Relationships Act* in 1999, including a change in name to the *Property (Relationships) Act*.[3] Impetus for these amendments originated in 1993, when the Gay and Lesbian Rights Lobby produced a consultation document entitled *The Bride Wore Pink*.[4] The Gay and Lesbian Rights Lobby recommended that the PRA be amended to recognise same sex relationships within its framework for property adjustment between parties to de facto relationships. Subsequently, two private members bills (the *Significant Personal Relationships Bill 1997* and the *De Facto Relationships Amendment Bill 1998*) were introduced to Parliament but failed to proceed. The latter Bill, however, received wide community support and, in October 1998, the State government referred the issues raised in the *De Facto Relationships Amendment Bill 1998* to the Legislative Council's Standing Committee on Social Issues. Before the Committee reported, the government decided to enact its own Bill, the *Property (Relationships) Legislation Amendment Act 1999* (NSW) (the "1999 amendments").

1.10 The 1999 amendments are considered yet another milestone in that they provide a framework for the division of property between people in a "domestic relationship", which includes same sex cohabiting couples and those in a "close personal relationship". A "close personal relationship" is a relationship between two adults, whether or not related by family, who are living together in a situation where one provides the other with domestic support or personal care. An example would be where an adult child lives with and cares for his or her elderly parent.

1.11 The 1999 amendments also extended opposite sex de facto rights and obligations to people in same sex relationships in areas such as inheritance, compensation and stamp duty, and amended a smaller number of other Acts to apply to those in close personal relationships.

Report of the Social Issues Committee

1.12 Following the passage of the 1999 amendments, the government referred to the Legislative Council's Standing Committee on Social Issues (the "Social Issues Committee") the question of which other laws should be changed to be consistent with the amended PRA. It also referred to the New South Wales Law Reform Commission consideration of the operation of s 20 of the PRA, which enables court-ordered financial adjustment, including superannuation, and alteration of property interests of partners in a domestic relationship. The Commission was asked to take account of the work of the Social Issues Committee in its review.

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3. See *Property (Relationships) Legislation Amendment Act 1999* (NSW) Sch 1[2].
4. This paper was subsequently redrafted into a second edition in 1994: see Lesbian and Gay Rights Service, *The Bride Wore Pink: Legal Recognition of Our Relationships: A Discussion Paper* (2nd ed, Sydney, 1994).

1.13 The Report of the Social Issues Committee raised several issues which it recommended the Law Reform Commission investigate as part of this review, namely:[5]

- the introduction of a relationship recognition system;
- definitional issues raised by the 1999 amendments;
- jurisdictional issues in relation to the District Court;
- alternatives to litigation;
- legal recognition of non-biological parents to ensure that children in non-traditional domestic relationships were not disadvantaged; and
- the adequacy of the maintenance provision in relation to children.

Miscellaneous Acts Amendment (Relationships) Act 2002 (NSW)

1.14 In 2002, after the Law Reform Commission's publication of DP 44, the New South Wales Parliament amended a further 20 State laws to include same sex couples in the definition of de facto partner or de facto relationship.[6] There are still a small number of Acts that continue to exclude same sex couples, inconsistently with the definitions contained in the PRA. These are canvassed in Chapter 2.[7]

REFERENCE OF POWERS TO THE COMMONWEALTH

1.15 Under the Australian Constitution, the power to make laws relating to marriage rests with the Commonwealth government,[8] implicitly leaving the power to make laws relating to relationships outside marriage to the States. Failing constitutional amendment, the only way in which the Commonwealth could legislate about matters relating to non-marital relationships would be if a State chose to refer its legislative power over those matters to the Commonwealth.

1.16 In 2003 (that is, after the release of DP 44), New South Wales referred to the Commonwealth its powers to legislate over financial matters relating to the breakdown of de facto relationships, in the *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW). Specifically, that Act provides for the reference of:

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5. NSW, Legislative Council, Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform (Inquiry into De Facto Relationships Legislation)* (Report 20, Parliamentary Paper No 127, 1999) Recommendation 26.
6. See *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW) and Chapter 2 at para 2.58.
7. See para 2.54-2.70.
8. *Commonwealth Constitution* s 51(xxi), see also s 51(xxii).

> *financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of different sexes,*
>
> *financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of the same sex.*[9]

1.17 The Act defines a "de facto relationship" as a "marriage-like relationship (other than a legal marriage) between two persons".[10] This definition relies much more on a traditional conception of a de facto relationship, centred on the marriage paradigm, than the current definition of a de facto relationship under the PRA.[11] Although the State government referred its power over both same sex and opposite sex de facto relationships, the Commonwealth government has indicated that it will not accept a referral of powers over same sex relationships.[12] The practical effect of this is that, once the referral of powers results in federal legislation, opposite sex de facto couples will take disputes over property to the Family Court, under federal legislation (most likely the FLA), following the breakdown of their relationships, while same sex couples and people in close personal relationships will continue to have their disputes dealt with by State courts under the PRA.

Background to the reference of powers

1.18 For a long time, commentators and practitioners criticized the lack of uniformity of State and Territory legislation dealing with the division of property between de facto couples.[13] One submission to the Commission made the following comment:

> *The first point which is obvious, but bears restating, is that it is a ludicrous situation that the States and Territories of Australia are out of step with each other about this important area of law.*[14]

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9. See *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 4(1).
10. See *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 3(1).
11. See Chapter 2 for the PRA definition.
12. See below at para 1.29. The *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) makes it clear that the reference of powers over one type of relationship acts independently of the reference of powers over the other. That is, the reference of powers over opposite sex relationships is not defeated by reason of the Commonwealth's refusal to accept a reference of powers over same sex relationships: see s 4(2).
13. For example, Australia, Constitutional Commission, Advisory Committee, *Distribution of Powers* (Report, 1987) Ch 4; Australia, Family Law Council, *Comments on the Report of the Joint Select Committee on the Operation and the Interpretation of the Family Law Act* (Report to the Minister for Justice, 1993) at para 9.02.
14. D Farrar, *Submission* at 2.

1.19 Many disputes between de facto couples transcend State borders as more and more people move and live interstate for various reasons, sometimes for long periods, buying and selling property as they go.

1.20 The Commonwealth agitated for uniform de facto relationship legislation for a considerable time. It had been a constant agenda item at meetings of the State and Commonwealth Attorneys General ("SCAG") since at least 2002, if not beforehand. One option was for all the States and Territories to adopt a model uniform law. However, the Commonwealth's preferred position, and arguably the most efficient, was for the States and Territories[15] to refer their powers over de facto relationships to the Commonwealth, in the same way that they had referred their powers over what were then known as access and custody issues in respect of the children of de facto partners in 1986.[16]

1.21 The issue gained momentum once the Commonwealth Parliament passed amendments to the FLA to allow the superannuation interests of parties to be treated as property and thus capable of being divided.[17] As superannuation is an increasingly valuable component of household finances, the ability to distribute it on the termination of a marriage is of obvious importance. However, because the superannuation industry is largely regulated by Commonwealth legislation, there are constitutional constraints on replicating the FLA scheme in State legislation, to the detriment of a substantial number of people living in relationships outside marriage. It was this that provided the impetus for the New South Wales Attorney General to refer powers to the Commonwealth.[18]

1.22 New South Wales was the first State to refer its powers over de facto relationships to the Commonwealth,[19] followed closely by Queensland[20] and

15. Note that the Australian Capital Territory and the Northern Territory do not strictly need to make a reference of powers to the Commonwealth, because of the power of the Commonwealth over the Territories under s 122 of the *Commonwealth Constitution*.
16. See *Commonwealth Powers (Family Law - Children) Act 1986* (NSW); *Commonwealth Powers (Family Law - Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law – Children) Act 1986* (Vic); *Commonwealth Powers (Family Law) Act 1987* (Tas). Western Australia was the only State not to refer its powers. The Western Australian Family Court, a State court, is vested with jurisdiction over federal legislation as well as state legislation: see FLA s 41.
17. See Chapter 8 at para 8.13-8.14 for discussion of the FLA scheme for the division of superannuation entitlements, and the constitutional constraints on New South Wales in replicating that scheme.
18. See NSW, *Parliamentary Debates (Hansard)* Legislative Council, 5 September 2003 at 3236.
19. *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW), yet to be proclaimed.
20. *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld), yet to be proclaimed.

Victoria.[21] Tasmania has indicated its intention to refer powers but has not yet done so. South Australia has indicated it will not refer powers.[22] Western Australia has introduced legislation to refer legislative power to the Commonwealth in relation to the superannuation interests of de facto partners.[23] The Act refers power only in relation to superannuation and not other financial matters, as these are already dealt with in the recently amended *Family Court Act 1997* (WA).[24]

Benefits of the reference of powers

1.23 Apart from ensuring that a single piece of legislation will apply to all people in de facto relationships regardless of where they live in Australia, and making amendments to the legislation easier, there are many advantages in including de facto couples in the FLA.

1.24 First, as mentioned above, de facto couples will have access to the new superannuation splitting provisions of the FLA, introduced in 2003.

1.25 Secondly, the referral will enable jurisdiction over de facto property disputes to be conferred on the courts administering the FLA, notably the Family Court of Australia and the Federal Magistrates Court.[25] This means that de facto couples will be able to have their property disputes and any disputes over parenting issues heard in a single court, reducing duplication of proceedings, costs and time. This may also help alleviate the inevitable stress that accompanies the breakdown of relationships.

1.26 Thirdly, by being able to bring matters to the Family Court or the Federal Magistrates Court, de facto couples will have access to a specialised court with proven expertise in handling family disputes, and one which boasts specialised integrated mediation services to promote settlements and reduce costs.

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21. *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic), yet to be proclaimed.
22. The SA government has undertaken a review of its legislation: see Parliament of South Australia, Social Development Committee, *Statutes Amendment (Relationships) Bill 2004* (Report 21); see also *Statutes Amendment (Relationships No. 2) Bill 2005* (SA).
23. See *Commonwealth Powers (De Facto Relationships) Act 2005* (WA).
24. See *Family Court Amendment Act 2002* (WA). The aim of the WA referral is for the Commonwealth to legislate so as to give the Family Court of WA the same jurisdiction and powers in relation to the superannuation interests of de facto couples as it has in relation to married couples under the superannuation splitting arrangements contained in the FLA.
25. Jurisdiction to hear disputes between de facto couples under the PRA had been conferred on the Family Court pursuant to the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) and the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW). However, the cross-vesting scheme collapsed when the High Court ruled it unconstitutional in *Re Wakim* (1999) 198 CLR 511.

1.27 Lastly, opposite sex de facto couples will be brought within a financial adjustment scheme that affords greater rights and responsibilities than are currently provided for by the PRA. Views will differ as to whether or not this is a benefit, or an appropriate regime to apply to de facto relationships. It is an issue which is at the centre of the Commission's discussion in Chapter 7 of this Report.

Limitations of the reference of powers

1.28 There are two main limitations of the reference of powers.

1.29 The first was already noted, at paragraph 1.17, namely the anticipated refusal of the Commonwealth to accept a reference of powers over same sex couples. In a media comment following a SCAG meeting, the then federal Attorney General indicated that the Commonwealth would only take up the reference of powers in respect of opposite sex de facto couples.[26] Despite the Commonwealth's announcement of its intention to legislate for opposite sex de facto couples only, New South Wales, Queensland and Victoria have made provision for the reference of State powers in respect of same sex de facto relationships, as well as opposite sex de facto relationships, to allow for a future Commonwealth government to extend the operation of the legislation, if so minded.[27]

1.30 A second limitation is that none of the States' referral Acts has yet commenced. They are all due to commence on proclamation, to allow the various Parliaments time to consider the amendments proposed by the Commonwealth in relation to the FLA.[28] If a State Parliament were dissatisfied with the amendments proposed by the Commonwealth, it could choose not to proclaim the referring Act. The practical effect of this delay is that the settlement of financial matters between opposite sex de facto partners continues to be regulated by State legislation, (that is, in New South Wales, the PRA), until such time as the reference of powers comes into operation.

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26. See I Munro, "Gay couples left out of court shift" *The Age* (8 March 2002) at 3. See also B Crawford, "Family equality for gays: Kirby" *The Australian* (28 October 2002) at 3; F Shiel, "Family Court should rule on gay disputes: Kirby" *The Age* (28 October 2002) at 3.
27. See *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 4(1)(b); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) s 4(1)(b); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic) s 4(1)(b).
28. See *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) s 2; *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) s 2(1), and note s 2(2), which expressly overrides the application of s 15DA of the *Acts Interpretation Act 1954* (Qld) (giving automatic commencement 12 months from the date of assent); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic) s 2.

When will the Commonwealth legislate for de facto couples?

1.31 When the Commonwealth will take up the reference of powers is not known at this stage. In fact, there has been no formal policy announcement by the Commonwealth that it will amend the FLA to include de facto couples.[29] The Commission understands that such amendment is on the Commonwealth government's legislative agenda. We also understand that the Commonwealth is not waiting to receive a referral of powers from all the States before it introduces amendments in the Parliament.

Impact of reference of powers on this review

1.32 The reference of the State's powers to the Commonwealth has, potentially, an enormous impact on this review. A significant difficulty for the Commission has been to determine how to proceed, since the exact limits of the reference of powers, and its implications, remain uncertain until such time as the reference comes into operation. To allow us to continue with our review in any sensible way, we have found it necessary to make certain assumptions.

1.33 Our first assumption is that the Commonwealth will take up the States' reference of powers with respect to the breakdown of opposite sex de facto relationships some time in the near future. There are two things to note about this assumption. First, it means that the PRA will be predominantly limited in its application to dealing with the breakdown of same sex and close personal relationships. Secondly, and this qualifies our first point, the reference of the State's powers is very specifically limited to referring power over financial matters arising out of the *breakdown* of a de facto relationship. Presumedly, opposite sex de facto couples who wish to adjust their property interests during the lifetime of their relationship (rather than as a consequence of a relationship breakdown) will still be brought within the scope of the PRA.[30] They will only have access to the Commonwealth legislation if their relationship breaks down.

1.34 Our second assumption is that, once the Commonwealth takes up the reference of powers with respect to opposite sex de facto couples, it is likely to extend the FLA provisions to them in much the same terms as they currently apply to

29. To date, there has been only media comment from the office of the then Commonwealth Attorney General, Daryl Williams, following the meeting of the Standing Committee of Attorneys General in 2002: "Commonwealth wins de facto property powers" (Media release of the Commonwealth Attorney General, 8 November 2002).
30. There could be a number of reasons why a de facto couple may want to adjust their property interests during the lifetime of their relationship (whether they be in a same sex or opposite sex relationship). For example, they may wish to adjust their shares in property without incurring stamp duty, or they may wish to prevent third party creditors of one partner from gaining access to assets by transferring title to the other partner.

regulate property distribution between married couples. Importantly, we assume that the Commonwealth will not seek to create a second (or more limited) set of rights for de facto couples, which differ in any significant way from those afforded married couples. Thus, when, in this Report, we consider questions of inconsistencies between the federal law's anticipated treatment of opposite sex de facto relationships under the FLA, and the State's treatment of same sex de facto and close personal relationships under the PRA, we are assuming that the FLA will provide for the adjustment of property interests between opposite sex de facto couples in essentially the same way as it currently provides for such adjustment between married couples.

1.35 Our third assumption is that, whatever amendments the New South Wales government makes to the PRA consequent upon the recommendations in this Report, they are unlikely to be made until the Commonwealth government takes up the State's reference of powers over opposite sex de facto couples, or indicates that it will not do so.

1.36 Our fourth assumption is that any amendments that are made to the PRA to give effect to our recommendations, will not apply retrospectively, that is, they will not apply to relationships that break down before the amendments commence. As a consequence, any opposite sex de facto couples who separate before the changes to the FLA take effect (and who will therefore be governed by the PRA rather than the FLA), will be governed by the PRA in its current form.

1.37 The practical consequence of these assumptions is to confine the focus of our review predominantly to people in same sex and close personal relationships. It is these two groups of people who will be mostly affected by any legislative amendments to the PRA that seek to implement the recommendations made in this Report. Having said that, we see no reason why our recommendations for reform could not also apply to matters relating to the breakdown of opposite sex de facto relationships, should any or all of these assumptions prove false. Moreover, given the limitation of the reference of powers to the breakdown of opposite sex relationships, opposite sex de facto couples will still be brought within the scope of the PRA in specific situations, namely the adjustment of property interests during the lifetime of their relationship, the entry into and termination of domestic relationship agreements, and registration of their relationship under our recommended registration system.[31] Consequently, while this Report pays special regard to issues surrounding same sex and close personal relationships, our recommendations for reform of the PRA are wide enough to apply to opposite sex relationships in these situations.

OVERVIEW OF THE COMMISSION'S APPROACH TO REFORM OF THE PRA

1.38 The Commission's first attempt to devise a legal framework for de facto relationships was made more than twenty years ago. As our discussion below demonstrates, the socio-legal context in which our current review is based is markedly

31. See Chapter 4, Recommendation 15.

different from that of the early 1980s. Courts and legislatures around the world have increasingly recognised and acknowledged the diversity of family forms and household arrangements in which people live.[32] An important question for this current review is whether the PRA adequately reflects these social changes, or whether New South Wales should now seek to adopt a more expansive model of property adjustment.

1.39 The focus of our present review is also significantly different from that of our first inquiry. In 1983, the Commission considered legislative models as they might apply to people living in opposite sex de facto relationships. Now, as a consequence of the 1999 amendments to the PRA, and the anticipated reference of powers to the Commonwealth, the starting point of this Report is the distribution of property following the breakdown of same sex de facto and close personal relationships. While we do not intend to limit our approach for reform to such an extent as to exclude a more general application of our recommendations to opposite sex de facto relationships, issues relating to same sex and close personal relationships are at the centre of this review, and form the basis for considerations for change.

The social and demographic context

1.40 How we live and what family forms we develop have undergone radical change over the last half-century.[33] Traditional concepts of the nuclear family, comprising parents who are married to each other and raise their biological or adopted children, are being challenged by a number of different family structures. These changes in family forms are linked to a range of social and economic trends. The increasing rates of divorce and remarriage, for example, have seen a corresponding increase in the numbers of single parent, step and blended families. The trend towards later partnering, and delayed child bearing, has contributed to lower fertility rates, increased childlessness and increased numbers of couple-only families. Such trends have implications for the nature and composition of families. For example, as more and more young people stay in education longer, and postpone partnering, couples with children tend to be older.[34]

1.41 Couple families with children (that is, where two parents live together) are still the most common type of family in Australia today, although the proportion of such families declined over the 15 years between the 1986 and 2001 censuses.[35]

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32. See NSW Law Reform Commission, *Review of the Property (Relationships) Act 1984* (DP 44, 2002) at para 1.7.
33. See, for example, M Gilding, "Changing families in Australia, 1901-2001" (2001) 60 *Family Matters* 6. See also D de Vaus, *Diversity and Change in Australian Families: Statistical Profiles* (Australian Institute of Family Studies, Melbourne, 2004).
34. Australian Bureau of Statistics, *Australian Social Trends 2003* (Catalogue No 4102.0, 2003) at 37.
35. Couple families with children made up 60% of all households in 1986 compared with 52% in 2001. See Australian Bureau of Statistics, *Australian Social Trends 2005* (Catalogue No 4102.0, 2005) at 7.

Conversely, the proportion of couples without children, single-parent families, and people living alone increased over the same period.[36]

1.42 A recent study shows that the presence of children is most likely to affect how Australians define a family. This study reports that couples with children are more likely to be considered a family than couples without children. Same sex couples with children are considered families by 65% of younger Australians, compared with only 14% of older Australians.[37]

De facto relationships

1.43 The nature of couple families (that is, families with two cohabiting partners) is also changing, with an increasing number of couples choosing to cohabit, before marrying, or instead of marrying.[38] The number of men and women choosing to live together before marriage has risen from 46% in 1986 to 72% of registered marriages in 2001.[39] Cohabitation is, in these instances, considered a pathway or stepping-stone to marriage.[40] Australian Bureau of Statistics data also shows that, in the same period, marriage rates dropped and increasing numbers of people never married.[41]

1.44 Australian Institute of Family Studies research highlights the changing trends in family formations. It demonstrates that increasing numbers of couples are cohabiting though the majority still eventually marry.[42] Expectations of marriage among men and women who cohabit vary with previous marital experience, age and the length of time that the parties have lived together. Those who had never married before were, for example, more likely to expect to marry their partner than those who had been married before. Older partners were also less likely to say they expected to marry their partner and for both partners, expectations of marriage decreased the longer they cohabited.

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36. Between 1986 and 2001, the proportion of people living in one-parent families increased from 9% to 12%, the proportion of people living as partners in couple families without children increased from 17% to 20%, and the proportion of people living alone has increased from 7% to 9%: see Australian Bureau of Statistics, *Australian Social Trends 2005* (Catalogue No 4102.0, 2005) at 8.
37. S Wilson, G Meagher, R Gibson, D Denemark, and M Western (ed), *Australian Social Attitudes: The First Report* (UNSW Press, Sydney, 2005).
38. The number of couples in de facto relationships increased from 6% in 1986 to 12% of all couple families in 2001. See Australian Bureau of Statistics, *Australian Social Trends 2003* (Catalogue No 4102.0, 2003) at 38.
39. See also D de Vaus, L Qu and R Weston, "Changing patterns of partnering" (2003) 64 (Autumn) *Family Matters* 10-15.
40. See also L Qu, "Expectations of marriage among cohabiting couples" (2003) 64 (Autumn) *Family Matters* 36.
41. Australian Bureau of Statistics, *Australian Social Trends 2003* (Catalogue No 4102.0, 2003) at 38.
42. L Qu and R Weston, "Starting out together: through cohabitation or marriage" (2001) 60 (Spring-Summer) *Family Matters* 76.

1.45 While the rate of divorce among married couples who had lived together prior to marriage might be expected to be lower than for those married couples who had not previously cohabited, the converse appears to be true.[43] Cohabitation prior to marriage is no guarantee against separation and divorce. Despite the higher incidence of cohabitation, and its growing social acceptance, research by the Australian Institute of Family Studies suggest that for men and women, marriage is still the preferred family form.[44]

Same sex families

1.46 Same sex couples cannot legally marry.[45] It was not until the 1996 Census that the Australian Bureau of Statistics began to collect and tabulate data on the incidence of same sex families. The Census form relies on same sex couples volunteering information about themselves rather than explicitly asking them to tick a box saying they are in a same sex de facto relationship. The Census defines same sex couples as "two persons of the same sex who report a de facto partnership in the relationship question, and who are usually resident in the same household".[46] As the Census relies on self-reporting, the Bureau itself concedes that its data may have some limitations. Many people may be reluctant to identify themselves as being in a same sex de facto relationship.

1.47 The 1996 Census reported that there were 10,000 same sex families in Australia. By 2001, the figures doubled, to 20,000 same sex families, suggesting an increase in those willing to identify as partners in a same sex relationship.[47] Of these, 11,000 were gay male couples and 9,000 were lesbian couples.[48] New South Wales

43. See L Qu, "Expectations of marriage among cohabiting couples" (2003) 64 (Autumn) *Family Matters* 36.
44. See L Qu, "Expectations of marriage among cohabiting couples" (2003) 64 (Autumn) *Family Matters* 36.
45. In 2004, the Commonwealth passed the *Marriage Amendment Act 2004* (Cth) to amend the *Marriage Act 1961* by confining the meaning of "marriage" to the "union of a man and a woman, to the exclusion of all others, voluntarily entered into for life": see s 5 of the *Marriage Act 1961* (Cth). This was intended to ensure that Australian courts could not in the future redefine marriage to include same sex unions or recognise same sex marriages entered into abroad: see also *Marriage Act 1961* (Cth) s 88B(4), 88EA.
46. Australian Bureau of Statistics, *2001 Census Dictionary* (Catalogue No 2901.0, Canberra, 2001) at 248.
47. Australian Bureau of Statistics, *2005 Year Book Australia* (Number 87, Catalogue No 1301.0) at 142.
48. See Australian Bureau of Statistics, *2005 Year Book Australia* (Number 87, Catalogue No 1301.0) at 142-144. See also D Dale, "The closet door opens on 19,596 gay couples" *Sydney Morning Herald* (20 June 2002) at 1, reporting on the census findings as they relate to families of same sex couples.

had the largest reported number of same sex couple families with 8,913, [49] the vast majority of them (6,986) living in Sydney.

1.48 According to this data, same sex families represent 0.5% of all couple families in 2001.[50] Twenty per cent of lesbian households and five per cent of male same sex relationships were reported to contain children. The 2001 Census did not collect any data on whether the children were born from previous opposite sex relationships or from other parenting arrangements, nor did it take into account single gay and lesbian parents.

Increased social and legal acceptance of non-traditional family types

1.49 As it has become apparent that the nature of the family unit is a dynamic one, trends and attitudes have changed with time. De facto relationships no longer have the same social stigma that once attached to them in the 1960s or 1970s.[51] Their greater social acceptance, reflected in most areas of law, has contributed to increasing numbers of people choosing to cohabit without marrying, and raising children outside marriage. It is significant that some legislative initiatives in other States to regulate the distribution of property between de facto couples have rejected New South Wales' approach in the PRA, with its perception of the nature of de facto relationships as inherently distinct from marriage, and moved instead towards the model set up for married couples by the FLA.[52] The legal status of same sex families has also undergone considerable change over the last 25 years. As mentioned earlier, same sex couples are now legally recognised for a variety of different purposes, at both federal and State level.[53] They are, for example, recognised in matters such as superannuation, hospital and coronial rights, property settlement, taxation, compensation payments and in matters relating to wills and estates.

Carers

1.50 As the population ages, there is increasing recognition of the caring role performed by family, friends and neighbours. In 1998, there were 2.3 million carers in

49. There were 4,613 same sex couples reported in Victoria and 2,500 in Queensland. The numbers were much smaller in the other States and Territories.
50. Australian Bureau of Statistics, *2005 Year Book Australia* (Number 87, Catalogue No 1301.0) at 142.
51. D de Vaus, "Family values in the nineties" (1997) 48 *Family Matters* 7.
52. See discussion in Chapter 7.
53. There remain some significant areas of non-recognition at the State level including, for example, adoption, and more so at the federal level, including, for example, in the areas of immigration and social security. See J Millbank, *Same-Sex Families* (Legal Information Access Centre, Hot Topics No 53, 2005). See also Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements (National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits)* (Discussion Paper, 2006).

Australia.[54] Three quarters of these carers provided care to someone living in the same household.

1.51 The Australian Bureau of Statistics defines a carer as someone who provides help or supervision to any person with a disability or who has an ongoing health condition, or to any person aged 60 years and over.[55] A primary carer is a carer who assists the other person with basic activities of self-care, mobility or communication.

1.52 In 1998, about one in five carers were reported to be primary carers. Those who took on the primary care role were almost always a family member of the person needing care, most commonly their wife, mother, daughter or husband. Two thirds of carers had been providing care for over five years, while 12% reported that they had been caring for the other for over 20 years. Most carers said they felt a family obligation to provide care.[56]

1.53 Primary carers are more likely to live in the same household as the person being cared for if that person is their partner or child. In contrast, less than half of those who were caring for a parent, or someone other than a parent, partner or child, were living with that person.

1.54 The caring role can be very taxing on the carer, emotionally, physically and financially. For many carers, it is the equivalent of a full-time job, without the remuneration. In fact, for over half of the primary carers in Australia in 2003, their main source of income was reported to be a government pension or allowance.[57]

Objects and principles of reform

1.55 What should be the aims of the Commission's recommendations for change to the PRA, and what principles should guide our approach to reform? In answering these questions, the Commission has taken account of the social context in which the PRA now operates, as well as changes to the law both in New South Wales and elsewhere since the introduction of this State's de facto legislation, which reflect different conceptions of what it is to be a family. We have also taken account of views expressed by members of the public within our consultation process.[58] With these considerations in mind, the following basic principles have guided our approach to reform:

- Families, and domestic relationships, now take many and diverse forms.

54. Australian Bureau of Statistics, *Disability Ageing and Carers: Summary of Findings* (Catalogue No 4430.0, 1998) at 10.
55. See Australian Bureau of Statistics, *Disability Ageing and Carers: Summary of Findings* (Catalogue No 4430.0, 1998) at 65.
56. Australian Bureau of Statistics, *Disability Ageing and Carers: Summary of Findings* (Catalogue No 4430.0, 1998) at 47-51.
57. See Australian Bureau of Statistics, *Australian Social Trends 2005* (Catalogue No 4102.0, 2005) at 43.
58. See para 1.72-1.76.

- Legal safeguards are necessary to protect people's rights and resolve disputes when a relationship breaks down, irrespective of what form that relationship has taken, and whether the parties to the relationship were married or not.
- Wherever possible, the law should not discriminate between types of relationships, but should apply a consistent approach to settling financial matters at the end of a relationship.

1.56 To this end, relationships legislation should seek to do the following:

- It should do away with any hierarchy inherent in the legislation, which attaches greater rights to some relationships than to others.
- It should provide a clear and consistent framework for resolving property and financial disputes which arise when a relationship breaks down, whatever form that relationship may have taken.
- It should strive to provide the same safeguards to protect the rights of parties to same sex relationships, and close personal relationships, as are given to opposite sex de facto and married relationships.

1.57 Of course, while there continues to be a separate regime to deal with financial matters relating to opposite sex de facto and married couples, which excludes other types of relationships from its operation, it will be difficult to achieve these aims with complete success.

Including an objects clause in the PRA

1.58 In DP 44,[59] the Commission raised the question of whether the PRA should include a provision that expressly sets out the objects of the legislation. We received a mixed response from submissions.

1.59 The principal advantage of including an objects clause in the PRA is that it would provide a statement of what Parliament intended its purposes to be, and how it should operate. Objects clauses are, in this way, an aid to statutory interpretation, particularly where the words of the statute itself fail to set out the intention of a specific provision clearly and unambiguously.[60]

1.60 A number of submissions received by the Commission supported the inclusion of an objects clause in the PRA.[61] A few submissions, on the other hand, considered that an objects clause was unnecessary,[62] or did not support its inclusion for fear it

59. DP 44 at para 2.16 and Issue 1.
60. See discussion in DP 44 at para 2.16. The *Property Law Act 1974* (Qld) includes an objects clause in relation to its financial adjustment scheme for de facto couples in s 255.
61. Victorian Bar, *Submission* at 3; Gay and Lesbian Rights Lobby Inc, *Final submission* at 5; Lesbian and Gay Solidarity, *Submission* at 1; Women's Legal Resources Centre, *Submission* at 4.
62. Anglican Diocese of Sydney, *Submission* at 2-3.

may be unduly restrictive.[63] New South Wales Young Lawyers commented that, rather than assisting interpretation, an objects clause may have unexpected negative consequences. They viewed the proposed objects clause as inappropriate. The Anglican Diocese of Sydney had a particular concern with the objects clause proposed in DP 44 on the basis that it implied that marriage is outdated and that "those who hold strongly to its principles should be forced to recognize the validity of its alternatives".

1.61 The Women's Legal Resources Centre, which supported the inclusion of an objects clause, suggested that it be formulated to include express reference to the impact of domestic violence on women and children, and to acknowledge the significance of non-financial contributions, in the alteration of property interests.[64]

1.62 The Commission does not consider that an objects clause would restrict statutory interpretation. The increasing use of objects clauses in modern statutes is a positive step. Apart from assisting judicial interpretation where there is uncertainty and ambiguity, it makes the legislation far more accessible to the lay reader, including those whom it seeks to protect. We have therefore recommended that an objects clause be included in the PRA in the terms set out below. They reiterate the principles put forward in DP 44, with the exception of the second object. This object recognizes the specific focus of the PRA, once the Commonwealth takes up the referral of powers. It draws attention to the fact that one of the aims of the legislation is to reduce the impact of homophobia on people in non-traditional relationships and facilitate their access to justice.

1.63 We have not incorporated the suggestion of the Women's Legal Resources Centre, because it is too specific for the purposes of an objects clause. Nor do we agree with the Anglican Diocese of Sydney that an objects clause that recognizes the diversity of domestic relationships must necessarily imply that marriage is outdated. On the contrary, our recommendation simply acknowledges that other forms of domestic relationships also exist, for which the statutory regime set up by the PRA may have relevance. By doing so, we do not seek to detract in any way, and nor could we, from the continuing validity of marriage.

Recommendation 1

The PRA should provide for an objects clause in the following terms:

The objects of this Act are to:

- Recognise and respect the diversity of relationships covered under the Act;

63. NSW Young Lawyers, *Submission* at 1.
64. Women's Legal Resources Centre, *Submission* at 4.

- Promote the equal treatment of people living in diverse relationships and improve their access to the legal system;
- Recognise and respect people's rights to order their own financial affairs subject to certain safeguards to ensure any agreement reached between them is voluntarily made and fair;
- Facilitate a just and equitable resolution of financial matters at the end of a domestic relationship; and
- Provide a fair, timely, and affordable process for resolving financial matters at the end of a domestic relationship.

Further review of the PRA

1.64 In paragraph 1.46-1.48, the Commission noted the limited empirical evidence that is available about gay and lesbian relationships in Australia, and the consequent difficulties involved in drawing any firm conclusions or generalisations about same sex relationships. With this in mind, we consider that, if our recommendations for reform to the PRA are implemented, the PRA should be subsequently reviewed to evaluate the impact of reform on, in particular, the gay and lesbian community, and to ascertain whether it is achieving its stated objectives.

Recommendation 2

The PRA should be reviewed within five years of amendment to ascertain whether it is achieving its objectives.

TERMINOLOGY

The name of the PRA

1.65 There is a view, perhaps cynical, that the name of the PRA was changed from the *De Facto Relationships Act* to the *Property Relationships Act* when it was amended in 1999 in order to divert attention away from the fact that the rights contained in the Act were being extended to same sex de facto couples. Some commentators noted that the 1999 amendments passed through Parliament with barely any vocal opposition. The suggestion was that many members, who might otherwise have opposed the legislation, were led to believe that the Act was more about property than relationships.[65]

1.66 Regardless of the motivation for the name change, the Commission does consider it somewhat odd and misleading to imply that the PRA concerns only property relationships. While it is true that one of the principal objects of the legislation is to provide a statutory regime for the alteration of property interests between domestic partners, the Act also provides statutory recognition of various forms of human relationships, for example, close personal relationships. The adoption of the PRA definitions of these relationships in a myriad other State laws has significant implications in many different areas of life. It affects who can benefit on intestacy, for example, or who is the next of kin of a person with whom a medical professional should consult in emergency situations. For this reason, the Commission thinks it is too narrow, misleading and superficial to continue to refer to the Act as the *Property (Relationships) Act*. Furthermore, if a new Part is inserted in the Act to implement and regulate an optional system of registration of domestic relationships, as recommended by the Commission in Chapter 4, there will be even more reason to rename the Act the "Relationships Act".

65. See J Millbank and K Sant, "A bride in her every-day clothes: same sex relationship recognition in NSW" (2000) 22 *Sydney Law Review* 181 at 201-205.

Recommendation 3

The *Property (Relationships) Act 1984* should be renamed the *Relationships Act 1984*.

De facto relationship or civil union

1.67 There is also much to be said for revisiting the terminology in relation to how we describe relationships. The word "de facto" originally was used to describe a marriage in fact but not in law. Most people in New South Wales, and around Australia, are familiar with the term "de facto". In other parts of the world, different terminology is used. In Britain, people living in relationships akin to, but outside, marriage are referred to as common law husbands or common law wives. Despite studies which show that the vast majority of people in Great Britain assume that cohabiting couples have the same rights and entitlements as married couples, they still only have recourse to common law and equity to settle any property disputes that arise when their relationships end.

1.68 Since the introduction of the *Civil Partnership Act 2004* (UK), there are now "civil unions" in Britain.[66] The parties to those civil unions are called "civil partners". Similar terminology applies in New Zealand, Canada and in several states of America.

1.69 If the Commission had raised the issue of terminology in DP 44, and consulted on this specific issue, we may have made some recommendations in this regard. However, that is not the case. The Commission notes that all the case law and commentary on the PRA refer to de facto couples and de facto relationships. This terminology, though somewhat archaic, is part of common parlance and everyone is familiar with it. Consequently, although the Commission considers that the terms "civil unions" and "civil partners" are more modern terms, we make no recommendation for change at this time.

THE CONDUCT OF THIS REVIEW TO DATE

DP 44

1.70 In April 2002, we released DP 44 as a preliminary consultation paper in this review. It examined the major issues concerning the PRA, as well as several other areas of law that deal broadly with family relationships. For example, it examined the broader issue of the law's place in the regulation of relationships, in which situations it was appropriate for the law to do so and what principles should inform such regulation. The Commission also examined the issue of non-recognition of the relationship between a child and a non-biological parent.

66. These relate only to same sex partners. The Act was not extended to opposite sex cohabiting couples.

1.71 DP 44 was based on research, findings of previous reviews and preliminary consultations that gave rise to various issues. It posed a series of questions and invited feedback and discussion from the public.

Submissions

1.72 The Commission received less than 30 submissions in response to DP 44, despite a second mail-out in August 2002. Though disappointing in number, the Commission was very grateful to have received several very substantial submissions that went into lengthy discussion on the issues raised and alerted the Commission to other issues not previously canvassed. The Commission would like to thank those who took the time to contribute to this review.

Questionnaire and focus groups

1.73 The release of DP 44 preceded the State's reference of powers to the Commonwealth. The scope of the Commission's discussion was therefore much broader in that paper, in so far as it considered the application of the PRA to non-marital relationships generally, including opposite sex de facto relationships. In the light of the reference of powers, and the consequent shift in focus of our review, the Commission undertook further and specific consultations with the gay and lesbian community to ascertain its views on the issues raised in DP 44 and to discuss various options for reform. These consultations took two forms: first, we posted a questionnaire on our website, directed specifically at the gay and lesbian community, and secondly, we organised a series of focus groups with members of gay and lesbian communities in Sydney and Lismore on the separate issues of property and parenting.

Questionnaire

1.74 The questionnaire was designed to obtain qualitative and quantitative information about respondents' views on how the PRA operates and if it should be changed to mirror the financial adjustment provisions of the FLA. The survey also sought respondents' views on a range of other issues including whether there should be a registration system for gay and lesbian couples and how the law should recognise non-biological parents.

1.75 A total of 69 respondents completed this survey. A report of the results of the questionnaire can be found in Part B of Appendix C, and the questionnaire itself is reproduced in Part A of Appendix C. The Commission thanks all those who responded to the questionnaire.

Focus groups

1.76 The Commission also arranged for focus groups to be held in both Sydney and Lismore. One focus group in each location considered issues concerning same sex parenting. A second focus group in each city centred on issues relating to property and maintenance, including the availability and use of financial agreements. The Commission had also intended to run two focus groups in outer western Sydney, but these had to be abandoned because few participants registered. Experienced

facilitators who were sensitive to the issues being discussed were engaged to run the focus groups. The views expressed by focus group participants are noted throughout this Report. The Commission thanks all participants for taking part in the discussion.

RAISING PUBLIC AWARENESS

1.77 An important matter of concern arising from discussions in the focus groups with lesbians and gay men was that very few were aware of their rights under the legislation. Few knew that they could enter into binding financial agreements before or during their relationship. Many had no idea that they could bring an action under the PRA for an order for a share of property held only in the other's name.

1.78 The Gay and Lesbian Rights Lobby, in their submission, spoke of similar findings from their consultations with lesbian and gay families. The Lobby submitted that many of those families were still unaware of the legal recognition granted to them in 1999 across a wide variety of laws, including the amendments to de facto relationships legislation to cover their relationships in the same way as opposite sex de facto couples. The Gay and Lesbian Rights Lobby argued that a public education campaign is needed to inform people of their rights.[67]

1.79 It is particularly important in the case of legislation such as the PRA, which is not administered by a public body but instead requires parties themselves to bring proceedings or negotiate within the knowledge of their rights and responsibilities under the legislation, that they be well informed of what those rights and responsibilities are. We support the call for an education strategy to raise awareness of the PRA among those directly affected by those changes.

Recommendation 4

An education strategy should be implemented to raise awareness of rights and obligations under the PRA among those directly affected by it.

STRUCTURE OF THIS REPORT

1.80 This Report is divided into four parts.

1.81 Part One relates to the ways in which the law defines and recognizes domestic relationships, and to the purposes of legal regulation of such relationships. It consists of this Chapter, and the next four chapters:

- Chapter 2 discusses the legal definitions of a de facto relationship;
- Chapter 3 discusses the legal definitions of a close personal relationship;

67. Gay and Lesbian Rights Lobby Inc, *Final submission* at 3.

- Chapter 4 considers the means by which the law should recognise a domestic relationship, so as to attract the rights and obligations arising from the PRA and other legislation, in particular, whether it is desirable to implement a system for registering relationships; and
- Chapter 5 relates to the ways in which the law should recognise variations on the parent/child relationship, particularly the relationship between a child and his or her non-biological parent in same sex relationships.

1.82 Part Two relates to the financial adjustment powers arising from the PRA. It comprises Chapters 6-11:

- Chapter 6 considers the threshold requirements that parties to a domestic relationship must satisfy in order to apply for an order adjusting their property interests after the breakdown of their relationship;
- Chapter 7 looks at the criteria which the courts apply when exercising their discretion to make a just and equitable adjustment of property under s 20 of the PRA;
- Chapter 8 deals with the meaning of "property" and "financial resource" under the PRA;
- Chapter 9 looks at the specific issue of whether evidence of domestic violence should be taken into account in the division of property under s 20 of the PRA;
- Chapter 10 relates to the power to order the payment of maintenance under the PRA; and
- Chapter 11 considers miscellaneous aspects of financial adjustment orders and proceedings.

1.83 Part Three, which consists of Chapter 12, discusses private ordering under the PRA, that is, the power of individuals to make financial agreements to deal with the breakdown of their relationship.

1.84 Part Four relates to the various means of dispute resolution for financial adjustment under the PRA. Chapter 13 deals with aspects of formal adjudication by the courts, and Chapter 14 looks at mediation.

2. Defining a de facto relationship

- Introduction
- Threshold criteria of a de facto relationship
- Indicia of a de facto relationship
- Consistent legal definitions of a de facto relationship

INTRODUCTION

2.1 The *Property (Relationships) Act 1984* ("the PRA") applies to people in a "domestic relationship". A "domestic relationship" is the umbrella term used to refer to de facto and close personal relationships.[1] Part One of this Report considers the ways in which the PRA defines and recognises these types of relationships. This Chapter considers the definition of "de facto relationship". It questions whether it is appropriate for the PRA to define a de facto relationship according to certain requirements. It also considers whether the PRA definition of "de facto relationship" should be adopted uniformly in legislation in New South Wales, rather than various definitions of the term applying to discrete pieces of legislation.

THRESHOLD CRITERIA OF A DE FACTO RELATIONSHIP

2.2 According to s 4(1) of the PRA, a relationship must satisfy three threshold criteria in order to be eligible for consideration as a de facto relationship. The mere existence of these elements is not enough in itself to attract the operation of the PRA; all the circumstances of the relationship must then be considered to determine whether it is a de facto relationship so as to come within the scope of the Act.[2] These three elements serve as a first step towards establishing this, and, as such, require proof that, for the time of the relationship, the parties:

- were adults;
- lived together as a couple; and
- were not married or otherwise related to each other.

2.3 The PRA definition of a "de facto relationship" no longer[3] requires that the relationship be between a man and a woman. Instead, the term encompasses both opposite sex and same sex couples.

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1. See *Property (Relationships) Act 1984* (NSW) ("the PRA") s 5(1). Where the term "domestic relationship" as defined in the PRA is used in other New South Wales statutes, reference is being made to those in de facto relationships as well as those in close personal relationships: see, for example, *Family Provision Act 1982* (NSW); *Bail Act 1978* (NSW); and *Duties Act 1997* (NSW). Where the intention is to extend the provisions of the particular statute only to people in intimate couple relationships, the term "de facto relationship" or "de facto partner" is used: see, for example, *Compensation to Relatives Act 1987* (NSW); *Motor Accidents Act 1988* (NSW); and *Human Tissue Act 1983* (NSW).
2. See below at para 2.39-2.41.
3. Prior to 1999, s 3 of the *De Facto Relationships Act 1984* (NSW) defined a "de facto relationship" as a "relationship between de facto partners, being the relationship of living or having lived together as husband and wife …". The Act was amended and renamed in 1999, and a "de facto relationship" is now defined in gender neutral terms, as two "adult persons" who live together as a couple:

2.4 The Commission considers the suitability of these three elements below.

Cohabitation

2.5 There are two distinct situations in which the PRA includes a requirement of cohabitation within the definition of a "de facto relationship". The first is in the general definition of a de facto relationship, in s 4(1)(a): a de facto relationship is a relationship in which (among other things) two people "live together as a couple". This general definition of a de facto relationship does not insist upon a particular period of time for which a couple must live together. This definition applies throughout the PRA, unless otherwise specified, and also applies to the various other pieces of State legislation which refer to, and make provision for, de facto relationships, and which adopt the general definition of that term set out in s 4 of the PRA.[4] In addition to this general definition, s 17 of the PRA imposes a specific requirement for parties to a domestic relationship, who wish to make a claim for property adjustment (including maintenance) under Part 3 of the PRA, or who seek to give effect to a domestic relationship agreement or termination agreement under Part 4 of the PRA,[5] to show that they "lived together in a domestic relationship for a period of not less than two years".[6]

2.6 The terms "live together as a couple" and "lived together in a domestic relationship" are not further defined in the PRA. Specifically, it is ambiguous whether the notion of "living together" requires cohabitation, or simply proof of some form of a shared life, without necessarily a shared residence. It appears that, in formulating its original definition of a de facto relationship, on which the statutory definition is based, the Law Reform Commission used the term "living together" as implying some element of cohabitation, both in relation to the general definition of de facto relationship, and the more specific type of de facto relationship which attracts the operation of the financial adjustment scheme. The Commission referred to Commonwealth legislation, from which it drew its definition of a de facto relationship.

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see PRA s 4(1), as inserted by the *Property (Relationships) Legislation Amendment Act 1999* Sch 1[9]. See Chapter 1 at para 1.9-1.11.

4. See below at para 2.58.
5. See PRA s 47, which refers to a party who seeks an order under Part 3 (which does not apply to couples that have not lived together for less than two years).
6. There are two exceptions that obviate the need to meet the two-year requirement. First, the birth of a child of the parties creates an automatic entitlement to bring a claim for property adjustment and maintenance. Secondly, a court may also allow a claim for property adjustment to be heard notwithstanding the fact that the parties lived together for less than two years where the applicant can show that he or she has made a substantial contribution or is taking care of a child of the respondent and the court is satisfied that the applicant would suffer serious injustice if the claim were not heard: PRA s 17(2). See Chapter 6.

That legislation in turn referred to de facto spouses as people who live together in the same household.[7]

2.7 Certainly, there appears to be an assumption in the case law that the notion of "living together" involves some form of cohabitation.[8] In one case, Master McLaughlin expressly said that, in light of the definition of a "de facto relationship" in the PRA, and in particular the requirement that parties live together as a couple, "… it is difficult to envisage the existence of a de facto relationship in circumstances where the parties do not actually, throughout the period of the relationship, reside together on a full-time basis …".[9] In an earlier case, Justice Mahoney appears to use the terms "live together" and "cohabit" interchangeably, noting that, in situations such as where a couple takes separate holidays, cohabitation is not essential to the continuance of a de facto relationship, but where one party decides not to "live together" with the other, the relationship ceases.[10]

2.8 In DP 44,[11] the Commission considered whether cohabitation should continue to be a required element of the definition of a de facto relationship, in either or both the general usage of that term, or its more specific application to the property adjustment scheme under Part 3 of the PRA. This question generated much debate in the focus group discussions and in the questionnaire, as well as in submissions.

Objections to cohabitation as a requirement

2.9 De facto relationships are typically considered to involve a certain level of mutual commitment and interdependence, which raise them above more casual intimate relationships for the purposes of attracting various legal rights and obligations. In the context of formulating a general legal definition of a de facto relationship, (rather than its specific application to a financial adjustment scheme), cohabitation is a conventional and convenient indicator of such mutual commitment and interdependence. However, to confine legal recognition of de facto relationships solely to those relationships involving cohabitation is arguably too limiting, and excludes a number of people who fall outside traditional relationships but who nevertheless see themselves as forming part of a committed partnership. For example, it excludes lesbian and gay couples who choose not to cohabit for fear of homophobia, or for other reasons. The continued requirement of cohabitation in the PRA, when it was amended in 1999, was considered by some as "possibly the greatest flaw of the New South Wales Act definition, as in many cases it could mean nothing is gained for people in non-traditional relationships":

7. See NSW Law Reform Commission, *De Facto Relationships* (Report 36, 1983) at para 9.5-9.6, and 17.4-17.12. See *Social Security Act 1947* (Cth) (now repealed) s 83AAA(1).
8. For example, *Przewoznik v Scott* [2005] NSWSC 74 at para 15 per McDougall J; *Richardson v Kidd* [2002] NSWSC 306 at para 21-24 per Master Macready.
9. *Mao v Peddley* [2001] NSWSC 254 at para 58 per Master McLaughlin.
10. *Hibberson v George* (1989) 12 Fam LR 725 at 740 per Mahoney JA.
11. See DP 44 at para 2.62-2.69, Issue 4.

> *(a) Cohabitation may be an indicator of financial and emotional interdependence in a relationship (and therefore the need to access legal avenues such as statutory property division regime) or it may not. Such a criterion should not be used in an under-inclusive manner any more than it ought to be used in an over-inclusive manner (by covering, for example, all cohabitees regardless of their relationship).*[12]

2.10 In an effort to move away from what was perceived as the imposition of a traditional, heterosexual paradigm of personal relationships, the two earlier (unsuccessful) attempts to amend the *De Facto Relationships Act 1984* removed a requirement of cohabitation from the general definition of an intimate or personal relationship. The *Significant Personal Relationships Bill 1997* gave legal recognition to a relationship that was a "significant personal relationship", being one in which the parties to the relationship:

> *(a) mutually acknowledge:*
>
> (i) their emotional interdependency, or
> (ii) the fellowship and support that each provides to the *other,*
>
> *or both, and*
>
> (b) believe that the relationship will continue and are mutually committed to the relationship continuing.[13]

2.11 This definition focused on the level of commitment and interdependence as the defining features of a personal relationship, and expressly stipulated that parties did not need to be members of the same household.[14] The *De Facto Relationships Amendment Bill 1998*, while expressly recognising de facto relationships where two persons "live together as a couple on a bona fide domestic basis",[15] also recognised a broader category of domestic relationship that involved two persons sharing an element of emotional and financial interdependence, "whether or not they live together".[16] To guard against over-inclusion of more casual relationships with the removal of the cohabitation requirement, the 1998 Bill included a detailed list of (non-exhaustive) matters for the Court to consider when determining whether or not a de facto or domestic relationship existed.[17] The omission of cohabitation from the general definitions of personal and domestic relationships in these Bills was consistent with

12. J Millbank and K Sant, "A bride in her every-day clothes; same sex relationship recognition in NSW" (2000) 22 *Sydney Law Review* 181 at 207-208.
13. See *Significant Personal Relationships Bill 1997* (NSW) cl 5(1).
14. See *Significant Personal Relationships Bill 1997* (NSW) cl 5(2)(a)(i).
15. See *De Facto Relationships Amendment Bill 1998* (NSW) Sch 1[4].
16. *De Facto Relationships Amendment Bill 1998* (NSW) Sch 1[4].
17. See *De Facto Relationships Amendment Bill 1998* (NSW) Sch 1[13].

the argument from, for example, the Gay and Lesbian Rights Lobby[18] that there are many people in relationships who are financially and emotionally interdependent who do not reside with each other.

2.12 In relation to the more specific definition of the type of de facto relationship that attracts the operation of the financial adjustment scheme under Part 3 of the PRA, the same objections to imposing a cohabitation requirement apply. Parties to a relationship may share a significant level of emotional and financial interdependence without sharing a residence, particularly people in non-traditional relationships. To impose a two-year cohabitation requirement in order to attract the application of the financial adjustment scheme is arguably to exclude certain people who have been in financially interdependent relationships but who have not cohabited. It is interesting to note that, despite this objection, the 1998 Bill implicitly retained a two-year cohabitation requirement for de facto and domestic relationships where parties sought relief under the financial adjustment scheme.[19] This contrasts with the position taken in the 1997 Bill, which required that, in order for the property division scheme to apply, the domestic relationship must have existed for not less than two years, but did not require that the parties to the relationship cohabit for two years.[20]

The position in other Australian jurisdictions

2.13 The Australian Capital Territory, the Northern Territory, and Tasmania, do not include a cohabitation requirement within their general legislative definitions of a de facto relationship.[21] However, all these jurisdictions impose a "duration" requirement on the types of de facto relationships that attract the operation of their property adjustment schemes. In the Australian Capital Territory and Tasmania, the parties must show that the relationship existed for at least two years, and in the Northern

18. The *Bride Wore Pink* recommended legal recognition of a broader category of "significant personal relationships" which did not require (but could include) a sexual relationship or cohabitation: see Lesbian and Gay Legal Rights Service, *The Bride Wore Pink: Legal Recognition of Our Relationships: A Discussion Paper* (2nd ed, Sydney, 1994) at 2. See also J Millbank and K Sant, "A bride in her every-day clothes: same sex relationship recognition in NSW" (2000) 22 *Sydney Law Review* 181 at 207-208.
19. See *De Facto Relationships Amendment Bill 1998* (NSW) Sch 1[14].
20. See *Significant Personal Relationships Bill 1997* (NSW) cl 39(1). As in s 17 of the PRA, this proposed duration requirement was subject to exceptions: see *Significant Personal Relationships Bill 1997* (NSW) cl 39(2).
21. See *De Facto Relationships Act 1991* (NT) s 3A(1); *Relationships Act 2003* (Tas) s 4(1)(a); *Domestic Relationships Act 1994* (ACT) s 3. Note that s 3 of the ACT Act defines the term, "domestic relationship" to include a domestic partnership, which is in turn defined in s 169(2) of the *Legislation Act 2001* (ACT) as a relationship between two persons "living together" as a couple. It seems clear that the term "living together" in this context does not necessarily imply cohabitation, since s 3(2) of the *Domestic Relationships Act* expressly provides that people in a domestic relationship (including, by reason of s 3(1), a domestic partnership) do not need to cohabit.

Territory, parties must show that they lived together for two years (subject to certain exceptions).[22]

2.14 The South Australian government has also considered the question of whether to retain a cohabitation requirement in its legal definitions of a de facto relationship.[23] Most laws in South Australia require partners to live together in order to prove the existence of a de facto partner or a "putative spouse". Some laws stipulate that partners should cohabit for two years, while others require five years' cohabitation. The government took the view that cohabitation is required because:

> *(b) The imposition of legal rights and duties without the consent of the parties should be reserved for situations where it is likely that the parties' affairs have merged, or the parties have ordered their lives in such a way that legal intervention is warranted to protect them, or one of them. The endurance of a cohabiting relationship is a key indicator that this may have occurred.*[24]

Submissions

2.15 Of those submissions that considered this issue, there was strong support for the proposal to remove the requirement of cohabitation from the general definition of a de facto relationship.[25] Cohabitation could be relied on as an indicator of a de facto relationship, rather than as an essential element.[26] To require cohabitation, it was submitted, is out of step with modern relationships, especially many gay and lesbian relationships.[27] Conversely, the Equity Division of the Supreme Court submitted that the common community understanding of what it was to be in a de facto relationship incorporated a notion of cohabitation.[28]

2.16 In relation to the more specific notion of a de facto relationship which attracts the financial adjustment scheme under Part 3 of the PRA, a number of submissions considered that it was appropriate to continue to require a minimum period of

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22. *Domestic Relationships Act 1994* (ACT) s 12(1); *Relationships Act 2003* (Tas) s 37(1); *De Facto Relationships Act 1991* (NT) s 16(1).
23. SA, Attorney General's Department, *Removing Legislative Discrimination Against Same Sex Couples* (Discussion Paper, 2003). South Australia is the only State or Territory in Australia that confines its financial adjustment regime to opposite sex de facto couples: see *De Facto Relationships Act 1996* (SA) s 3.
24. SA, Attorney General's Department, *Removing Legislative Discrimination Against Same Sex Couples* (Discussion Paper, 2003) at 10.
25. Women's Legal Resources Centre, *Submission* at 5-6; Gay and Lesbian Rights Lobby Inc, *Interim submission* at 6-7, *Final submission* at 5; Anti-Discrimination Board of NSW, *Submission* at 2, 7-8; NSW Young Lawyers, *Submission* at 4; Lesbian and Gay Solidarity, *Submission* at 2.
26. Women's Legal Resources Centre, *Submission* at 5-6; Anti-Discrimination Board of NSW, *Submission* at 7-8.
27. Women's Legal Resources Centre, *Submission* at 5-6; Anti-Discrimination Board of NSW, *Submission* at 7-8.
28. See Equity Division of the Supreme Court of NSW, *Submission* at para 27.

cohabitation before entitling a person to bring an application for adjustment. It was submitted that a two year cohabitation requirement indicated a sufficiently committed relationship so as to warrant the application of the scheme, and also had the effect of discouraging unmeritorious or opportunistic claims.[29] The Equity Division of the Supreme Court submitted that requiring cohabitation sifts out trivial claims. It also argued that an alternative threshold would be needed if cohabitation were no longer required in order to keep out claims where substantial injustice is unlikely to have occurred.[30] On the other hand, one submission argued that the two year minimum cohabitation period is discriminatory, and should only apply if it is also required of married partners before they can claim the property of the other.[31]

2.17 The New South Wales Law Society sought to distinguish the purpose of requiring cohabitation. It submitted that cohabitation should not be a requirement for the purpose of determining whether a relationship exists but argued that it was both necessary and desirable to require at least two years' cohabitation with regard to property issues:

> *(c) To avoid the possibility of unmeritorious claims. Such a minimum period assists in establishing the status of a relationship and contributions of the parties.*[32]
>
> *(d)*

2.18 Others supported a minimum period of two years' cohabitation on the basis that it reflected the commitment of the partners to the relationship.[33] Requiring (a minimum period of) cohabitation is a means of protecting people in relationships who do not wish to be caught within the property division regime and who would perhaps assume that by not living with their partner, they fall outside its scope.

2.19 The Women's Legal Resources Centre submitted that the financial adjustment jurisdiction of the PRA should be attracted if a relationship has existed for two years, taking into account the indicia of a relationship, as set out in s 4 of the PRA.[34]

Consultations

2.20 The majority of respondents to the questionnaire[35] (84%) believed that the PRA should continue to require people in a domestic relationship to have cohabited before entitling them to claim a share of each other's property when they split up.[36] However, there was little consensus about the minimum period of cohabitation that

29. Victorian Bar, *Submission* at para 12; Equity Division of the Supreme Court of NSW, *Submission* at para 49; V Palfreeman, *Submission* at 2.
30. Equity Division of the Supreme Court of NSW, *Submission* at para 49.
31. S Landers, *Submission.*
32. Law Society of NSW, *Submission* at 7.
33. V Palfreeman, *Submission*.
34. Women's Legal Resources Centre, *Submission* at 4-6.
35. See Appendix C.
36. See Appendix C.

should be required. 28% of respondents agreed that the current two year period was appropriate but 25% thought that the period should be increased to three years; 12% said that people should only be required to live together for one year and 32% were unsure what the period should be.

2.21 At the Sydney focus group, which was attended mostly by gay men, more than half of whom were in or had been in a cohabiting de facto relationship, the majority of participants agreed that cohabitation was a good indicator of the parties' commitment to the relationship. However, they also conceded that it was not always the case. One participant explained that he and his partner had maintained separate homes for the first two years of their relationship as each had children from a previous marriage. Although they did not cohabit, he considered himself to have been in a de facto relationship for that first two year period.

2.22 Another view was that recognising a relationship after two years provides some protection for people who drift into relationships and who are not aware of their rights and responsibilities under the PRA, or who have not entered into any agreement. It was submitted that partners should live together for a reasonable period of time before legal obligations are imposed. Conversely, it was argued that the two year cohabitation requirement should be waived where the parties had entered into an agreement.

2.23 By contrast, the Lismore focus group was attended predominantly by women, all of whom were currently in a same sex de facto relationship, ranging in duration from 7 to 26 years. Almost half of the group had children within the context of their present relationship. The majority of the Lismore participants considered that cohabitation should not be a mandatory prerequisite to the application of the PRA. It was noted that couples in same sex relationships are more likely *not* to cohabit than couples in opposite sex relationships. In addition, one participant suggested that using cohabitation as an essential indicator of a de facto relationship forces people in same sex relationships to conform to a heterosexual paradigm. A number of people suggested that the focus should be on contributions rather than cohabitation. Most people agreed that cohabitation was a useful indicator of a certain type of relationship and had a place as one of the factors to be taken into consideration by a court.

The Commission's view

2.24 There are two issues. The first is whether the PRA should continue to define a de facto relationship as one between two adult persons who live together, and the consequent effect of any amendment to this definition on all New South Wales laws that rely on the PRA definition of a de facto relationship. The second issue is whether the PRA should continue to require parties to live together for at least two years before they may bring an application for property adjustment or maintenance under Part 3.

2.25 ***The definition of a de facto relationship***. Whether cohabitation should continue to be required in the PRA definition of a de facto relationship depends largely on the purposes for which it is required. Should it be required, for example, to show that a de facto relationship exists for the purpose of decision-making in illness or after the death of a partner, or disclosure of pecuniary interests? One might argue that in

these situations, it is not relevant whether the parties live together in the same house continuously. The first scenario concerns the question of whether to allow a person, with whom the seriously ill or injured person had a significant relationship, to make certain decisions in relation to the care of that person. In relation to the second scenario, the disclosure of pecuniary interests, if the object is to disclose potential conflicts of interest, again whether or not the person lives with his or her partner would appear immaterial. What matters is the social and emotional interdependency of the partners and their commitment to each other.

2.26 The major advantage of removing the cohabitation requirement from the definition of de facto relationship is that couples in non-cohabiting, non-traditional relationships would not be automatically excluded at the first barrier. It would admit intimate couples who are mutually committed to each other and emotionally and/or financially interdependent but who, for a variety of reasons, do not live together. This would include de facto couples who live apart during the week, either through choice or work commitments, but spend their weekends together, and couples separated because one of them is in prison or working overseas.

2.27 The Commission notes that more recent State and Territory relationships legislation has dispensed with the requirement that a couple live together in order to come within the definition of a de facto relationship.[37]

2.28 The Commission considers that cohabitation should not be a threshold requirement under the PRA to prove the existence of a de facto relationship. It ought simply to be one of a number of factors that the Court may take into account when asked to determine or declare the existence of a de facto relationship under s 4(2). A new definition of de facto relationship should be adopted that dispenses with the requirement for a couple to live together. This definition should be used for the purposes of certain other laws where cohabitation is immaterial, such as laws relating to health and care issues, discrimination and domestic violence.

2.29 An amendment to dispense with the requirement of cohabitation in the definition of de facto partner in the PRA would have a follow-on effect on other New South Wales laws reliant on this definition. Some of those laws in which financial implications arise for the State, an employer or an insurer already require that de facto partners live together for a minimum period.[38] A change in the PRA definition will not alter this. The minimum period of cohabitation will continue to apply in those cases.

2.30 There will, though, be other areas of law that will need to be examined individually, and decisions taken as to whether protections or entitlements afforded by those laws should be extended to non-cohabiting de facto couples. In situations where the entitlements hinge more accurately on the nature of the relationship

37. See para 2.13-2.14 above.
38. For example, the *Insurance Act 1902* (NSW) and the *Victims Compensation Act 1996* (NSW) already contain a requirement that de facto partners must have lived together for two years before they are entitled to an insurance or compensation payment under the respective legislation.

between two people, and less so on whether or not they live together (such as decision-making in emergency medical situations, guardianship, or to access the rights and protections afforded by anti-discrimination, domestic violence and evidence laws), there is likely to be little justification for excluding non-cohabiting couples. On the other hand, where certain financial benefits are available, such as exemptions from stamp duty, there is merit in limiting these benefits to cohabiting couples only.

Recommendation 5

> The definition of "de facto relationship" in s 4(1) of the PRA should be amended to dispense with any suggestion that the parties to the relationship must cohabit.

2.31 ***Cohabitation for the purpose of bringing a Part 3 application.*** Chapter 6, which deals with the threshold requirements for bringing financial adjustment proceedings under Part 3 of the PRA, considers whether the Act should continue to require parties to live together for at least two years before they bring such an application. The Commission's conclusion, which draws on the discussion leading to Recommendation 5, is that the PRA should be amended to require that the parties have been in a domestic relationship for a period of two years, rather than that they have "lived together" for that period of time, before an order can be made under Part 3.[39]

Age requirement

2.32 The PRA applies only to people who are aged 18 or over. One of the issues discussed in DP 44 was whether the Act should be amended to cover people aged 16 and 17 who live together.[40] The Commissioner for Children and Young People had previously submitted that it was anomalous that young people aged 16 or 17 could marry and therefore have access to the property division provisions of the *Family Law Act 1975* (Cth) ("the FLA"), yet had no legal remedy under the PRA if they lived together without marrying. She had also submitted that there might be a greater need to protect a young person cohabiting with an older person, who would assumedly be in a weaker bargaining position.[41]

2.33 New South Wales Young Lawyers submitted that, ideally, people should have access to the PRA and its remedies whenever they need them. However, given that rights in respect of property division under Part 3 of the Act only arise once the parties have cohabited for two years, the PRA effectively covers people in domestic relationships who have cohabited since they were 16 years of age.[42] In other words, by the time the two-year cohabitation period is satisfied, the parties are likely to be 18

39. See Recommendation 24.
40. DP 44 at para 6.14.
41. NSW Commission for Children and Young People, National Children's and Youth Law Centre, *Submission* at 5-6.
42. NSW Young Lawyers, *Submission* at 8; see also Law Society of NSW, *Submission* at 6.

years old. The New South Wales Law Society made a similar submission and argued that the provision was adequate.[43]

2.34 The Commission agrees with these submissions and does not consider it necessary to amend the current age requirement in the PRA. However, the Commission does believe that young people aged between 16 and 17 years should be able to register their relationship with authorisation, just as they may marry an adult with the authorisation of a judge or magistrate[44] and thus have access to the provisions of the FLA.[45]

Family relationship requirement

2.35 The PRA imposes a third threshold requirement, framed in the negative, that parties to a de facto relationship not be married to each other or otherwise related. Does this requirement continue to be appropriate, in light of the PRA's anticipated focus on same sex couples?

2.36 The first requirement, relating to marriage, is not relevant in the context of same sex de facto couples. That is, it is unnecessary to stipulate that parties to a same sex de facto relationship cannot be married to each other because, under Commonwealth law, people of the same sex cannot marry each other.[46] Nevertheless, it is worthwhile to retain this requirement to ensure the PRA's constitutional validity,[47] and in view of any possibility (however remote at this stage) that same sex marriages may one day be legalised in Australia. Moreover, as the Commission noted in paragraph 1.33, it is possible (at least in theory) that opposite sex de facto couples will continue to be brought within the scope of the PRA, after the referral of powers, for adjustment orders not relating to the breakdown of their relationship, or if they wish to register their relationship pursuant to the Commission's Recommendation 15. For these reasons, the stipulation as to marriage should remain.

2.37 As for the second requirement, is it desirable to restrict legal recognition of (same sex) de facto couples to couples that are not "related to each other"? According to s 5A of the PRA, persons are "related" if:

> *(e) one is the parent, or another ancestor, of the other, or*
>
> *(f) one is the child, or another descendant, of the other, or*
>
> *(g) they have a parent in common.*

43. Law Society of NSW, *Submission* at 6.
44. See *Marriage Act 1961* (Cth) s 12(1).
45. See Recommendation 7 below.
46. See *Marriage Act 1961* (Cth) s 5.
47. The power to make laws in respect of marriage rests with the Commonwealth: *Commonwealth Constitution* s 51(xxi).

2.38 Regardless of the sexual orientation of the parties, there is clear objection to giving legal recognition (and, implicitly, legal approbation) to an intimate relationship involving parent and child. The potential for power imbalance, and consequently, exploitation, in this type of relation is reason alone to deny it recognition at law. That objection is less compelling in the context of siblings in a de facto relationship. The biological justifications for refusing to recognise this type of relationship are not valid for same sex siblings, because they cannot produce a biological child together. The foundation for such an objection must therefore lie in the continuing social condemnation of incestuous relationships, regardless of whether they involve same or opposite sex couples. This is reflected in s 78A of the *Crimes Act 1900* (NSW), which makes incest a criminal offence, and defines incest to include sexual intercourse between siblings (with no limitation to siblings of the opposite sex). Similarly, the *Relationships Act 2003* (Tas), which now includes same sex de facto relationships within its legal definition of de facto relationships, nevertheless retains a requirement that couples not be related, including siblings.[48] As in these legislative provisions, the stipulation as to family members should be retained in the definition of de facto relationships in the PRA.

INDICIA OF A DE FACTO RELATIONSHIP

2.39 In addition to these threshold criteria, s 4(2) of the PRA sets out a list of factors that serve as indicia of the existence of a de facto relationship. This list is not exhaustive or conclusive proof of a de facto relationship, but serves as a guide only.[49]

2.40 When it first came into operation, the *De Facto Relationships Act 1984* (NSW), as it was then known, provided no guidance to the Court in terms of which factors it should take into account when determining whether or not a de facto relationship existed between the parties. In *Roy v Sturgeon,* Justice Powell enunciated a list of factors that he considered relevant in determining this preliminary issue.[50] This list was inserted into the legislation, in 1999.[51] Section 4(2) now provides that:

> *(h) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:*

48. See s 4, 7(1)(c). However, the Queensland legislation, which defines a de facto relationship to include a same sex relationship, prohibits relationships between brother and sister only: see *Property Law Act 1974* (Qld) s 260; *Acts Interpretation Act 1954* (Qld) s 32DA(1), (5)(b) in conjunction with the *Marriage Act 1961* (Cth) s 23B(2)(b). The *Domestic Relationships Act 1994* (ACT) s 3, in conjunction with the *Legislation Act 2001* (ACT) s 169(2), makes no reference to family relationships.
49. See PRA s 4(3).
50. *Roy v Sturgeon* (1986) 11 NSWLR 454; DFC 95-031. Justice Powell also included procreation of children as a factor to be included in the assessment.
51. See *Property (Relationships) Legislation Amendment Act 1999* (NSW) Sch 1[9].

(i) *(a)* *the duration of the relationship,*

(j) *(b)* *the nature and extent of common residence,*

(k) *(c)* *whether or not a sexual relationship exists,*

(l) *(d)* *the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,*

(m) *(e)* *the ownership, use and acquisition of property,*

(n) *(f)* *the degree of mutual commitment to a shared life,*

(o) *(g)* *the care and support of children,*

(p) *(h)* *the performance of household duties,*

(q) *(i)* *the reputation and public aspects of the relationship.*

2.41 It is not necessary to show that all these factors are present, although arguably the more that there are, the more likely it is that a de facto relationship is found to have existed. A similar list of factors has been adopted in a number of other Australian jurisdictions.[52] Since 2003, de facto couples in Tasmania may register their relationships,[53] and proof of registration is itself proof of the relationship.[54]

Are these factors appropriate?

2.42 Justice Powell had also considered the "procreation of children" as an additional factor to be considered by the Court when determining whether or not a de facto relationship existed. Although this factor is not included in the PRA, the list is otherwise substantially the same as that developed over time by New South Wales courts with reference to opposite sex de facto couples. Jenni Millbank and Kathy Sant have argued that:

(r) *The problem with such a list is that it is fundamentally influenced by the origins and history of de facto law, which had as its starting*

52. See *Property Law Act 1958* (Vic) s 275(2); *Relationships Act 2003* (Tas) s 4(3); *Domestic Relationships Act 1994* (ACT) s 3(1), in conjunction with *Legislation Act 2001* (ACT) s 169(2); *Property Law Act 1974* (Qld) s 260(1), in conjunction with *Acts Interpretation Act 1954* (Qld) s 32DA(2); *Interpretation Act 1984* (WA) s 13A(2).
53. *Relationships Act 2003* (Tas) Part 2. See discussion of the Tasmanian registration system in Chapter 4.
54. *Relationships Act 2003* (Tas) s 4(2). This also applies to people in caring relationships: s 5(4).

> *point a comparison with marriage – for example, the "procreation of children" and "reputation and public aspects of the relationship".*[55]

2.43 The factors, therefore, may not reflect the characteristics of a lesbian or gay relationship. Indeed, some of the indicators are arguably detrimental to a person trying to establish that they were in a same sex relationship.[56] For example, some same sex couples may not hold themselves out to family and friends as being in a de facto relationship for a variety of reasons, including fear of homophobia and fear of being ostracized by their families. In an earlier case under the *Family Provision Act 1982,* the failure to satisfy the "public reputation" test of the relationship was enough for the Court to find that there was no de facto relationship between the parties.[57]

2.44 Importantly, s 4(3) of the PRA expressly provides that the s 4(2) factors are merely a guide, and that the absence of one or more of them does not necessarily mean that the Court should find there was no de facto relationship between the parties. This may explain a softening in the courts' approach.[58] In another more recent *Family Provision Act* case, for example, when faced with conflicting testimony about the commitment of the parties to each other, and the way others viewed their relationship, the Court commented:

> (s) *Although I accept the plaintiff's evidence that the deceased did discuss marriage with her, it is again apparent, from what the deceased told other people, that he did not make the same observations to them. The truth, I think, is that the deceased gave the plaintiff to understand one set of things, and his friends and family another. It may be, although I do not go so far to say, that the deceased was, as one might put it, stringing the plaintiff along to some extent.*[59]

2.45 There have also been divergent opinions on what it means to be "living together". In one case, the Court held that a couple could not accurately be considered to be living together as a de facto couple when they shared accommodation for only four nights a week.[60] In another case, Justice McDougall

55. J Millbank and K Sant, " A bride in her every-day clothes; same sex relationship recognition in NSW" (2000) 22 *Sydney Law Review* 181 at 191.
56. J Millbank and K Sant, " A bride in her every-day clothes; same sex relationship recognition in NSW" (2000) 22 *Sydney Law Review* 181 at 191-192.
57. *Light v Anderson* (1992) DFC 95-120. See also *Dorman v Beddowes* (NSW Court of Appeal, 40285/1996, 14 April 1997, unreported).
58. J Millbank and K Sant, " A bride in her every-day clothes; same sex relationship recognition in NSW" (2000) 22 *Sydney Law Review* 181 at 192.
59. *Przewoznik v Scott* [2005] NSWSC 74 at para 14.
60. *Aranas v Berry* [2002] NSWSC 355. See para 2.6-2.7 above.

intimated that two people can still be considered to live together even though their cohabitation is not continuous and even though it occurs in different premises:

> *(t) If the plaintiff and the deceased are to be regarded as a de facto couple for the purposes of the* Property (Relationships) Act*, then it was necessary that they lived together as a couple. That means, I think, that even if they did not live in the one property all the time, or even if they did not live together all the time, the extent of their cohabitation and of their emotional dependence and commitment, must have been such as to have shown to people, to the world, that they were to be regarded as a couple.*[61]

2.46 A similar approach was taken in *Greenwood v Merkel*, where it was found that the parties were in a bona fide de facto relationship "in a way that suited them". Except for a period of about 7 months, the parties maintained separate homes. Influencing Acting Justice Burchett's determination was the fact that the parties were (or said they were) faithful to each other; they held themselves out as a couple, supported each other and were involved with each other's families and relations.[62]

2.47 In its 1999 report, the New South Wales Legislative Council's Standing Committee on Social Issues ("the Social Issues Committee") expressed a preference for the alternative and more expansive list of indicators contained in the *De Facto Relationships Amendment Bill 1998*.[63] This Bill provided that, in determining the existence of a de facto or domestic relationship, the Court should have regard to all the circumstances of the relationship, including but not limited to:

- the nature of the parties' commitment to each other including the duration of the relationship, the length of time the parties lived together, the degree of companionship and emotional support they drew from each other, and whether they see the relationship as a long term one;

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61. *Przewoznik v Scott* [2005] NSWSC 74 at para 15. In *Martin v Brustolin* [2004] NSWSC 1028, the deceased and the plaintiff had had a relationship lasting 31 years but only lived together for 5 or 6 of those years. The Court found that there was a de facto relationship for only the period that they actually lived together. Compare *Dunk v Public Trustee* [2003] NSWSC 37 where, although the plaintiff and the deceased did not live together full time, she was found to have been in a de facto relationship with the deceased, a relationship that continued for 32 years.
62. *Greenwood v Merkel* (2004) 31 Fam LR 571.
63. NSW, Legislative Council, Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform (Inquiry into De Facto Relationships Legislation)* (Report 20, Parliamentary Paper No. 127, 1999) Recommendation 8 at 53. The Bill had been introduced by the Hon Elizabeth Kirkby (Australian Democrats) and was referred to the Social Issues Committee. It lapsed when Parliament was prorogued in 1999.

- the social aspects of the relationship including the opinion of family and friends, any joint social activities taken or planned, and whether they represent themselves to others as being in an interdependent relationship;
- the nature of the household including any joint responsibility for care and support of children, their living arrangements and any sharing of housework responsibilities; and
- the financial aspects of the relationship including any joint ownership of property, joint liabilities, the extent of any pooling of financial resources, any legal obligations one to the other, and the sharing of household expenses.[64]

2.48 This list of factors is based on indicia used in federal migration legislation to guide decision-makers when forming opinions about whether an interdependent relationship exists.[65]

Submissions

2.49 None of the submissions that addressed this issue made any criticism of the list of factors in s 4(2). On the contrary, it was generally submitted that the list was both useful and appropriate, but should remain expressly inclusive.[66] New South Wales Young Lawyers submitted that, as the Court has significant discretion in determining whether a domestic relationship exists, on a case-by-case basis, there was no need to extend or elaborate the existing factors.[67]

The Commission's view

2.50 The Commission does not consider it necessary to adopt the list of factors provided in the *De Facto Relationships Amendment Bill 1998*. In large part, they merely elaborate what is already contained in s 4(2). Further, it is evident from the case law that New South Wales courts already take those factors into account when exercising their substantial discretion under s 4(2) to determine the threshold issue of whether a de facto relationship exists.

2.51 The current list of indicia is adequate and it is appropriate and desirable that the list remains inclusive. This simultaneously provides a guide for the Court and allows it maximum flexibility to recognise the diverse forms of relationships that people live in today. For example, that the parties did not always and continuously live in the same house is but one of the factors that a court can take into account, but is by no means in itself conclusive of whether or not a de facto relationship exists or existed between them.[68] A court will also examine, among other things, the nature of the parties' commitment to each other, how they presented their relationship to family and friends, the intermingling of their financial affairs and the extent to which they were emotionally interdependent. Of course, some factors, such as the care and

64. *De Facto Relationships Amendment Bill 1998* Sch 1[13].
65. See *Migration Regulations 1994* (Cth) reg 1.09A (indicia for determining an "interdependent relationship").
66. Victorian Bar, *Submission* at para 51; Law Society of NSW, *Submission* at 6.
67. NSW Young Lawyers, *Submission* at 8. See also Law Society of NSW, *Submission* at 6; Victorian Bar, *Submission* at para 51.
68. *Dunk v Public Trustee* [2003] NSWSC 37.

support of children, may not feature as prominently in same sex relationships as in opposite sex ones.

2.52 There is, however, one matter in the indicia in s 4(2) that requires amendment in its application to same sex relationships. People in same sex de facto relationships might not hold themselves out publicly as a couple because of community prejudice. Although a court can currently use its discretion to take the incidence of homophobia into account, and discount the fact that this particular factor is not present, it is appropriate to amend s 4(2)(i) to make this plain. The language of the PRA itself should make it clear that, when considering the reputation and public aspects of a relationship, the Court should be mindful of the social context in which a same sex de facto relationship exists. If the parties did not hold themselves out publicly as a couple, the Court should take into account the possible reasons for this, and make concessions if the parties feared discrimination, and ostracism from their families and friends.

Recommendation 6

Section 4(2)(i) of the PRA should be amended to require the Court to consider, where relevant, possible reasons for parties not holding themselves out publicly as a couple, arising from the social context in which their relationship existed.

The effect of a registration system

2.53 In Chapter 4, the Commission recommends the implementation of a system of registration for people in domestic relationships in New South Wales akin to that which has been implemented in Tasmania.[69] If the system is implemented, proof of registration of a de facto relationship[70] will constitute proof of the relationship itself. The PRA should be amended to reflect this.

Recommendation 7

If a system of registration of domestic relationships is implemented (see Recommendation 15), the PRA should be amended to provide that proof of registration of a de facto relationship is proof of the relationship.

CONSISTENT LEGAL DEFINITIONS OF A DE FACTO RELATIONSHIP

2.54 In DP 44, the Commission raised the issue of whether a definition of de facto partner, based on the PRA definition of de facto relationship, should be applied consistently across all relevant legislation in New South Wales.[71] This issue was raised because, at that time, there was substantial legislative inconsistency in the

69. See Recommendation 15.
70. Or a close personal relationship.
71. DP 44 at para 2.55-2.56 and Issue 2.

definition of "de facto partner" or "spouse". Various definitions were used in legislation and the range of definitions included several that were limited to opposite sex partners.[72] Similarly, various terms were used to refer to de facto partners, including de facto spouse, same sex partner and partner of the same sex.

2.55 In recognition of this inconsistency, the Social Issues Committee had recommended in December 1999 that the government examine all New South Wales legislation "to determine whether amendments need to be made to ensure a consistent application of the new definition of de facto" in the PRA.[73] The Committee had also recommended that "a general drafting instruction be issued to the Parliamentary Counsel's Office that in all new legislation any reference to a 'de facto relationship' is to be consistent with the definition used in the [PRA]".[74]

2.56 The Commission's preliminary view was that there was no policy reason why all legislation that refers to de facto partner or to some other equivalent term should not define that term by reference to the PRA's definition of a de facto relationship. Similarly, where the term spouse is used, the Commission's initial view was that the definition should include a de facto partner, as defined by reference to the PRA.[75]

2.57 Consistent application of a PRA-based definition of de facto partner was supported by the Women's Legal Resources Centre, the Anti-Discrimination Board, the Gay and Lesbian Rights Lobby, New South Wales Young Lawyers, the Anglican Diocese of Sydney,[76] Lesbian and Gay Solidarity and the Victorian Bar. The Equity Division of the Supreme Court submitted that a uniform definition should not be adopted without individually identifying the legislation where the definition is to be applied and working out the consequences of adoption of the definition for each piece of legislation.[77]

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72. See DP 44 at para 2.26.
73. NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform (Inquiry into De Facto Relationships Legislation)* (Report 20, Parliamentary Paper No. 127, 1999) Recommendation 12 at 67. It was also proposed that the government "review and amend all legislation imposing responsibilities and obligations to require similar compliance by those in same sex relationships as those in opposite sex relationships" and that "adequate measures" be put in place "to protect the privacy of those making disclosures regarding their same sex relationship": see Recommendation 11 at 67.
74. NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform (Inquiry into De Facto Relationships Legislation)* (Report 20, Parliamentary Paper 127, 1999) Recommendation 13 at 67.
75. DP 44 at para 2.56.
76. With the proviso that the term "spouse" is not used to refer to de facto partners: Anglican Diocese of Sydney, *Submission* at 3.
77. Equity Division of the Supreme Court of NSW, *Submission* at 11.

Statutes that exclude same sex de facto partners or relationships

2.58 The legislative inconsistency that existed at the time of the release of DP 44 was partially remedied by the enactment of the *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW), which amended over 20 statutes to include same sex couples in the relevant definitions. While this was a significant development, definitions of de facto partner, spouse or de facto relationship that exclude same sex de facto partners were left in four statutes.[78] Since the 2002 reforms, exclusionary terminology has been included in a further three statutes.[79]

2.59 Two of the statutes that were omitted from the 2002 reforms relate to superannuation. In the *Coal and Oil Shale Mine Workers (Superannuation) Act 1941* (NSW), clause 27(9) of Schedule 2 defines "spouse" as including "any person of the opposite sex with whom the mine worker is living as the mine worker's spouse on a bona fide domestic basis". The definition relates to eligibility for a pension under the COALSUPER Rules in circumstances where a "spouse" has been deserted or left without support by a mine worker and the "spouse" has taken maintenance proceedings under the FLA. This particular section of the Act applies only to members whose services were terminated before March 1978. The scheme to which this section relates was closed to new members in 1994. As no new pensions are expected to be granted under this section, it was not considered necessary to amend the definition. [80] There is little reason to amend the definition as part of this exercise.

78. *Coal and Oil Shale Mine Workers (Superannuation) Act 1941* (NSW), *Public Authorities Superannuation Act 1985* (NSW), *Local Government Act 1993* (NSW) and *Adoption Act 2000* (NSW). Statutory discrimination against same sex couples still remains in other areas. For example, the definition of "parental leave" in s 55 of the *Industrial Relations Act 1996* (NSW) excludes a woman from entitlement to unpaid parental leave where her same sex partner gives birth to a child. The Human Rights and Equal Opportunity Commission recently released a discussion paper, which noted the variations in State and Territory laws in terms of inclusion of same sex couples within provisions for financial and work-related benefits and entitlements. The Paper invited submissions giving information and examples of State and Territory laws that discriminate against same sex couples in the context of financial and work-related benefits and entitlements: see Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (Discussion Paper, April 2006) at 25.
79. *Commercial Agents and Private Inquiry Agents Act 2004* (NSW), *Home Building Amendment Act 2004* (NSW) and *Property, Stock and Business Agents Act 2002* (NSW). See below at para 2.66-2.69.
80. Information obtained from an officer of the Public Employment Office, NSW Premier's Department.

2.60 Section 5 of the *Public Authorities Superannuation Act 1985* (NSW) only includes opposite sex de facto partners within its definition of "spouse".[81] The definition of "spouse" is relevant to the payment of a benefit where the contributor dies during employment.[82] However, as the Public Authorities Superannuation Scheme is now closed and a death benefit is not payable under the Act unless the deceased contributor died prior to 1 April 1988, the definition has no ongoing effect.[83]

2.61 The *Adoption Act 2000* (NSW) and the *Local Government Act 1993* (NSW) are the other two statutes in which exclusionary definitions were retained in 2002. In the *Adoption Act 2000*, a "couple" is defined as meaning a man and a woman who are married or are in a de facto relationship.[84] The exclusionary nature of this definition is reinforced by that of "de facto relationship", which again refers to a relationship between a man and a woman.[85] The impact of these definitions is that same sex couples are ineligible to adopt a child jointly.[86] In its 1997 *Review of the Adoption of Children Act 1965* (NSW), the Commission recommended that the law in this area be changed and that same sex couples be eligible to adopt a child as a couple.[87] We consider that the policy justifications for that recommendation remain compelling.[88]

2.62 The *Local Government Act 1993* definition of "de facto partner" is expressly confined to a partner of the opposite sex.[89] This definition relates to duties of disclosure of a pecuniary interest[90] and, if amended, would oblige councillors and other certain individuals to disclose the identity of their same sex de facto partner in specified circumstances. The definition also relates to a prohibition on the misuse of information and the improper use of influence[91] but amendment of those provisions would not entail public disclosure of an individual's same sex relationship.

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81. The Act was amended in 2003 by the *Superannuation Legislation Amendment (Family Law) Act 2003* (NSW) to include same sex de facto partners for certain purposes in Schedules 6 and 7 but the definition of spouse remained exclusionary.
82. *Public Authorities Superannuation Act 1985* (NSW) s 26, 27 and 32, Sch 6 and Sch 7. The definition also relates to the payment of a pension but same sex de facto partners are recognised in that context.
83. *Public Authorities Superannuation Act 1985* (NSW) s 3A.
84. *Adoption Act 2000* (NSW) s 3 and Dictionary.
85. *Adoption Act 2000* (NSW) s 3 and Dictionary.
86. *Adoption Act 2000* (NSW) s 26 and 28.
87. NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)* (Report 81, 1997) at Recommendation 58 and para 6.119.
88. For further discussion, see Chapter 5.
89. *Local Government Act 1993* (NSW) s 3 and Dictionary.
90. *Local Government Act 1993* (NSW) s 443 and 454. See also more generally Part 2 of the *Local Government Act 1993* (NSW).
91. *Local Government Act 1993* (NSW) s 664(2) and (3).

2.63 The core concern of the disclosure provisions in the *Local Government Act 1993* is to ensure that councillors and others act honestly and in the public interest.[92] These objectives are an important element of establishing public accountability and confidence in local government.[93] In the view of the Commission, there is no reason that the pecuniary interests of a person's same sex de facto partner are any less relevant to the purpose of the provisions than the interests of an opposite sex de facto partner. The prohibition on the misuse of information and the improper use of influence relates to similar objectives and, again, the limited definition of de facto partner cannot be justified by reference to the legislative purpose. Further, the exclusion of same sex partners leaves a significant gap in the protection of the public interest that the relevant provisions seek to ensure.

2.64 A possible justification for retaining an exclusionary definition in the *Local Government Act 1993* is that under New South Wales law, a person can legitimately be discriminated against on the basis that he or she is in a same sex de facto relationship.[94] While the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on the grounds of marital status, the definition of marital status only includes being in an opposite sex de facto relationship.[95] These concerns about discrimination have not, however, led to exclusionary definitions being retained in other legislation that confers duties of disclosure. For example, under the *Aboriginal Land Rights Act 1983* (NSW), if a person's de facto partner[96] has a pecuniary interest in a matter, the person must disclose the nature of that interest if he or she is attending an Aboriginal Land Council meeting where the matter is being considered.[97] Any such disclosure must then be recorded in the minutes of the meeting.[98] Similarly, the *Independent Commission Against Corruption Regulation 2005* (NSW) provides that the Commissioner (for the Independent Commission Against Corruption) may require an officer of the Commission, or an applicant for a position as an officer, to provide personal particulars about his or her spouse.[99] Spouse is defined as including the other party to a de facto relationship within the meaning of the PRA.[100] In addition, all officers of the Commission must provide a statement of their financial interests, including any financial interests of their spouse.[101]

92. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 27 November 1992 at 10423.
93. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 27 November 1992 at 10424.
94. Unless the discrimination is also discrimination on the grounds of the individual's sexual orientation: *Anti-Discrimination Act 1977* (NSW) s 49ZF – 49ZR.
95. *Anti-Discrimination Act 1977* (NSW) s 4.
96. The term "de facto partner" is not defined.
97. *Aboriginal Land Rights Act 1983* (NSW) s 183, 184.
98. *Aboriginal Land Rights Act 1983* (NSW) s 185.
99. *Independent Commission Against Corruption Regulation 2005* (NSW) cl 4, 5.
100. *Independent Commission Against Corruption Regulation 2005* (NSW) cl 3(1).
101. *Independent Commission Against Corruption Regulation 2005* (NSW) cl 10. For further examples of legislation that confers duties of disclosure, see *Day*

2.65 While the Commission recognises that an inclusive definition would expose individuals to potential discrimination on the basis of their being in a same sex de facto relationship, as do definitions that currently include same sex de facto partners, the appropriate response to this concern is to provide legal protection rather than to retain an exclusionary definition. Accordingly, the Commission reiterates the recommendation in its 1999 *Review of the Anti-Discrimination Act 1977 (NSW)* that "marital status" should be renamed "domestic status" and that the definition of domestic status should include being in a domestic relationship within the meaning of the PRA.[102]

2.66 Since the 2002 reforms, exclusionary terminology has been included in the *Property, Stock and Business Agents Act 2002* (NSW), the *Commercial Agents and Private Inquiry Agents Act 2004* (NSW) and the *Home Building Amendment Act 2004* (NSW). In these three statutes, there is reference to a "de facto partner who is living or has lived with [a person] as his or her wife or husband on a bona fide domestic basis although not married to him or her". This phrase specifies those who are classified as an "associate" or "close associate" of a person.

2.67 Under the *Property, Stock and Business Agents Act 2002* and the *Commercial Agents and Private Inquiry Agents Act 2004*, classification as an associate is relevant to the provisions concerning failure to account[103] and receivership. In both Acts, for example, a failure to account by a licensee includes a failure that arises from an act or omission of a licensee's associate[104] and the property of a licensee's associate may be declared to be receivable property.[105] The Commission can see no reason why a same sex de facto partner should not be recognised as an associate of a licensee for the purposes of these and other similar provisions. Indeed, it is inconsistent with the consumer and public protection objectives of the Acts[106] to limit the reach of the

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Procedure Centres Regulation 1996 (NSW) cl 16, 17 and *Greyhound and Harness Racing Administration Act 2004* (NSW) Sch 1[10] and [11].

102. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) Recommendations 32 and 33. The original recommendation stated that domestic status should include the status of being "in cohabitation with another person in a domestic relationship other than marriage". However, as we now advocate the use of consistent terminology, we have modified the recommendation to refer to a "domestic relationship within the meaning of the PRA".
103. Including management and the Compensation Fund.
104. *Property, Stock and Business Agents Act 2002* (NSW) s 125; *Commercial Agents and Private Inquiry Agents Act 2004* (NSW) Sch 2[28].
105. *Property, Stock and Business Agents Act 2002* (NSW) s 139; *Commercial Agents and Private Inquiry Agents Act 2004* (NSW) Sch 2[30].
106. See NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 6 December 2001, at 19862 regarding the *Property, Stock and Business Agents Act 2002* (NSW) and NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 3 June 2004, at 9639 regarding the *Commercial Agents and Private Inquiry Agents Act 2004* (NSW).

provisions to opposite sex de facto partners and thereby leave a gap in the protection offered.[107]

2.68 Similar provisions dealing with failure to account and receivership are found in the *Conveyancers Licensing Act 2003* (NSW).[108] However, in that Act, an "associate" includes a same sex de facto partner.[109] The presence of inclusive terminology in the *Conveyancers Licensing Act 2003*, accompanied by the lack of a policy justification for excluding same sex de facto partners in the other Acts, indicates that pre-PRA terminology may have been inadvertently used in the drafting of the *Property, Stock and Business Agents Act 2002* and then repeated in the *Commercial Agents and Private Inquiry Agents Act 2004*. This view gains support from the comment made during the Second Reading of the *Commercial Agents and Private Inquiry Agents Bill* that "[t]he provisions contained in schedule 2 … are based on similar provisions in the *Property, Stock and Business Agents Act 2002*".[110] The *Home Building Amendment Act 2004* amends the licensing provisions of the *Home Building Act 1989* (NSW) to provide that an application for a licence may be rejected on grounds involving a close associate of the applicant.[111] In her Second Reading Speech, the Minister for Fair Trading stated that these new provisions are intended "to more effectively prevent inappropriate persons from being involved in the industry".[112] It is again inconsistent with this legislative objective to omit same sex de facto partners from the list of potential close associates. Given that the terminology used in this Act is identical to that used in relation to "associates" in the *Property, Stock and Business Agents Act 2002* and the *Commercial Agents and Private Inquiry Agents Act 2004*, it is possible that this is a further instance of inadvertent exclusion.

2.69 The Commission can see no compelling policy reason why the *Local Government Act 1993, Adoption Act 2000, Property, Stock and Business Agents Act 2002*, *Commercial Agents and Private Inquiry Agents Act 2004* and *Home Building Amendment Act 2004* should not be amended to include same sex de facto partners or relationships within the relevant definitions. All of the statutes apply to opposite sex de facto partners and therefore already accommodate de facto relationships within their policy objectives. There is no feature of the legislation that justifies differentiating between opposite sex and same sex de facto relationships. It is the Commission's view that in the absence of a policy justification for maintaining the current statutory

107. This is particularly so in relation to failure to account. In his Second Reading Speech on the *Property, Stock and Business Agents Bill*, the Minister for Fair Trading observed that "[d]efalcation can lead to the wholesale loss of lifetime savings and a litany of social ills that attach to that": NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 6 December 2001, at 19862.
108. See, for example, s 91, 92 and 106.
109. *Conveyancers Licensing Act 2003* (NSW) s 91 and 106.
110. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 3 June 2004, at 9636.
111. See *Home Building Act 1989* (NSW) s 20(6), 32B(5) and 40, as amended by *Home Building Amendment Act 2004* (NSW) Sch 2[6], [14], [19].
112. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 10 November 2004, at 12535.

position, considerations of equality and statutory consistency provide a compelling basis for amendment. The process that was commenced by the 1999[113] and 2002 amendments[114] should now be completed.

Inconsistent terminology

2.70 While the 2002 amendments remedied a significant amount of substantive legislative inconsistency, they did not address descriptive and definitional inconsistencies in legislation that already included same sex de facto relationships. Accordingly, de facto partners are still referred to by a range of terms including de facto spouse[115] or, in the case of same sex de facto partners, partner of the same sex[116] or same sex partner.[117] Similarly, differing definitions of de facto partner and spouse still exist, some of which do not refer to the PRA.[118] The Commission considers that existing legislation should be amended to achieve consistency in the terminology and definitions that are used in relation to spousal and de facto relationships. As regards new legislation, the Commission considers that consistent PRA-referenced definitions of de facto relationship, de facto partner and spouse should be applied.

Recommendation 8

The following statutes should be amended to include a party to a de facto relationship within the meaning of the PRA, or a de facto relationship within the meaning of the PRA, in their definitions:

Local Government Act 1993 (NSW)

Adoption Act 2000 (NSW)

Property, Stock and Business Agents Act 2002 (NSW)

Commercial Agents and Private Inquiry Agents Act 2004 (NSW)

Home Building Amendment Act 2004 (NSW)

113. *Property (Relationships) Legislation Amendment Act 1999* (NSW).
114. *Miscellaneous Acts Amendment (Relationships) Act 2002* (NSW).
115. See, for example, *Workers Compensation Act 1987* (NSW) s 37.
116. See, for example, *Victims Support and Rehabilitation Act 1996* (NSW) s 9.
117. See, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100A.
118. See, for example, s 3(1) of the *Workers' Compensation (Dust Diseases) Act 1942* (NSW) and s 4(4) of the *Child Protection (Prohibited Employment) Act 1998* (NSW).

Recommendation 9

Consistent PRA-referenced definitions of de facto partner, spouse and de facto relationship should be used in all relevant New South Wales legislation.

"De facto partner" should be defined as "the other party to a de facto relationship within the meaning of the *PRA".*

"Spouse" should be defined as "(a) a husband or wife, or (b) the other party to a de facto relationship within the meaning of the *PRA".*

"De facto relationship" should be defined as "a de facto relationship within the meaning of the *PRA".*

Existing legislation that deviates from this terminology, either in relation to the definition or to the term itself, should be amended to ensure consistency.

Where legislation uses the term de facto partner, spouse or de facto relationship without defining that term, the legislation should be amended to include the definition set out above.

3. Defining a close personal relationship

- Introduction
- Current definition
- Calls for a broader definition
- Should de facto and close personal relationships be regulated by the same legislation?

INTRODUCTION

3.1 The *De Facto Relationships Act 1984* (NSW) was enacted to provide a just and equitable means of dealing with the breakdown of opposite sex unmarried relationships. In 1999, at the same time as the Act was renamed the *Property (Relationships) Act 1984* ("the PRA"), the scope of the legislation was extended beyond opposite sex unmarried relationships to include same sex de facto relationships and the new category of "close personal relationships". The concept of a "domestic relationship" was introduced as a means of including couple and non-couple relationships in a single category.[1]

3.2 The notion of a close personal relationship encompasses carer relationships, where one person provides another person with care and assistance in his or her daily life, without receiving payment. The PRA provides a framework for dealing with some of the consequences of a breakdown in such a relationship, in particular, the division of property between the two parties to the relationship. This Chapter examines the way in which the PRA currently defines a "close personal relationship", and discusses proposals to broaden that definition. It also considers whether or not it is appropriate for a single piece of legislation to make provisions for the financial consequences flowing on from the breakdown of both de facto and close personal relationships.

CURRENT DEFINITION

3.3 Section 5(1)(b) of the PRA defines a close personal relationship as one (not being a marriage or a de facto relationship) between two adults, whether or not related by family, who live together in circumstances where one or each of the parties provides the other with domestic support and personal care. Section 5(2) provides that:

> *For the purposes of subsection (1)(b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:*
>
> *(a) for fee or reward, or*
>
> *(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).*

1. For a comprehensive overview of the history of this legislation, see J Millbank, "The Property (Relationships) Legislation Amendment Act 1999 (NSW)" (1999) 13 *Australian Journal of Family Law* 93. See also Lesbian and Gay Legal Rights Service, *The Bride Wore Pink: Legal Recognition of Our Relationships* (2nd ed, Sydney, 1994).

3.4 The definition of close personal relationship would cover such situations as an adult child caring for an elderly parent in the family home, or two friends who live in the same home, with one providing care and support for the other.

Interpretation

3.5 The PRA provides little guidance as to whom it means to include in the definition of close personal relationship. What guidance the legislation offers is expressed in the negative: a close personal relationship does not exist where one person provides personal care and domestic support to the other for payment, or who does so on behalf of another person or institution. Nor, as the Attorney General made clear in his Second Reading speech in relation to the 1999 amending legislation, is there any "... intention to create rights and obligations between persons who are merely sharing accommodation as a matter of convenience, in the way flatmates might".[2]

3.6 In the Parliamentary debates, Senator Cohen explained:

> *"Close personal relationship" is not necessarily restricted to people related by family, but they have to be living together, and one or each of them has to provide the other with domestic support and personal care. Thus there are three main criteria to the "close personal relationship" definition, which is intended mainly, if not exclusively, to cover carers. Examples of those relationships would be a son or daughter caring for an elderly parent. It is not intended to cover flatmates or paid carers.*[3]

3.7 There have been very few cases brought by people in close personal relationships. In fact, in most cases where the existence of a close personal relationship is claimed, the claim is presented as an alternative argument. The primary cause of action is usually that the applicant was in a de facto relationship with the defendant or, in the case of matters under the *Family Provision Act 1982*, the deceased.[4]

3.8 The first reported decision of the Supreme Court that considered the definition of close personal relationship was the decision of Master Macready in *Dridi v Fillmore.* The Master took a narrow view, holding that a close personal relationship exists only when two adults live together in the same house (although not necessarily as a couple given that the two may be related by family) and one or each of whom provides the other with both domestic support *and* personal care.[5] These were held to

2. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 13 May 1999 at 229.
3. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 May 1999 at 296.
4. For example, *Dridi v Fillmore* [2001] NSWSC 319; *Devonshire v Hyde* [2002] NSWSC 30; *Woodland v Rodriguez* [2004] NSWSC 1167; *Nedljkovic v Orozovic* [2005] NSWSC 755; *Gollege v Donnachie* [2005] NSWSC.
5. *Dridi v Fillmore* [2001] NSWSC 319.

be cumulative, that is, both domestic support and personal care must be provided. One of them alone would not be sufficient.

3.9 Domestic support includes such things as doing the shopping for the parties, cooking, washing and providing accommodation, etc. Personal care, on the other hand, implies care of a more private nature such as assistance with bodily functions and personal hygiene: for example, dressing and undressing, bathing, food preparation and eating, taking medication etc.[6] In *Devonshire v Hyde*, Master Macready said one might expect this kind of care from an employed nurse or carer, or a mother for her sick child or a daughter for her elderly incapacitated mother. While the paid nurse or carer would be excluded by the terms of the Act, the mother or daughter in the last two examples would be included.

3.10 The "personal care" element is not easy to satisfy. In a recent case, it was held that taking the deceased to doctor's appointments and keeping him company was not sufficient. The plaintiff did not provide any evidence that she provided assistance by way of feeding, clothing or showering, or administering medication to the deceased, therefore no close personal relationship was found to exist.[7] By contrast, in *Jurd v Public Trustee,* apart from cooking, cleaning and keeping the property tidy for the deceased, the plaintiff claimed also to have bathed the deceased's feet, brushed his hair and cajoled him into bathing etc. The deceased was very obese and suffered from diabetes and emphysema. The Supreme Court found that the elements of a close personal relationship had been met, although the relationship was one of short duration.[8]

CALLS FOR A BROADER DEFINITION

3.11 There has been some criticism that the PRA defines a close personal relationship too narrowly, excluding relationships where two people are financially interdependent but who do not live together, or provide the level of domestic support and care that appears to be required.[9]

3.12 In its submission, the Gay and Lesbian Rights Lobby argued that the current interpretation of close personal relationships as only including those of physical incapacity and care[10] is too narrow and defeats the primary purpose of the 1999

6. *Devonshire v Hyde* [2002] NSWSC 30.
7. *Bogan v Macorig* [2004] NSWSC 993. In *Dridi v Fillmore, Devonshire v Hyde* and *Woodland v Rodriguez*, the "personal care" requirement was also not satisfied and the claims failed.
8. [2001] NSWSC 632. A close personal relationship was also proved in *Przewoznik v Scott* [2005] NSWSC 74.
9. J Millbank and K Sant, " A bride in her every-day clothes; same sex relationship recognition in NSW" (2002) 22 *Sydney Law Review* 181 at 207-208.
10. *Dridi v Fillmore* [2001] NSWSC 319.

amendments, which was to recognise and protect close non-sexual relationships of interdependence.[11]

3.13 In its report, the Standing Committee on Social Issues ("the Social Issues Committee") had recommended that the "close personal relationship" definition be broadened to encompass a wider range of interdependent personal relationships.[12] It also recommended that the s 4(2) indicators of a de facto relationship[13] be available to the Court when determining whether a close personal relationship exists.[14] This would involve looking at common indicators of interdependence and reliance such as the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the parties' commitment to each other.

Should people in close personal relationships be required to cohabit?

3.14 Section 5(1)(b) of the PRA requires that people "live together" in order to be eligible for consideration as parties to a close personal relationship. As with de facto relationships,[15] there is a further limitation for those people wishing to make use of the financial adjustment scheme under Part 3 of the PRA: parties to a close personal relationship cannot make a claim under Part 3 unless they have been living together for at least two years.[16]

3.15 As the Commission discussed in Chapter 2, in the context of the definition of a de facto relationship, the term "living together" is arguably ambiguous, but appears to require some form of cohabitation.[17] A requirement of cohabitation excludes from recognition under the PRA those people who provide domestic support and personal care on a daily basis but do not reside with the person for whom they provide care.

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11. Gay and Lesbian Rights Lobby Inc, *Final submission* at 5. By contrast, the *De Facto Relationships Amendment Bill 1998* had envisaged a wider application to cover non-cohabiting non-sexually intimate relationships where there was emotional or financial interdependence: see Sch 1[4].
12. NSW, Legislative Council, Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform (Inquiry into De Facto Relationships Legislation)* (Report 20, Parliamentary Paper No. 127, December 1999) at 50-55.
13. See para 2.40.
14. NSW, Legislative Council, Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform (Inquiry into De Facto Relationships Legislation)* (Report 20, Parliamentary Paper No. 127, December 1999) Recommendation 8 at 55.
15. See Chapter 2.
16. See PRA s 17(1).
17. In one recent case, the Court held that a close personal relationship did not exist because the parties did not live together, impliedly meaning that they did not cohabit: see *Kolar v Dernovsek* [2005] NSWSC 838.

3.16 The Equity Division of the Supreme Court submits that any modification to the existing definition of close personal relationship, to include, for example siblings who are joint owners of property but live separately, should only occur if the Law Reform Commission is able to identify and is satisfied that there is a class of people suffering an injustice which is currently not being remedied.[18] New South Wales Young Lawyers do not support removing the requirement for cohabitation for people in close personal relationships, although they do support removing it for people in de facto relationships. Their justification for the distinction is that close personal relationships are less easy to define. They argued that fixing a definite connection in these types of relationship is beneficial to the Court in terms of identifying close personal relationships.[19]

3.17 As with de facto relationships,[20] several submissions expressed the view that requiring a minimum period of cohabitation in order to be eligible to bring an application for financial adjustment under Part 3 of the PRA sifts out trivial claims.[21] It was submitted that if the cohabitation requirement were removed for certain domestic relationships, an alternative threshold would need to take its place and keep out claims where substantial injustice is unlikely to have occurred.[22]

Approach in other jurisdictions

3.18 The recently enacted Tasmanian legislation adopts the same definition of close personal relationship as applies under the PRA with one notable exception: it does not require persons in a "caring relationship" to live together.[23] It does, however, contain the same elements of domestic support and personal care as in the PRA. To date, there have been no judicial pronouncements on the provisions.

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18. Equity Division of the Supreme Court of NSW, *Submission* at 14.
19. NSW Young Lawyers, *Submission* at 2. See also Anglican Diocese of Sydney, *Submission* at 3; Anti-Discrimination Board of NSW, *Submission* at 8. But contrast this with the opposing views of Lesbian and Gay Solidarity, *Submission* at 2; Gay and Lesbian Rights Lobby Inc, *Final submission* at 5-6.
20. See para 2.15-2.19.
21. Equity Division of the Supreme Court of NSW, *Submission* at para 49; NSW Young Lawyers, *Submission* at 6-7; Victorian Bar, *Submission* at para 12, 51; Law Society of NSW, *Submission* at 6-7. But see Gay and Lesbian Solidarity, *Submission* at 3; Gay and Lesbian Rights Lobby Inc, *Final submission* at 5-6. The Gay and Lesbian Rights Lobby submitted that if there were concerns to exclude unmeritorious claims for financial adjustment, with respect to both de facto and close personal relationships, then these concerns could be met by means other than a blanket prohibition.
22. Equity Division of the Supreme Court of NSW, *Submission* at para 49.
23. *Relationships Act 2003* (Tas) s 5(1). Note that parties in a close personal relationship must live together for two years before they can make a claim for financial adjustment under the Act: see s 37(1) (subject to exceptions in s 37(2)-(3)).

3.19 Significantly, the Tasmanian legislation also provides that the receipt of a carers' pension or allowance under federal social security legislation does not disqualify a person from being in a caring relationship.[24]

3.20 Also, it allows people in a caring relationship to register their relationship under Part 2 of the Act. If they do so, proof of registration is proof of the existence of the relationship. If the relationship is not registered, however, the Act provides that, when determining whether a caring relationship exists, the Court must take into account all the circumstances of the relationship including a list of inclusive factors similar to those it considers when determining the existence of a de facto relationship.[25]

The Commission's view

3.21 Parliament clearly intended to confine close personal relationships to those relationships where one or both of the parties provides care to the other. There was no intention to cover non-couple interdependent relationships in the broader sense as contemplated by the *De Facto Relationships Amendment Bill 1998* which was espoused by the Gay and Lesbian Rights Lobby and supported by the Social Issues Committee. The intention, made clear in the Second Reading speeches, was to provide an avenue for redress for people who suffer some detriment (and are not compensated for it) because of the care and support they provide to another, be it an elderly or ailing parent or friend or neighbour, for no fee or reward.

3.22 In most cases, such relationships are likely to end with the death of the person being cared for, in which case the person who has taken care of the other may have recourse against the estate if they feel they were not adequately provided for. The statutory provisions for property adjustment are useful for those in close personal relationships in situations where the relationship breaks down during the life of the parties. For example, an elderly mother living in the home of a daughter who has taken care of her for many years, may, after a falling out, move out with another son or daughter. More often than not, these private care arrangements will not be documented in any kind of written agreement. Without the PRA, the jilted daughter would only have recourse to equitable remedies under general law.

3.23 The Commission acknowledges that there may be carers who do not reside with the person to whom they provide domestic support and personal care on a day-to-day basis. Removing any requirement for cohabitation would bring these non-resident carers within the scope of the PRA, and for this reason we consider that the definition of a close personal relationship should dispense with any requirement that the parties to the relationship cohabit. Instead, the PRA should include a list of indicia, very similar to those already included in relation to de facto relationships, under s 4(2), as a safeguard against trivial claims being brought. The list of indicia should be modified, as in s 5(5) of the Tasmanian *Relationships Act 2003*, to exclude references to a sexual relationship, and to give explicit recognition to the level of domestic support and personal care.

24. *Relationships Act 2003* (Tas) s 5(3).
25. *Relationships Act 2003* (Tas) s 5(4) and 5(5).

3.24 While the Commission does not consider that the definition of a close personal relationship should include any requirement of cohabitation, we nevertheless take the view that such relationships must be shown to have existed for no less than two years in order to bring a claim for financial adjustment under Part 3 of the PRA. As with de facto relationships,[26] some form of objective indicator is necessary to ensure that the relationship in question was sufficiently long-lasting and committed to justify the disturbance of private property rights. We address this in Chapter 6.

3.25 The Commission also recommends that the PRA be amended to make it clear, as in the Tasmanian legislation, that a carers' pension or allowance under social security legislation does not disqualify a person under s 5(2).

Recommendation 10

The definition of "close personal relationship" in s 5(1)(b) of the PRA should be amended to dispense with any suggestion that the two parties to the relationship must cohabit.

Recommendation 11

The PRA should be amended to provide that, for the purpose of s 5(2)(a), a fee does not include a carer's pension or allowance under the *Social Security Act 1991* (Cth) made to a party to a close personal relationship in respect of care provided by that party to the other party in the relationship.

Recommendation 12

The PRA should be amended to provide that, in determining whether two persons are in a close personal relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:

(a) the duration of the relationship;
(b) the nature, extent of and need for common residence;
(c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
(d) the ownership, use and acquisition of property;
(e) the degree of mutual commitment to a shared life;
(f) the performance of household duties;
(g) the reputation and public aspects of the relationship;
(h) the level of personal care and domestic support provided by one or each of the partners to the other.

Recommendation 13

26. See Chapter 2 at para 2.31.

If a system of registration is implemented (see Recommendation 15), the PRA should be amended to provide that proof of the registration of a close personal relationship is proof of the relationship.

SHOULD DE FACTO AND CLOSE PERSONAL RELATIONSHIPS BE REGULATED BY THE SAME LEGISLATION?

3.26 While the scope of the PRA changed significantly in 1999, the substantive provisions remained largely the same and simply became applicable to the new category of "domestic relationship". Such an approach arguably disregards the differences between de facto relationships and other close personal relationships and inappropriately places non-couple relationships in a regime designed to address the particular consequences of the breakdown of de facto relationships. In recognition of these concerns, DP 44 raised the issue of whether or not the provisions in the PRA concerning de facto relationships are appropriate for recognising and regulating close personal relationships.

Approach in other jurisdictions

3.27 The move towards a broad category of "domestic relationship" in New South Wales was part of a wider trend in relationship recognition. In Australia, non-couple relationships were first recognised in the Australian Capital Territory. The *Domestic Relationships Act 1994* (ACT) moved beyond the concept of a couple-based relationship to use a "domestic relationship" as its central concept. A "domestic relationship" is defined in the ACT legislation as a personal relationship between two adults, in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other. Under the *Domestic Relationships Act*, the same substantive property adjustment and maintenance provisions apply to all domestic relationships, whether the individuals involved are in a couple or a non-couple relationship.

3.28 A similar approach has been taken in the Tasmanian *Relationships Act 2003*, which uses the central concept of a "personal relationship". Included within the definition of "personal relationship" are relationships between two adults, in which one or each of them provides the other with domestic support and personal care.[27] As with the Australian Capital Territory and New South Wales legislation, the same substantive property adjustment and maintenance provisions apply to all "personal relationships", without distinctions being drawn in relation to couple and non-couple relationships.

27. Such relationships are called "caring relationships", while the Tasmanian equivalent of "de facto relationship" is a "significant relationship": *Relationships Act 2003* (Tas) s 4.

Submissions

3.29 Both the Anti-Discrimination Board and the Gay and Lesbian Rights Lobby supported continued legislative recognition of close personal relationships. However, the Lobby submitted that the current interpretation of close personal relationships (as only including those of physical incapacity and care)[28] is too narrow and defeats the primary purpose of the 1999 amendments, which was to recognise and protect close non-sexual relationships of interdependence.[29]

3.30 The Women's Legal Resources Centre considered that close personal relationships should not be recognised or regulated under the PRA. While the Centre acknowledged that there might well be a need to regulate the division of property in close personal relationships, it submitted that this should be addressed separately from de facto relationships.[30] The Centre was concerned that bringing close personal relationships within the PRA detracted from the main purpose of the legislation, which was to deal with the breakdown of de facto relationships.

3.31 New South Wales Young Lawyers submitted that close personal relationships should not be regulated in the same way as de facto relationships because they have very different characteristics.[31] Likewise, the Victorian Bar Association observed that close personal relationships present with diverse characteristics and merit diverse legal responses. Accordingly, it is inappropriate to assume that one size fits all in the regulation of these relationships.[32]

3.32 The Judges of the Equity Division of the Supreme Court also noted that there are significant differences within the class of close personal relationships, but commented that similar differences exist within the class of de facto relationships.[33] Such differences can be accommodated by the Court making orders by reference to the circumstances of each individual case or by the parties entering into a contract, which they can adjust to their own individual circumstances. The PRA merely uses the concept of a domestic relationship as a means of conferring jurisdiction on the Court or of empowering the parties. In the view of the Judges of the Equity Division, in these circumstances, it is appropriate for one piece of legislation to govern both types of relationships.

The Commission's view

3.33 In modern legislation, there is a tendency for legal rights and obligations to attach to relationships based on whether or not recognition of a particular relationship accords with the policy objectives of the legislation. Rather than focusing on formal

28. *Dridi v Fillmore* [2001] NSWSC 319.
29. Gay and Lesbian Rights Lobby Inc, *Final submission* at 5.
30. Women's Legal Resources Centre, *Submission* at 5.
31. NSW Young Lawyers, *Submission* at 2.
32. Victorian Bar, *Submission* at 4.
33. Equity Division of the Supreme Court of NSW, *Submission* at 12.

categories of relationship, it is the substance of the relationship that is important. The PRA enables this type of approach to be taken to relationship recognition by defining three categories of relationship, namely de facto relationships, close personal relationships and the composite category of domestic relationship. This tripartite categorisation acknowledges that for certain legal purposes it is appropriate to distinguish between couple and non-couple relationships, while for other legal purposes it is appropriate to recognise both types of relationships.

3.34 Having regard to the nature of the relationships that are recognised, and to the consequences of such recognition, it is appropriate for de facto relationships and close personal relationships to continue to be regulated by the same piece of legislation. Both types of relationships involve the intermingling of the parties' lives and a likelihood of financial interdependence. Against this background it is appropriate that the Courts have the ability to consider whether any form of property adjustment or financial maintenance is appropriate should the relationship end. While close personal relationships and de facto relationships may have very different characteristics, the Commission shares the view of the Judges of the Equity Division of the Supreme Court that the differences can be accommodated by the orders made by the Courts. The existence of the differences does not affect the shared characteristics, which bring both types of relationship within the policy objectives of the PRA.

3.35 The merging of de facto relationships and close personal relationships for the purposes of the PRA has not precluded other areas of the law from acknowledging the fundamental differences between these relationships. For example, a substantial number of statutes confer rights and/or obligations on de facto partners but not on the broader category of domestic partner. One such statute is the *Human Tissue Act 1983* (NSW), under which a de facto partner, but not a domestic partner, has the ability to authorise the removal of an organ from their deceased partner.[34] This reflects the mutual emotional intimacy that characterises a couple relationship, but may often be absent in a non-couple relationship. By contrast, only a limited number of statutes attach legal consequences to domestic relationships. Other than the PRA, the *Family Provision Act 1982* (NSW),[35] *Duties Act 1997* (NSW),[36] *Powers of Attorney Act 2003* (NSW),[37] *Bail Act 1978* (NSW)[38] and *District Court Rules 1973* (NSW)[39] are

34. *Human Tissue Act 1983* (NSW) s 23 and 24.
35. A party to a domestic relationship and child who is a child of the parties to a domestic relationship, by virtue of s 5 of the PRA, are defined as an "eligible person" for the purposes of provision orders: *Family Provision Act 1982* (NSW) s 6.
36. Domestic relationships are recognised for the purposes of various exemption provisions: *Duties Act 1997* (NSW) s 68, 119 and 267.
37. In Schedule 3, which deals with the prescribed expression that authorises an attorney to give a gift, relatives of either party to a domestic relationship are recognised as a "relative" of the person giving the power of attorney.
38. Section 4 includes a party to a domestic relationship within the meaning of "close relative". It also defines close relatives of one party to a domestic relationship as being close relatives of the other party.

the only legislative instruments that confer rights or obligations on domestic partners or otherwise recognise domestic relationships.[40]

Recommendation 14

De facto relationships and close personal relationships should continue to be regulated by the same piece of legislation.

39. Rule 2, Part 31A provides that a person with whom a judgment debtor is in a domestic relationship can make certain applications of behalf of the judgment debtor.
40. The *Coroners Act 1980* (NSW) and *Trustee Act 1925* (NSW) recognise children who are regarded as a child of the parties to a domestic relationship, by virtue of s 5 of the PRA: *Coroners Act 1980* (NSW) s 4 and *Trustee Act 1925* (NSW) s 45.

4. Legal recognition of domestic relationships

- Introduction
- Current presumptive approach
- Alternative approaches
- The Commission's view

INTRODUCTION

4.1 This Chapter considers the ways in which a relationship should be brought within the operation of the *Property (Relationships) Act 1984* ("the PRA"), and any other legislation dealing with "domestic relationships". It discusses and makes recommendation for a system of registering relationships so as to attract the legal rights and obligations that apply to de facto and close personal relationships.

CURRENT PRESUMPTIVE APPROACH

4.2 Under the PRA, those who meet the definition of "domestic relationship" automatically fall within the operation of the Act, without the need to register a relationship. Accordingly, certain types of relationships are presumed to be "domestic relationships" and the PRA therefore takes a presumptive approach to recognition of those relationships.

4.3 The main advantage of a presumptive approach is that people are not required to take active steps to have the PRA apply to their relationship. As a result, they do not need to be aware of the PRA to benefit from it.[1] Should they not want to be covered by the PRA, the presumptive approach allows them to "opt out" of the operation of the Act by making private agreements.[2] The ability to "opt out" addresses the potential for a presumptive approach to be over-inclusive, although it is only of value to those with some knowledge about the legislation.

4.4 A key difficulty with the presumptive approach is that it relies upon a relationship being objectively identifiable as a domestic relationship. It will not always be clear whether a relationship is or was a domestic relationship and particular difficulties may arise where parties disagree about the nature of their relationship[3] or a third party disputes that a domestic relationship existed, following the death of a party.[4] Even where a relationship is clearly identifiable as a domestic relationship, there may be uncertainty about when the relationship commenced or terminated.[5] These problems may be exacerbated in relation to close personal relationships, which are arguably less easy to identify than de facto relationships.[6] At present, certainty for the parties can only be obtained by seeking a declaration from the Court as to the existence and duration of a domestic relationship, under s 56 of the PRA.

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1. The focus groups and questionnaire indicated that many people are unaware that the PRA exists or have very limited knowledge about its provisions: see Appendix C.
2. See PRA s 44-52. See Chapter 12.
3. See eg *Saba v Xu* [2004] NSWSC 858; *Zaronias v Constantine* [2004] NSWSC 774.
4. See eg *Bogan v Macorig* [2004] NSWSC 993.
5. See eg *Dalli v Dragovic* [2004] NSWSC 1033; *Dridi v Fillmore* [2001] NSWSC 319.
6. See eg *Bogan v Macorig* [2004] NSWSC 993.

ALTERNATIVE APPROACHES

4.5 In DP 44, we set out three possible alternative approaches to that currently taken by the PRA.[7] The first alternative approach is a system of voluntary registration. Under this approach, the PRA would only apply to people who have formally registered their relationship. The major benefits of registration are certainty and autonomy; the parties to a relationship can be readily identified and have demonstrated that they know about, and agree to be bound by, the legislation. Further, parties who would not come within the PRA on a presumptive approach because, for example, they do not live together, could elect to bring their relationship within the legislation. An additional benefit is the symbolic value of registration. It enables people who do not wish or are legally unable to marry, such as lesbian and gay couples, to have their relationship formally acknowledged by the State.

4.6 Despite the advantages of registration, there are a number of reasons for objecting to registration being the sole means of relationship recognition under the PRA.[8] A significant concern is that this approach relies upon couples being informed about the legislation and taking active steps to bring their relationship within the PRA. In addition, it forces individuals in same sex relationships to make a public declaration of their sexual orientation before they can benefit from the legislation. Concerns about homophobia may mean couples are disinclined to make such a declaration.[9] Same sex couples may also be hesitant about participating in a form of relationship recognition that is perceived as a "second best" option.[10]

4.7 The second alternative approach is to retain the current presumptive approach, but also introduce an optional registration system for those people who wish to have their relationships recognised more formally.[11] The flexibility of this option would address many of the disadvantages of registration. However, there is the possibility that a hierarchy of relationships would develop, either in the approach of the Courts[12] or in community perceptions, with registered domestic relationships being placed above presumptive domestic relationships.[13] In addition, the optional

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7. DP 44 at para 2.78 - 2.80.
8. See DP 44 at para 2.74 – 2.76 for further discussion of this point.
9. See eg NSW Attorney-General's Department, *'You Shouldn't Have to Hide to be Safe': A Report on Homophobic Hostilities and Violence Against Gay Men and Lesbians in NSW* (2003).
10. Lesbian and Gay Legal Rights Service, *The Bride Wore Pink* (2nd ed, Sydney, 1994) at Ch 8.3.
11. DP 44 at para 2.78.
12. A court may be hesitant to find that a de facto relationship exists if a couple has the option to register their relationship but chooses not to do so: see Gay and Lesbian Rights Lobby Inc, *Final submission* at 6.
13. And marriage retaining pre-eminence over both. See, for example, P Ettelbrick, "Wedlock alert: a comment on lesbian and gay family recognition" (1996) 5 *Journal of Law and Policy* 107.

nature of the registration system would not address concerns about the status of registration as a "second best" option.[14]

4.8 The third approach outlined in DP 44 was to apply a presumptive approach to certain relationships, while giving people the option to register other types of relationships.[15] For example, it could be presumed that people in de facto relationships were automatically covered by the PRA, while people in close personal relationships, who wanted to come within the PRA, could register their relationships.

The approach in other jurisdictions

4.9 De facto relationships are now recognised by statute in all States and Territories of Australia.[16] In general, a presumptive approach is taken to relationship recognition.[17] Exceptionally, in Tasmania, the *Relationships Act 2003* applies a combination of the presumptive and registration approaches in relation to "personal relationships".[18] For the period between 1 January 2004 (when the *Relationships Act* commenced) and 16 December 2005, 57 "significant relationships"[19] had been registered.[20]

4.10 Recently, in the Australian Capital Territory, the *Civil Unions Bill 2006* proposed the introduction of provision for couples, either of the same or opposite sex, to enter into a civil union.[21] In so far as it involves a public ceremony, a civil union resembles more closely a legal marriage than registered relationships in Tasmania. The *Civil Unions Bill* set out a procedure for entering into a civil union,[22] similar to that for entering into a marriage,[23] including a requirement that the couple make a declaration before an authorised celebrant and one other witness.[24] The Bill expressly provided that a civil union was to be treated for all purposes under territory law in the same way as a marriage.[25] Among other things, the Bill provided for the *Domestic*

14. See para 4.6 above.
15. DP 44 at para 2.79.
16. South Australia is the only jurisdiction that does not currently recognise same sex relationships: see *De Facto Relationships Act 1996* (SA) s 3.
17. *Property Law Act 1958* (Vic); *Domestic Relationships Act 1994* (ACT); *Property Law Act 1974* (Qld); *De Facto Relationships Act 1991* (NT); *Family Court Act 1997* (WA); *De Facto Relationships Act 1996* (SA).
18. *Relationships Act 2003* (Tas) s 4, 5, 6. A "personal relationship" equates to a domestic relationship.
19. Comprising both same sex and opposite sex relationships.
20. Information received from the Tasmanian Department of Births, Deaths and Marriages, 16 December 2005.
21. The Governor-General disallowed the *Civil Unions Bill* on 13 June 2006.
22. See *Civil Unions Bill 2006* (ACT) cl 9-11.
23. See *Marriage Act 1961* (Cth) Pt IV Div 2.
24. *Civil Unions Bill 2006* (ACT) cl 11.
25. *Civil Unions Bill 2006* (ACT) cl 5.

Relationships Act 1994 (ACT) to recognise civil unions as a personal relationship for the purposes of that Act.[26]

4.11 Statutory schemes recognising de facto relationships have also been enacted in other jurisdictions around the world including Canada, New Zealand, the USA and several parts of Europe.[27] A variety of approaches have been taken, including same sex marriage,[28] registered partnerships,[29] presumptive recognition[30] and a combination of these approaches.[31] In the United Kingdom, the *Civil Partnership Act 2004* recently came into operation.[32] It makes provision for people in same sex relationships to register their relationship as a civil partnership, as a means of gaining formal legal recognition of their relationship. Registration as a civil partnership gives rise to various legal rights and responsibilities, including, for example, employment and pension benefits, payment of maintenance and child support, and access to fatal accidents compensation.[33]

Submissions

4.12 The Anglican Diocese of Sydney[34] and the Women's Legal Resources Centre[35] supported supplementing the current presumptive approach with an optional registration system. The Women's Legal Resources Centre submitted that the option of registration would enable couples who may not fall within the PRA under a

26. *Civil Unions Bill 2006* (ACT) Sch 1[34], [72].
27. Civil unions, or registered partnerships, are formally recognised in the following countries: Denmark, Norway, Israel, Sweden, Greenland, Hungary, Iceland, Netherlands (now recognises same sex marriage), France, South Africa, Belgium (now recognises same sex marriage), Canada (now recognises same sex marriage), Germany, Portugal, Finland, Croatia, Luxembourg, New Zealand, United Kingdom, Andorra, Slovenia, Switzerland, and in some regions of Argentina, Spain, Italy, Brazil, United States of America, Liechenstein, Austria, Czech Republic, Greece, Ireland, Poland, Honduras: see International Gay and Lesbian Human Rights Commission, "Where You Can Marry: Global Summary of Registered Paternerships, Domestic Partnerships and Marriage Laws", http: www.iglhrc.org/site/iglhrc/content.php?type=1&id=91. See also DP 44 at para 2.42-2.54.
28. For example, the Netherlands and Belgium.
29. For example, the United Kingdom and New Zealand.
30. For example, Hungary, Canada, Sweden and Spain.
31. In Quebec, for example, couples can choose to join in a civil union. However, even if couples choose not to join in a civil union, a limited range of laws presumptively recognises de facto relationships. See *Civil Code of Quebec*.
32. The *Civil Partnership Act 2004* (UK) commenced on 5 December 2005.
33. For commentary, see S Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (OUP, 2006) Ch 2.
34. Anglican Diocese of Sydney, *Submission* at 4.
35. Women's Legal Resources Centre, *Submission* at 6.

presumptive approach to elect nevertheless to be bound by the legislation.[36] Lesbian and Gay Solidarity, which highlighted the potential for better formal recognition of relationships as a particular advantage, also supported this approach.[37]

4.13 The Gay and Lesbian Rights Lobby supported retention of the current presumptive approach. It submitted that adding an optional registration system would entrench a three-tiered hierarchy of relationships and could enhance difficulties of proof for people who have not registered their relationship.[38] Registration as the sole means of recognition for either de facto or close personal relationships was rejected on the basis that many relationships that would be recognised under a presumptive approach would be left unrecognised. A similar view was expressed by the judges of the Equity Division of the Supreme Court.[39]

4.14 New South Wales Young Lawyers submitted that a registration system should not be introduced because of the danger that such a system would create different tiers of relationships.[40] This was a concern shared by the Anti-Discrimination Board, which also rejected registration on the basis that few people would register their relationships.[41] The Board further submitted that legislation such as the PRA, which affords protection to less powerful parties within relationships, is significantly undermined if protection is only given to those who register their relationships.[42]

Focus groups and questionnaire

4.15 There was general consensus in the focus groups that the presumptive approach should not be *replaced* by a system of registration. However, participants expressed a broad range of views on registration as an optional system, designed to supplement the PRA's presumptive approach.

4.16 A commonly expressed objection to an optional registration system was that it perpetuated the second class status of same sex relationships. People described registration as "insulting" and akin to "a consolation prize". In response to this objection, several participants commented that registration was in fact a positive alternative to marriage as they did not wish to participate in that traditional institution. To a large extent, the focus group discussions reflected a debate that exists more

36. Women's Legal Resources Centre, *Submission* at 7. The Centre did, however, also express a number of concerns about registration, including low levels of uptake and the creation of a hierarchy.
37. Lesbian and Gay Solidarity, *Submission* at 2.
38. Gay and Lesbian Rights Lobby Inc, *Final submission* at 6.
39. Equity Division of the Supreme Court of NSW, *Submission* at para 30.
40. NSW Young Lawyers, *Submission* at 3.
41. Anti-Discrimination Board of NSW*, Submission* at 8.
42. Anti-Discrimination Board of NSW*, Submission* at 9.

broadly, namely whether marriage should be the ultimate goal of reform efforts by the gay and lesbian community or whether registration is a preferable objective.[43]

4.17 A number of participants considered that registration would offer same sex couples significant practical benefits. For example, a certificate of registration would provide clear evidence to a court or hospital that the parties were in a de facto relationship. Several participants mentioned that lesbians and gay men often have difficult relationships with their parents or other relatives and that same sex partners are frequently not acknowledged by an individual's family of origin. In these circumstances, clear evidence of a relationship could be of significant comfort and value to de facto partners. The evidentiary aspect of registration could be beneficial not only in relation to matters involving the parties but also in relation to matters involving a child and co-mother or gay or lesbian step-parent. As the potential practical benefits of registration were important, many participants who favoured an optional system of registration expressed the view that it had to give rise to legal consequences.

4.18 Sixty-four per cent of respondents to the questionnaire supported an optional registration system. Sixteen per cent objected and nineteen per cent were unsure.[44] The comments of those in favour of optional registration reflected the concerns of focus group participants that registration should not be a merely symbolic act.

THE COMMISSION'S VIEW

4.19 The Commission shares the view expressed in both the submissions and the focus groups that registration should not replace the current presumptive approach to relationship recognition. As discussed above, there are several compelling objections to relying on registration as the sole means of bringing domestic relationships within the ambit of the PRA.[45] By contrast, the issue of whether an optional registration system should supplement the presumptive approach is more finely balanced, both in terms of policy considerations and community opinion.

4.20 The Commission acknowledges that there are strong objections to the introduction of an optional registration system. In particular, we recognise the concerns that registration may establish a hierarchy of relationships and that it may be perceived as offering same sex couples a second-rate form of formal recognition of their relationships. However, it is necessary to balance these concerns against the practical benefits of registration and the degree of community support for an optional registration system. Such concerns must also be considered against the background of developments such as the *Marriage Amendment Act 2004* (Cth), which indicate

43. See, for example, R Graycar and J Millbank, "The bride wore pink … to the *Property (Relationships) Legislation Amendment Act 1999*: relationships reform in New South Wales" (2000) 17 *Canadian Journal of Family Law* 227.
44. One percent did not respond to this question: see Appendix C.
45. See para 4.6 above.

that same sex relationships are unlikely to be given the same recognition as opposite sex relationships at the federal level in the near future.

4.21 While there are strong arguments both for and against, the Commission recommends that the current presumptive approach in the PRA be supplemented with an optional system of registration. The provision of a legal process that is available to same sex couples for the purpose of formalising their relationships if they wish to do so affects far more than the particular couples who take advantage of it. It is, of itself, an acknowledgement by the State of the propriety of such relationships and of the civil rights of the persons who are in them. It may therefore have a positive role in correcting or, at least, reproving homophobia. Current constitutional arrangements prevent the State of New South Wales from doing more. But it is as much as it can do. It is not correct, therefore, to say that the availability of registration is a second-best response to the legitimacy of gay and lesbian relationships. It is, in fact, the best that the State can do. And the State should do it.

4.22 The option of registration offers those couples who wish to have their relationship formally recognised the ability to do so, but, by supplementing a presumptive approach, does not compel couples to register in order to come within the PRA. The experience in Tasmania suggests that, while the number of couples taking up the option to register may be small, given the general population size of Tasmania, it is not insignificant.

4.23 In putting forward a recommendation for a registration system, its application to opposite sex de facto relationships should be noted. It is likely that a registration system will be predominantly favoured by same sex couples, because it is the only means available to them for formal recognition of their relationships. Nevertheless, there is no reason in principle why an option to register a relationship should not also be available to any opposite sex de facto couple who wishes to do so. Practical benefits might flow from being able to provide ready legal proof of their relationship, which make registration desirable. There is no constitutional objection to providing for a registration system for opposite sex couples, because such a system is distinct from, and does not conflict with, the definition of a marriage in the *Marriage Act 1961* (Cth). However, given that the State has referred its power over financial matters arising from the breakdown of a de facto relationship to the Commonwealth, registration of an opposite sex de facto relationship under State law could not affect recognition of that relationship for the purposes of property adjustment under federal legislation, unless the Commonwealth agreed to make provision for such legislative recognition.

Recommended amendments to the PRA

4.24 An optional registration system should be added to the PRA by enacting a new Part 1A and amending the definitions of “de facto relationship” and “close personal relationship” to include relationships that are registered under that Part.[46] As

46. The *Relationships Act 2003* (Tas) Parts 2 and 3 provide a useful model for this approach.

registration of a relationship would automatically bring that relationship within the meaning of "de facto relationship" or "close personal relationship", the legal rights and obligations that attach to those relationships would automatically attach to any registered relationship.

4.25 It will be necessary for the PRA to stipulate those who are eligible to register a relationship and the ways in which registration can be revoked, as well as to address associated procedural and administrative matters. As the Commission has not consulted on the specific details of a registration system, the following discussion expresses our preliminary views on certain matters and does not contain final recommendations.

4.26 An important feature of registration is the autonomy that it gives individuals in determining the status of their relationships. However, the significance of the legal consequences that attach to a de facto or close personal relationship means that it is appropriate to impose some limitations on who is eligible to register such a relationship. The Commission considers that individuals should only be eligible to register a de facto or close personal relationship if both parties are of or above the age of 18 years. Where one or both of the parties is aged 16 or 17 years, eligibility should be dependant on authorisation being granted by a court. This approach would achieve consistency with the federal laws in relation to property adjustment[47] and would acknowledge that while 16 and 17 year olds can legally live in couple or carer relationships, individuals in this age bracket are in a period of developing maturity.

4.27 A further limitation, currently imposed on de facto relationships, relates to individuals who are related by family. As the Commission noted in Chapter 2,[48] the PRA does not recognise intimate relationships involving family members as de facto relationships. We have already put forward our reasons for retaining this limitation in the definition of a de facto relationship, and consider that it should also act as a limitation on those eligible to register their relationships as de facto relationships.

4.28 A separate exclusion is currently imposed in relation to close personal relationships. Under s 5(2) of the PRA, a close personal relationship is taken not to exist where domestic support and personal care is provided in return for a fee or reward or in the carer's capacity as an employee or agent of another or of an organisation. This exclusion is imposed on the basis that the interdependence and mutuality that justify attaching legal rights and obligations to close personal relationships are not present in "professional" caring relationships. Were these relationships recognised as close personal relationships, the reach of the PRA would be inappropriately wide.

4.29 While a limitation of this nature is appropriate in relation to presumptive recognition, it is not necessarily appropriate in relation to registration of a close

47. As 16 and 17 year olds are able to marry under the *Marriage Act 1961* (Cth), with authorisation, they have access to the property adjustment provisions under the FLA.
48. See para 2.35-2.38.

personal relationship. In the Commission's view, there is no fundamental policy objection to permitting individuals to register a close personal relationship, where one party provides the other with professional support and care services. However, in recognition of the potential for exploitation that could exist in such a relationship, we consider that individuals who wish to register a close personal relationship in these circumstances should be required, as a condition of eligibility, to obtain independent legal advice prior to registration.[49] An example of this type of requirement is found in s 11(3) of the Tasmanian *Relationships Act 2003*.[50]

4.30 A common condition of eligibility, found in several registration regimes,[51] is that neither of the parties is married or is a party to a registered relationship. This requirement of exclusivity is designed to limit the number of competing obligations that may exist at any one time. It also reflects the policy objective of attaching consequences to interdependent relationships, which will typically involve only two parties at a time. However, a concern with an exclusivity requirement is that a person may be in more than one domestic relationship at a time[52] and may wish to have more than one partner legally recognised. In the Commission's view, the combination of an exclusive registration system and a non-exclusive presumptive system achieves an appropriate balance between certainty and flexibility.

4.31 A registration system will have to address the ways in which registered relationships are to be terminated. The Commission considers that rather than mirroring provisions of the *Family Law Act 1975* (Cth) ("the FLA") regarding the dissolution of a marriage, a more straightforward approach to termination is appropriate, given the diversity of registrable relationships. We suggest that registration of a relationship should be automatically revoked upon the death of one of the parties. Similarly, automatic revocation should occur if one of the parties marries. This would be consistent with a requirement of exclusivity and acknowledges the unlikelihood of registered relationships being treated as bars to marriage under the *Marriage Act 1961* (Cth). Beyond these instances of automatic revocation, there should be scope for a mutual or unilateral application for revocation.

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49. In addition, the *Crimes Act 1900* (NSW) provisions concerning incest go some way to addressing concerns about family members entering into exploitative relationships: *Crimes Act 1900* (NSW) s 78A, s 78B and s 78C.
50. "Each party to a caring relationship must lodge a certificate, in a form approved by the Registrar, from a solicitor of the Supreme Court of Tasmania which states that the solicitor provided legal advice to that party, independently of the other party to the relationship, as to –
(a) the effect of the registration of a deed of relationship on the rights of the parties; and
(b) the advantages and disadvantages, at the time that the advice was provided, to the party of registering a deed of relationship."
51. For example, *Civil Partnership Act 2004* (UK) s 3; *Civil Union Act 2004* (NZ) s 8; *Relationships Act 2003* (Tas) s 11.
52. For example, a person could simultaneously be in a de facto or a close personal relationship. See *Straede v Eastwood* [2003] NSWSC 280.

4.32 In jurisdictions with relationship registration schemes, it is common practice for there to be controlled public access to the relationship register. For example, in Tasmania, the Registrar may allow access to a person who has an "adequate reason" for wanting information from the register.[53] Similar provisions exist in New South Wales in relation to the Births, Deaths and Marriages Register.[54] While the Commission recognises that some same sex couples would not want information about their relationship to be publicly available, registration would be a voluntary process and statutory controls on public access would limit the potential for unjustified intrusions on privacy to occur. Further, we consider that a confidential register would be contrary to the public status and purpose of a registered relationship. Accordingly, we recommend that there should be controlled public access to information about registered relationships.

4.33 The Commission recommends that the Registry of Births, Deaths and Marriages have responsibility for administering the registration system.[55] The experiences of other jurisdictions suggest that this would not result in a significant increase in the Registry's workload.

Recommendation 15

The current presumptive approach in the PRA should be supplemented with an optional system of registration. This registration system should be integrated into the PRA, with a new Part being enacted to address registration and consequential amendments being made to other provisions.

Recommendation 16

New South Wales should seek the support of the Commonwealth for federal legislation that recognises that de facto relationships registered under State law will qualify as de facto relationships for the purposes of federal legislation.

53. *Relationships Act 2003* (Tas) s 20 – 24.
54. *Births, Deaths and Marriages Act 1995* (NSW) s 46.
55. See para 4.9.

5. Recognition of functional parent/child relationships

- Terminology
- Introduction
- The extent of recognition under the PRA
- Ways of acquiring legal recognition as parents
- Recognition for child support

TERMINOLOGY

5.1 In this Chapter, the following terminology is used:

Legal parent means a biological, adoptive or presumptive parent of a child.

Legal child means a biological, adoptive or presumptive child of an adult.

Functional parent means a person who is responsible for the day-to-day care and long-term welfare of a child of whom he or she is not a biological, adoptive or presumptive parent.

Functional child means a child who has a relationship with an adult as if that adult were his or her parent, but who is not the biological, adoptive or presumptive child of that adult.

Presumptive parent means an adult who is presumed to be a legal parent of a child, pursuant to s 14 of the *Status of Children Act 1996* (NSW), but who is not the biological or adoptive parent of that child.

Presumptive child means a child who is the legal child of an adult, who is presumed to be the legal parent of the child, pursuant to s 14 of the *Status of Children Act 1996* (NSW), but who is not the biological or adoptive parent of that child.

Birth mother means a woman who conceives a child through artificial insemination, with the consent of her partner.

Co-mother means a woman who consents to the artificial insemination of her female partner, with the intention of being a parent to the child.

Lesbian step-parent means the female partner of a child's legal mother, who is a functional parent of the child.

Gay step-parent means the male partner of a child's legal father, who is a functional parent of the child.

5.2 Our choice of terminology is designed to distinguish between categories of relationships that may attract different legal and practical considerations. We recognise that this terminology may not accord with the language used by adults and children in same sex families.[1]

1. Our consultations with the lesbian and gay communities indicated that there is a significant divergence of opinion regarding the appropriate terminology: Sydney focus group (children).

INTRODUCTION

Calls for greater recognition of functional parent/child relationships

5.3 In Australia, increasing numbers of children are being raised outside the traditional heterosexual nuclear family model.[2] Children are now living in a diverse variety of family forms, including lesbian and gay families.[3] Within these diverse family forms is an equally diverse range of parenting arrangements.[4] However, these developments in family structures have not been accompanied by equivalent legal developments. As a result, our current laws do not fully recognise the reality of many children's lives or meet the practical needs of many families.

5.4 A key deficiency in the law is its limited recognition of the relationship between a child and an adult who acts as a parent, but who is not a legal parent. The Commission refers to this type of relationship as a functional parent/child relationship. In its Inquiry into De Facto Relationships Legislation, the Legislative Council's Standing Committee on Social Issues ("the Social Issues Committee") noted that limited legal recognition of the functional parent/child relationship has the potential to

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2. See Australian Bureau of Statistics, *Australian Social Trends 2003* (Catalogue No 4102.0, 2003) at 35. According to this report, while families comprising couples with children (of any age) remain the most prevalent type of family in Australia, the increase in the number of these families was relatively small (3%) between 1986 and 2001. In comparison, the number of one-parent families increased by 53%, and couple families without children living with them increased by 33% over the same period. Consequently, over time, couple families with children are forming a smaller proportion of all families - 47% of families in 2001, down from 54% in 1986.
3. In *Re Patrick*, Guest J observed that gay and lesbian families are an apparently growing phenomenon in Australian society: *Re Patrick* [2002] FamCA 193 at para 327. This view is supported by an Australian survey, cited in J Millbank "From here to maternity: a review of the research on lesbian and gay families" (2003) *Australian Journal of Social Issues* 541 at 549. There is limited information available about the actual numbers of children who are being raised by lesbian or gay parents. However, it has been estimated that around 15-20% of Australian lesbians and 10% of gay men have children: J Millbank "From here to maternity: a review of the research on lesbian and gay families" (2003) *Australian Journal of Social Issues* 541 at 549.
4. Again, in *Re Patrick*, Guest J stated that gay and lesbian families cannot be characterised as an homogenous group because they may take many forms: [2002] FamCA 193 at para 328. See also J Millbank "From here to maternity: a review of the research on lesbian and gay families" (2003) *Australian Journal of Social Issues* 541 at 545-561 and J Millbank (on behalf of the Gay and Lesbian Rights Lobby), *Meet the Parents: A Review Of The Research On Lesbian And Gay Families* (Gay and Lesbian Rights Lobby Inc (NSW), Sydney, 2002) at 22-36.

disadvantage the children of those in non-traditional relationships.[5] The concerns of the Social Issues Committee are widely shared. On various occasions, the Courts have highlighted the need for the law to reflect developments in the nature of parenting.[6] As far back as 1996, Justice Fogarty observed that:

> *It is a reality of life that children are born as a result of a variety of artificial conception procedures, out of non-traditional circumstances, and into non-traditional families. Legislation which deals with the personal and financial responsibility for such children should be clear and exhaustive and should recognise the reality of these situations.*[7]

5.5 In light of such concerns, the Social Issues Committee recommended that:

> *the issue of legal recognition of non-biological parents*[8] *to ensure children of those in non-traditional domestic relationships are not disadvantaged be fully examined, with a view to amending appropriate legislation if necessary.*[9]

5.6 The Committee further recommended that this issue be referred to the Commission for consideration in the course of this reference.[10]

Recognising functional parent/child relationships in same sex families

5.7 In accordance with the Social Issues Committee's recommendation, and in light of the anticipated focus of the *Property (Relationships) Act 1984* (NSW) ("the PRA") on same sex relationships,[11] the Commission's consideration of the extent of legal recognition of functional parent/child relationships is confined to children in families with same sex partners, and the specific legal and practical difficulties encountered by adults and children in such families.

5.8 In the context of same sex families, there are two situations in which the functional parent/child relationship principally arises:

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5. NSW, Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform (Inquiry into De Facto Relationships Legislation)* (Report 20, Parliamentary Paper No. 127, December 1999) ("the Social Issues Committee Report") at 77, 82, 83.
6. See *Re Patrick* [2002] FamCA 193 at para 335 and *Re Mark* [2003] FamCA 822 at para 82.
7. *B v J* (1996) FLC ¶92-716 at 83,621.
8. The Social Issues Committee's use of the phrase "non-biological parent" equates to our use of "functional parent", which is defined at para 5.1.
9. Social Issues Committee Report at 82.
10. Social Issues Committee Report at 82.
11. See Chapter 1 at para 1.33.

- Where lesbian partners decide to have a child together, one conceiving the child through artificial insemination, and the other, the "co-mother", consenting to her partner's artificial insemination; and
- Where one party to a same sex relationship has a biological or adopted child from a previous relationship, and his or her current partner acts as step-parent to the child.

5.9 In these situations, neither the lesbian co-mother nor the step-parent currently has any legal parental status in respect of the child. Because they have no legal status, there are very few legal rights and obligations arising from the functional parent/child relationship. The law simply fails to recognise its existence. Extensive practical consequences for both the adult and the child flow on from this non-recognition. An illustrative overview of these consequences is provided below.[12]

The legal practicalities of raising a "functional child" in a same sex family

5.10 From the perspective of a functional parent, the impact of non-recognition is felt even before the child is born. Under the *Industrial Relations Act 1996* (NSW), certain employees may be entitled to parental leave in connection with the birth of a child.[13] Maternity leave may be available to a female employee who is pregnant, while paternity leave may be taken by a male employee in connection with the birth of his child. A male employee may also take paternity leave in connection with his partner's pregnancy, even if he is not the biological father.[14] There is no equivalent scope for a female employee to take maternity leave in connection with her partner's pregnancy. Accordingly, a co-mother is not entitled to take parental leave.[15]

5.11 The effects of non-recognition continue to be felt by a child and his or her functional parent in their day-to-day lives. Unless or until a functional parent obtains a parenting order,[16] he or she will have no legal status to make decisions about a child's life. For example, a co-mother who has not obtained a parenting order cannot provide consent to a doctor providing medical treatment.[17] Similarly, unless he obtains a parenting order, a gay step-parent cannot provide a child-care centre or school with

12. See also DP 44 at para 3.47-3.78.
13. *Industrial Relations Act 1996* (NSW) Part 4.
14. *Industrial Relations Act 1996* (NSW) s 55 (2) and (3).
15. Likewise, parental leave is not available to a woman who becomes the partner of a woman who is already pregnant.
16. Parenting orders are discussed below at para 5.38-5.41.
17. In a Canadian study, several functional mothers reported difficulties in getting their children admitted to hospital or to see a doctor because they could not prove that they had the authority to do so: F Nelson, *Lesbian Motherhood: An Exploration Of Canadian Lesbian Families* (University of Toronto Press, Toronto, 1996) at 14-15, cited in J Millbank, "From here to maternity: a review of the research on lesbian and gay families" (2003) *Australian Journal of Social Issues* 541 at 552.

valid permission for matters concerning his step-child. Overseas travel is a further area where a functional parent may encounter practical difficulties.[18] Our consultations with the gay and lesbian community revealed that these day-to-day practical limitations are a significant concern for same sex families.[19]

5.12 The consequences of non-recognition are particularly acute where a legal parent dies.[20] For example, even where there is a surviving co-mother who has cared for a child for 15 years, the child will not automatically continue to live with and be cared for by her. While the birth mother could appoint the co-mother as a testamentary guardian, the Court has the ability to alter guardianship appointments as it thinks fit.[21] The lack of certainty that a child would continue to live with his or her co-mother, should his or her birth mother die, was highlighted as a matter of great emotional stress by participants in our focus groups.[22]

5.13 Non-recognition may also place a child at a disadvantage where a functional parent dies. Should a functional parent die without leaving a valid will, the child has no automatic entitlement to inherit any part of the estate. The *Wills, Probate and Administration Act 1898* (NSW) addresses intestacy by establishing a hierarchy of people who will inherit the estate. Legal children are placed near the top of that hierarchy, while functional children are omitted from the list.[23] The effect of this omission is that members of the statutory hierarchy, such as an aunt or uncle to whom the deceased person may not have had a close relationship, may automatically inherit the estate, while a functional child who lived with the deceased for a number of years and was, in fact, dependent upon the deceased, has no automatic entitlement.[24]

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18. This was raised as a practical problem for families in the Sydney focus group (children).
19. In particular, for co-mothers: Lismore focus group (children).
20. Unlike day-to-day issues, these consequences cannot be avoided by way of a parenting order.
21. *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) s 14(3), s 14(4) and s 18.
22. Sydney focus group (children); Lismore focus group (children). Similar concerns were expressed about continued contact with a child should the relationship between the legal and functional parent or co-mother end.
23. *Wills, Probate and Administration Act 1898* (NSW) s 61B.
24. Ensuring that there is a current will is an obvious means of avoiding the deleterious effect of the lack of recognition of functional children in the intestacy context. However, this does not address the concern that the functional child is disadvantaged because of the non-recognition of the functional parent/child relationship. It should be noted that a functional child could be eligible to claim under the *Family Provision Act 1982* (NSW): see DP 44 at para 3.69.

Considerations of this Chapter

5.14 The practical problems which confront both the adult and child in a functional parent/child relationship suggest two possible areas for reform. The first involves consideration of the legal rights and responsibilities which should arise out of the functional parent/child relationship. Given our terms of reference, we focus our consideration of reform in this area to the legal rights arising from the PRA. The second possible area for reform involves consideration of the scope for functional parents to acquire legal parental status. In this Chapter, the Commission discusses, and makes recommendation for reform, in respect of both areas.

THE EXTENT OF RECOGNITION UNDER THE PRA

5.15 As we noted before,[25] given that a functional parent currently has no legal status in respect of his or her functional child, there are very few legal rights and obligations imposed on their relationship. Where the law does afford any rights to this type of relationship, it does so in very specific and limited situations, predominantly in the context of compensation and payment of damages to a child to whom an injured or deceased person stood in loco parentis.[26]

5.16 The PRA potentially provides some recognition of the functional parent/child relationship. The two key areas where a functional parent/child relationship may have legal consequences under the PRA are in respect of:

- property adjustment;[27] and
- maintenance.[28]

5.17 The extent to which the PRA recognises the functional parent/child relationship in these circumstances is uncertain, and depends on the interpretation of the term, "child of the parties".

Property adjustment

5.18 In deciding whether or not to make an order adjusting parties' interests in property, the Court is required to consider a range of factors. Under the current law, the main consideration for the Court is the contributions that the parties have made. Under the Commission's recommendation for reform, the parties' contributions remain

25. See para 5.4.
26. See, for example, *Workers' Compensation Act 1987* (NSW) s 25, s 37. See DP 44 at para 3.30-3.38 for a discussion of the various pieces of legislation that make provision for the functional parent/child relationship.
27. PRA s 17 and s 20.
28. PRA s 27, s 30 and s 33.

a primary consideration in the adjustment process.[29] Consideration of the parties' contributions include consideration of their contributions to the welfare of a "child of the parties" or of a child accepted into the household of the parties.[30]

Maintenance

5.19 The PRA provides for a very limited right of maintenance.[31] One of the two bases on which the Court may make an order for maintenance is that the applicant is unable to support himself or herself because he or she has the care and control of a "child of the parties", or a child of the respondent, where the child is under the age of 12 years or, if the child has a physical or mental disability, under the age of 16 years, at the time of the application.[32] Under the Commission's Recommendation 32, that age limit will be changed to 18 years for all children, whether or not they have a disability.

Shortening time limits for financial adjustment

5.20 In general, a court cannot make an order dividing up property, or awarding maintenance, unless the parties to the domestic relationship have lived together for at least two years.[33] Under the Commission's Recommendation 24, that general rule will be changed to a requirement that the parties' relationship have existed for at least two years. One way of circumventing this time limit, both as it currently stands and under the Commission's recommendation, is if there is a "child of the parties", or the applicant has the care and control of a child of the respondent, and failure to make the adjustment order would result in serious injustice to the applicant.[34] Where these conditions are met, a court can make an order adjusting the parties' property interests even if the parties have lived together for less than two years, or, under the Commission's recommendation, if their relationship has existed for less than two years.

Other areas

5.21 There are a limited number of other Acts which adopt the PRA's notion of a "child of the parties to a domestic relationship", in order to make provision for certain

29. See Chapter 7, Recommendation 27.
30. PRA s 20(1)(b).
31. See Chapter 10.
32. PRA s 27(1)(a). See also Chapter 10.
33. PRA s 17(1). See Chapters 2 and 6 .
34. PRA s 17(2). A further exception, unrelated to the existence of a child, is that the applicant has made substantial contributions, which would not otherwise be adequately compensated: PRA s 17(2)(b)(i). See para 6.14-6.15.

legal rights. To the extent that that term recognises a functional child as a child of the parties, then the rights and responsibilities arising from the functional parent/child relationship are recognised in these pieces of legislation.[35]

5.22 The first of these Acts is the *Family Provision Act 1982* (NSW), which enables "eligible" persons to apply for a share or a greater share of the estate of a deceased person. Eligible persons may be entitled to provision from an estate if the share they received was inadequate for their proper maintenance, education and advancement in life.[36] One of the categories of eligible persons is a "child of the deceased person or, if the deceased person was, at the time of his or her death, a party to a domestic relationship, a person who is, for the purposes of the *Property (Relationships) Act 1984*, a child of that relationship".[37]

5.23 A child of the parties to a domestic relationship is included in the definition of "child" for the purposes of the protective trust provision of the *Trustee Act 1925* (NSW).[38] Likewise, the *Coroners Act 1980* (NSW) includes a child of the parties to a domestic relationship in the definition of "relative".[39]

"Child of the parties" defined

5.24 It is obvious that the extent to which the PRA, and related legislation, recognise the functional parent/child relationship depends on the extent to which they recognise a "child of the parties" as including a functional child. Section 5(3)(d) of the PRA defines a "child of the parties to a domestic relationship" to include "a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*)".[40] "Parental responsibility" is, in turn, defined in the *Children and Young Persons (Care and Protection) Act* as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children".[41]

5.25 It is unclear precisely in which circumstances a child in a functional parent/child relationship will be recognised as "a child of the parties to a domestic relationship". The uncertainty lies in whether a functional parent is able to possess "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children" in the absence of any legal parental status in respect of the child, or any court order, such as a parenting order,[42] conferring parental responsibility.

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35. *Property (Relationships) Legislation Amendment Act 1999* (NSW) s 4 and Sch 2.
36. *Family Provision Act 1982* (NSW) s 9.
37. *Family Provision Act 1982* (NSW) s 6.
38. *Trustee Act 1925* (NSW) s 45.
39. *Coroners Act 1980* (NSW) s 4(5).
40. PRA s 5(3)(d).
41. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3.
42. See below at para 5.38-5.41 for a discussion of parenting orders under the FLA.

5.26 In the financial adjustment provisions of the PRA, a distinction is drawn between a situation where there is a child of the parties and a situation where the applicant has the care and control of a child of the respondent.[43] This distinction suggests that something more than acting as a parent is required to trigger s 5(3)(d) of that Act. However, comments by the then Attorney General, the Hon JW Shaw, in his Second Reading Speech, conversely suggest that a wider, functional approach should be taken to the requirement in s 5(3)(d).[44]

A need for greater recognition?

5.27 In DP 44, the Commission concluded that the scope of s 5(3)(d) of the PRA is unclear. We proposed that the subsection be clarified in favour of a broad definition of the term, "child of the parties", to make it clear that it included a child in respect of whom one of the parties was a functional parent with no legal connection to the child, not even the grant of a parenting order.[45] The basis of this view was that a narrow interpretation, requiring some form of legal status in respect of the child, would unnecessarily limit the scope of the PRA and that of the other statutes into which the s 5(3)(d) definition carries.

5.28 The practical effect of such reform of the PRA would be that it would be clear that a lesbian co-mother and a step-parent in a same sex family could:

- be required to pay maintenance, or have property interests divided up with their (former) partners, even if the de facto relationship in question did not last for two years;
- have the contributions which they made to their functional child recognised by way of an adjustment of property in their favour;
- be required to pay maintenance in favour of their partners who have the care and control of their functional child, or be eligible to apply for maintenance themselves if they have the care and control of the functional child.

Submissions

5.29 We received eight submissions regarding s 5(3)(d) of the PRA. Two submissions expressed the view that a parenting order is an essential feature of a child being a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* (NSW)).[46] The basis of both submissions was that parental

43. PRA s 17.
44. "This extended definition will ensure that the welfare of children being cared for in the domestic relationships contemplated by the bill is considered if the domestic relationship breaks down": NSW, *Parliamentary Debates (Hansard)* Legislative Council, 13 May 1999 at 229.
45. See DP 44 at para 3.18-3.22 and Issue 6.
46. See P Parkinson, *Submission* at 8-9; Anti-Discrimination Board of NSW, *Submission* at 9-10.

responsibility is an inherently legal concept, involving legal powers. As such, it is not something that can be acquired solely through a functional parent/child relationship. One submission expressed the contrary view, arguing that there is nothing to suggest that a parenting order is necessary.[47] The remaining five submissions did not comment on the interpretation of s 5(3)(d) in its present form.[48]

5.30 Five submissions considered that, irrespective of the current meaning of s 5(3)(d), a parenting order should not be necessary for a child to be recognised as "a child of the parties to a domestic relationship" in the context of functional parenting.[49] The judges of the Equity Division of the Supreme Court considered that, as the exercise of (functional) parental responsibility will affect the factual matrix in respect of which financial adjustment under the PRA will be made, it is sensible to take a wide approach in defining "a child of the parties to a domestic relationship".[50]

5.31 Three of the submissions that supported a wide interpretation nevertheless considered that the amendment to s 5(3)(d), proposed in DP 44,[51] would be an inappropriate or ineffective means of achieving the policy objective.[52] The objections centred on the legal implication of retaining reference to "parental responsibility" and the *Children and Young Persons (Care and Protection) Act 1998*. Rather than using the current wording as the basis of an amended definition, the submissions called for a fresh approach. Professor Patrick Parkinson and the Women's Legal Resources Centre suggested that the language of the *Family Law Act 1975* (Cth) ("the FLA") could be a useful starting point.[53]

5.32 Two submissions objected to the proposed amendment. The Law Society of New South Wales opposed the proposed amendment as the contribution of a functional parent, who does not have a parenting order, is recognised by s 20(1)(b) of

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47. Gay and Lesbian Rights Lobby Inc, *Final submission* at 7.
48. See Lesbian and Gay Solidarity, *Submission* at 2; Victorian Bar, *Submission* at para 14-23; Equity Division of the Supreme Court of NSW, *Submission* at para 32; Women's Legal Resources Centre, *Submission* at 7; NSW Young Lawyers, *Submission* at 3.
49. Equity Division of the Supreme Court of NSW, *Submission* at para 32; Anti-Discrimination Board of NSW, *Submission* at 9-10; Gay and Lesbian Rights Lobby Inc, *Final submission* at 7; Lesbian and Gay Solidarity, *Submission* at 2; Women's Legal Resource Centre, *Submission* at 7.
50. Equity Division of the Supreme Court of NSW, *Submission* at para 32.
51. DP 44 proposed to amend s 5(3)(d) to state: "a child for whose long-term welfare both parties *exercise* parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1989*) without necessarily having a parenting order in their favour": see Issue 6 at para 3.22.
52. P Parkinson, *Submission* at 8-9; Anti-Discrimination Board of NSW, *Submission* at 10; Women's Legal Resources Centre, *Submission* at 7.
53. Professor Parkinson highlighted FLA s 55A (as well as the loco parentis concept), while the Women's Legal Resources Centre suggested FLA s 65C (as well as introducing the term "functional parent" into the PRA).

the PRA.[54] New South Wales Young Lawyers considered that amendment could lead to a biological parent being excluded from the parenting role, without having the opportunity to challenge the recognition of a functional parent.[55]

The Commission's view

5.33 In the Commission's view, there is no compelling justification for requiring any legal connection, including the existence of a parenting order, as an essential feature of the definition of "child of the parties" under s 5(3)(d). For this reason, we have recommended that s 5(3)(d) of the PRA be amended to include the notion of a functional child within its definition of "child of the parties". Our recommendation omits any reference to "parental responsibility" as defined in the *Children and Young Persons (Care and Protection) Act*, since that Act arguably requires some form of legal recognition of parental status. According to our recommended amendments to s 5(3)(d), such legal recognition would not be a prerequisite to eligibility as a child of the parties.

5.34 Recognising a functional child as "a child of the parties to a domestic relationship" does not detract from the rights and responsibilities of a non-resident legal parent. Rather, the core effect of recognition is to add to the ways in which the financial needs of the child can be met. It can only be in the best interests of the child to allow for greater scope for those who have exercised the responsibilities of a parent to continue to meet those responsibilities, following the breakdown of a de facto relationship.

5.35 At the moment, there is no way for functional parents in same sex families to acquire legal parental status: same sex partners cannot legally adopt, nor, in the case of lesbian co-mothers whose partners are artificially inseminated, are they presumed to be legal parents. At the very most, they can apply for a parenting order under the FLA as a limited form of recognition of their role as parent. Given that functional parents in same sex families currently have such limited means available to them of acquiring any form of legal parental status, it is important that the PRA be capable of recognising their rights and responsibilities in respect of their (functional) children by not requiring any legal connection between the adult and child.

5.36 In the remainder of this Chapter, the Commission discusses and makes recommendations to allow for functional parents in same sex families to acquire, or be presumed to have, legal parental status through adoption and presumption of parentage. If these recommendations are implemented, then it may be thought that the arguments in favour of a broad definition of "child of the parties" become less compelling. We do not agree. Regardless of whether Recommendations 18, 19, and 21, concerning adoption and presumption of parentage, are implemented, it is desirable to include Recommendation 17 for two reasons. First, if Recommendations 18, 19, and 21 are not implemented, a broad definition of "child of the parties" is necessary because of the very limited scope that will continue to exist for functional

54. Law Society of NSW, *Submission* at 1.
55. NSW Young Lawyers, *Submission* at 3.

parents to acquire any legal status. Secondly, even if Recommendations 18, 19, and 21 *are* implemented, it is desirable for the PRA to include a broad definition of the term, "child of the parties" to include situations where functional parents choose not to acquire legal parental status. Such situations will essentially cover step-parents in same sex families who choose not to adopt their step-children, but who still exercise responsibility over them. The justifications for possibly requiring step-parents to pay child maintenance are discussed more fully at the end of this Chapter.[56] For the moment, we reiterate that it can only be in the best interests of the child to allow for recognition of all those who have exercised responsibility over that child, in order to ensure that his or her financial needs are met. Whether or not the Court imposes financial responsibilities on a step-parent with no legal connection to a child will depend on the particular circumstances of the individual case. We concede that this position may not necessarily accord with the position that will be taken under federal legislation in respect of step-parents in opposite sex de facto families. It is not known whether, once the referral of powers is taken up, federal legislation will make similar provision for step-parents who do not adopt their step-children to be liable for an adjustment of property or an award of maintenance in their partners' favour to accommodate the children's needs. While we do not know what position the Commonwealth will take in this matter, we consider that our position best serves the interests of the child.

Recommendation 17

Section 5(3)(d) of the PRA should be amended to define "a child of the parties to a domestic relationship" as including a child for whose day-to-day care and long-term welfare both parties exercise responsibility.

WAYS OF ACQUIRING LEGAL RECOGNITION AS PARENTS

5.37 This section discusses the possibility of reform to the ways in which functional parents in same sex families can acquire recognition as legal parents. In opposite sex families, parents who bear no biological connection with their children may acquire status as their legal parents through adoption, or through a presumption of parentage. Thus, in the case of a step-parent in an opposite sex family, he or she can legally adopt the step-child once certain criteria are met.[57] In the case of a male partner whose female partner has been artificially inseminated, he is generally presumed to be the child's legal parent.[58] Neither of these options is currently available to people in same sex relationships. At the most, they can apply for some legal recognition of their parental role through a parenting order.

56. See below at para 5.96-5.102.
57. See below at para 5.63-5.75.
58. See below at para 5.43-5.47.

Parenting orders under the FLA

5.38 The core principle regarding the care and control of a child is that each of the child's parents[59] has legal responsibility for the child.[60] This legal responsibility is termed "parental responsibility".[61] However, any person concerned with the child's care, welfare or development[62] can apply to the Family Court to have this altered by way of a parenting order.[63] Parenting orders deal with aspects of parental responsibility such as who a child can live with,[64] who has maintenance obligations[65] and who is to be responsible for the day-to-day care of the child.[66]

5.39 Parenting orders are a way of conferring parental responsibility, or aspects of it, on a person who would not otherwise have any legal connection with a child.[67] They therefore provide a way in which a functional parent can establish a legal relationship with a child. For example, a birth mother and co-mother could apply for a joint parenting order and thereby acquire legal recognition of a parental relationship between the co-mother and child.[68] Similarly, a legal father and his male partner could seek a joint parenting order.[69] Alternatively, a parenting order could be used to

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59. Being biological, adoptive or presumptive parents.
60. FLA s 61C(1).
61. FLA s 61B defines the term "parental responsibility".
62. FLA s 65C.
63. It should be noted that recent amendments to the FLA under the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) include amendments to the imposition of parenting orders, which for the main part emphasise the presumption that equal shared parental responsibility by both parents will generally serve the child's best interests: see, in particular, Schedule 1[12]-[13].
64. FLA s 64B(2)(a).
65. Previously FLA s 64B(2)(c), amended and renumbered as s 64B(2)(f) by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 1[22].
66. Previously FLA s 64B(2)(d). Under the new amendments, s 64B(2)(c) will provide for a parenting order to deal with the allocation of parental responsibility for a child: *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 1[22].
67. It is clear from FLA s 64C that a parenting order may be made in favour of a person who is not a legal parent of a child. It should be noted that the granting of a parenting order does not necessarily affect the parental responsibility of another person, such as a biological parent, for the child: FLA s 61D(2).
68. Joint parenting orders have been granted to lesbian couples: Lismore focus group (children); J Millbank, "Same sex couples and family law", Paper presented at the Third National Conference of the Family Court (October 1998) «*www.familycourt.gov.au/papers/html/millbank.html*»; J Millbank, *And then … the brides changed nappies* (Final report, Gay and Lesbian Rights Lobby Inc, Sydney, 2003) at 12.
69. As *Re Mark* [2003] FamCA 822 illustrates, a biological father and his male partner may seek a joint parenting order.

provide legal recognition of multi-parent families, with a known donor and a co-mother having orders that deal with issues such as contact and residence.[70]

5.40 While parenting orders give legal recognition to the relationship between a functional parent and a child, there are some limitations on their efficacy for this purpose. First, a parenting order ceases to have effect once the child reaches 18 years of age, marries or enters into a de facto relationship.[71] Accordingly, these orders do not create an enduring legal parent/child relationship. Secondly, a court will not necessarily grant a desired parenting order. In deciding whether to make a parenting order, a court must regard the best interests of the child as the paramount consideration[72] and could potentially conclude that making an order was not in the child's best interest. During our consultations with the gay and lesbian communities, the concern was expressed that magistrates' assessment of the child's best interests may be affected by homophobia.[73] Thirdly, parenting orders do not affect significant areas of the law, such as intestacy, and therefore do not equate to legal parental status, even while the order is in force.

5.41 Additional concerns about parenting orders, which were identified in our community consultations, were the potential expense[74] and the inconvenience of always having to carry the order on one's person as a functional parent cannot always anticipate when his or her status will be questioned.[75] We were also advised that the process of seeking an order can be highly stressful, as people are concerned about potential homophobia within the legal system.[76] This same concern can prompt people to avoid seeking an order altogether.[77] Some focus group participants, however, reported positive experiences with the parenting order process.[78]

Presumptive recognition of lesbian co-mothers?

5.42 One way in which a lesbian couple may have a child together is through the use of artificially inseminated donor sperm. Indeed, where a lesbian couple is raising

70. J Millbank, *And then … the brides changed nappies* (Final report, Gay and Lesbian Rights Lobby Inc, Sydney, 2003) at 12.
71. FLA s 65H(2).
72. Currently FLA s 65E. Under the new amendments, the paramountcy of the child's best interests will be provided for in s 65AA: see *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 1[28].
73. We were advised that people living in regional and rural New South Wales travel to Sydney to seek parenting orders because they are concerned that they will encounter homophobia if they deal with local courts: Lismore focus group (children).
74. Sydney focus group (children).
75. Lismore focus group (children).
76. Lismore focus group (children).
77. Sydney focus group (children).
78. Sydney focus group (children).

a child, the child is increasingly likely to have been conceived in the context of that relationship.[79]

Current law regarding children who are conceived through artificial insemination

5.43 The legal parentage of children who are conceived through artificial insemination is affected by two irrebuttable presumptions:

- The man who provided the sperm for the procedure, and who is therefore the biological father, is presumed *not* to be the legal father of the child.[80] This presumption applies whether the donor is anonymous or whether the woman knows his identity.
- Where the child's mother has a male partner with whom she is living on a bona fide domestic basis,[81] that male partner *is* presumed to be the legal father of the child, if he consented to the procedure.[82] He is presumed to have consented to the procedure,[83] but that presumption is rebuttable by proof on the balance of probabilities.[84]

5.44 These presumptions of parentage are intended to remove all rights and responsibilities from the sperm donor and to transfer them to the child's mother and her male partner.[85] In so doing, they are designed to reflect the assumed intentions of the biological and functional parents.[86]

5.45 While the presumptions may facilitate parenting by couples in opposite sex relationships who have a child using donor sperm, they do not take into account the existence of couples in same sex relationships, who exercise the same choice. This means that where a child is conceived in the context of a lesbian relationship, the presumption that the sperm donor *is not* the child's legal father fails to be accompanied by a presumption that the mother's partner *is* the child's legal parent. The result of this failure is that children who are conceived in the context of a lesbian relationship are denied a second legal parent, when such a parent is available. In the eyes of the law, the co-mother is a complete stranger to the child, other than in those limited areas where the functional parent/child relationship is recognised.

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79. J Millbank, "From here to maternity: a review of the research on lesbian and gay families" (2003) *Australian Journal of Social Issues* 541 at 551.
80. *Status of Children Act 1996* (NSW) s 14(2) and s 14(4).
81. *Status of Children Act 1996* (NSW) s 14(6).
82. *Status of Children Act 1996* (NSW) s 14(1)(a).
83. *Status of Children Act 1996* (NSW) s 14(5).
84. *Status of Children Act 1996* (NSW) s 14(1)(a) and s 14(4). See also FLA s 60H.
85. D Kovacs, "The AID child and the alternative family: who pays? (or mater semper certa est – that's easy for you to say!)" (1997) 11 *Australian Journal of Family Law* 141 at 142.
86. Further discussion regarding the background of the presumptions is contained in DP 44 at para 3.92-3.96.

5.46 The difficulties posed by current presumptions of parentage for non-traditional families were noted in the recent report of the statutory review of the *Status of Children Act 1996* (NSW):[87]

> *The impact of the Act on non-traditional [families] requires further consideration. At present, the parentage presumptions under Part 3 of the Act do not give effect to the intentions of a non-traditional [family] using assisted reproductive technology. Nor does Part 2 provide for equal treatment for the legal purposes of children born into a non-traditional family.*[88]

5.47 Although outside the scope of the review, the report also noted comments by the Registry of Birth, Deaths and Marriages that it "received numerous enquiries from same sex couples wishing to record a second parent other than the mother on the child's birth certificate".[89]

Submissions

5.48 In DP 44, the Commission asked whether it is appropriate to amend the parentage presumptions, so that the consenting female partner of a woman who conceives a child through artificial insemination is presumed to be the legal parent of the child.[90]

5.49 Seven submissions expressly addressed this question.[91] Six of these submissions supported applying the presumption of parentage to female partners, primarily on the basis that there was no justification for restricting its applicability to male partners. The remaining submission stated that the relationship between a co-mother and her child should not be a matter that changes from State to State and that there should be a review of the relevant FLA provisions.[92]

5.50 In supporting amendment to the *Status of Children Act 1996* (NSW), the Anti-Discrimination Board stated that children who are born to a lesbian couple as a result of a fertilisation procedure suffer clear legal disadvantage. The Board submitted that

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87. NSW Attorney General's Department, *Report on the Review of the Status of Children Act 1996* (2003). This review was undertaken in accordance with s 40 of the *Status of Children Act 1996* (NSW).
88. NSW Attorney General's Department, *Report on the Review of the Status of Children Act 1996* (2003) at Conclusion.
89. NSW Attorney General's Department, *Report on the Review of the Status of Children Act 1996* (2003) at para 4.7.
90. DP 44 at para 3.97.
91. NSW Young Lawyers, *Submission* at 2; Law Society of NSW, *Submission* at 1-2; Gay and Lesbian Rights Lobby Inc, *Final submission* at 8; Women's Legal Resources Centre, *Submission* at 8; Lesbian and Gay Solidarity, *Submission* at 2; Victorian Bar, *Submission* at para 18-20; Anti-Discrimination Board of NSW, *Submission* at 11-12.
92. Victorian Bar, *Submssion* at para 20.

removal of this disadvantage, through amendment, would be consistent both with the *Anti-Discrimination Act 1977* (NSW) and with the purpose of the *Status of Children Act 1996* (NSW). It further submitted that amendment would ensure clarity in the relationship between the child and his or her co-mother.[93]

5.51 The Gay and Lesbian Rights Lobby advised that in consultations on parenting reforms, lesbian mothers and co-mothers had expressed universal support for amendment.[94] There was likewise unanimous support in the focus groups for amending the parenting presumption.[95] Application of the presumption was considered by the Lobby and the focus group participants to be consistent with the intentions of the women, as well as with their actual experiences of parenting. Widespread support was also expressed in the Lobby's consultations with lawyers and policy workers, who supported the simplicity, equity and breadth of coverage of an amended presumption. Focus group participants highlighted similar benefits.[96]

5.52 The Lobby itself submitted that co-mothers should be presumed to be the legal parents of their children through a simple amendment to make the relevant provisions of the *Status of Children Act 1996* (NSW) gender-neutral. While this amendment would have the same effect as allowing co-mothers to adopt their children, the Lobby submitted that the parentage presumption would be far cheaper and easier to use. It also submitted that amendment to the *Status of Children Act 1996* (NSW) should have retrospective effect so that legal parental status was available to existing co-mothers.[97]

Approach in other jurisdictions

5.53 Several jurisdictions have considered, or are currently considering, the question of whether co-mothers should be presumptive legal parents.

5.54 Western Australia was the first Australian jurisdiction to introduce a legislative response to the issues raised by lesbian parenting. In 2002, the State enacted a new section of the *Artificial Conception Act 1985* (WA), which provides that where a woman who is in a de facto relationship with another woman undergoes, with the

93. Anti-Discrimination Board of NSW, *Submission* at 11-12.
94. Gay and Lesbian Rights Lobby Inc, *Final submission* at 8. The Lobby also advised that no fathers who attended consultations objected to the proposal: at 8.
95. Sydney focus group (children); Lismore focus group (children). Participants highlighted the automatic nature of the recognition as being particularly desirable.
96. Lismore focus group (children).
97. The Lobby submitted that the retrospective effect of the amendments should be restricted to lesbian couples who were still cohabiting and jointly parenting resident children under the age of 18, born to them as a couple through artificial insemination, at the time the amendments came into effect.

consent of her partner,[98] an artificial fertilisation procedure as a result of which she becomes pregnant, her partner is presumed to be a parent of the unborn child and is a parent of any child born as a result of the pregnancy.[99] This section was accompanied by a consequential amendment to the *Births, Deaths and Marriages Registration Act 1998* (WA) to enable the presumed parent to register the child's name and to be named on the birth certificate as the other parent.[100] As at 5 April 2004, ten new births have been registered to record two mothers and another five existing birth registrations have been updated to identify another woman as the child's second parent.[101]

5.55 More recently, similar legislative amendment has occurred in the Australian Capital Territory and the Northern Territory.[102] The *Parentage Act 2004* (ACT) extends the parentage presumptions so that same sex domestic partners, as well as opposite sex domestic partners, are presumed to be parents when a child is born within a domestic partnership,[103] including where that child is conceived through donor insemination.[104] The *Parentage Act 2004* (ACT) expressly states that the presumptions cannot operate so as to provide a child with more than two parents at any one time.[105] Under the *Status of Children Act* (NT), the relevant provisions mirror those found in the Western Australian Act.[106]

5.56 New Zealand,[107] Canada and South Africa extend the parentage presumptions to the same sex partner of the birth mother. In Quebec, if a couple is joined in a civil union, the female partner of the birth mother is presumed to be the other parent of the

98. Consent is presumed, although the presumption is rebuttable: *Artificial Conception Act 1985* (WA) s 6A(2).
99. *Artificial Conception Act 1985* (WA) s 6A.
100. See *Births, Deaths and Marriages Registration Act 1998* (WA) s 18 and 19.
101. Letter from WA Registry of Births, Deaths and Marriages.
102. A similar amendment was also recently proposed in Tasmania in the *Relationships (Consequential Amendments) Bill 2003* Sch 1[5]. However, the clause was struck out in the Upper House. Note that presumptive recognition was supported by the Tasmanian Law Reform Institute. The issue is also considered in Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Parentage* (Position Paper 2, 2005) at Chapter 3. In particular, Interim Recommendation 1 proposes that Victorian law recognise the birth mother's female partner as a parent of the child. Similarly, Interim Recommendation 5 proposes that legislation relating to the registration of the birth of a child be in gender neutral language, enabling a co-mother to be registered.
103. See *Legislation Act 2001* (ACT) s 169.
104. *Parentage Act 2004* (ACT) s 8(1) and 11(4). While the presumption has retrospective effect, the section does not affect interests in property that happened before the commencement of the Act: s 8(2) and (3).
105. *Parentage Act 2004* (ACT) s 14.
106. *Status of Children Act* (NT) s 5DA.
107. See *Status of Children Act 1969* (NZ), Part 2 as inserted by *Status of Children Amendment Act 2004* (NZ) s 14.

child.[108] A 2001 decision of the British Columbia Human Rights Tribunal ordered that BC Vital Statistics make it possible for a same sex non-biological mother or father to be listed as a "parent" on a child's birth certificate.[109] Similarly, in South Africa, the Constitutional Court ordered that the equivalent of s 14 of the *Status of Children Act 1996* (NSW) be read in a gender-neutral manner, enabling a same sex partner to be presumed to be a parent.[110] Most recently, it has been reported that the Californian Supreme Court has found that both partners in a same sex relationship are legal parents when they have children using artificial insemination procedures and raise them together. Both parents are consequently entitled to all the rights and responsibilities of parenthood, including custody and liability to pay child support.[111]

The Commission's view

5.57 In the Commission's view, there is no justification for excluding co-mothers from the *Status of Children Act 1996* (NSW) parentage presumptions. The legal disadvantage suffered by children who are born within a lesbian relationship and their co-mothers constitutes a compelling justification for prompt legislative amendment. In addition, the emotional repercussions of non-recognition of the parent/child relationships should not be ignored. The focus groups revealed that non-recognition and the attendant insecurity are a source of daily stress for many co-mothers.[112] We consider that extending presumptive parental status is the most simple and effective means of removing this legal and emotional disadvantage. In addition, extension of the presumption removes the difference of treatment between opposite sex and same sex couples. Section 14 of the *Status of Children Act 1996* (NSW) should be reworded so that references to a pregnant woman's partner be made in gender neutral terms. Thus, instead of "husband" in s 14(1), the term "partner", or "spouse" could be used, and could be subsequently defined in s 14(6) to extend to a de facto partner as that term is defined in the PRA. Amendments to this effect would allow co-mothers who have consented to a fertilisation procedure to be presumed to be the legal parent of any child born as a result of that procedure. As with male partners, the lesbian partner's consent would be presumed, but that presumption would be rebuttable by proof on the balance of probabilities. In practice, in situations where lesbian partners have used informal fertilisation methods, rather than gone through official channels, it may be difficult to rebut a presumption of consent, if there is very little or no evidence to corroborate the party's version of events. However, this will ultimately be a matter for the Courts to determine according to the usual rules of evidence.

5.58 The Commission agrees with the approach taken in the ACT that the presumption of parentage for co-mothers should have retrospective effect. Rather than requiring existing co-mothers to go through an adoption procedure, it is

108. *Act instituting civil unions and establishing new rules of filiation SQ 2002, c* 6.
109. *Gill v. Ministry of Health* 2001 BCHRT 34.
110. *J and B v Director General, Department of Home Affairs* (2003) CCT 46/02.
111. M McKee, "California same sex couples win parenting rights" *The Recorder*, 24 August 2005.
112. Lismore focus group (children).

preferable that they be able to demonstrate that they are a person to whom the presumption applies and apply to have the child's birth certificate amended. As with the ACT legislation, retrospective application of the presumption should not, however, affect the vesting of an interest in property that happened before the commencement of the recommended amendments.

Recommendation 18

The *Status of Children Act 1996* (NSW) s 14(1) and (6) should be reworded in gender neutral terms so as to extend the presumption of parentage to parties to a de facto relationship, as defined in the PRA s 4.

Recommendation 19

The amendments effected by Recommendation 18 should apply retrospectively, but should not affect the vesting in possession or in interest of any property that happened before the commencement of the amendments.

Status of donor

5.59 Cases such as *Re Patrick*,[113] as well as a growing body of literature, have highlighted the need to give fresh consideration to how the law deals with gamete donation.[114] The status of known donors has been raised as a matter meriting particular attention.

5.60 *Re Patrick* concerned an application by a known sperm donor for contact with the child who was artificially conceived, using his sperm. The child, Patrick, was being raised by his birth mother and co-mother. Following Patrick's conception, disagreement emerged as to the role of the donor in the child's life. The disagreement continued for over two years and culminated in a bitterly contested application for contact. As Justice Guest observed, the case starkly demonstrated the complexities surrounding donor insemination. It further illustrated the law's inability to deal with the biological and social reality of children such as Patrick, who are conceived with the assistance of a known donor.[115]

113. *Re Patrick* (2002) 28 Fam CA 193.
114. See, for example, New Zealand Law Commission, *New Issues In Legal Parenthood* (Preliminary Paper 54, 2004); Victorian Law Reform Commission, *Assisted Reproductive Technology And Adoption: Should The Current Eligibility Criteria In Victoria Be Changed?* (Consultation Paper, 2003); F Kelly, "Redefining parenthood: gay and lesbian families in the Family Court - the case of *Re Patrick*" (2002) 16 *Australian Journal of Family Law* 1; D Dempsey, "Donor, father or parent? Conceiving paternity in the Australian Family Court" (2004) 18 *International Journal of Law, Policy and the Family* 76.
115. *Re Patrick* at para 335.

5.61 Against the background of *Re Patrick* and the wider debate, two submissions raised issues concerning known donors.[116] While the Commission appreciates that the legal status of known donors is relevant to the matters addressed in this review, we consider that this area extends beyond our terms of reference. Fundamental questions are involved that relate not only to non-traditional families but also to families who fit the "traditional" model through the operation of the *Status of Children Act 1996* (NSW). Further, the issues extend beyond the question of how functional parent/child relationships should be treated by the law. They are part of a wider debate about gamete donation, which includes issues such as the child's right to know their genetic identity.

5.62 Although we do not consider it appropriate to address the status of known donors in detail in this Report, the Commission believes that there should be a review of the current law in this area. As the issues involved in known sperm donation are not, as a matter of principle, restricted to same sex parenting, we consider that a review of this area should encompass both same sex and opposite sex parenting. Pertinent issues that could be considered in the course of such a review include:

- Enabling same sex families to register parenting plans;
- Enabling known donors to opt in to legal parental status;
- Recognition of multiple legal parents;
- Enabling known donors to be named on a child's birth certificate, without attaching legal parental status to that act.

Recommendation 20

The law relating to sperm donation, including the legal status of known sperm donors, should be reviewed.

Step-parent adoption

5.63 Adoption is a way of creating a legal parent/child relationship between an adult and a child who have neither a biological nor a presumptive parent/child relationship. While adoption can take a variety of forms, in the context of this review, the Commission's discussion is limited to step-parent adoption. Accordingly, this Report does not address the wider issue of whether same sex couples should be eligible to adopt. The Commission has already given detailed consideration to this wider issue in its report on the *Adoption of Children Act 1965* (NSW). In that report, we recommended that same sex couples be able to adopt a child jointly, on the basis that there is no good reason for the law to exclude people from seeking to adopt solely on the basis of their sexual orientation, if they are otherwise suitable as adoptive parents.[117] We reaffirm this position. If prospective adopting parents are able to show

116. Gay and Lesbian Rights Lobby Inc, *Final submission* at 2; Anti-Discrimination Board of NSW, *Submission* at 3.4.
117. See NSW Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)* (Report 81, 1997) at Recommendation 58 and para 6.119-6.121.

that they can promote the bests interests of the child in question, they should not be prevented from doing so simply because of assumptions relating to their sexual orientation. This broader issue may be addressed in the statutory review of the *Adoption Act 2000* (NSW) which is currently taking place.[118]

Current law in New South Wales

5.64 Under the *Adoption Act 2000* (NSW), a "step-parent" is eligible to adopt the legal child of his or her opposite sex partner.[119] "Step-parent" is defined in the Act as a person who:

- is not a birth parent or adoptive parent of the particular person; and
- is married to the particular person's birth parent or adoptive parent or has had a de facto relationship of 3 or more years duration with the birth parent or adoptive parent.[120]

5.65 "De facto relationship" is defined as a "relationship between a man and a woman who live together as husband and wife on a bona fide domestic basis although not married to one another".[121] Accordingly, where a child's functional parent and legal parent are in a same sex de facto relationship, the functional parent is ineligible to adopt the child under the step-parent adoption provisions of the *Adoption Act 2000*.

5.66 An adoption order can be made in favour of a heterosexual step-parent of a child if:

- the child is at least 5 years old;
- the step parent has lived with the child and the child's birth or adoptive parent for a continuous period of not less than 3 years immediately before the application for the adoption order;
- consent has been given by each of the child's parents and any guardian; and

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This issue is also discussed in Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Parentage* (Position Paper 2, 2005) at Chapter 6. In particular, Interim Recommendation 26 proposes that the relevant Victorian legislation, the *Adoption Act 1984* (Vic), be amended to allow for adoption orders to be made in favour of same sex couples.

118. See NSW, Department of Community Services, *Review of the Adoption Act 2000* (Issues paper, April 2006).
119. Step-parent adoptions are not a common occurrence: in 2002-2003, there were only 72 adoptions by step-parents in Australia: Australian Institute of Health and Welfare, *Adoptions Australia 2002-03* (Canberra, 2003).
120. *Adoption Act 2000* (NSW) Dictionary.
121. *Adoption Act 2000* (NSW) Dictionary. We note that this definition is inconsistent with that contained in the PRA.

- the Court is satisfied that the making of the adoption order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the child.[122]

5.67 Where an adoption order is made in favour of a step-parent, the pre-existing parent/child relationship between the resident legal parent and the child is unaffected.[123] This contrasts with the general effect of an adoption order, which terminates the parental rights and status of the birth parents and transfers them to the adoptive parent(s).[124] However, if there is another legal parent, other than the one who lives with the adopting step-parent, then that legal parent relinquishes his or her parental rights and responsibilities upon adoption by the step-parent.[125]

Submissions

5.68 In DP 44, the Commission asked whether the step-parent adoption provisions should be amended to include lesbian and gay step-parents.[126] We received eight submissions on this issue, of which six supported amendment of the relevant legislation.[127] A common reason for supporting amendment was the lack of any reason to exclude lesbian and gay individuals from the scope of the step-parent adoption provisions. One submission objected to amendment on the basis that it is most desirable that children be raised by their biological parents.[128] It did not address the situation where only one biological parent is available to raise a child. The Victorian Bar did not express a view on the desirability of amendment but questioned whether revisiting the issue in the context of this review takes the matter any further than the recommendations made in the Commission's review of the *Adoption of Children Act 1965* (NSW) in 1997.[129]

Approach in other jurisdictions

5.69 Over the past decade, a clear trend has emerged in favour of extending eligibility for step-parent adoption to gay and lesbian individuals. A number of jurisdictions now permit lesbian and gay individuals to adopt their partner's children. The first Australian State or Territory to reform the law was Western Australia. Under the *Adoption Act 1994* (WA), lesbian and gay individuals are eligible to adopt a child

122. *Adoption Act 2000* (NSW) s 30. The requirement that the Court be satisfied that the making of the adoption order is clearly preferable in the best interests of the child to any other legal action means that the Court will have to be satisfied that some form of parenting order would not be more appropriate.
123. *Adoption Act 2000* (NSW) s 95(3).
124. *Adoption Act 2000* (NSW) s 95(2).
125. See *Adoption Act 2000* (NSW) s 95(3).
126. See DP 44 Issue 7 at para 3.90.
127. Anti-Discrimination Board of NSW, *Submission* at para 3.2; Gay and Lesbian Rights Lobby Inc, *Final submission* at 7-8; Lesbian and Gay Solidarity, *Submission* at 2; NSW Young Lawyers, *Submission* at 3; Law Society of NSW, *Submission* at 1; Women's Legal Resources Centre, *Submission* at 8.
128. Anglican Diocese of Sydney, *Submission* at 5.
129. Victorian Bar, *Submission* at para 17.

in the capacity of step-parent.[130] Tasmania[131] and the Australian Capital Territory[132] have also amended their adoption legislation, with similar effect. The issue has also been considered in Victoria.[133]

5.70 These domestic developments are consistent with adoption laws in several overseas jurisdictions. For example, gay and lesbian individuals are eligible to adopt children in the United Kingdom,[134] South Africa,[135] certain regions of Spain,[136] Denmark,[137] Iceland,[138] The Netherlands,[139] Norway,[140] Finland,[141] Sweden,[142] most Canadian provinces and territories[143] and certain States in the USA.[144] Fuller discussion of some of the jurisdictions can be found in DP 44.[145]

130. *Adoption Act 1994* (WA) s 67(1)(a). Lesbian and gay individuals are eligible to adopt in the same circumstances as heterosexual individuals.
131. *Adoption Act 1988* (Tas) s 20(6)-(8).
132. *Adoption Act 1993* (ACT) s 18(2).
133. Victorian Law Reform Commission, *Assisted Reproductive Technology And Adoption: Should The Current Eligibility Criteria In Victoria Be Changed?* (Consultation Paper, 2003).
134. *Adoption and Children Act 2002* (UK).
135. *Du Toit v Minister for Welfare and Population Development* (2003) 4 CHRLD 21.
136. Navarra, the Basque Country and, recently, Aragon.
137. *Registered Partnership Act 1989* (Denmark) s 4(1) (as amended in 1999).
138. *Act on Registered Partnership 1996* (Iceland) art 6 (as amended in 2000).
139. *Civil Code, Book 1* (Netherlands) (as amended in 2001).
140. *Registered Partnership Act 1993* (Norway) s 4 (as amended in 2002).
141. *Adoption Act* (153/1985) (Finland). However, although homosexual individuals may be able to adopt, registered homosexual partners are excluded from the definition of spouse in the *Adoption Act*, by s 9(2) of the *Act on Registereed Partnerships* (950/2001) (Finland).
142. *Registered Partnerships Act* (SFS 1994:1117) (Sweden) ch 3, s 1 (as amended in 2003).
143. *Adoption Act* RSBC 1996 c. 5 (British Columbia); *The Charter Compliance Act* SM 2002 c. 24 (Manitoba); *Child Welfare Act* RSA 2000 c. C-12 (Alberta); *Adoption Act* SNL 1999 c. A-2.1 *(Newfoundland); Adoption Act* SNWT 1998 c. 9 (Northwest Territories)*; SCM and NCJ* (2001) 202 DLR (4th) 172 (regarding Nova Scotia); *Child and Family Services Act* RSO 1990 c. C.11 (Ontario) (see also *Re K* (1995) 23 OR (3d) 679 regarding Ontario); *Civil Code of Quebec* SQ 1991 c. 64 (Quebec); *Adoption Act* SS 1998 c. A-5.2 (Saskatchewan).
144. Step-parent adoption is available by statute or appellate court decision in California, Connecticut, District of Columbia, Illinois, Indiana, Massachusetts, New York, New Jersey, Pennsylvania and Vermont. See, for example, *Vermont Stat Ann Tit 15A 1-102(b) (Supp 2000)* (Vermont); *California Family Code* §9000(f) (California); *Connecticut Gen Stat* 45a-724(3).
145. See DP 44 at para 3.83-3.86.

Should gay and lesbian individuals be eligible to adopt as step-parents in New South Wales?

5.71 Enabling gay and lesbian individuals to adopt in the capacity of step-parent would bring a number of potential benefits to both the adult and child involved. Significantly, adoption would:

- give the child automatic inheritance rights from the step-parent and address other areas of non-recognition;
- give the parenting relationship permanency;
- confer full parental rights and obligations on the step-parent, which is of particular relevance if the legal parent with whom the child resides should die;
- strengthen relationships within the new family; and
- express the step-parent's commitment to the child.

5.72 Many of the benefits of step-parent adoption are as relevant to opposite sex parenting as to same sex parenting. However, certain of the benefits, such as conferring full parental rights and obligations on the step-parent, may be of particular benefit to children conceived by artificial insemination in the context of a lesbian relationship, who would otherwise have only one legal parent.

5.73 While step-parent adoption offers the adopting adult and adoptive child a range of benefits, the procedure also entails potential disadvantages. These disadvantages are most relevant where a child has an existing second legal parent, who would be required to relinquish his or her parental rights. There is the possibility that the child will feel rejected by the legal parent who is relinquishing his or her parental rights. More concretely, the child would lose the right to inherit automatically from the relinquishing parent and that parent's extended family. The *Adoption Act 2000* (NSW) addresses such concerns by providing that an adoption order can only be made if the Court is satisfied that adoption is clearly preferable in the best interests of the child to any other action that could be taken by law, such as granting a parenting order in favour of the step-parent.[146]

5.74 The potential disadvantages of step-parent adoption are no more acute where the potential adoptive parent is in a same sex relationship with a child's legal parent than where the child's step-parent is in an opposite sex relationship. Indeed, where a child had been artificially conceived by a single lesbian, step-parent adoption would not involve severing any family relationships. And where concerns do arise about the desirability of adoption, the statutory safeguard[147] is rendered no less effective by the fact that the step-parent is in a same sex relationship with the child's legal parent.

5.75 The Commission considers that there is no justification for excluding gay and lesbian step-parents from the ambit of the relevant provisions of the *Adoption Act*

146. *Adoption Act 2000* (NSW) s 30(d).
147. *Adoption Act 2000* (NSW) s 30(d).

2000. All children should have the opportunity to be adopted by a step-parent, when adoption is in the child's best interests.

Recommendation 21

The *Adoption Act 2000* (NSW) s 30 should be amended so that the same sex partner of a child's legal parent is eligible to adopt the child in the capacity of step-parent.

Co-mother adoption

5.76 Co-mothers are, by definition, different from step-parents. The fundamental difference is that a co-mother has intended to be a child's parent from the point of the child's conception, while a step-parent may not become involved in a child's life until a much later stage. It is necessary to consider whether adoption law should reflect this difference.

5.77 The current step-parent adoption provisions contain certain conditions that are arguably inappropriate in the context of adoption by a co-mother, namely the requirements that the child be at least five, and that the step-parent have lived with the legal parent for at least 3 years.[148]

5.78 Even if the step-parent adoption provisions were amended in accordance with Recommendation 21, these conditions would preclude a co-mother from adopting her child for at least five years. This means that children who were conceived through artificial insemination, in the context of a lesbian relationship, would bear the disadvantage of having only one legal parent until they were at least five years old.[149] In recognition of the implications of the step-parent adoption conditions for these children, the Commission asked in DP 44 whether a co-mother should be able to adopt her child under modified step-parent adoption provisions.[150]

5.79 The Gay and Lesbian Rights Lobby provided the only submission that directly responded to this issue. The Lobby submitted that there should be a new provision in the *Adoption Act 2000* which provides specifically for adoption by a co-mother where there is either one legal parent or where both legal parents consent to the adoption. This provision should have a presumption in favour of an adoption order or, at the very least, no presumption against it. The Lobby supported a provision of this nature, even if the *Status of Children Act 1996* were amended, because it could be useful if the child was born in a jurisdiction which did not presume co-mothers to be legal parents.

148. *Adoption Act 2000* (NSW) s 30. See para 5.66 above regarding additional conditions.
149. Unless, of course, the *Status of Children Act 1996* (NSW) were amended in accordance with Recommendation 18.
150. See DP 44 at para 3.99-3.100 and Issue 8.

5.80 A modified form of step-parent adoption is provided for in The Netherlands. There, where a child is conceived in the context of a lesbian relationship, the co-mother can apply to adopt the child immediately after the birth.[151] The general requirement that the child be cared for by the step-parent for at least one year is removed. However, in both co-mother and general step-parent adoption, the adopting parent must have cohabited with the child's legal parent for at least three years.

5.81 The Commission considers that enabling co-mothers to adopt, under a modified form of step-parent adoption, would be of significant benefit to children who are conceived through artificial insemination in the context of a lesbian relationship. The current temporal restrictions on step-parent adoption, in particular the requirement that the child be at least five years old, should not be applicable to this form of adoption.

5.82 Such a provision would be of particular importance if the *Status of Children Act 1996* (NSW) were not amended in accordance with Recommendations 18 and 19. However, even if that Act were amended, a co-mother adoption provision would be a valuable way to:

- address the disadvantage suffered by children who were born in jurisdictions without an equivalent parentage presumption; and
- provide a means by which to impose an automatic child support duty on a co-mother.[152]

151. *Civil Code, Book 1* (Netherlands) art 228.
152. See para 5.103-5.111 below.

Recommendation 22

The *Adoption Act 2000* (NSW) should be amended to provide that a co-mother is eligible to adopt her child immediately following the birth of the child. The relevant provision should contain a presumption in favour of adoption.

Multi-parent adoption

5.83 The Anti-Discrimination Board and the Gay and Lesbian Rights Lobby submitted that the Commission should consider moving beyond the limits of the two-parent model towards recognition of multi-parent families. A possible means of recognising multiple parents would be through adoption.

5.84 This is not an issue that was raised in DP 44, nor one on which the Commission has consulted with the community. Given that enabling a child to have more than two legal parents at any one time would represent a fundamental shift in family law, recognition of multiple legal parents requires extensive consultation. This is particularly so given the controversial nature of such a step. Further, the significance of a recommendation to that effect would extend beyond the terms of reference for this Report. However, the Commission considers that this issue merits further, detailed consideration in the context of a wider reassessment of the fundamental principles of Australian family law.

RECOGNITION FOR CHILD SUPPORT

5.85 The Commission considers that the disadvantages currently faced by children in non-traditional families are most appropriately addressed by reforming the *Status of Children Act 1996* (NSW) and the *Adoption Act 2000* (NSW). However, if the recommendations in relation to these statutes are not implemented, we consider that a comprehensive statute audit should be undertaken with the aim of identifying areas of non-recognition and assessing whether the lack of recognition is consistent or inconsistent with the purpose of the law in question. Such an exercise was supported in a number of submissions.[153] The Commission has not undertaken this task in the course of this reference in light of our recommendations concerning comprehensive,

153. See Anti-Discrimination Board of NSW, *Submission* at 3.5.2; Law Society of NSW, *Submission* at 2; NSW Young Lawyers, *Submission* at 4-5; Women's Legal Resources Centre, *Submission* at 9; Lesbian and Gay Solidarity, *Submission* at 2; Gay and Lesbian Rights Lobby Inc, *Final submission* at 11 (although only necessary if only partial recognition were recommended and if an audit would not cause further delays in reforming this area).

rather than piecemeal, reform.[154] We have, however, examined the specific issue of child support, as the Social Issues Committee identified this as an area in need of prompt attention.[155]

Commonwealth child support legislation

5.86 The assessment of child support is primarily governed by the *Child Support (Assessment) Act 1989* (Cth) ("the CSAA").[156] The FLA also provides for the making of child maintenance orders, when child support under the CSAA is not available in a particular case.[157]

5.87 Under both the FLA and the CSAA, parents have the primary duty to maintain their child or children.[158] For the purposes of the FLA, a "parent" is defined as a biological, adoptive or presumptive parent.[159] This definition does not include functional parents who stand *in loco parentis.* Similarly, a "parent" for the purposes of the CSAA is a biological, adoptive or presumptive parent.[160] The CSAA specifically defines what is meant by the terms "adoptive" and "presumptive" parent. Section 5 provides that:

> *Parent means:*
>
> *(a) when used in relation to a child who has been adopted – an adoptive parent of the child; and*
>
> *(b) when used in relation to a child born because of the carrying out of an artificial conception procedure - a person who is a parent of the child under section 60H of the* Family Law Act 1975*.*

5.88 In respect of children born as a result of artificial conception procedures, s 60H of the FLA provides that:[161]

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154. We note that the Victorian Bar submitted that an exercise of this nature was "manifestly too ambitious": *Submission* at para 21.
155. Social Issues Committee Report at 83.
156. A discussion of Commonwealth child support legislation is contained in DP 44 at para 3.104-3.112.
157. See FLA Part 7 Div 7. FLA s 66E provides that one party cannot apply for a child maintenance order from another party if an application for child support could be made under the CSAA from either party.
158. FLA s 66C(1); CSAA s 3.
159. *In the marriage of Tobin* (1999) 24 Fam LR 635; FLA s 60D, which defines "parent" in relation to a child who has been adopted as an adoptive parent of the child.
160. *Re B and J* (1996) 21 Fam LR 186; *In the marriage of Tobin* (1999) 24 Fam LR 65.
161. FLA s 60D defines an artificial conception procedure to include:
    (a) artificial insemination; and

- Children born to a married couple, or a couple who are living together as husband and wife on a genuine domestic basis, are the children of that couple where the artificial procedure was carried out with their consent[162] *or* if a prescribed Commonwealth, State or Territory law deems the child to be their child.[163] The *Status of Children Act 1996* (NSW) has been prescribed pursuant to this provision.[164]
- A child born to a woman is presumed to be the woman's child if a Commonwealth, State or Territory law so provides.[165] This provision appears to have been designed to address situations where the birth mother was the recipient of donated ova.[166] No New South Wales law has been prescribed pursuant to this section.[167]
- A child born to a woman is presumed to be a man's child if a Commonwealth, State or Territory law so provides.[168] No laws have been prescribed pursuant to this provision. This is a reflection of a consistent policy in States and Territories not to recognise sperm donors as legal parents.[169]

5.89 Child support will ordinarily be payable under the CSAA from a natural or adoptive parent of a child, where the parents separated, or the child was born, after 1 October 1989. Similarly, child support under the CSAA may be sought from a presumptive parent, where the child was artificially conceived, and the parents were in an opposite sex relationship. If the parents separated, or the child was born, before 1 October 1989, then an application for a child maintenance order from a natural, adoptive, or presumptive parent, must be made under the FLA, rather than under the CSAA.

5.90 Step-parents are not liable to pay child support in respect of their step-children under the CSAA, unless they have legally adopted the child. Step-parents who have not adopted their step-child may have a duty to maintain that step-child under the

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(b) the implantation of an embryo in the body of a woman.

162. FLA s 60H(5) provides that consent is presumed, but may be rebutted on the balance of probabilities.
163. FLA s 60H(1) and s 60H(4).
164. *Family Law Regulations 1984* (Cth) reg 12C and Sch 6.
165. FLA s 60H(2).
166. See *Re B and J* (1996) 21 Fam LR 186 at 191 (Fogarty J). Note that it is unclear if, or how, this provision applies in situation where a female bears a child through the use of an artificial insemination procedure, yet is not the recipient of donated ova: *Re J and M* (2004) 32 Fam LR 668.
167. *Family Law Regulations 1984* (Cth) reg 12CA and Sch 7.
168. FLA s 60H(3).
169. See *Re B and J* (1996) 21 Fam LR 186 at 191-194 (Fogarty J). Note that it is unclear if, or how, this provision applies in situations where the male who provided the sperm for an artificial insemination procedure seeks to be recognised as the legal parent of the resulting child: *Re Patrick* (2002) 28 Fam LR 579 and *Re Mark* (2003) 31 Fam LR 162. This forms part of a wider debate regarding the status of donors, discussed above at para 5.59-5.62.

FLA.[170] However, the definition of "step-parent" is confined to individuals who are or were married to a legal parent of the child.[171]

Maintenance provisions under the PRA

5.91 The maintenance provisions of the PRA provide limited scope for the provision of child support by a functional parent in the context of a domestic relationship. A court may make an order for partner maintenance on the basis that the applicant is unable to support himself or herself because he or she has the care and control of a child of the parties or a child of the respondent. The child must be under the age of 12 years or, if the child has a physical or mental disability, under the age of 16 years, at the time of the application.[172] Unless s 5(3)(d) of the PRA is interpreted widely, these provisions will not permit maintenance to be sought from a functional parent who has not been granted a parenting order.[173] Recommendation 17 is intended to ensure that s 5(3)(d) is interpreted widely to allow for the possibility of an award of maintenance against a functional parent.

5.92 The age limits under the PRA are significantly lower than those found in the Commonwealth legislation, where an application for maintenance or child support can be made in relation to a child until he or she turns 18, or marries or enters into a de facto relationship.[174] A further point of contrast between the PRA and the Commonwealth legislation is that under the State law, any entitlement to financial assistance depends upon the applicant being unable to support himself or herself. There is no scope to find that a non-resident co-mother, for example, has an obligation to assist with the financial burden of raising a child, independently of the resident parent's financial circumstances. Finally, as the PRA maintenance regime is essentially about partner maintenance, it lacks the child-centred focus of the Commonwealth child support regime and places children in non-traditional families completely outside that regime. Recommendation 32, discussed in Chapter 10, raises the age limits for child maintenance orders to 18, regardless of whether or not the child has a disability.

170. A step-parent will only have a duty to maintain a child if a court determines it is proper they have such a duty: FLA s 66D. The matters that must be taken into account by a court are listed in FLA s 66M.
171. FLA s 60D.
172. PRA s 27(1)(a).
173. See discussion above at para 5.24-5.26.
174. FLA s 66L(1), s 66V. *Child Support (Assessment) Act* (Cth) s 24. An exception to the Commonwealth age limit may exist if maintenance is necessary to enable a child to complete his or her education or because of a disability of the child: FLA s 66L(1)(a), (2)(a) and (2)(b); *Child Support (Assessment) Act* (Cth) s 151B

Equitable estoppel

5.93 A functional parent can be required to provide child support through the equitable doctrine of promissory estoppel.[175] The potential operation of this doctrine is illustrated by the case of *W v G*,[176] which involved a dispute between a lesbian couple who had had two children together, conceived by way of artificial insemination. W was the biological mother of the children and, following the breakdown of the relationship, the children remained in her care. She sought a lump sum payment from G by way of equitable compensation towards the cost of maintaining them.

5.94 The key elements in a claim of promissory (or equitable) estoppel are that the plaintiff has acted in reliance on a promise made by the defendant, that the defendant knew or intended the plaintiff would so act and that this has caused the plaintiff detriment. W argued that by making positive comments about having children together and by participating in the insemination process, G caused or encouraged her to believe that G would fulfil her promise to act as a parent to the children and to contribute to their upbringing. She further argued that, relying on that promise, W had the two children and was now placed in the detrimental position of having the cost and responsibility of raising the children without G's assistance. The Court found that W was entitled to relief on the basis of equitable estoppel and ordered that G provide a lump sum of $151,125 towards the cost of raising the children.

5.95 While the doctrine of equitable estoppel may provide a legal means of dealing with questions of child support by co-mothers, it is undesirable that it become the primary vehicle for doing so. As one commentator has noted, addressing the dispute in terms of an "unconscionable dishonoured deal", which could equally have involved property instead of children, is an inappropriate way to approach child support matters. The proper focus of a child support application should be the needs of the child. Furthermore, had the dispute been resolved under the FLA, the parties would have had the opportunity to use the Family Court's dispute resolution services such as conciliation and mediation, which may have avoided litigation altogether.[177]

175. See DP 44 at para 3.64-3.67 for a fuller discussion.
176. *W v G* (1996) 20 Fam LR 49. For a detailed discussion of this decision, see J Millbank "An implied promise to parent: lesbian families, litigation and *W v G* (1996) 20 Fam LR 49" (1996) 10 *Australian Journal of Family Law* 112 and J Millbank, "Parental responsibility of co-mothers" (1996) 21 *Alternative Law Journal* 243.
177. D Sandor, "Paying for the promise of co-parenting - a case of child maintenance in disguise?" (1996) 43 *Family Matters* 24 at 26.

Should a discretionary child maintenance duty be imposed on unmarried step-parents?

5.96 As noted above, married step-parents may have a duty to maintain a child under the FLA.[178] This duty is secondary to that of a legal parent and is also dependent on a court determining that it is appropriate to impose the duty in the particular circumstances. The factors that a court must consider when determining whether to impose a child maintenance order on a step-parent are:

1. the objects of the child maintenance provisions and the primary duty of a child's legal parents to maintain the child;

2. the length and circumstances of the marriage to the relevant parent of the child;

3. the relationship that has existed between the step-parent and the child;

4. the arrangements that have existed for the maintenance of the child; and

5. any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person. [179]

5.97 The imposition of this type of discretionary support obligation is controversial, even in the context of marriages. There is a view that relationships may be undermined if step-parents are concerned that taking on a parental role in relation to their partner's child could result in long-term financial obligations if the relationship ends. [180] Competing with this concern is the view that it is clearly beneficial to a step-child that he or she receives the sorts of benefits accruing to children upon the separation or divorce of their legal parents.[181] Further, once a step-parent has assumed a parental role, it is arguably not in the child's best interests to allow that step-parent to waive unilaterally all responsibilities for the child if the adult relationship breaks down.[182] This is especially so if the relationship is a lengthy one.

5.98 There is also a concern that the State will be left to support the children of relationships which have ended. It is thought to be more economical and just that a person who has previously borne responsibility for the child continue to do so. In the United States, for example, legislation in several States imposes liability on step-

178. FLA s 66D and s 66M.
179. FLA s 66M.
180. See C Davies, "The ever-changing picture of support and other developments" 20 *Canadian Family Law Quarterly* 213.
181. A Harvison Young, "This child does have 2 (or more) fathers: step-parents and support obligations" (2000) 45 *McGill Law Journal* 107 at 119
182. See, for example, *Chartier v Chartier* [1999] 1 SCR 242 in which the approach of the Canadian Supreme Court privileged the best interests of the child.

parents "only for children who are, or are likely to become, recipients of public assistance."[183]

5.99 The question for the Commission is whether a functional parent who is in a de facto relationship with a child's legal parent should have a discretionary, secondary obligation to maintain the child, equivalent to that imposed on married step-parents under s 66M of the FLA. Such an obligation is imposed in certain provinces of Canada[184] and the United Kingdom.[185]

5.100 Five submissions supported extending a discretionary child maintenance obligation to unmarried step-parents.[186] In the view of the Anti-Discrimination Board, the public policy rationale for discretionary step-parent maintenance obligations is equally applicable in the context of unmarried step-parents, whether they are in a same sex or opposite sex de facto relationship. One submission opposed any extension, stating that the issue should be referred to the Commonwealth because child support obligations should be uniform throughout Australia.[187]

5.101 The Commission considers that the policy underlying the FLA step-parent maintenance obligation applies equally in the context of unmarried step-parents, whether they be in same sex or opposite sex relationships. As with married step-parents, there are strong arguments against imposing an automatic liability on unmarried step-parents to pay maintenance for their step-children with whom they have no legal relationship: in some circumstances, it may be unfair to impose financial obligations on a person to maintain a child simply by reason of having entered into a relationship with that child's parent. However, in other circumstances, particularly in the case of long relationships, similar arguments justify requiring an unmarried step-parent to pay maintenance as justify a married step-parent paying maintenance. A discretionary power to impose such an obligation would ensure that an unmarried step-parent would be required to pay maintenance only in circumstances where the interests of the child and the nature of the relationship justified such an imposition. Such circumstances may be rare.

5.102 In our view, the preferable way to extend child maintenance obligations to unmarried step-parents is by amending the relevant provisions of the FLA. While this may be realistically achievable in the case of unmarried step-parents in opposite sex relationships, the disinclination of the federal government to recognise gay and lesbian families makes it unlikely that the FLA will be amended with comprehensive effect. However, our Recommendation 17 to amend the PRA maintenance provisions

183. M Mahoney, "Support and custody aspects of the step-parent – child relationship" 70 *Cornell Law Review* 38 at 43.
184. For example, British Columbia.
185. *Civil Partnership Act 2004* (UK) s 75, s 78.
186. Anti-Discrimination Board of NSW, *Submission* at 14; Gay and Lesbian Rights Lobby Inc, *Final submission* at 10; Law Society of NSW, *Submission* at 2 (proviso that must have been in relationship for 2 years); NSW Young Lawyers, *Submission* at 4; Women's Legal Resources Centre, *Submission* at 9.
187. Victorian Bar, *Submission* at para 20.

would go some way to ensuring that children who have gay or lesbian step-parents are not disadvantaged in this area.

Should an automatic duty to support a child be imposed upon co-mothers?

5.103 The principal object of the child support provisions in both the FLA and the CSAA is to ensure that children receive a proper level of financial support from their parents.[188] This object is reflected in the primary duty imposed on parents to maintain a child.[189] The clear policy basis of these child support laws is that the legal parents of a child should bear the primary financial responsibility of supporting that child, either because of their biological parentage[190] or their acceptance of that responsibility through adoption.

5.104 Another rationale underlying the policy of child support obligations is that parents, and not the State, should provide financial support for children. As Justice Fogarty noted in *B v J*, the "financial support of children is a matter of great public interest" and "the community as a whole would be adversely affected if a person were permitted to waive a 'right' to seek support from a child's parent".[191]

5.105 In DP 44, the Commission raised the issue of whether it is appropriate to impose an automatic child support duty on co-mothers. Four submissions expressed general support for the imposition of such a duty.[192] Implicit in these submissions was that support was conditional on legal recognition of the co-mother. One submission expressly limited its support of an automatic duty to legal parents.[193] Our community consultations revealed divided opinion on this issue. While there was universal support for co-mothers being under a moral obligation to provide child support, reservations were expressed about the desirability of translating that into a legal obligation, in the absence of recognition of the co-mother as a legal parent.[194]

5.106 The Commission considers that it would be consistent with the purpose of child support laws to impose an obligation on co-mothers to provide financial support for their children. However, it is unacceptable and unjust for an automatic financial obligation to be imposed on a co-mother in the absence of accompanying automatic legal recognition of her status as a parent of the child. In this respect, the Commission

188. FLA s 66B(1); CSAA s 4.
189. FLA s 66C; CSAA (Cth) s 3(1).
190. Actual or presumed.
191. *Re B v J* (1996) 21Fam LR 186 at 195.
192. Lesbian and Gay Solidarity, *Submission* at 2; Law Society of NSW, *Submission* at 2; NSW Young Lawyers, *Submission* at 4; Anti-Discrimination Board of NSW, *Submission* at 13-14 (with some reservations).
193. Women's Legal Resources Centre, *Submission* at 9.
194. Lismore focus group (children); Sydney focus group (children).

shares the concern expressed in the submissions that rights should, in general, accompany responsibilities.

5.107 If Recommendation 21 regarding amendment of the *Adoption Act 2000* (NSW) is implemented, co-mothers would fall within the rubric of federal child support legislation. This is because the definition of parent in both the FLA and CSAA includes an adoptive parent

5.108 Implementation of the Commission's Recommendation 18, in relation to the parenting presumptions under the *Status of Children Act 1996* (NSW), will not, however, bring co-mothers within the ambit of the CSAA.

5.109 Section 60(H) of the FLA, on which the CSAA relies, defines a presumptive parent in the context of children born using artificial insemination procedures in gender specific terms. Section 60(H)(1) specifically deals with couples involved in an artificial insemination procedure. However, it refers to a couple who is married or living as husband and wife on a genuine domestic basis.

5.110 If an automatic child support duty is to be imposed on co-mothers, the provisions of s 60H(1) of the FLA need to be amended in gender neutral terms. Being Commonwealth legislation, the Commission is unable to recommend changes either to the CSAA or the FLA. We can only urge the Commonwealth to review the operation of its child support laws in relation to children born to lesbian couples using artificial insemination procedures. Unless it does so, children born into non-traditional families will suffer disadvantage as a result of an inability of the birth mother to enforce child support obligations against the co-mother.

5.111 In the absence of any changes to the law in these areas, it is appropriate that co-mothers are treated in the same way as other unmarried step-parents.

Recommendation 23

New South Wales should request the Commonwealth to amend FLA s 60H in gender neutral terms so that an automatic child support duty is imposed on co-mothers.

6. Threshold requirements of financial adjustment proceedings

- Introduction
- Definition and duration of domestic relationships
- Residence
- Limitation period

INTRODUCTION

6.1 Before proceedings for an adjustment of property interests or for an award of maintenance can be brought under the *Property (Relationships) Act 1984* (NSW) ("the PRA"), the Court has to be satisfied that:[1]

- there was a domestic relationship between the plaintiff and the defendant;
- the parties have lived together for at least two years;
- the parties, or one of them, has a residence-related connection with New South Wales; and
- the application for property adjustment orders or maintenance is brought within two years of the termination of the relationship.

6.2 This Chapter examines these threshold requirements. It assumes that the *Commonwealth Powers (De Facto Relationships) Act 2004* (NSW) will result in the enactment of federal law that covers the field as far as concerns financial adjustment proceedings in the context of the breakdown of de facto opposite sex relationships. Such proceedings will then only arise in State courts in respect of same sex partners or persons in a close personal relationship.

DEFINITION AND DURATION OF DOMESTIC RELATIONSHIPS

6.3 "Domestic relationship" refers either to a "de facto relationship" or a "close personal relationship".[2] Chapters 2 and 3 examine the meaning of these terms in detail. In particular, the Chapters deal with the requirement, which is part of the description of both de facto and close personal relationships, that the parties "live together" before their relationship can amount to a domestic relationship.

Cohabitation requirement

6.4 The problem with a requirement that parties "live together" for the purposes of establishing a domestic relationship is that it implies cohabitation in the sense of sharing a common residence or being members of the same household. The Commission is of the view that this is an unnecessary restriction on both de facto and close personal relationships. Accordingly, we have recommended that the PRA not require cohabitation as a necessary element of the definition of a domestic relationship.[3] The nature and extent of any common residence of the parties,

1. These factors are variously found in PRA Part 3 Division 1.
2. PRA s 5(1).
3. See Recommendations 5 and 10.

nevertheless, remains a factor (along with others) that is relevant to the determination of the existence of a domestic relationship.[4]

6.5 Section 17 of the PRA also refers to the parties living together. Subject to two exceptions (which are discussed below),[5] that section requires that the parties have lived together in a domestic relationship for at least two years before the court can make a property adjustment or maintenance order. Submissions expressed support for the continuation of such a requirement, predominantly for the purpose of sifting out unmeritorious claims. This view also found support among respondents to the Commission's Questionnaire on Same Sex Relationships and the Law[6] and from some (but not all) participants in focus groups on the basis that a cohabitation requirement was an indication of the parties' commitment to each other, and could properly form the basis of an entitlement to seek an order for an alteration of property interests or maintenance from the other party. Respondents to the Questionnaire were, however, divided on the length of the period for which parties should be required to live together.

6.6 In the Commission's view, the same objections to requiring cohabitation apply in this context as in defining domestic relationships for the general purposes of the PRA.[7] Cohabitation may exclude certain intimate non-traditional relationships where parties do not live together, but who nevertheless have been part of a committed and financially interdependent relationship. This is particularly important in the context of the breakdown of de facto gay and lesbian relationships where fear of homophobia may have prevented the parties from establishing a common residence. Moreover, the circumstances in which one person provides domestic support and personal care to another on a day-to-day basis may seem to satisfy the notion of a close personal relationship even though the parties do not share the same home.

6.7 On the other hand, there are compelling policy justifications for requiring some objective indicator of a relatively serious, long-lasting commitment to warrant the disturbance of private property rights. It is worth noting that, while some Australian jurisdictions have dispensed with a cohabitation requirement in their general definitions of domestic relationships, all Australian jurisdictions retain some minimum period either of cohabitation, or duration of the relationship, before the parties' property interests can be adjusted.[8] In our view, the duration of the relationship is the best objective indicator for this purpose. It should, therefore, be sufficient that a consideration of all relevant factors indicates the existence of a domestic relationship over a particular period of time. Section 17(1) of the PRA should be amended accordingly.

4. Recommendation 12. See also PRA s 4(2)(b) (de facto relationship).
5. See para 6.8-6.22.
6. See Appendix C.
7. See para 2.25-2.30, 3.21-3.25.
8. See para 2.13-2.14.

Recommendation 24

Section 17(1) of the PRA should be amended to provide that, except as provided by subsection (2), a court shall not make an order under Part 3 unless it is satisfied that the parties to the application have been in a domestic relationship for a period of not less than two years.

Exceptions to the two-year duration period

6.8 Currently, even if two people in a domestic relationship have not lived together for the requisite two years, a party to that relationship may still be able to bring a claim for property adjustment or maintenance if:

- there is a child of the parties to the application;[9] or
- the applicant has made substantial contributions for which he or she has not been adequately compensated, or he or she has the care and control of a child of the respondent; and, in either case, the failure to make the order would result in serious injustice to the applicant.[10]

6.9 Similar exceptions apply in relationships legislation in other jurisdictions.[11]

6.10 The appropriateness of these exceptions, and the necessity for other exceptions, require examination.

A child of the parties to the application

6.11 An assumption on which this Report is based is that the current PRA will, so far as it affects financial adjustments following the breakdown of domestic relationships, come to be concerned solely with same sex and close personal relationships.[12] This suggests that s 17(2)(a) of the PRA, which effectively dispenses with the requirement that the relationship has endured for two years where there is a "child of the parties" to the application, is of limited relevance since any child in question is unlikely to satisfy the current statutory definition of the phrase: the child cannot be born as a result of sexual relations between the parties or of adoption by both parties, and both parties may not have parental responsibility for the long-term welfare of the child under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).[13]

6.12 The Commission has, however, recommended that the definition of a "child of the parties" to a domestic relationship be expanded to include a child for whose day-

9. PRA s 17(2)(a).
10. PRA s 17(2)(b).
11. See, eg, *Relationships Act 2003* (Tas) s 37; *Property Law Act 1958* (Vic) s 281; *De Facto Relationships Act 1991* (NT) s 16.
12. See para 1.33.
13. See PRA s 5(3).

to-day care and long-term welfare both parties exercise responsibility.[14] If the PRA is amended in this way, the existence of such a child should permit a financial adjustment order to be made notwithstanding the fact that the domestic relationship has not endured for a period of two years for the reasons that underlie the current legislative provision. A financial adjustment order may be required in such circumstances to compensate for on-going contributions made as a parent or to provide maintenance in respect of child care responsibilities. The Commission, therefore, makes no recommendation in respect of s 17(2)(a).

A child of the respondent

6.13 The legislation provides that a court may make a financial adjustment order (without regard to the duration of the domestic relationship) where the applicant has "the care and control of a child of the respondent", provided that the failure to make the order would result in "serious injustice" to the applicant.[15] In the Commission's view, this provision should be retained. "Care and control" is wider than the "day-to-day care and long-term welfare" that will be covered in s 17(2)(a). It is designed to cover the perhaps unusual case where the applicant retains practical care and control of his or her partner's child after the de facto relationship ends.[16] A court should have power to make an order in such cases notwithstanding the fact that the relationship has not lasted for two years, provided the applicant can show "serious injustice".[17]

Substantial contributions

6.14 Section 17(2)(b)(i) of the PRA provides that a court may make an order under Part 3 where the applicant has made "substantial" contributions for which he or should would not otherwise be adequately compensated unless an order were made, again provided that failure to make an order would result in serious injustice to the applicant. This presents obvious difficulties of interpretation.[18] Assessing whether, in a relationship spanning less than two years, the contributions of one party are "substantial" as opposed to ordinary, may produce seemingly inconsistent results.[19] Usually, the assessment involves a broad estimate of the contributions and an evaluation of whether those contributions have already been compensated.[20] Such an assessment necessarily involves an examination of the nature and incidents of the

14. See Recommendation 17 at para 5.36.
15. PRA s 17(2)(b)(ii).
16. See Report 36 at para 9.6.
17. See para 6.16-6.17.
18. See DP 44 at para 6.22-6.24.
19. For example, becoming a joint mortgagor (albeit never being required to make mortgage repayments) was not considered a substantial contribution in the 1993 case of *Street v Bell* (1993) 114 FLR 167 but it was in *Dries v Ryan* [2000] NSWSC 1163 (but note the issue arose in the context of commercial litigation).
20. *Street v Bell* (1993) 114 FLR 167 per Renauld J (of the Family Court heard under cross vesting legislation). See also *Greenwood v Merkel* (2004) 31 Fam LR 571.

relationship as a whole.[21] As part of the exercise, the Court generally looks at whether those contributions have been offset by the other party's contributions.[22] In one case, a plaintiff's financial contributions towards renovating the defendant's home, paying for a joint holiday and being a homemaker for the defendant and his son, were considered substantial and held to outweigh the defendant's contributions.[23] In *Kolacek v Brezina,* on the other hand, it was held that the plaintiff's financial and homemaker contributions were more than offset by the defendant's contributions, who provided her with rent-free accommodation and a high standard of living.[24]

6.15 In the Commission's view, it is just that where a party to a domestic relationship has made "substantial" contributions that would not otherwise be "adequately" compensated, a court should have the discretionary power to dispense with the requirement that the relationship should have lasted for two years.[25] That discretion is necessarily flexible to enable its proper application in the overall factual situation before the court.

Serious injustice

6.16 Where the relationship has lasted less than two years and the applicant asks the court to make an order on a substantial contributions basis[26] or on the ground that the applicant has the care and control of a child of the respondent,[27] the court must be satisfied that failure to make the order would result in "serious injustice" to the applicant.[28] It seems clear from the structure of the legislation, as well as from the Commission's recommendation on which the legislation is based,[29] that this is an additional requirement to the two grounds in s 17(2)(b).

6.17 In DP 44, the Commission expressed a tentative preference for the view that "serious injustice" should not be an independent requirement in s 17(2)(b) at least in

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21. *Stelzer v McDonald* [1999] NSWSC 602 at para 31 (Bergin J). Her Honour found that the plaintiff had made very large contributions to the property and financial resources of the parties as well as homemaker contributions, but so too had the defendant.
22. See for example *Reilly v Gross* (NSW, Supreme Court, No 787/86, 5 August 1986, unreported).
23. *Reilly v Gross*. See also *Weston v Castle* (NSW, Supreme Court, No 1813/89, 23 August 1989, unreported) where a disparity in contributions was found and an adjustment made.
24. *Kolacek v Brezina* [1999] NSWSC 578. See also *Dorman v Beddowes* (NSW, Supreme Court, No 1314/96, 22 April 1996, unreported).
25. See NSW Law Reform Commission, *De Facto Relationships* (Report 36, 1983) at para 9.6.
26. See para 6.14-6.15.
27. See para 6.13.
28. PRA s 17(2)(b).
29. See NSW Law Reform Commission, *De Facto Relationships* (Report 36, 1983) at para 9.7.

"substantial contribution" cases on the ground that, once it is found that the applicant has made substantial contributions for which he or she has not been adequately compensated, it should follow that he or she will suffer serious injustice if not allowed to proceed with his or her claim. The Victorian Bar supported this view.[30] The Commission is, however, persuaded by the submission of the Equity Division of the Supreme Court that the "serious injustice" threshold has a real role to play in s 17(2)(b) in weeding out trivial claims.[31] This is because there is a possibility that the meaning of "substantial" could, as in other legislative contexts,[32] be equated to "non-trivial". An additional reference to "serious injustice" is justified as a check on this possibility. It is, moreover, an important check both in "substantial contribution" cases and in cases where the applicant has the care and control of a child of the respondent, given the diversity of relationships covered by the legislation and the proposed removal of cohabitation from the duration requirement in Recommendation 24.

Registered relationships

6.18 In Chapter 4, the Commission recommends that a system for the registration of domestic relationships be developed. If a relationship is registered, the fact of registration is, at least, proof of the existence of the relationship.[33] The question then arises as to whether or not the fact of registration should dispense with the requirement that a domestic relationship must have endured for two years before a financial adjustment order under Part 3 can be made. This question arises particularly in the case of de facto relationships.

6.19 The danger of relaxing the two-year period in de facto relationship cases is that Part 3 orders can then be made in circumstances where the parties have registered their relationship without a great deal of commitment on the part of one or both of them, with the result that the relationship endures for only a short period of time. There is also a possibility that the parties may not have been aware of the significance of registration in terms of the access it creates to Part 3 orders. On the other hand, there will be circumstances in which the parties' decision to register their relationship is taken, after thoughtful reflection, in order to make a public expression of their commitment. Indeed, the parties may change their position (for example, by giving up particular employment) in order to devote their time fully to the partnership. Such parties may be fully informed of the consequences of registration as regards Part 3 orders. These arguments are finely balanced.

6.20 The Commission has, however, concluded that other factors tip the balance in favour of dispensing with the two-year duration requirement for Part 3 orders where a relationship is registered because:

30. Victorian Bar, *Submission* at para 51.
31. Equity Division of the Supreme Court of NSW, *Submission* at para 50.
32. For example *Tillmanns Butcheries Pty Ltd v Australasian Mean Industry Employees' Union* (1979) 42 FLR 331; *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437 at 444.
33. See Recommendations 7 and 13.

- the fact that the relationship has endured for only a short period of time will itself qualify the force of the commitment of the parties to a shared life evidenced in registration, and hence the extent (if any) to which the Court is prepared to make a financial adjustment order;[34]
- by analogy, parties to a marriage are not required to have been married for any particular period of time before they become entitled to bring proceedings for property adjustment or maintenance under the *Family Law Act 1975* (Cth) ("the FLA");[35]
- uniformity with the law in Tasmania favours allowing a claim for a financial adjustment order regardless of the duration of the relationship.[36]

6.21 The last point applies equally to close personal relationships. Moreover, in the case of close personal relationships, there will generally be fewer reasons for registration. Of the 56 domestic relationships that had been registered in Tasmania by November 2005, none were close personal relationships. The Commission considers that it is generally more likely than not that such relationships will be registered only after the parties have given the question full consideration and are fully informed of the consequences of registration.

34. See Chapters 7 and 9.
35. See S Landers, *Submission*; Sydney focus group (property).
36. See *Relationships Act 2003* (Tas) s 37(3).

Recommendation 25

PRA s 17 should not apply to domestic relationships that have been registered in accordance with the system proposed in Recommendation 15.

Registration and Commonwealth law

6.22 The implementation of the last recommendation will only apply to financial adjustment proceedings in State courts. The breakdown of a relationship between opposite sex couples registered under State law may result in financial adjustment proceedings in federal courts following the reference of powers. In the Commission's view, it would be anomalous if such registered relationships were not recognised in the same way for the purpose of federal financial adjustment proceedings. It is, of course, beyond the competence of the New South Wales Parliament to pass legislation to apply to federal proceedings. It is, however, desirable that the New South Wales government should approach the Commonwealth government to achieve this end if, for this purpose, the definition of a de facto partner in federal law includes a requirement that the de facto relationship should have endured for a particular period of time. Recommendation 164, in paragraph 4.33 of Chapter 4, addresses this issue.

RESIDENCE

The legislative requirements

6.23 In order to have jurisdiction to hear the matter, the Court must be satisfied that:

(a) at least one of the parties was resident in New South Wales at the time the application was made; *and*

(b) both parties lived in New South Wales for a substantial period of their relationship (a substantial period being at least one-third of the length of the relationship), *or* the applicant made in New South Wales substantial financial or non-financial contributions to the parties' property and financial resources.[37]

6.24 "Residence" takes its meaning from the context of the statute in which it is used.[38] In the context of the PRA, "residence" cannot be satisfied if one party to the relationship lives in New South Wales *as their home* at the time of the application. Thus, under the *Domestic Relationships Act 1994* (ACT) (which relevantly corresponds to the PRA), the Supreme Court of the Australian Capital Territory has held that where parties were living in Victoria at the time of the application, the

37. PRA s 15. See also *Flett v Brough* (NSW, Supreme Court, No 2638/97, 20 November 1998, unreported).
38. M Tilbury, G Davis and B Opeskin, *Conflict of Laws in Australia* (OUP, 2002) at 446-452.

jurisdiction of the ACT Supreme Court could not be founded on the applicant's presence in Canberra for the purposes of initiating proceedings, notwithstanding the lengthy period in which the parties had previously lived as a married couple in the ACT, as well as the presence in the ACT of real property owned by the parties.[39] Chief Justice Higgins commented:

> *I recognize the inconvenience, indeed the potential injustice, of this result. Had the plaintiff decided to return to live in the ACT after the separation of the parties, orders might have been made … The relationship plainly had a real connection with the ACT. There is property situated here.*
>
> *However, I am bound to apply the clear meaning as it seems to me … of the Act. If the legislature considers that the Act is too restricted in its coverage or discriminates unfairly between classes of de facto relationships it is, of course, open to it to amend the Act.*[40]

6.25 The legislation additionally requires a strong connection with New South Wales either in terms of the period that the relationship endured in New South Wales, or in terms of the applicant's contribution in New South Wales to the property and financial resources of the parties. The Queensland Law Reform Commission has pointed out that the requirement that parties have lived in the State for one third of their relationship can lead to anomalous results. For example, it allows a claim by a couple who have lived in the jurisdiction for nine months of a two year relationship, but would exclude a couple who had lived in the State for five years of a 20 year relationship.[41]

6.26 In 1993, the Queensland Law Reform Commission suggested a modified residency requirement in the following terms:[42]

> *A court may make an order under this Part only if its is satisfied –*
>
> *that one or both of the de facto partners lived in Queensland on the day on which an application under this Part was made; and*
>
> *that –*
>
> *both partners have lived together in Queensland for at least one year;*

39. *Kempe v Webber* [2003] ACTSC 7.
40. *Kempe v Webber* at [46]–[47].
41. Queensland Law Reform Commission, *De Facto Relationships* (WP 40, 1992) at 89.
42. Queensland Law Reform Commission, *De Facto Relationships* (WP 40, 1992) at 89.

substantial contributions of the kind referred to in … have been made in Queensland by the partner making the application; or

a substantial part of the partner's assets or a substantial asset is situated in Queensland.

6.27 This proposal was not pursued. In its 1993 Report, the Queensland Law Reform Commission recommended that the question of jurisdiction should be referred to common law principles, then recently reformulated in the "clearly inappropriate forum test".[43] The Commission pointed out that these principles enable a respondent to object to the Court's jurisdiction, and that even if the respondent does not object, the issue may still be raised by the Court if it thinks it appropriate, by reason of its inherent jurisdiction to prevent abuse of process.[44]

Forum shopping

6.28 The requirement that the parties or one of them has a connection with New South Wales by way of residence has been a feature of the PRA since it was first enacted in 1984. It was recommended by the Commission in Report 36 as a means of providing a sufficient nexus with New South Wales. It was also intended to dissuade claims from people in other parts of Australia who had little or no connection with New South Wales but sought to bring a claim here because the implementation of the Commission's recommendations would mean that New South Wales was the only State that provided a statutory regime for the division of property between de facto couples.[45]

6.29 Where a claimant having little or no connection with New South Wales seeks to bring a claim here and that claim itself has no connection with New South Wales (for example, because it does not concern property situated in New South Wales), the claimant is said to be "forum shopping". Submissions addressing the residency issue tended to regard the prevention of forum shopping as a compelling argument to keep residency provisions in the legislation.[46] Yet the temptation to forum shop in this area of the law should not now be exaggerated.[47] Forum shopping is motivated by considerations of expense or convenience (where it is cheaper and easier in the circumstances for the claimant to litigate in New South Wales), or by the prospect of a

43. *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.
44. Queensland Law Reform Commission, *De Facto Relationships* (Report 44, 1993) at 36-38.
45. NSW Law Reform Commission, *De Facto Relationships* (Report 36, 1983) at para 9.16. See also *Bentley v Marsters* [2005] NSWSC 346 at para 32 (Malpass AJ).
46. Law Society of NSW, *Submission* at 7 (suggesting the adoption of the model in the Queensland Law Reform Commission's Working Paper); NSW Young Lawyers, *Submission* at 5; Victorian Bar, *Submission* at 20.
47. Likewise, the Equity Division of the Supreme Court of NSW doubted that making s 15(1) the only jurisdictional requirement would result in a flood of claims in New South Wales: *Submission* at para 52.

more favourable outcome (where the New South Wales financial adjustment regime is more favourable to a claimant than that in a jurisdiction with which the claim is more closely related). Whatever may have been the situation when the Commission reported in 1983, when New South Wales was the only State to have relationships legislation, forum shopping is much less likely today. Now, all States and Territories have their own laws regulating property division on the breakdown of de facto relationships. All but South Australia extend those laws to same sex de facto couples,[48] and some also cover the broader category of non-intimate caring relationships.[49] The laws of most other Australian jurisdictions appear, at least at first glance, as favourable to claimants as the law of New South Wales.

6.30 It is, in any event, doubtful that removing the residency requirement would lead to forum shopping. Significant developments in the law since the Commission's *Report on De Facto Relationships* ensure that New South Wales Courts have adequate power to deal with cases that possess no (or little) connection with New South Wales. In the first place, the courts can decline to hear a case. While the process of a New South Wales court can be served on a person anywhere in Australia,[50] the defendant can object to the plaintiff's choice of New South Wales as a forum and seek to have the proceedings stayed.[51] The basis for staying the proceedings is that the Court of another State or Territory that has jurisdiction to determine all the issues between the parties is the more appropriate forum in which to try the case.[52] Where the process originates in the Supreme Court, the Court may not stay the proceedings[53] but may transfer them to a court in another Australian law district.[54] The basis of such a transfer is that the other court is the more appropriate one to determine the proceedings, the wide test being simply "the interests of justice"[55] or (less convincingly) that New South Wales is an inappropriate forum.[56] Even where there is no connection with another Australian jurisdiction (but with some foreign jurisdiction), the court may decline to hear the matter on the basis that New South Wales is a clearly inappropriate forum.[57]

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48. With the exception of South Australia, though this is under review.
49. ACT, Tasmania.
50. *Service and Execution of Process Act 1992* (Cth) ("SEPA") s 5(1).
51. SEPA s 20. But note this section does not apply where the Supreme Court of a State is the court of issue. The transfer of proceedings between State Supreme Courts is dealt with under cross-vesting legislation: *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW).
52. SEPA s 20(3),(4). Under SEPA s 5(1) each Territory is to be regarded as a State.
53. SEPA s 20(1).
54. *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) s 5.
55. See *Bakinvest AG v Seabrook* (1988) 14 NSWLR 711.
56. See B Opeskin, "Cross-vesting of jurisdiction and the federal judicial system" in B Opeskin and F Wheeler, *The Australian Federal Judicial System* (Melb UP, 2000) 299 at 323-326.
57. *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. There are subtle differences in the application of the test depending on whether the application is

6.31 It is true that if it hears the case, a New South Wales court will then apply the law of New South Wales regardless of the connections that the parties or the case may have with other jurisdictions.[58] If the law of New South Wales is more favourable to the claimant than that of a jurisdiction to which the parties or the case are more closely connected, an incentive to forum shop theoretically remains. This argument, however, overlooks the discretionary nature of financial adjustment proceedings in all jurisdictions, making it difficult to say with certainty that a more favourable outcome will be obtained in New South Wales than in another jurisdiction. It also ignores the width of the powers of courts in New South Wales in practice to refuse to hear cases that have little or no connection with this State.

The Commission's view

6.32 It is obviously desirable that proceedings for financial adjustment in a New South Wales court should have some connection with New South Wales. The residence of the parties (or one of them) in New South Wales at the date of application provides one such connection. It should not, however, be a necessary connection. Nor should it be the only factor capable of connecting the proceedings to New South Wales.

6.33 The Commission notes that a residence condition can run counter to constitutional requirements in so far as it creates a relevant discrimination against residents of other States.[59] Moreover, where the factual situation involves other connections with this State – for example, a past residency and the presence of property here – these other connections ought, taken singly or as a whole, to be capable of giving a New South Wales court jurisdiction to hear the matter in an appropriate case. Yet the current legislation recognises the force of factors other than residence only to the extent of requiring that an alternate additional requirement to residence at the date of application, is that substantial contributions in New South Wales to the property and financial resources of the parties have been made. The other alternative additional requirement merely specifies that the parties must have been resident in New South Wales for at least one-third of the duration of their domestic relationship. This injects an undesirable rigidity that is avoided at general law where a court can refuse to exercise its power to hear a case if, having regard to the overall factual situation, New South Wales is an inappropriate forum, or there is a more appropriate forum in which the proceedings should take place, or the interests of justice require that the proceedings should take place elsewhere.

6.34 The choice involved in reforming the law in this area is between (a) specifying in the legislation the connections with New South Wales that will justify the initiation of

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to stay proceedings commenced in NSW or to serve process outside Australia: see Tilbury, Davis and Opeskin at 96.

58. P E Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, LexisNexis, 2002) at 507.
59. *Commonwealth Constitution* s 117. See *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463. Compare *Transport Accident Commission v Sweedman* (2004) 10 VR 31 (CA).

proceedings here (the current approach in s 15 of the PRA), and (b) relying on the general law and allowing the commencement of proceedings in unfettered circumstances[60] but declining to exercise jurisdiction through a stay or transfer of the proceedings.[61] The Commission prefers the second approach.

6.35 Part 3 orders will be sought on breakdown in gay, lesbian and close personal relationships. We have drawn attention to the lack of empirical data about such relationships.[62] This and the assumption that parties in gay and lesbian relationships may constitute a highly mobile sector of the population, suggest that many factors other than residence ought to be relevant considerations in the determination of a court's jurisdiction. The tests at general law allow the Courts to have regard to the factors referred to in s 15 of the PRA as well as to other relevant factors, according them such weight as is appropriate in the overall factual situation. Even the narrowest of general law tests, the inappropriate forum test,[63] is more likely to yield satisfactory results than a legislative restatement of factors justifying the initiation of proceedings in PRA matters in New South Wales. As the interim, and subsequently abandoned, proposal of the Queensland Law Reform Commission demonstrates, a restatement is unlikely to reach all factors that ought to be relevant to the appropriateness of the Court's determination of jurisdiction in all cases and also likely to be too rigid. Moreover, reliance on the general law is unlikely to provoke a spate of forum shopping.

6.36 We therefore recommend the repeal of s 15 of the PRA. This would bring the law of New South Wales into line with that in Queensland and Tasmania.

Recommendation 26

PRA s 15 should be repealed.

LIMITATION PERIOD

6.37 A time limit for bringing financial adjustment proceedings is specified in s 18 of the PRA. An action must be brought within two years of the date of separation where a domestic relationship has ceased.[64] Applications may be brought out of time if the Court is satisfied that greater hardship would be caused to the applicant by refusing leave than would be caused to the other party by granting it. In the case of

60. Or, in international cases, in cases that satisfy listed heads of jurisdiction and the Court's discretion: Tilbury, Davis and Opeskin, at 63-77.
61. See especially SEPA s 5.
62. See para 1.46-1.48.
63. The inappropriate forum test is narrower than the others to the extent to which it creates a presumption in favour of the jurisdiction of the Court in which the proceedings are brought.
64. PRA s 18(1).

proceedings for maintenance, however, an extension of time will not be granted in cases where children are not involved.[65]

6.38 Similar provisions are found in the Australian Capital Territory, the Northern Territory, Tasmania and Victoria.[66] In South Australia, proceedings must be brought within one year of separation, although the Court may hear an application brought outside the limitation period if, after considering both parties' interests, it is satisfied that doing so is necessary to avoid serious injustice to the applicant. In Western Australia, an application must also be brought within one year of the relationship ending, but the Court may grant a de facto partner leave to apply out of time if satisfied that hardship may be caused to a de facto partner if leave were not granted.[67] The position in Queensland is similar except that the general limitation period is two years and that leave to apply out of time can be granted where the Court is satisfied that hardship would result to the applicant *or to a child* of the de facto partners if leave were not granted.[68] As in Western Australia, there is no need to consider any hardship or prejudice to the defendant.

6.39 Section 44 of the FLA provides that an application for property adjustment (or maintenance) must be brought within one year of a decree nisi becoming absolute or a marriage being declared null. Section 44(3) gives the Court a discretion to grant leave to an applicant to apply out of time where it is satisfied that greater hardship would be caused to the applicant or a child of the parties if leave were not granted.[69]

How it has been interpreted

6.40 Although s 18 of the PRA is framed differently from s 44 of the FLA, New South Wales courts have considered family law jurisprudence in the interpretation of s 18.[70] In *McDonald v McDonald*,[71] the Full Court of the Family Court held that an applicant seeking leave to bring proceedings out of time must establish:

- a reasonable prima facie case for relief if the proceedings had been brought in time;
- that denial of the applicant's claim would cause hardship to him or her; and
- an adequate explanation as to his or her delay.

6.41 The second of these elements is a statutory requirement while the first and third recognise the fact that the power to extend time is a discretionary one.[72] In a subsequent case under the FLA, another element was identified, namely, to consider

65. PRA s 18(2).
66. There is no provision to claim maintenance in either Victoria, Queensland or South Australia. See Chapter 10.
67. *Family Court Act 1997* (WA) s 205ZB.
68. *Property Law Act* (Qld) s 288(2). Italics added.
69. FLA s 44(3) and (4).
70. *Deves v Porter* [2003] NSWSC 625.
71. (1977) FLC ¶90-317
72. *Deves v Porter* [2003] NSWSC 625 at para 38 (Campbell J).

any prejudice that the respondent would suffer by reason of the delay in bringing the application.[73] This element is, of course, expressly included in s 18 of the PRA.

6.42 Hardship has been defined to mean a substantial detriment.[74] Of relevance in determining whether an applicant will suffer hardship is an assessment of their claim.[75] An applicant who is likely to receive a substantial award, in light of their circumstances, will generally be able to show hardship if leave were not granted.[76] The Federal Court hearing a matter under the FLA has held that hardship will not generally result if the claim is considered trifling in the circumstances of the applicant or a child of the relationship, or if the costs of pursuing an action are likely to add up to as much, if not more than what the applicant is likely to receive in terms of an award.[77]

Is hardship sufficient?

6.43 While a finding of "greater hardship" is necessary, it is generally accepted that such a finding may not be sufficient to persuade the court to grant leave to apply out of time. The Supreme Court has held that the use of the word "may" in s 18(2) gives the court a discretion to consider other matters of justice as well, such as whether there is an adequate explanation for the delay.[78] Thus, although there is no statutory requirement for an adequate explanation to be given under the PRA, case law has required it.[79] Indeed, some applications have been refused on the basis that no adequate explanation was given,[80] even where there has been shown to be a case of greater hardship.[81]

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73. *In the Marriage of Frost and Nicholson* (1981) FLC ¶91-051 at 76,422 (Nygh J).
74. *Deves v Porter* [2003] NSWSC 625 at para 40-41 (Campbell J).
75. *Beattie v Reid* [2000] NSWSC 97 unreported (Master Macready).
76. See for example, *Brzezowski v Seewoo* [2005] NSWSC 505 (Master Macready). The defendant had suffered a work injury, so despite the relationship coming to an end, the plaintiff continued to live with and take care of him for 4 years. Understandably, she only lodged an application under s 20 once he left the home. As he had collected a damages payout of $1.3m, the Supreme Court found that she would suffer greater detriment if leave were not granted.
77. *In the Marriage of Whitford* (1979) FLC 90-612.
78. *Parker v McNair* [1990] DFC ¶95-087 at 76,159 (McLelland J).
79. See *Brzezowski v Seewoo* [2005] NSWSC 505. For examples of successful applications for leave, see *Stone v Wright* (1989) 13 Fam LR 584 (NSWSC); *Parker v McNair* [1990] DFC ¶95-087 (NSWSC); *Meyer v Melocco* (1991) 14 Fam LR 765 (NSWSC).
80. *Trelore v Romeo* [1991] ¶DFC 95-108 (NSWSC); *Reid v George* [1996] DFC ¶95-173 (NSWSC).
81. *Beavan v Fallshaw* (1992) 15 Fam LR 686. In this case, Bryson J said that while an explanation for the delay is relevant, it should not in his view, "be viewed as an opportunity to impose order on litigants or to instil discipline in them" (at 688). *Bevan v Fallshaw* has since been distinguished: *Joyce v Delany & La Patrice Holdings Pty Ltd* [2004] VSC 338.

6.44 The Supreme Court of Victoria has similarly interpreted the corresponding provision in Victorian legislation to require a reasonable explanation for the delay before it will grant leave to apply out of time.[82] Gillard J took a contrary view in *Harris v Harris*, where he said that the primary concern was to do justice between the parties, and in particular, to consider where the greater hardship would fall. He considered that the requirement for an adequate explanation for the delay was "outdated" and should be consigned to the "judicial dustbin". In his opinion, the failure to provide an adequate explanation should never be the basis for refusing to grant leave where there were factors that justified it.[83] Subsequent cases have distinguished *Harris* and consistently held that while there is no statutory requirement, it is appropriate that the Court require the applicant to provide a satisfactory explanation for the delay.[84]

6.45 An adequate explanation need not be an entirely satisfactory one.[85] As Cummins J said in *Lockett v Duckett:*

> *… the standard is not a rigorous or high standard of satisfaction, but rather a standard of reasonableness; that is, a reasonable explanation, allowing, in particular, for the emotional and human factors involved in domestic arrangements and the complex of factors involved in such arrangements.*[86]

6.46 The Family Court has taken the same approach in its interpretation of s 44 of the FLA.[87] A court may grant leave to bring claims out of time in order to avoid hardship. But courts have said this discretion is to be exercised judiciously. The intention of Parliament in setting the limitation period is to ensure that the financial relationship between the parties to a marriage should, wherever possible, be resolved within a reasonable time frame after the dissolution of the marriage. Family Court decisions have consistently held that apart from hardship, the Court is to take into account the length of the delay and the reasons for it. As *McDonald*'*s* case shows, other matters including the prejudice to the other party resulting from the delay, are also relevant.

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82. See for example, *Joyce v Delany and La Patrice Holdings Pty Ltd* [2004] VSC 338 at para 46 (Williams J), relying on *Harris v Harris* and *Moore v Clarke; Lockett v Duckett* (2004) 32 Fam LR 346 at 349 (Cummins J); *Stott v Murphy* [2004] VSC 373 at para 14 (Cummins J); *McGibbon v Marriott* [1999] VSC 381 at para 7 (Warren J) which was applied in *Lockett v Duckett*; and approved in *Stott v Murphy.*
83. *Harris v Harris* (1997) DFC 95-192 at 77,675 (Gillard J).
84. *McGibbon v Marriott* [1999] VSC 381 (*Warren J*) at para 7. Applied in *Stott v Murphy* [2004] VSC 373 (Cummins J).
85. *Deves v Porter* [2003] NSWSC 625.
86. *Lockett v Duckett* [2004] VSC 377 at para 21 (Cummins J).
87. See *Whitford v Whitford* (1979) 24 ALR 424.

Submissions

6.47 In DP 44, the Commission asked if hardship alone should be the only relevant factor in determining whether or not leave should be granted to proceed out of time. The Commission also asked specifically whether an adequate explanation for the delay should be required from claimants in such cases.

6.48 Most submissions received on this issue supported the current practice of the Court to require the applicant to provide a reasonable explanation for the delay. While many agreed that hardship should be the main factor, it was generally argued that the Court should also be able to take into account a wide range of other relevant or "subsidiary" factors when exercising its discretion to accept applications brought out of time. These factors include the length of the delay and whether the applicant has provided an adequate explanation for the delay.[88] The Victorian Bar submitted that this should also include prejudice to the defendant if leave were granted.[89]

The Commission's view

6.49 In the Commission's view, there is no need to amend s 18. It accords with the practice of the Family Court and of courts dealing with relationship disputes in other jurisdictions; it is also consistent with the practice of the courts in a wide range of cases where time limits apply. The two-year limitation period, running from the date on which the relationship ceases, is generally a reasonable period of time both for the applicant to arrange to bring a claim and for the respondent to answer any such claim. It is, however, appropriate that the Court should retain discretion to grant leave to hear an application out of time. This discretion should continue to be exercised judiciously. The PRA aims to provide an avenue for people to adjust their financial positions within a reasonable period of time after their relationship ceases. The PRA also requires that, so far as practicable, the orders made should settle once and for all the financial position between the parties and avoid further proceedings between them.[90] This enables people to move on with their lives. In the Commission's view, while hardship should be the primary consideration, it is appropriate and just that all relevant factors are taken into account in the exercise of the Court's discretion to achieve a balance between flexibility and the necessity of bringing the financial relationships between the parties to final determination.

88. Law Society of NSW, *Submission* at 7; Equity Division of the Supreme Court of NSW, *Submission* at 23.
89. Victorian Bar, *Submission* at 20.
90. PRA s 19.

7. Just and equitable financial adjustment

- Introduction
- Overview of section 20
- Other ways of dividing up property: the FLA model
- Defining “just and equitable”
- Options for reform
- The Commission’s view

INTRODUCTION

7.1 An important objective of the *Property (Relationships) Act 1984* (NSW) ("the PRA") is to secure a just and equitable adjustment of property interests between parties to a domestic relationship, usually once that relationship breaks down. This Chapter deals with the criteria that the Courts apply when deciding whether or not to make an adjustment, and the terms of such an adjustment, under s 20 of the PRA. In doing so, the Commission considers the numerous criticisms of s 20, relating to its perceived limitations in dividing up property in a just and equitable way.[1]

7.2 This Chapter evaluates s 20 in the light of the shift in focus that our review has undergone since the release of DP 44.[2] To this end, we take account of the context in which s 20 will be operating once the reference of the State's powers comes into effect, when its application will arise predominantly in the context of same sex and close personal relationships. We also evaluate any options for reform in light of the likelihood that property settlements for married and opposite sex de facto couples will be regulated by the existing regime under the *Family Law Act 1975* (Cth) ("the FLA").

OVERVIEW OF SECTION 20

Background: Why s 20 was introduced

7.3 New South Wales was the first Australian State to give de facto couples statutory rights to seek a property adjustment order. Prior to the introduction of the PRA, a party to a de facto relationship who had no legal title in shared property had to mount complicated actions in equity to seek a beneficial share in the property. These actions were onerous, costly and often unsuccessful. Many of the equitable doctrines that were relied upon to claim beneficial interests had been developed in commercial contexts and did not translate well to personal relationships.[3] For the most part, they failed to give sufficient recognition to:

- indirect financial and non-financial contributions of a partner to the assets and financial resources of the parties, for example, by way of contributions to the general household expenses which enable the other partner to acquire assets in his or her name; and

1. See NSWLRC, *Review of the Property (Relationships) Act 1984 (NSW)* (Discussion Paper 44, 2002) ("DP 44") at para 5.40-5.61.
2. See Chapter 1 at 1.33.
3. See DP 44 at para 5.3–5.5 and NSWLRC, *De Facto Relationships* (Report 36, 1983) ("Report 36") at para 5.7 for a more detailed discussion of the equitable remedies used prior to the enactment of the *De Facto Relationships Act 1984* (NSW). See also J Wade "Discretionary property for de facto spouses: the experiment in New South Wales" (1987) 2 *Australian Journal of Family Law* 75.

- financial and non-financial contributions of one partner to the welfare of the other partner and the children of the relationship (including homemaker contributions).[4]

7.4 While many equitable doctrines were developed by the Courts in order to facilitate fairer outcomes for people in marriage-like relationships,[5] parties still faced expensive and complicated litigation with uncertain outcomes. In the past, this was especially the case for people in same sex relationships. The Courts demonstrated particular difficulty in applying equitable principles to divide up property following the breakdown of such relationships, although more recently they have displayed a greater readiness to use equitable doctrines in the context of same sex relationships in much the same way as they have typically done for opposite sex relationships.[6]

7.5 In its report, *De Facto Relationships* (Report 36, 1983) ("Report 36"), this Commission considered that the common law's failure to take into account a broader range of contributions effectively allowed the partner who acquired property in his or her name to be unjustly enriched by the unrecognised contributions of the other partner. The Commission therefore recommended that the Courts be given statutory powers to adjust legal rights in property, where it was just and equitable to do so, having regard to a wider range of direct and indirect financial and non-financial contributions than was the case under the general law.[7]

7.6 Factors the Commission considered relevant to the adjustment of property rights included direct financial contributions, physical labour in relation to building a house or working in a business, payment of household expenses, supporting the other partner while he or she studied to further a career, providing housekeeping or nursing services and caring for children. Further, the Commission made it clear that

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4. Report 36 at para 7.43.
5. See, for example, the test formulated by Deane J based on constructive trust principles in *Baumgartner v Baumgartner* (1987) 164 CLR 137 and in *Muschinksi v Dodds* (1985) 160 CLR 593. See the discussion in Report 36 at para 7.6-7.28.
6. The Courts have appeared more prepared to divide up property in same sex relationships on the basis of a resulting or express trust, or promissory estoppel, rather than applying a constructive trust: see, for example, *Harmer v Pearson* (1993) 16 Fam LR 596; *Hartigan v Widdup* [1992] ACTSC 25; *Hammon v O'Brien* (1990) DFC 95-091. More recently, Courts have divided up property following the breakdown of a same sex relationship on the basis of a constructive trust: see *West v Mead* [2003] NSWSC 161; *Penzikis v Brown* [2005] NSWSC 215. See Jenni Millbank's discussion of the development of the common law in cases involving same sex relationships in "Domestic rifts: who is using the *Domestic Relationships Act 1994*?" (2000) 14 *Australian Journal of Family Law* 163; "Cutting a different cake: trends and developments in same-sex couple property disputes" (2005) *Law Society Journal* 57.
7. This was limited to financial contributions for the acquisition of assets. See Report 36 at para 7.42 - 7.43.

there was no need to establish a connection between the contributions made and the property claimed.[8]

7.7 The Commission specifically rejected allowing a broader consideration of any matter relating to the future needs of the parties when making property orders, unlike the position for married couples under the FLA.[9] To the extent that future needs should be considered at all, the Commission recommended that they be recognised through a maintenance order, separately from an order for property adjustment. Although it acknowledged that de facto relationships resembled marriage to a certain extent, and that de facto couples were entitled to have access to a statutory regime for the resolution of property disputes when their relationships ended, the Commission was also of the view that de facto relationships should not be equated with marriage. The Commission considered that there were substantial differences between the two kinds of relationships and that the law should reflect this difference. Consequently, it recommended a more limited statutory regime for the distribution of property and financial resources for de facto couples than was then available to married couples under the FLA.

7.8 In 1999, the existing regime for property adjustment under the PRA was extended to include same sex de facto couples and people in close personal relationships.[10]

Current law: What s 20 provides

7.9 The property division scheme under the PRA allows for a court to adjust the interests in property[11] held by each party to a domestic relationship. Section 20(1) of the PRA provides that:

> *… [A] court may make such order adjusting the interests of the parties in the property as to it seems just and equitable having regard to:*
>
> *(a) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them, and*

8. Report 36 at para 7.46. Contrast *Green v Robinson* (1995) 36 NSWLR 96 where the majority (with Kirby P dissenting) held that there had to be a nexus between contributions and the superannuation entitlement. For detailed discussion, see Ch 8.
9. See Report 36 at para 7.44.
10. See *Property (Relationships) Legislation Amendment Act 1999* (NSW) Sch 1[9]. See Chapter 1 at para 1.9-1.11.
11. For the meaning of "property", see PRA s 3(1) and Chapter 8 at para 8.2-8.4.

> *(b) the contributions, including the contributions made in the capacity of homemaker or parent, made by either of the parties to the relationship to the welfare of the other party to the relationship or to the welfare of the family constituted by the parties and one or more of the following, namely:*
>
> *(i)a child of the parties,*
>
> *(ii)a child accepted by the parties or either of them into the household of the parties, whether or not the child is a child of either of the parties.*

7.10 Once the Commonwealth takes up the State's referral of legislative powers over opposite sex de facto couples,[12] s 20 of the PRA will govern the division of property with respect to same sex couples who have been in a de facto relationship for at least two years, and two adults who have been in a "close personal relationship" for at least two years.[13] Its application to opposite sex de facto couples will be very limited, and operate only in respect of orders adjusting their interests in property while their relationships are still in existence, rather than after they have broken down.[14]

7.11 Of course, in the majority of cases, parties will not take a disputed claim to court to have adjudicated according to the terms set down in s 20. Instead, they will negotiate and settle the division of their property themselves, and apply to the Court to make an order in the terms to which both have consented.[15] In such cases, there are two important incentives for parties to make use of the formal legal process set up by the PRA, in the form of consent orders made by the court, rather than relying on their own private arrangements: the first is the reassurance provided by a court-enforceable order; the second is the exemption from stamp duty arising from such a court-ordered transfer of title to property. In most cases, therefore, s 20 will not be applied to resolving disputed claims. It will nevertheless provide negotiating parties with guidance as to their legal entitlements and obligations, and provide the Courts with an overarching duty to ensure that their orders, including consent orders, are just and equitable, with regard to the factors set out in the section.[16]

How s 20 has been interpreted

7.12 DP 44 contains a full discussion of the manner in which s 20 has been interpreted. At the core of the debate is whether the words in s 20, "having regard to,"

12. See Chapter 1 at para 1.32-1.37 for the assumptions that underlie the referral of powers.
13. See Recommendation 24.
14. See para 1.33.
15. Section 38(1)(j) authorises the Court to make an order by consent adjusting financial interests.
16. See PRA s 20(1).

mean "having regard *only* to" or "having regard *principally* to" the factors contained in subsections (a) and (b).[17]

Three differing approaches to interpretation

7.13 There have been a number of widely divergent judicial findings on the correct approach to be followed under s 20. This has made it very difficult for decision-makers, practitioners and parties to reach consistent and predictable outcomes. These findings can be generalised into three differing approaches, which are examined in detail in DP 44.[18] Briefly, they are:

- The adequate compensation approach, formulated by Justice Powell in *D v McA*.[19] The applicant is required to show that his or her contributions have not already been adequately compensated during the course of the relationship. Homemaking and parenting contributions may be considered adequately compensated by the provision of "free accommodation" while the parties lived together. This approach has been criticised as devaluing the contributions of a homemaker.[20]
- The reliance and expectation approach, formulated by Justice Handley in *Dwyer v Kaljo*,[21] and since overruled.[22] The Court is not limited to considering only those matters set out in s 20 in determining what is just and equitable. Other relevant factors can also be considered, such as the length of the relationship, and the future needs of the parties. Justice Handley interpreted the section as empowering the Court to make orders to remedy any injustice a party would otherwise suffer because of a reasonable reliance on the relationship, or a reasonable expectation from the relationship, and to restore to one party benefits rendered to the other party during the relationship.
- The strict contributions approach, applied by Justice Mahoney (with whom Justice Sheller concurred) in *Wallace v Stanford*.[23] According to this approach, the powers conferred on the Court by s 20 are not "at large". The Court is confined to a consideration only of the two kinds of contributions mentioned in the section. Justice Mahoney based his approach on several factors, one of which was that s 20 was the result of this Commission's conclusion, in Report 36, that people in de facto relationships should not be equated with those who are married.

17. *Evans v Marmont* (1997) 42 NSWLR 70 at 90 (Priestley JA). Note that Priestley JA answered this question by adopting the latter interpretation, although his was a dissenting view.
18. At para 5.16-5.39.
19. (1986) 11 Fam LR 214.
20. See below at para 7.74.
21. (1992) 27 NSWLR 728 at 744-746.
22. See *Evans v Marmont* (1997) 42 NSWLR 70.
23. (1995) 37 NSWLR 1 at 8-13, Sheller JA concurring at 23.

Evans v Marmont: Clarifying the law?

7.14 A specially constituted five-member bench of the Court of Appeal was convened to clarify the correct approach to s 20 in the case of *Evans v Marmont.*[24] However, it is not entirely clear that it did.[25] Chief Justice Gleeson and Justice McLelland held that the contributions listed in s 20 are to be the focal point, but also suggested that other relevant factors may be considered, such as the length of the relationship, the needs of the parties and loss of opportunity costs.[26] Such considerations could not be taken into account independently but must be made in the context of assessing contributions, although their Honours did not specify how this was to be done or the weight such other considerations should be given.

7.15 In contrast, Justice Meagher, who (with Chief Justice Gleeson and Justice McLelland) made up the majority, held that "the court may have regard to each of the two [contribution] factors and *not to any other factors*".[27] His view was not explicitly endorsed by any of the other judges.

The approach since Evans v Marmont

7.16 Cases since *Evans v Marmont* have tended to favour the strict contributions approach of Justice Mahoney in *Wallace v Stanford* (affirmed by Justice Meagher in *Evans v Marmont*).[28] In *Powell v Supresencia*,[29] for example, Justice Sheller (with whom Justices Tobias and Einstein agreed) held that the PRA prescribes the focal points by reference to which it is to exercise its discretion as to what order seems just and equitable. It is by having regard only to those matters in s 20(1)(a) and (b) that the Court may adjust property interests in a just and equitable manner.

OTHER WAYS OF DIVIDING UP PROPERTY: THE FLA MODEL

7.17 There is now legislation in every Australian jurisdiction to regulate the division of property following the breakdown of a de facto relationship. There are those jurisdictions that have followed the PRA model, [30] and those that have chosen instead

24. (1997) 42 NSWLR 70.
25. O Jessep, "Financial adjustment in domestic relationships in NSW: some problems of interpretation" (A paper prepared for a seminar conducted by the NSW Law Reform Commission, Sydney, 7 July 2000) at para 2.4.
26. See (1997) 42 NSWLR 70 at 75-81.
27. (1997) 42 NSWLR 70 at 97 (emphasis added).
28. See, for example, *Rowling v Foley* (1998) DFC ¶95-204; *Wakeford v Ellis* (1998) DFC ¶95-202; *Stroud v Simpson-Phillips* [1999] NSWSC 994 (McLaughlin M); *Fuller v Taaffe* (1998) DFC ¶95-198; *Rose v Richards* [2004] NSWSC 315; *Turnbull v McGregor* [2003] NSWSC 899; *Hughes v Egger* [2005] NSWSC 18. See A de Costa, *Submission* at 12-18.
29. (2003) 30 Fam LR 463 at 471 (Shellar JA), 482 (Tobias JA concurring), 483 (Einstein J).
30. Victoria and the Northern Territory are the only jurisdictions to have followed the approach in NSW: see *Property Law Act 1958* (Vic) s 285(1); *De Facto Relationships Act 1991* (NT) s 18(1). See for example, *Robertson v Austin*

to adopt the model set up (for married couples) by the FLA.[31] In more recent years, the majority have applied the FLA model.

The FLA model

7.18 The model for property division set up under the FLA allows for consideration of a much broader range of factors than is admitted under the PRA. These factors are both retrospective, allowing for consideration of each party's past contributions, as well as prospective, allowing consideration of present and future needs.

7.19 Section 79 of the FLA authorises the Family Court to make any order altering a spouse's property interests as it considers appropriate, but may not make an order that is not "just and equitable".[32] In deciding what is just and equitable, the Court must take account of the financial and non-financial contributions of the parties to the acquisition, maintenance and conservation of the property in dispute, and the contributions of the parties to the welfare of the family, including homemaking and parenting contributions. In addition, the Court must consider:

- the effect of any proposed order on the earning capacity of the parties;
- the matters referred to in s 75(2) in so far as they are relevant;
- any other order affecting the parties or a child of the marriage; and
- any child support that has been paid or is payable.

7.20 The matters referred to in s 75(2)[33] are:

> *(a) the age and state of health of each of the parties;*
>
> *(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;*
>
> *(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;*
>
> *(d) commitments of each of the parties that are necessary to enable the party to support:*

[2003] VSC 80; *Lovegrove v Richards* [2003] VSC 465; *Gabriel v Gabriel* [2005] VSC 158; *Fiket v Linco* (1998) 145 FLR 456; *Deans v Jones* [2003] NTSC 117.

31. See *Property Law Act 1974* (Qld) s 291-309; *Domestic Relationships Act 1994* (ACT) s 15(1), s 19; *Relationships Act 2003* (Tas) s 40(1), s 47; *De Facto Relationships Act 1996* (SA) s 11. *Family Court Act 1997* (WA) s 205ZD(3), s 205ZG(4). For discussion of the South Australian scheme, see *H v G* (2005) 34 Fam LR 35.
32. FLA s 79(2).
33. Section 75 relates to claims for spousal maintenance. Section 75(2) lists the matters to be taken into account in claims for spousal maintenance (as well as in claims for property adjustment).

(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain;

(e) the responsibilities of either party to support any other person;

(f) … the eligibility of either party for a pension, allowance or benefit under:

(i) any law of the Commonwealth, of a State or Territory or of another country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates within or outside Australia; and the rate of any such pension, allowance or benefit being paid to either party;

(g) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable;

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

(i) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;

(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;

(l) the need to protect a party who wishes to continue that party's role as a parent;

(m) if either party is cohabiting with another person – the financial circumstances relating to the cohabitation;

(n) the terms of any order made or proposed to be made under s 79 in relation to:

(i) the property of the parties; or

(ii) vested bankruptcy property in relation to a bankrupt party;

(na) any child support under the Child Support (Assessment) Act 1989 *that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and*

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

(p) the terms of any financial agreement that is binding on the parties.

7.21 This list of matters, to be considered in a claim for property adjustment (as well as for spousal maintenance), is wide-ranging, and includes a 'catch-all' provision to consider anything which the justice of the case requires to be considered, under s 75(2)(o).

7.22 The Family Court has held that there are four steps that it should take before making orders for property adjustment under the FLA.[34] The first step is to identify and value the property, liabilities and financial resources of the parties as at the date of hearing. Secondly, the Court should identify and assess the contributions of the parties within the meaning of s 79(4) and determine, usually as a percentage of the net value of the parties' property, their contribution-based entitlements. The third step requires the Court to identify and assess the other matters referred to in s 79(4) including the spousal maintenance factors referred to in s 75(2) in so far as they are relevant, and determine the adjustment (if any) that should be made to the contribution-based entitlement of the parties at Step 2. Finally, the Court should consider the effect of those findings and determine what order is just and equitable in all the circumstances of the case.

The FLA model applied in other jurisdictions

7.23 The FLA model has been adopted, in various forms, in Western Australia, Tasmania, the Australian Capital Territory, and Queensland. The greatest variation is in Queensland, which makes no provision for maintenance. Overseas, New Zealand also has a scheme for property division which applies to both married and de facto couples.

Western Australia

7.24 Western Australia has afforded the same rights and obligations to de facto couples as married couples, by extending the provisions for property adjustment for married couples in its *Family Court Act 1997* (WA) to opposite sex and same sex cohabiting couples.[35] The Western Australian legislation mirrors federal family law in all respects with the exception of the recent FLA amendments to superannuation.[36]

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34. See, for eg, *Hickey v Hickey* which reiterated the four-stage approach and in particular, noted that the same four stage approach applies to superannuation interests regardless of whether a splitting or flagging order is being sought: (2003) 30 Fam LR 355 at 370 (Nicholson CJ, Ellis and O'Ryan JJ). See also *C and C* [2005] Fam CA 429 at para 21-22 (Bryant CJ, Finn and Coleman JJ).
35. Part 5A, dealing with de facto relationships, was inserted in 2002 by *Family Court Amendment Act 2002* (WA) s 47. A de facto relationship is defined as a relationship other than a marriage between two persons who live together in a "marriage-like" relationship. It does not matter whether the persons are of the

Tasmania

7.25 The Tasmanian scheme closely follows the regime set up under the FLA. Section 40 of the *Relationships Act 2003* (Tas) provides that a court may make an order for the adjustment of property interests of the parties, having regard to:

- the financial and non-financial contributions of the parties to any of their property;
- their financial resources;
- homemaking or parenting contributions made to the welfare of the family
- the nature and duration of the relationship; and
- any relevant matter mentioned in s 47.

7.26 Section 47(2) lists a set of factors that the Court may take into account when making an order for maintenance. These substantially replicate the factors in s 75(2) of the FLA.

Australian Capital Territory

7.27 The powers of the Court under the *Domestic Relationships Act 1994* (ACT) to alter the property interests of parties to a domestic relationship are also based on the FLA model[37] albeit with a less extensive list of maintenance factors.[38] Under s 15, the Court must make an order that is just and equitable having regard to the nature and duration of the relationship, the financial and non-financial contributions of the parties to property or financial resources, contributions to the welfare of the other party or to any child of the parties, including homemaker contributions, any relevant s 19(2) matters, and any other matters the Court considers relevant. The s 19(2) factors are an abbreviated list of the spousal maintenance factors found in s 75(2) of the FLA.

7.28 In the first case decided under the ACT legislation, the ACT Supreme Court stated two principles: first, that, in matters under the *Domestic Relationships Act 1994*, recourse can and should be had to appropriate cases under the FLA, and, secondly, that the constraints on matters that the Court may have regard to under the New South Wales legislation do not similarly constrain the ACT court.[39]

South Australia

7.29 Section 11 of the *De Facto Relationships Act 1996* (SA) closely resembles s 20 of the PRA in its focus on the contributions of the parties as matters that the

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same or opposite sex, or if they are married to someone else or in another de facto relationship: see *Interpretation Act 1984* (WA) s 13A(1), (3).

36. This is due to the regulation of superannuation by the Commonwealth. In order to overcome this difficulty, the Western Australian government has referred powers to the Commonwealth in respect of de facto relationships in so far as it concerned the treatment of superannuation interests on relationship breakdown: see Chapter 8.
37. *Domestic Relationships Act 1994* (ACT) s 15.
38. *Domestic Relationships Act 1994* (ACT) s 19.
39. *Ferris v Winslade* (1998) 22 Fam LR 725 at 731-732 (Cooper J).

Court is required to consider when making an order for the adjustment of property. However, s 11(1)(d) of the South Australian Act expressly allows for the Court to consider "other relevant matters".

Queensland

7.30 The *Property Law Act 1974* (Qld)[40] bases its property division scheme on the FLA model, with one major difference. It confers no rights on de facto couples to make a claim for periodic maintenance orders.[41] It includes consideration of factors very similar to the spousal maintenance factors in the FLA, but these are to be taken into account, where relevant, in the determination of a claim for property adjustment. Like the FLA, under the Queensland Act, the Court may make any order it considers "just and equitable" to adjust the property interests of either or both spouses[42] having regard to the parties' financial and non-financial contributions to the property[43] and their (or a child of the parties') contributions to the welfare of the family.[44] It may then make a further adjustment to the contributions-based entitlement of the parties based on matters that are essentially the same additional factors that the Family Court may take into account under s 75(2) of the FLA.[45]

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40. The *Property Law Act 1974* (Qld) was amended in 1999 by the *Property Law Amendment Act 1999* (Qld) to extend the statutory rights to bring a claim for property adjustment to same sex de facto couples. The amendments were in part based on the extensive work of the Queensland Law Reform Commission in the 1990s, which considered various models of property division: Queensland Law Reform Commission, *De Facto Relationships* (Report 44, 1993) at 48-49.
41. In its 1991 discussion paper, the Queensland Law Reform Commission said that because the legislation was concerned with beneficial entitlements to property it may be inappropriate to allow periodic maintenance to be awarded against de facto partners: Queensland Law Reform Commission, *Shared Property* (Discussion Paper 36, 1991) at 59. However, later publications by the QLRC recommended that the legislation cover maintenance because of the serious injustices that could arise if it were not available, especially if one partner had assumed a homemaking role: QLRC Report 44 at 70; Queensland Law Reform Commission, *De Facto Relationships* (Working Paper 40, 1992) at 48. This is despite arguments against including maintenance, such as that de facto couples have not made a life-long public commitment to support each other, that some have actually consciously avoided legal obligations and that there is a trend away from ordering long-term spousal maintenance upon marriage breakdown: QLRC Report 44 at 70. See Ch 10 for further discussion.
42. *Property Law Act 1974* (Qld) s 286(1). *Acts Interpretation Act 1954* (Qld) s 32DA, in combination with *Property Law Act 1974* (Qld) s 260 define a "de facto spouse" as either one of two persons, whether of the same or opposite sex, who are living or have lived together as a couple.
43. *Property Law Act 1974* (Qld) s 291. The provision expressly includes the financial contributions made by or for a child of the parties, and also their child's non-financial contributions (provided they are substantial).
44. *Property Law Act 1974* (Qld) s 292.
45. See *Property Law Act 1974* (Qld) s 297-308.

7.31 While such an approach emphasises the "clean break" objective, it has a major disadvantage, namely that it presupposes that there are sufficient assets to distribute at the end of the relationship to ensure a just and equitable outcome. Where there are few assets to divide, there is little or no relief for the economically weaker party even if the other party has a high income or high-income earning potential.

New Zealand

7.32 New Zealand provides for a single scheme to apply to the division of property for married and de facto couples.[46] The *Property (Relationships) Act 1976* (NZ),[47] (formerly the *Matrimonial Property Act 1976*) applies to married couples, civil union couples and de facto couples, including same sex couples.[48] When a marriage, civil union or a de facto relationship breaks down, the starting point under the legislation is of an equal division of *relationship* property,[49] defined as property acquired during, or in contemplation of, the relationship. The starting point of equal division also applies to the family home and family chattels, whether or not they were acquired by one party alone before the relationship.[50] The Court can depart from this starting point if there are extraordinary circumstances that make equal sharing unjust, in which case each party's share will be determined according to their contributions to the relationship.

7.33 The starting point of equal sharing does not apply to short-term de facto relationships, lasting less than three years, unless there is a child of the relationship or the applicant has made a significant contribution to the relationship and the Court is satisfied that failure to make the order would result in serious injustice.[51] If the equal sharing starting point does not apply, the property is to be divided according to the

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46. Unlike NSW, New Zealand is not fettered by a constitutional division of powers that reserves all matters relating to marriage to a federal government, implicitly leaving relationships outside marriage to the domain of the State.
47. It was amended by the *Property (Relationships) Amendment Act 2001*(NZ) s 5(2).
48. There was some opposition to including a regime for the division of property for de facto couples in the same piece of legislation that provides a property regime for married couples. The Select Committee subsequently recommended that the terminology distinguish between the two groups. New Zealand, Government and Administration Select Committee, *Report on Matrimonial Property Amendment Bill (1999)*. This was implemented in the Act as passed.
49. *Property (Relationships) Act 1976* (NZ) s 11.
50. *Property (Relationships) Act 1976* (NZ) s 8. Note that special provision is made where both parties enter the relationship as owners of a residential property, yet only one residence is used as the family home. The Court can make an order in whatever terms it considers just to compensate the party who owns the family home for the consequences of that property, but not the other party's, being treated as relationship property under the Act: *Property (Relationships) Act 1976* (NZ) s 16.
51. *Property (Relationships) Act 1976* (NZ) s 14A(2).

contributions each of the partners has made to the relationship.[52] Special rules also apply to marriages and civil unions that have lasted less than three years.

7.34 Another significant development in the legislation is the power of the Court to make a further adjustment to redress any economic disparities between the parties. Section 15 allows the Court to award a lump sum payment (in addition to the initial division of property) where it is satisfied that the income and living standards of one partner are likely to be significantly higher than the other because of the effects of the division of functions within the relationship while the partners were living together.[53] The factors that the Court may consider when making such an order include the parties' earning capacity, whether they have ongoing daily care of a child of the relationship and any other relevant factor.[54]

7.35 Separate property is defined as any property that is not relationship property. This mostly includes property acquired by either party while they were not in the relationship,[55] but can also include inheritances and gifts received during the relationship.[56] At the end of the relationship, separate property is held by the party who acquired it, unless it has been transformed into relationship property. This occurs when contributions of the other party, or the application of relationship property, has resulted in an increase in the value of the separate property, in which case the increase is treated as relationship property.[57]

DEFINING "JUST AND EQUITABLE"

7.36 Historically, the common law, and, subsequently, legislation, justified the adjustment of legal title to property, following the breakdown of a domestic relationship, on the basis that to do so was just and equitable. But what constitutes "just and equitable" in this context, or what should constitute "just and equitable"? As submissions have pointed out, legislation authorising the Courts to alter property entitlements in the interests of fairness should be based on a coherent view of the reasons why it is fair to do so, and the principles that define the notion of "just and equitable" in these circumstances.[58]

7.37 As the Courts have interpreted it,[59] the PRA defines the notion of "just and equitable" in much narrower terms than does the FLA: the PRA recognises only

52. *Property (Relationships) Act 1976* (NZ) s 14A(3). The situation regarding marriages of short duration is slightly different, See *Property (Relationships) Act 1976* (NZ) s 14.
53. *Property (Relationships) Act 1976* (NZ) s 15(1).
54. *Property (Relationships) Act 1976* (NZ) s 15(2).
55. *Property (Relationships) Act 1976* (NZ) s 9.
56. *Property (Relationships) Act 1976* (NZ) s 10.
57. *Property (Relationships) Act 1976* (NZ) s 9A.
58. Equity Division of the Supreme Court of NSW, *Submission* at para 6-7; P Parkinson, *Submission* at 4-5.
59. See para 7.12-7.16.

previous contributions as justifying an adjustment of title, but does not recognise that a person's future financial needs may also make it just and equitable to divide up property. The justification for this narrower view of what is just and equitable has been that de facto relationships are not the same as marriages, and do not bring with them the same rights and obligations with respect to property division.[60]

Defining "just and equitable" in terms of past contributions: the PRA model

7.38 Section 20 of the PRA permits the alteration of title to property if it is just and equitable to do so, on the basis that the legal title does not properly reflect the financial and non-financial contributions each party has made to the property, or to the welfare of the family.

7.39 Disparity between legal title and actual contributions is as much an issue for de facto relationships as marriages, and as relevant to same sex relationships as opposite sex ones. It may also arise in close personal relationships. In one recent case, involving a lesbian relationship that lasted 15 years, one woman had made the bulk of the financial contributions, while the other had made the major non-financial contributions through the care of their two children.[61] In another case, again involving a lesbian relationship, where legal title to the property was held solely in one woman's name, the Court adjusted entitlements to the property in recognition of the financial contributions made by the other woman.[62]

7.40 Financial contributions in short relationships are likely to be much more important than those made in comparatively long relationships.[63] This is because the Court considers them by comparison to the financial and non-financial contributions of the other party.[64] In short relationships, the period of the relationship may not be long enough to enable the major financial contributions of one party to be effectively or substantially offset by the contributions of the other. Inevitably, much depends on the nature and quality of the offsetting contributions made by the other party.

7.41 In its submission, the Equity Division of the Supreme Court asserted that the mere making of a contribution by a party to a domestic relationship in some way, and at some stage during the relationship should not, of itself, entitle them to be reimbursed for that contribution when the relationship breaks down. It is argued that there may well be many instances where one party has spent his or her own money on occasion and for some purpose and that this has not amounted to an increased level of ownership in either property or an asset. This does not mean that it will be just and equitable to repay or compensate the party for this amount in all cases. In other

60. See Report 36 at para 5.56-5.57.
61. See *Millar v Smith* [2003] NSWSC 161.
62. *Penizikis v Brown* [2005] NSWSC 215.
63. *DDM and GAJ* [2003] FMCAfam 229.
64. See, for example, *Bremner* (1994) 18 Fam LR 407; *Pierce* (1998) 24 Fam LR 377.

words a mere contribution will not automatically give a basis for the transfer of property on just and equitable grounds.[65]

7.42 The assessment of non-financial contributions, including homemaking and parenting contributions, is not an exact science. As Justice McLelland noted in *Davey v Lee*:

> *Typically a de facto relationship involves the mutual conferring and receiving of benefits, (be they emotional, social, sexual or intellectual) of a kind which are incapable of evaluation in monetary terms, as well as other benefits which are, or may be in varying degrees, capable of such evaluation. Often, one or other, or both, of the parties may value non-material contributions to the welfare of the family more highly than material contributions. These, however, are not matters which lend themselves to detailed examination and analysis by a court.*

7.43 His Honour went on to say that attempting to value contributions to the welfare of the family by reference to what it costs to hire a housekeeper or nanny is artificial and inappropriate. In most couple families with children, homemaking and parenting duties are generally shared, although often one partner is found to do more than the other. In the light of this, Justice McLelland said "it would rarely be feasible or realistic to attempt to evaluate such relative contributions in monetary terms, or in isolation from the nature and incidents of the relationship as a whole". Rather, his view was that the Court "is required to make a holistic value judgment" in the exercise of a general discretionary power.

7.44 The task of the Court in proceedings under s 20 "is not akin to an accounting exercise".[66] Ultimately, it is difficult for the Court to say with any precision why non-financial contributions are valued in a particular way. As Justice White said, in *Hughes v Egger,* "the criteria to guide a discretionary judgment are so general that in the final analysis, the outcome depends on the judge's impression of a mix of factors whose weight cannot be exactly weighed". [67]

Criticisms of the PRA's approach

7.45 It seems uncontroversial to alter legal interests in property so that they more accurately reflect the contributions made by parties to a domestic relationship. At least, all relationships legislation in Australia dealing with the division of property requires consideration of contributions made. What is controversial about the PRA's current approach is its focus solely on past contributions, and the concern that such a

65. See Equity Division of the Supreme Court of NSW, *Submission* at para 12.
66. *Davey v Lee* (1990) 13 Fam LR 688 at 689 (McLellan J), referring to the judgment of the Full Court of the Family Court in *Ferraro v Ferraro* (1993) FLC ¶92-335 at 79,578.
67. [2005] NSWSC 18 at para 160.

limitation is incapable of achieving consistently just and equitable divisions of property. In particular, the following criticisms have been made.[68]

Uncertainty in the law

7.46 The controversy surrounding the interpretation of s 20 has given rise to uncertainty and instability in practice.[69] The decision in *Evans,* which was intended to resolve the controversy, has failed to do so, though it does appear that the strict contributions-based approach has found most favour in subsequent cases.

Failure to allow consideration of future needs

7.47 If a strict contributions approach is indeed the correct approach, or at least the most favoured one, this calls into question the ability of s 20 to allow for a just and equitable distribution of parties' property. A strict contributions approach is retrospective and does not allow account to be taken of the present and future economic needs of the parties, where those needs have arisen as a direct consequence of the relationship.

7.48 A number of submissions supported amending s 20 to give the court power to consider parties' future economic needs.[70] On the other hand, the Equity Division of the Supreme Court submitted that legislation should not require consideration of all future needs, but only those which have arisen as a result of a party being in the relationship. The Equity Judges stated that s 20 often requires the court to play a balancing game, and it is not always as simple as taking assets from one party to accommodate for the other's future needs; it may require a more subtle, albeit principled, approach of moderating and negotiating future needs.[71]

Economic disparities between the parties

7.49 Another criticism of the strict contributions approach, related to the issue of the failure to take future needs into account, is that it is incapable of properly redressing the economic disparities between the parties that arise out of the relationship.[72] The financial circumstances that parties find themselves in at the end of their relationship

68. See DP 44 at para 5.40-5.61.
69. J Mee, "Property rights and personal relationships: reflections on reform" (2004) 24 *Legal Studies* 414 at 438.
70. Lesbian and Gay Solidarity, *Submission* at 4; Women's Legal Resources Centre, *Submission* at 13-14; D Farrar, *Submission* at 3; Gay and Lesbian Rights Lobby Inc, *Interim submission* at 4-5; A de Costa, *Submission* at 19-20; NSW Young Lawyers, *Submission* at 7; Law Society of NSW, *Submission* at 5. See too the comments of the Queensland Law Reform Commission in relation to the NSW model under s 20 of the PRA. The QLRC described s 20 as having "serious defects", and considered that its proposed model, incorporating provision for consideration of present and future needs, assured "fairer and more equitable" orders: Queensland Law Reform Commission, *De Facto Relationships* (Report 44, 1993) at 4-5.
71. Equity Division of the Supreme Court of NSW, *Submission* at 8. See too Victorian Bar, *Submission* at para 41, and P Parkinson, *Submission* at 15.
72. See discussion in DP 44 at para 5.41-5.43.

are often a consequence of the roles and responsibilities they undertook during the relationship, particularly if, for example, one of the parties took time out of the workforce, or accepted part-time work, to take on the primary care of children. This will likely affect not only the party's present income, but also that party's future earning capacity, given the interruption to his or her career.

7.50 A number of submissions agreed that the PRA should be capable of redressing the economic disparities between the parties at the end of a relationship, provided such disparities are shown to have arisen directly as a result of the parties' roles in the relationship,[73] though it may be an "ambitious exercise" and dependent on there being substantial property.[74] The Victorian Bar submitted that financial compensation may be appropriate where there is evidence that the parties agreed that one would undertake a less financially rewarding role, and both acted on this agreement, to the disadvantage of the first partner. But they warned:

> *... for courts to set about compensating a party without establishing the linkage between the role in the relationship (as compared with that party's own strengths or weaknesses) is to compensate a party merely for having been in a domestic relationship. The task of compensating for the financially disadvantageous role should be undertaken conservatively, and the principles need to be stated clearly.*[75]

7.51 Adjustment should only be made to accommodate the negative consequences resulting from the relationship, not to correct injustices which "have their source elsewhere".[76] Similarly, New South Wales Young Lawyers stated that the PRA is not an appropriate tool to address the circumstances arising from income disparities due to gender stereotyping.[77]

7.52 An alternative way of compensating for economic disparities arising out of the relationship is through an award of maintenance.[78] The advantage of this is that compensation would be feasible even where there was modest property at stake provided of course, that the paying party had an income. On the other hand, using an award of maintenance to compensate for taking on a less financially rewarding role in the relationship is not strictly consistent with the clean break principle.[79]

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73. Victorian Bar, *Submission* at para 41; Gay and Lesbian Rights Lobby Inc, *Interim submission* at 4-5.
74. Victorian Bar, *Submission* at para 41. The submission from the NSW Law Society took an opposite view. It considered the PRA an inappropriate tool to compensate for the parties' economic disparities.
75. Victorian Bar, *Submission* at 15.
76. At 10.
77. NSW Young Lawyers, *Submission* at 7.
78. Victorian Bar, *Submission* at para 41.
79. See Chapter 10.

Broadening "just and equitable" to include FLA matters?

7.53 Should the PRA be amended to allow, or require, express consideration of a party's present and future circumstances and needs? Over 20 years ago, this Commission justified a restrictive approach on the basis that de facto couples should have fewer rights and obligations with respect to property division than married couples. In more recent years, the PRA's restrictive approach has been compared with the more liberal approach under the FLA model, in terms of which is better able to fulfil its aim of achieving a fair division of property for de facto couples.[80] To this end, the arguments for and against conferring more limited rights on de facto couples have been assessed in general terms, rather than as they apply to the context of same sex and close personal relationships.

Arguments for conferring more limited rights on de facto couples

7.54 The principal arguments for conferring more limited rights on de facto couples generally, include the following.

- There is a qualitative difference between marriage and cohabitation, in so far as marriage involves a public commitment and conscious decision to enter a relationship of interdependence. It cannot be assumed that those entering a de facto relationship expect the same level of commitment and interdependence. Some may make a deliberate decision not to marry in order to avoid the dependence and obligations that, in theory at least, arise from marriage. The law should not impose the same considerations in the adjustment of property following the breakdown of that de facto relationship as it imposes on a marriage. Professor Parkinson submits that the intentions about property sharing of those entering a marriage are not the same as those entering a de facto relationship:[81]

  > *It is far from clear that the majority of de facto couples intend to engage in a complete socio-economic partnership from the inception of the relationship in which what is mine is all yours and what is yours is all mine.*

- If de facto relationships are equated with marriages in so far as they impose the same rights and obligations for property division, then there may be less incentive for people to marry, which in turn erodes the institution of marriage.

Arguments for conferring the same rights on de facto couples

7.55 In light of the shift in social trends since the PRA's inception, the principal arguments for conferring on de facto couples generally, the same rights and obligations as married couples include the following.

- In so far as is relevant to questions of property adjustment, there is no real difference between marriage and a de facto relationship. As with marriage,

80. Queensland Law Reform Commission, *De Facto Relationships* (Report 44, 1993) at 4-5, 48-55.
81. See P Parkinson, *Submission* at 4.

people entering into a de facto relationship may have varying motives, intentions and expectations. Some de facto relationships may be relatively short-term, and casual, but others may last for decades. The relevant feature of both types of relationships, in so far as devising a property adjustment scheme is concerned, is a degree of interdependence, both emotional and financial. This characteristic may not bear any link to the commitment that the parties had to each other at the beginning of the relationship, nor their intentions upon entering the relationship. There are no doubt a number of couples who choose to live together for a variety of reasons without the express intention, at the time, to make a life long commitment to each other. It is arguable that, the longer a de facto relationship continues, the less important the parties' original intentions are, especially for those who subsequently have children.

- People in de facto relationships are just as likely as their married counterparts to face economic disparities and future financial needs arising from the roles and responsibilities they have undertaken while in the relationship. This is especially so for those who have taken on the primary care of a child or children. A scheme that recognises only past contributions is incapable of achieving equity in all such cases.
- Society has demonstrated an increasing acceptance of de facto relationships, with more and more couples choosing to live in de facto relationships either as a prelude to, or instead of, marriage.[82] The law should be available to help all those who need assistance in sorting out their lives after the breakdown of their relationship, and should seek to achieve fairness in all such cases, irrespective of the type of relationship involved. It is not true that in doing so, the law will make people alter their ways of life or change their moral codes:

  > *One of the fundamental misconceptions which plagues me is the failure to understand that heterosexual family life in no way gains stature, security and respect by the denigration or refusal to acknowledge other forms of family.*[83]

Applying the arguments to same sex and close personal relationships

7.56 The above discussion examines the arguments for and against conferring broader rights on de facto couples with respect to property division legislation, by comparisons with married couples. But, assuming that any reforms to the PRA will apply predominantly to people in same sex and close personal relationships, what relevance will these arguments continue to have?

82. See para 1.49.
83. See A Nicholson, "The changing concept of family: the significance of recognition and protection" (1997) 6 *Australasian Gay and Lesbian Law Journal* 11 at 24.

Same sex relationships: What do they look like?

> *Look around. Sex, Friendship, Loss, Fun, Violence, Love, Boredom, Breakfasts, passion, need and ecstasy. These are our relationships.*[84]

7.57 What do same sex relationships look like? Do they share any general features that may have a bearing on the direction which reform to property division legislation should take?

7.58 Is it possible to generalise about any type of human relationship in any sensible way? Like heterosexual relationships, there is bound to be great diversity in the range of same sex relationships to which s 20 will apply (although all will involve a period of co-habitation, as currently required by the legislation). Some will be relatively brief (although all will last for at least two years),[85] while others may span several decades. Some may have started with a mutual intention to form a life-long partnership, while others may have formed from less ambitious beginnings. There may be a large pool of assets, or there may be next to nothing. The extent of financial dependence, and interdependence, between partners will vary, as will the degree to which their assets have become enmeshed. A single legislative provision must accommodate all these permutations. Thus far, the same can be said of any legislative provision dealing with the adjustment of property interests following the breakdown of a domestic relationship, whether it be a same sex or opposite sex de facto relationship, or a marriage.

7.59 In Chapter 1, the Commission referred to the scant statistical data relating to same sex couples in Australia, from which it is difficult to draw any reliable conclusions about relevant characteristics.[86] In the Australian Capital Territory, Professor Jenni Millbank conducted an empirical study of gay and lesbian couples who made use of the property adjustment scheme under the *Domestic Relationships Act 1994* (ACT).[87] However, the number of such cases was so small that she could not draw any definitive conclusions about the types of relationships to which the legislation is being applied,[88] except that there was a relatively low use of the Act by same sex couples. Elsewhere, Professor Millbank has described certain features as common among same sex couples, such as that same sex couples often own property in only one partner's name, even when both contribute to the mortgage, and

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84. See Lesbian and Gay Legal Rights Service, *The Bride Wore Pink: Legal Recognition Of Our Relationships* (2nd ed, Discussion Paper, a project of the Gay and Lesbian Rights Lobby, 1994) at section 5.
85. Because of the two years co-habitation requirement under the legislation: see Chapter 6.
86. See para 1.46-1.48.
87. J Millbank, "Domestic rifts: who is using the *Domestic Relationships Act 1994* (ACT)?" (2000) 14 *Australian Family Law Journal* 1.
88. From November 1994 to May 1999, there were a total of 237 court files relating to claims for property adjustment under the *Domestic Relationships Act*, only five of which involved same sex couples (all of these being lesbian couples): see J Millbank, "Domestic rifts: who is using the *Domestic Relationships Act 1994* (ACT)?" (2000) 14 *Australian Family Law Journal* 1 at 4, 6-8.

same sex couples quite often have openly non-monogamous relationships that are nonetheless committed and stable.[89]

7.60 Of the same sex couples who participated in the Commission's focus groups, financial arrangements varied between couples. The most common arrangements were (i) pooling of all money and (ii) payment of equal contributions into a joint account, out of which came all shared expenses (mortgage, groceries, utility bills, etc). Only one couple in each focus group had totally separate finances.

7.61 In the Sydney focus group on property rights, about half of the participants owned their property with their partner, mostly as joint tenants. Two women said they had bought as joint tenants, but had contributed to the purchase price proportionate to their income. They also owned separate property, and one said that she had also bought a holiday house that she put into her partner's name for business reasons, in order to protect her assets from possible legal action.

7.62 The incidence of children, and child-caring responsibilities, in same sex families is also relevant to the question of property adjustment. It seems that a greater proportion of same sex relationships are childless, in contrast with opposite sex relationships, and, of course, the traditionally gendered division of roles with respect to child-raising does not readily transfer to same sex relationships. Nevertheless, while there may be fewer same sex couples with children, there is still a significant proportion of same sex households with children reported.[90] One study, commissioned by the Gay and Lesbian Rights Lobby, suggests that lesbian co-parents have a more even distribution of domestic labour than their heterosexual counterparts, that co-mothers are less likely than heterosexual fathers to be in full-time employment, and that co-mothers generally undertake a higher burden of child care than heterosexual fathers, although mothers tend to take a somewhat higher burden of child care than co-mothers.[91] It is possible that, at least for some of these families, one partner will have borne the majority of child-care responsibilities, with the consequent compromise to his or her earning capacity, and future needs with respect to the continued care of those children. Moreover, the financial impact of separation may be more greatly felt by a lesbian or gay man who has cared for children than his or her heterosexual counterpart, in so far as there may be no legal obligation on the

89. See J Millbank, "Cutting a different cake: trends and developments in same-sex couple property disputes" (2005) *Law Society Journal* 57 at 59.
90. See para 1.48, which refers to statistics collected from the 2001 census, recording that around 20% of lesbian households, and 5% of gay households, contained children (though the data does not detail whether these are children from previous relationships). In contrast, just less than half of opposite sex households include children. See also J Millbank, *Meet the parents: a review of the research on lesbian and gay families* (Gay and Lesbian Rights Lobby (NSW) Inc, 2002) at 6, 18-21.
91. See J Millbank, *Meet the parents: a review of the research on lesbian and gay families* (Gay and Lesbian Rights Lobby (NSW) Inc, 2002) at 10-11.

same sex partner to pay child support if the law does not recognise him or her as a co-parent.[92]

7.63 Although it seems impossible to generalise about same sex relationships, there are two common features that set them apart from opposite sex relationships in ways that may be relevant to considerations of property division:

- lesbians and gay men cannot marry; and
- same sex relationships remain in the minority in our society, and occur against a social background in which homophobia and social disapproval continue to be felt, to greater and lesser degrees.

7.64 An important argument against conferring on heterosexual de facto couples the same rights and obligations as married couples,[93] is that de facto couples have opted out of the more formal type of relationship, with its public and deliberate statement of intent to commit to a partnership. This argument does not transfer easily to same sex relationships, because people in same sex relationships in Australia are not legally permitted to marry. Consequently, nothing can necessarily be inferred from the fact that a same sex couple lives in a de facto relationship, as no other option is available to them. Regardless of their intentions or expectations at the outset of their relationship, they do not have the choice of whether or not they want to make a public commitment to each other through marriage. The closest thing to marriage for same sex couples is a commitment ceremony or, if the Commission's recommendation is adopted,[94] registration of their relationship.

7.65 Homophobia continues to be part of Australian society, and homophobic violence has been described as "pervasive".[95] Homophobia, and fear of social (and/or family's) disapproval, may have an effect on same sex couples in several ways that are relevant to questions of property distribution. First, it may discourage them from publicly acknowledging their relationships, and/or from living with each other, even though, in other respects, their relationships bear the features of a "de facto relationship". This is an issue relating to the ways in which the law gives recognition to particular types of relationships, and is discussed in Chapter 2. Secondly, homophobia may provide a strong disincentive to same sex couples from making use of formal legal mechanisms under the PRA to adjust their property entitlements, following the breakdown of their relationship. They may be concerned, for example, that they will be forced to come out to their families, or the general public, by making use of the PRA,[96] or they may have a general distrust of the legal system's ability to deal with their relationship in a fair, unprejudiced manner. Lastly, as a minority group

92. See Chapter 5.
93. See para 7.54 above.
94. See para 4.33 and Recommendation 15.
95. See J Millbank and K Sant, "Same sex relationship recognition in NSW" (2000) 22 *Sydney Law Review* 181 at 199.
96. This was one reason suggested by Professor Millbank for the under-use of the ACT legislation: see J Millbank, "Domestic rifts: who is using the *Domestic Relationships Act 1994* (ACT)" 3 *Australasian Journal of Family Law* 163.

facing social intolerance, some same sex couples may consider it important that they remain independent from the mainstream, avoiding regulation by a legal system that accepts as its norm heterosexual relationships.[97] These issues are relevant to considerations both of ways in which the PRA can be made more accessible to people in same sex relationships,[98] and ways to allow couples to make their own choices about the division of their property, with appropriate safeguards, independently of the system under the PRA.[99]

Close personal relationships

7.66 If it is difficult to generalise about the various types of same sex relationships to which s 20 of the PRA will apply, it is perhaps even more difficult to do so for close personal relationships. There is very little case law or commentary to provide guidance as to the types of relationships that will come within the scope of s 20 under this category. It is typically described as encompassing carer relationships; certainly, when the concept of a "close personal relationship" was introduced in Parliament, the example of the adult daughter caring for her ageing parent was evoked as an example of one such relationship. It has been suggested elsewhere[100] that the alignment of close personal relationships with traditional relationships of adult children caring for parents, and other such carer relationships, diverted the public's attention away from the more controversial recognition that was to be given to same sex relationships through the introduction of the *Property (Relationships) Act*. In this way, the category of close personal relationships became much narrower than was perhaps originally intended.

7.67 Whatever may have been the original intentions behind the introduction of this category, close personal relationships now seem most likely to comprise carer relationships. While it may be unlikely that a property dispute between a carer and his or her ageing and/or seriously ill parent or other loved one will come before the Courts while the parent or loved one is still living (as opposed to a claim against his or her estate), nevertheless s 20 of the PRA provides a framework for dividing up property between the carer and the "patient". As such, the traditional arguments for conferring more limited rights than are available under the FLA, do not readily apply to close personal relationships, as such relationships do not necessarily involve a quasi-marital or otherwise sexually intimate relationship. Instead, they will be typified by one party who is dependent on the other at all levels, including, perhaps, in terms of the management of finances, and the other party who is likely to have compromised his or her income and earning capacity to care for the other. These characteristics all raise concerns for the future needs of both parties, which could not currently be taken into account under the existing framework set up by s 20.

97. See C Caruana, "Relationship diversity and the law" (2002) 63 *Family Matters* 60 at 64-65.
98. See Chapter 1.
99. See Chapter 12.
100. J Millbank and K Sant, "A bride in her every-day clothes: same sex relationship recognition in NSW" (2000) 22 *Sydney Law Review* 181 at 203-205.

OPTIONS FOR REFORM

7.68 The preceding discussion highlights the criticisms of s 20, and its limitations in achieving equitable divisions of property. It also calls into question the continuing relevance of the arguments against conferring broader rights, as under the FLA model, in light of changes in the PRA's social context, and the characteristics of the two groups to whom the PRA will apply.

7.69 If the existing regime for property division under s 20 of the PRA were found to be no longer appropriate, there would be two options for reform:

- Adopt the FLA model, in legislation that either mirrors exactly s 79 and 75 of the FLA, or that includes some variation; or
- Formulate a new regime with an expressly specific focus on same sex and close personal relationships.

Adopting the FLA model

Advantages of adopting the FLA model

7.70 There are two important advantages of incorporating the FLA model of property division into the PRA, which can be identified in simple terms:

- The FLA model is arguably better equipped to achieve just and equitable results than the PRA because it allows consideration of a broader range of matters, including future needs of the parties. A broader discretion allows for consistently fairer results because it is better able to accommodate the varied situations arising in individual relationships.
- For the sake of uniformity, the FLA model should be applied to same sex couples and people in close personal relationships, as it will be to married couples and opposite sex de facto couples. The alternative, which is a separate regime for same sex and close personal relationships, may be perceived as unfair and discriminatory.

Criticisms of the FLA model

7.71 Despite these advantages, there are nevertheless several perceived shortcomings of the FLA model which have been previously identified, and which are equally relevant when considering a proposal to adopt the FLA model for property distribution for same sex and close personal relationships. These criticisms include the following.

7.72 The first criticism is that the FLA places *too* much discretion in the hands of the judges, by allowing consideration of such a wide range of factors. Too much discretion creates uncertainty about the law, which in turn may make disputes harder to settle. There is also the risk that individuals will be unclear about their rights under the law, and whether or not they have a legitimate claim against their former partner. Consequently, they may be more willing than they would otherwise be to concede

property in exchange for keeping children in their residence, or out of fear of violence. In response to this criticism, it has been argued[101] that there is no evidence that a large amount of discretion makes disputes harder to settle, and that the Family Court has developed a substantial body of case law to provide guidance on the exercise of its discretion. Presumably, that jurisprudence could be applied to the PRA, if it adopted the FLA model. It is necessary for courts to retain a wide degree of discretion if they are to accommodate all the varieties of facts, circumstances, and relationships that come before them in a fair manner.

7.73 The second and third criticisms relate to the contributions component of the adjustment process, and thus are equally relevant as criticisms of the current approach under s 20 of the PRA. It is argued that the assessment of contributions is "conceptually flawed",[102] that is, it is a ludicrous idea to assert that the Courts can logically compare contributions that are by their nature fundamentally different from one another. For example, how is the Court to compare, in monetary terms, a husband who sacrificed a high-earning career to spend more time with his family, with a husband who devoted most of his time to his career, and consequently contributed a large income to his family? In response to this criticism, the Family Law Council has argued that the assessment of contributions accords with public perceptions of fairness, and it is not persuaded that some other approach is demonstrably preferable.[103]

7.74 The third criticism relates to the homemaker contribution, which is a feature of both the FLA and the PRA models. The homemaker contribution requires the Court to consider the contributions of a homemaker, or parent, to the welfare of the other party, or to the children in the relationship, in the division of property. It may be difficult to assess and quantify the parties' homemaking and parenting contributions, and such an exercise inevitably relies on the subjective assessment of the trial judge. The difficulty in quantifying homemaking contributions may mean that they are inadequately recognised, particularly where the financial contributions of the other partner have been of a "special" kind.[104] Indeed, the Queensland Law Reform Commission specifically rejected the New South Wales model of property adjustment on the basis, among other things, that it undervalues homemaker and parenting contributions.[105]

7.75 Lastly, it has been argued that the FLA model cannot be based on a just foundation if it allows for any future needs to be taken into account, irrespective of

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101. See Family Law Council, *Submission on the Discussion Paper, Property and Family Law: Options for Change* (1999) at para 7.38-7.45.
102. P Parkinson, "Reforming the law of family property" (1999) 13 *Australian Journal of Family Law* 117 at 122.
103. Australia, Family Law Council, *Submission on the Discussion Paper, Property and Family Law: Options for Change* (1999) at para 13.13-13.14.
104. See I Kennedy, "Special contributions' and gender equality: recent developments in Australia and the UK" [2004] *International Family Law* 67.
105. Queensland Law Reform Commission, *De Facto Relationships* (Report 44, 1993) at 48-49.

whether or not those needs arise from the relationship. It may be questioned whether the law should allow for compensation for the misfortunes of a spouse with serious needs, where those needs have not arisen from the relationship, such as, for example, in the case of serious illness. It is argued that the future needs component of the Family Court's discretion should be confined to needs which have arisen as a result of the circumstances of the marriage, in particular a role division which leads one spouse to withdraw from participation in the workforce, usually to care for children. However, on the face of the legislation, there is nothing which requires a party's future needs to be linked to the marriage, and it certainly seems possible that the Court may take account of an unrelated future need in adjusting property interests.[106]

Devising a different model

7.76 The alternative option for reform of s 20 is to devise an entirely new model of property adjustment, in response to the perceived shortcomings of the FLA model. A separate regime for property division would then apply solely to same sex and close personal relationships.

7.77 A number of alternative models have been suggested in the past, in the context of proposed overhauls of the FLA scheme. They have included the following:

- A general rule of equal sharing of property, which can be departed from in certain, defined circumstances, including: where one party has made a substantially greater contribution to the relationship; or to take account of possible disparities in the parties' future needs and resources, which is wholly or partly attributable to a party's responsibility for the future care of the children of the relationship, or to a party's income earning potential having been affected by the relationship.[107]
- A system of adjustment which continues to take account of each party's contributions, but starts with the general presumption that parties have made equal contributions, and with a requirement to consider certain matters, including whether or not the role of parent has affected a spouse's ability to earn or derive income.[108]

106. See P Parkinson, *Submission* at 14-15, and see the decision of the Family Court cited in that submission at 15, *Braithwaite and Fox* (Family Court of Australia, unreported, 5487/1980, 7 June 2002, Frederico J). See also A Dickey, "Financial relief and nexus with marriage" (2002) 76(5) *Australian Law Journal* 287; Australia, Family Law Council, *Submission on the Discussion Paper, Property and Family Law: Options for Change* (1999) at para 7.24-7.27.
107. See Australian Law Reform Commission, *Matrimonial Property* (Report 39, 1987).
108. See *Family Law Reform Bill (No 2) 1995* (Cth), and Option 2 in AG Department's Discussion Paper: Australia, Attorney General's Department, *Property and Family Law: Options for Change* (Discussion Paper, AGPS, 1999).

- Equal division of "communal property",[109] with grounds for adjustment of equal shares to take account of certain factors, such as the parties' future needs, or economic disparities resulting from the relationship.[110]
- A method for taking account of economic disparities and future needs arising from the division of roles in the relationship, which aims to calculate and compensate for the opportunity costs of having children, by identifying economic loss, attributing it to child raising, and quantifying an amount for such loss. The 'opportunity cost' would then be charged as a "partnership debt" against the property, and repaid to the spouse who incurred the cost. The remaining property, after that debt has been repaid, is then divided equally between the spouses.[111]
- An equal division of property, which can then be adjusted to take account of four listed objectives: first, ensure the housing needs of any children of the relationship are adequately met; secondly, ensure adequate provision for the parent who has the primary care of any children of the relationship; thirdly, assist an economically dependent spouse to adjust to the breakdown of the relationship; lastly, compensate a party for serious economic disadvantage as a result of the circumstances of the relationship, subject to a defence that it would be contrary to the interests of justice to make the other party liable to pay compensation.[112]

7.78 These alternative models for property adjustment have, in turn, attracted criticism for a variety of reasons. For example, it has been argued[113] that some models, such as the method for calculating the opportunity costs of having children, would be too complicated and unworkable in practice. Other proposed models are not considered to overcome the basic objection to assessing different types of contributions. There are concerns that a proposed model may give rise to inequity in individual cases, such as the model which allows the net gains of property acquired before a marriage to be divided between parties, or a model which has a starting-point

109. "Communal property" is property acquired during the course of the cohabitation, and the net increase in value of any property owned before the relationship began.
110. See Option 2 of the 1999 Discussion Paper: Australia, Attorney General's Department, *Property and Family Law: Options for Change* (Discussion Paper, AGPS, 1999).
111. See K Funder, "Australia: a proposal for reform" in L Weitzman and M Maclean (ed), *Economic Consequences of Divorce: An International Perspective* (Oxford Clarendon Press, 1992) Ch 6. See reference to this proposal in P Parkinson, "Reforming the law of family property" (1999) 13 *Australian Journal of Family Law* 117 at 138.
112. See P Parkinson, "Reforming the law of family property" (1999) 13 *Australian Journal of Family Law* 117 at 138.
113. P Parkinson, "Reforming the law of family property" (1999) 13 *Australian Journal of Family Law* 117.

of equal shares and which may consequently place insufficient weight on the importance of future needs of the economically dependent spouse.[114]

What submissions said

7.79 The Equity Division of the Supreme Court submitted[115] that the FLA model is "not desirable" on the grounds that there are inherent differences between marriage and domestic relations. It preferred something similar to the Queensland model provided there is a clear nexus between consideration of the parties' future needs and the circumstances of the relationship. The Equity judges argued that future needs are only a proper subject for compensation to the extent that they arise from the relationship, and even so it may not be appropriate for the defendant to meet all these needs. Professor Parkinson submitted[116] that the marriage paradigm is inappropriate given that many relationships covered by the Act will be relatively short-term and transitory, and will be one of a number of such relationships entered into during a person's lifetime.

7.80 There was some support for the adoption of the FLA model.[117] New South Wales Young Lawyers reasoned that this would give scope for consideration of the future needs of the parties, in situations where entering the relationship has led to a diminished earning capacity for one of the parties.

7.81 The Gay and Lesbian Rights Lobby submitted that s 20 should take future needs into account. They prefer the Queensland model because of its clarity but are concerned that it has no specific provision for maintenance and would only support its adoption if the PRA also included specific child support provisions for the children of same sex couples to the age of 18. They conceded that future needs factors may not be appropriate for people who do not cohabit or for those who are not in intimate couple relationships.

7.82 A submission from Lesbian and Gay Solidarity argued that the general aim of this review should be to give equal rights and responsibilities to all people in relationships. As it is unlikely that any change will be effected at the federal level to bring same sex couples within the ambit of the FLA, it submitted that the PRA should be amended to mirror the FLA and thus remove any inequality at least for New South Wales residents.

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114. See N Seaman, *Fair Shares* (Sponsored by the Women's Legal Services Network, 1999) Ch 1. This study considered barriers to women obtaining equitable property settlements under the FLA.
115. Equity Division of the Supreme Court of NSW, *Submission* at para 45.
116. P Parkinson, *Submission* at 14-16, and below at para 7.84-7.85.
117. Lesbian and Gay Solidarity, *Submission* at 3; Women's Legal Resources Centre, *Submission* at 17; D Farrar, *Submission* at 3; NSW Young Lawyers, *Submission* at 7; Law Society of NSW, *Submission* at 5. The Gay and Lesbian Rights Lobby favoured adoption of the Queensland model, but with inclusion of a provision for maintenance: see *Interim submission* at 5.

7.83 Dennis Farrer,[118] a family law practitioner with 30 years' experience in the area, submitted that in his view, a "just and equitable" outcome requires the Court to have regard to those matters in s 75(2) of the FLA, or at least "the major ones". In his view, the ACT legislation, which is modelled on the FLA and contains an abbreviated list of s 75(2) factors, achieves this.[119]

An alternative approach based on parenthood

7.84 Professor Parkinson submitted that s 20 fails to address why and in what circumstances property should be adjusted at all when couples separate, whether married or not. He compared a partnership approach with a restitutionary approach and argued that the partnership approach (which assumes that the parties should share equally the fruits of their joint endeavour to the home and family) should only apply where there are children. The reason for this is not because of what each party contributed but to compensate the party who suffered adverse economic consequences from the relationship because, for example, they assumed greater caring responsibilities and depended on the security of the relationship.[120]

7.85 Professor Parkinson argued that a restitutionary approach, whereby each party gets back what he or she put in, should apply to those relationships where there are no children unless it can be demonstrated that there has been an adverse economic impact on one party for other reasons (for example, caring for an ailing partner). He also concluded that, rather than focusing on contributions, the Court should look at the issue of detrimental reliance as the primary justification for altering the parties' property rights.

7.86 The Victorian Bar made a similar recommendation. It argued that the PRA should draw a distinction between relationships where there are children and those where there are none:

> *…on the basis that the law has a greater interest in the regulation of economic outcomes for adults who enter into relationships with other adults where the welfare of children who are the progeny of such relationships is directly involved. It is submitted that s 75(2)-type factors have a clear role to play in such cases.*[121]

7.87 It stated further that:

> *… a higher level of responsibility ought to apply in cases where a child is born to the relationship, including children conceived within a relationship using an artificial conception procedure. Different considerations may apply in other domestic relationships including*

118. At the time of making his submission, Mr Farrar was the President of the ACT Law Society and the Treasurer of the Family Law Section of the Law Council of Australia.
119. D Farrar, *Submission* at 3.
120. P Parkinson, *Submission* at 18-19.
121. Victorian Bar, *Submission* at 17.

> *those involving a child who is, properly, the child of only one of the parties.*[122]

7.88 Where there were no children, the Victorian Bar submitted that it would be easier to justify the continuation of a distinction between marriage and other relationships so as to elevate marriage and recognise that some people form de facto relationships in order not to be covered by the same adjustment provisions as apply to married couples. It rejected what it saw as the Commission's two underlying assumptions for reform, namely that (a) property division between people in de facto relationships needs to be regulated by law in order to achieve a just and equitable outcome and (b) that marriage should no longer have a special status in society and law. It said that people who want to avoid the legal consequences of entering into a domestic relationship must now either form relationships that are not covered by the law or draw up expensive agreements.

7.89 Another submission similarly advocated a restitutionary approach where there are no children of the relationship. It was submitted that in these cases the partners should, on separation, take only whatever property they brought into the relationship. There should be no claim on the assets of the other partner. It was also submitted that it would be unfair to impose any obligation of support on a person in respect of any child that is not his or her own biological or adopted child.[123]

Questionnaire and focus groups

7.90 The vast majority of respondents to the questionnaire (93%) believed that the law governing the way in which property is divided on relationship breakdown should be the same for both same sex relationships and opposite sex de facto relationships.

7.91 Most respondents to the questionnaire agreed that the current range of factors that a court was required to take into account under the PRA was appropriate. Some commented that the Court should pay particular regard to whether the parties had an agreement or understanding, whether the relationship had been registered, the property owned by each person prior to the relationship, the contributions made by the parties to the property, whether either party had a disability requiring ongoing support, and the payment of child support. One respondent commented that non-couple income (such as an inheritance) should not be included in the pool of property considered.

7.92 There was substantial support for the consideration of future financial obligations and needs in the determination of property disputes. There was also considerable support for conferring an entitlement to claim maintenance from the other person.

7.93 The comments given by respondents to the questionnaire regarding property division almost exclusively focused on the issues of equity and fairness. The general

122. Victorian Bar, *Submission* at 18.
123. G Fox, *Submission* at 2.

consensus was that all relationships, whether heterosexual or homosexual, are based on the same elements (such as love and trust) and should be recognised accordingly. In general discussion in the focus groups, participants indicated that although they did not necessarily see same sex relationships as conforming to the heterosexual paradigm, they did not think that the law should treat same sex and opposite sex relationships any differently. In relation to the factors which a court should be able to take into account when making an order for property adjustment, participants generally took a basic equality approach: that is, that same sex relationships should be treated the same as marriages. Therefore, the additional matters that may be taken into account under the FLA should also be taken into account under the PRA. Participants thought that it was appropriate to take a very wide range of factors into account and that it was better for an over-inclusive approach to be taken than an under-inclusive one. It was observed, however, that it can be very difficult to put a monetary figure on certain of the factors.

7.94 Generally, participants in the focus groups agreed that where property had been purchased together, the property should be split 50/50. Where the parties owned property before they entered into the relationship, the general view was that care must be taken to protect the rights of the legal owner.

7.95 A small number of participants had had bad experiences and cautioned others to "get a good lawyer and get good advice, and enter into a financial agreement with your partner". Another issue that was raised was the need to plan carefully against the possibility that families will try to claim an estate against the partner, often disputing the existence of a de facto relationship.

THE COMMISSION'S VIEW

7.96 The Commission has reached the conclusion that s 20 of the PRA is in need of reform, and that the preferred option for reform is to adopt the FLA model.

7.97 Section 20, in its present form, is too restrictive to achieve a consistently fair division of property in all cases. Because it focuses solely on the past contributions that each party has made, it cannot redress economic disparities that arise upon the breakdown of a relationship and which are attributable to the role that each party has undertaken during the course of the relationship, and cannot make provision for future economic needs. Section 20 should be amended in a way that allows for such considerations to be taken into account, in the interests of fairness.

7.98 There are two points worth noting about this conclusion. The first is that it is clearly based on the view that relationships outside marriage should no longer be afforded more limited rights and obligations with respect to property adjustment than marriages. While there may be a number of de facto relationships that begin without the intention, or conscious decision, to make a life-long commitment to a partnership, in the way that a marriage (in theory, at least) begins, it cannot be assumed that all de facto relationships begin with an intention to enter a relationship that is somehow less committed than a marriage. This is especially the case for people entering same sex relationships, for whom the choice between marriage and cohabitation does not exist.

Similarly, comparisons between the intentions of those entering a marriage versus a de facto relationship have no relevance for people who enter a "close personal relationship". Moreover, the original intentions and expectations of those entering a de facto, or a close personal relationship, should assume less importance if, in reality, those relationships have given rise to a degree of interdependence and intertwining of assets. To confer the same rights and obligations with respect to property on such relationships says nothing, and makes no value judgment, about marriage, but simply acknowledges the social realities of the various ways in which people structure their private lives, and aims to provide a fair legal framework to provide safeguards when relationships break down.

7.99 The second point to be made about our conclusion relates to the issue of connecting future needs and economic disparities with the relationship. It has been argued, in submissions and in the literature,[124] that it is unfair if one party must have an adjustment of property made against him or her to accommodate future needs, or compensate for economic disparities, that are not attributable to the relationship. In relation to opposite sex relationships (whether inside or outside marriage), adjustment of property interests on the basis of future need and economic disparity has traditionally been viewed as a means of compensating a party, typically the woman, who faces a diminished income and earning capacity because she has left the full-time workforce in order to care for children of the relationship. It has been questioned whether it is the role of family law to compensate people for disparities that are not attributable to a relationship, or to act as some kind of "insurance" against any type of misfortune, such as a serious illness or disability that affects earning capacity.[125] Notwithstanding such doubts, on its face, there is no requirement in the FLA to accommodate only those future needs that arise from having children, or are otherwise attributable to a marriage, and it seems possible, in theory, for an adjustment to be made to accommodate other types of future needs, such as, for example, those arising from a serious illness.

7.100 For same sex relationships, the relevance of future needs to questions of property division should be considered. For these types of relationships, the gendered division of labour apparent in more traditional families is not readily transferable. It is also possible that a greater number of such relationships will be childless than in the heterosexual population. Nevertheless, there *are* increasing numbers of lesbian couples who have children together. Moreover, a number of people in lesbian and gay relationships will have children from previous, heterosexual relationships, and individual circumstances will differ as to the degree to which those children then become a part of the new household, where one or both partners provide care. The legislative framework should be flexible enough to take account of future needs and economic disparities that arise from a division of roles in same sex relationships, just as it does for opposite sex relationships. It will be a matter for the Court to determine,

124. See above at para 7.75**.**
125. P Parkinson, "Reforming the law of family property" (1999) 13 *Australian Journal of Family Law* 117; Australia, Family Law Council, *Submission on the Discussion Paper, Property and Family Law: Options for Change* (1999).

in individual cases, whether it is just and equitable to take account of future needs that arise from situations other than those involving the care of children.

7.101 Professor Parkinson, in his submission,[126] was particularly critical of what he considered to be the Commission's insistence on affording the same treatment for all cohabiting relationships, irrespective of whether they occur inside or outside marriage. He doubted that such a policy position could recognise and respect much diversity in the forms such relationships take. He suggested that the distinction between those entering marriage and those entering a de facto relationship may still reflect, for many heterosexual couples at least, a difference in intention and expectation as to the level of their commitment to a fully interdependent life. He asserted that the Commission's approach to property adjustment was driven by a conservative conception of the division of roles and financial dependency arising from a traditional heterosexual relationship, which we are seeking to apply to different types of relationships, a large number of which are without children, and which have a high degree of financial autonomy.

7.102 We do not agree that, by embracing a model for property division that accommodates consideration of the parties' present and future needs, we are essentially reinforcing a traditional notion of a domestic relationship with little relevance to many modern relationships. Indeed, we consider that the contrary is the case. Arguments for a continuing differentiation in legal treatment of married and de facto relationships, in relation to property division, are flawed if they essentially rely on a general inherent difference between such relationships, whether or not they claim to be recognising and respecting the diversity of such relationships. By concluding that s 20 of the PRA should be reformed to include provision for consideration of present and future needs, we are opting for a more flexible legal framework which is better able to address the many different fact situations arising from the many different forms relationships now take. As we have already noted, there may be de facto relationships, perhaps particularly same sex relationships, which do not involve children, or which do not follow a traditional notion of a gendered division of roles, and for which consideration of future needs has little relevance. Some, or maybe even many, of these relationships may have begun without any real intention of a life-long commitment. The model for property division which we recommend is flexible enough to accommodate these types of relationships just as well as it can accommodate others which *do* involve children, or which otherwise give rise to economic disparities which should properly be redressed through the adjustment of property interests.

7.103 Having concluded that s 20 of the PRA is in need of reform, the Commission takes the view that the preferred option for reform is to adopt the FLA model. In doing so, we acknowledge the criticisms of the FLA model. In particular, we acknowledge the difficulties involved in quantifying different types of contributions (a criticism of equal relevance to the current PRA model), and we admit that the broader the discretion afforded to the Courts, the less certainty of outcome there may be in individual cases. This in turn may lead to difficulties in settling claims outside of court. Nevertheless, we consider that a broad discretion is necessary in order for one single

126. See P Parkinson, *Submission* at 2-4, 14-16.

framework to accommodate adequately the many different types of relationships, and fact situations that will arise. We see merit in aspects of alternative models that have been proposed, and see some advantages in recommending a legislative scheme that is tailored specifically for people in same sex and close personal relationships. Ultimately, however, it is preferable to adopt the FLA model for two reasons. First, it is the model that will be applied to the rest of the population of New South Wales. To apply some other model, which is entirely new, untried anywhere in Australia, and with no jurisprudence yet surrounding it, to same sex and close personal relationships, is likely to be seen as discriminatory, and give rise to confusion and unnecessary complexities. Secondly, the alternative models that have previously been proposed to replace the FLA model have themselves been the subject of criticism, and we are not satisfied that they would work any better in practice, or achieve any fairer results, as to warrant the imposition of a separate scheme on a select section of our community. We note that our conclusion is supported by the majority of views expressed in submissions and in consultations.

7.104 Comment should also be made about Recommendations 28 to 30. Recommendation 28 omits from the State legislation reference to the federal courts' power to make orders adjusting vested bankruptcy property in relation to a bankrupt party. Such an order could not arise under State legislation because the State does not have the power to adjust proprietary interests that vest under federal law.[127] Recommendation 29 is consistent with the Commission's Recommendation 17, to give legal recognition to the rights and obligations of functional parents and children, as well as legal parents and children. Recommendation 30 allows consideration, for example, of any obligations to pay maintenance, to safeguard against double-dipping.[128] Further qualification of the "s 75(2) factors" is recommended in the context of maintenance, in Chapter 10.

Recommendation 27

PRA s 20 should be amended to authorise the Court in its discretion to make an adjustment order that seems to it just and equitable, having regard to the circumstances listed in FLA s 79(4), and including those matters listed in FLA s 75(2).

Recommendation 28

In reproducing in the PRA the matters listed in FLA s 75(2), matters related to vested bankruptcy property, as articulated in s 75(2)(n)(ii), should not be reproduced in the PRA.

127. See para 11.19-11.21.
128. See Chapter 10.

Recommendation 29

In reproducing in the PRA those matters set out in FLA s 79(4) and s 75(2), the expressions "child of the marriage" and "children of the marriage" should be redefined as child or children of the relationship, in accordance with Recommendation 17.

Recommendation 30

In reproducing FLA s 79(4) in the PRA, s 79(4)(f) should be redrafted to refer to an order under the PRA affecting a party to the relationship, or to an order affecting a child of the relationship made under Commonwealth or State law.

8. The scope of the adjustment power

- Introduction
- The meaning of property
- Financial resources defined
- Superannuation
- Contributions made before or after the relationship

INTRODUCTION

8.1 This Chapter considers the ways in which the *Property (Relationships) Act 1984* ("the PRA") defines the terms "property" and "financial resources". It outlines the types of property that can be the subject of an adjustment order under s 20 of the PRA. In particular, it discusses the ways in which entitlements to superannuation can be brought within the adjustment scheme under Part 3 of the PRA, as well as the issue of whether parties' contributions made before or after a relationship can come within the scope of an adjustment order.

THE MEANING OF PROPERTY

8.2 Section 20 authorises the Court to adjust the parties' interests in "property". Section 3(1) defines "property" as:

> *real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action,*[1] *and any right with respect to property.*

8.3 Property which is most commonly the subject of a property adjustment order is that which is described as basic or domestic property, namely the house, car, furniture and bank accounts.[2] There are, however, also non-domestic assets that will often need to be considered, such as businesses and farms.

8.4 In addition to these more common assets, other types of property may be brought within the scope of s 20 to be made the subject of an adjustment order. These include windfalls such as lottery or gambling wins, inheritances, loans, and gifts.[3] There is no clear rule about whether such types of assets will or will not be included within the general pool of property to be divided between the parties. The issue is whether or not it is just and equitable to include them within the general property pool, and much may depend on the particular circumstances of the individual case. For example, where a lottery ticket is jointly purchased by both parties, it is more likely that the winnings from that ticket will be considered as part of the property to be divided up under s 20. If, on the other hand, the lottery ticket was purchased by one party, towards the end of or after the relationship, the Court may be less inclined

1. Other choses in action include any claims a party may have to recover a sum of money, for example insurance claims.
2. These definitions are used in G Sheehan and J Hughes, "What is a fair settlement? The division of matrimonial property in Australia" (2000) 55 *Family Matters* 28 at 31.
3. See NSWLRC, *Review of Property (Relationships) Act 1984 (NSW)* (Discussion Paper 44 , 2002) ("DP 44") at para 6.58-6.76.

to take into account the lottery winnings in the adjustment process.[4] Similarly, in the case of a gift to one party only, the Court will look at the circumstances in which the gift was made. If it is evident that it was intended primarily to benefit its recipient, then it is likely to be considered as a contribution made by that party in the adjustment process.[5]

FINANCIAL RESOURCES DEFINED

8.5 To determine whether to adjust property interests, and the terms of such adjustment, s 20(1) of the PRA requires the Court to consider financial and non-financial contributions made to property and to the parties' "financial resources". Section 3(1) of the PRA defines "financial resources" as including:

> *(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided,*
>
> *(b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the parties to the relationship or either of them,*
>
> *(c) property, the alienation or disposition of which is wholly or partly under the control of the parties to the relationship or either of them and which is lawfully capable of being used or applied by or on behalf of the parties to the relationship or either of them in or towards their or his or her own purposes, and*
>
> *(d) any other valuable benefit.*

SUPERANNUATION

8.6 The legislative definition of "financial resources" expressly includes reference to superannuation entitlements. A degree of uncertainty surrounds the way in which the Courts have approached superannuation in relation to property division under the PRA. The approach at the State level contrasts with the legislative innovations at the federal level, with the recent amendment to the *Family Law Act 1975* (Cth) ("the FLA") to allow the Family Court to split spouses' interests in superannuation. The approach in New South Wales, and the new system under the FLA, are outlined below.

4. See *Mackie v Mackie* (1981) FLC 91-069; *Wallace v Stanford* (1995) 37 NSWLR 1; but contrast *Theodoropoulos v Theodoropoulos* (1995) 38 NSWLR 424.
5. See *Fowler v Zoka* [2000] NSWSC 1117.

The practical importance of superannuation

8.7 Next to the family home, entitlements under superannuation funds are the most significant asset in most households.[6] Indeed, the less wealthy a family household is, the greater the likelihood that superannuation plays a more significant part of the household's finances.

8.8 Since the introduction of compulsory employer superannuation, access to superannuation is wide, but not universal. It is confined to Australian residents in paid employment, earning over $450 per month. Even for those in receipt of superannuation, contributions vary.

8.9 Because of the link with paid employment, it is not surprising that superannuation coverage and the level of benefits varies widely between men and women. Not only do fewer women have superannuation, the median value of their superannuation entitlements is generally much lower than that held by men.[7] Therefore, the Commonwealth's move to treat superannuation as property capable of division[8] potentially increases the degree of equity in the division of assets of divorced or separated couples.

Current treatment of superannuation under the PRA

8.10 There does not appear to have been a uniform approach in the Courts' treatment of superannuation for the purposes of property adjustment under the PRA. One line of reasoning considers entitlements to superannuation solely as a financial resource, and not as property. As such, superannuation entitlements cannot be directly affected by an order adjusting property under s 20 of the PRA. The only ways for the Courts to recognize superannuation contributions is as contribution to a financial resource. Such contribution is then recognized by the adjustment of interests in (some other) property that *is* already vested in possession at the time of the order. Alternatively, the Court could adjourn the application for adjustment until the superannuation entitlements vest in possession.[9]

8.11 Another line of reasoning maintains that entitlements to superannuation are, in fact, both a financial resource *and* property, as defined by the PRA, therefore implying that the two terms are not mutually exclusive. As property, they can be directly affected by an order for property adjustment under s 20, including an order adjusting

6. See J Dewar, G Sheehan and J Hughes, *Superannuation and Divorce in Australia* (AIFS, Melbourne, 1999).
7. See R Clare, "Women and superannuation" (Association of Superannuation Funds of Australia Research Centre, 2001), especially at 21-22.
8. See below at para 8.13-8.14
9. See *Green v Robinson* (1995) 36 NSWLR 96 at 108 (Powell JA); *Gazzard v Winders* (1998) 23 Fam LR 716 at 729 (Beazley JA).

an interest in a superannuation entitlement which has not yet, at the time of making the order, reached the stage where it can readily be converted into money.[10]

8.12 There has also been disagreement in the case law about the ways in which the Courts can recognize parties' contributions to superannuation funds in exercising their discretion under s 20 of the PRA. On the one hand, it has been held that, in order for a Court to make an adjustment of property in favour of a party, in recognition of the other party's entitlements to a superannuation fund, it must be shown that the non-member party contributed to those entitlements, rather than to any other property or financial resource.[11] On the other hand, it has more recently been held that, like any other property or financial resource, superannuation entitlements should be included in the assets considered in identifying and valuing the parties' property, and an adjustment order that takes account of the superannuation entitlements does not depend on identifying contributions as contributions made directly or indirectly to those superannuation entitlements. It is not necessary to discern a connection between a party's contribution, a piece of property, and an adjusting order.[12]

The FLA approach

8.13 Part 8B of the FLA provides for the division of superannuation entitlements between separating spouses as part of the property adjustment process. Part 8B was inserted by amendments which came into effect in December 2002.[13] These amendments were a response to perceived difficulties and uncertainties in the Family Court's approach to the adjustment of superannuation entitlements.[14] What most often happened, prior to the 2002 amendments, was that a spouse with substantial superannuation entitlements received a much smaller proportion of available assets in the expectation that he would, in future, be entitled to a significant superannuation benefit.[15] It left that party with few current assets but a large future contingency, and the other party (usually the woman with little or no superannuation entitlements, and more often than not, the resident parent of the children of the marriage post-

10. See *Green v Robinson* (1995) 36 NSWLR 96 at 113 (Cole JA); *Chanters v Catts* [2005] NSWCA 411 at para 23-24 (Hodgson JA), para 90 (Bryson JA).
11. *Green v Robins* (per Powell JA), at 729 (Beazley JA).
12. *Green v Robinson* at 103 (Kirby P (as he then was)); *Chanter v Catts* [2005] NSWCA 411 at para 21 (Hodgson JA), at 88-89 (Bryson JA), at para 120 (Hunt AJA).
13. *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth)
14. See Australia, Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, Canberra, 1998); Australia, Senate Select Committee on Superannuation and Financial Services, *Report on the Provisions of the Family Law Legislation Amendment (Superannuation) Bill 2000* (AGPS, 2001); A Nicholson, "Proposed changes to property matters under the *Family Law Act*" (Address to the NSW Bar Association, Sydney, 20 May 1999).
15. Invariably it was the husband, in full time paid employment, who held substantial superannuation interests.

separation) with a greater share of the current assets but little prospect of a future nest egg.

8.14 Part 8B expressly provides that superannuation entitlements are to be treated as if they were property[16] for the purposes of the property adjustment discretion under s 79 of the FLA, and sets out the ways in which such entitlements can be split (whether by Court order or by agreement between the parties). The Part also makes provision for the flagging of superannuation interests, where the division of the interest is deferred and a trustee of a superannuation fund will not be able to deal with that interest until the flag is lifted. The Family Court can make orders affecting third party trustees, and the *Family Law (Superannuation) Regulations 2001* (Cth) set out methodologies for calculating the amount of a superannuation interest (except where the parties agree on an amount). Part 8B is generally designed to catch all superannuation schemes.[17] A majority of the Full Court of the Family Court has recently held that, because of the way the legislation is drafted, superannuation interests are different from property as defined in s 4(1) of the FLA, and are in fact another species of asset in relation to which orders can also be made in adjustment proceedings under s 79 of the FLA.[18]

Constitutional constraints on reform of the PRA

8.15 Once the referral of powers to the Commonwealth comes into effect,[19] the Family Court will, presumably, consider claims by opposite sex de facto couples according to the new regime set up by Part 8B of the FLA. This leaves people in same sex de facto relationships and close personal relationships to have their claims for superannuation entitlements dealt with according to the (arguably conflicting) case law surrounding s 20 of the PRA. Whatever may be considered the merits or shortcomings of the FLA approach, it must be undesirable to have two, significantly different, approaches to superannuation apply to different groups in the same population. This is a strong argument in itself for reform of the PRA to adopt the same, or similar, scheme to the FLA.

8.16 Indeed, when proposing its new regime, the Commonwealth government encouraged the States and Territories to amend their de facto relationships legislation, in order that all couples whose relationships break down might be treated equally under the law.[20] The Commonwealth government does not have the power to legislate in respect of relationships outside marriage, and, in the absence of agreeing

16. See FLA s 90MC.
17. See FLA s 90MB (Part 8B generally overrides any law of the Commonwealth, States or Territories, and anything in a trust deed or other instrument).
18. See *C and C* [2005] FamCA 429, especially at para 40-45 (Bryant CJ, Finn and Coleman JJ). Contrast with the judgments of Warnick J, especially at para 90-99, and O'Ryan J, especially at para 158-159 (their Honours dissented from the majority on this point, although they agreed on the final outcome in that case).
19. See at para 1.31.
20. Australia, Attorney General's Department, *Superannuation and Family Law: A Position Paper* (AGPS, 1998) at 79.

to take up the State's referral of powers, it has no power to legislate in respect of the division of superannuation entitlements for same sex and close personal relationships. It is therefore for the State government to make these legislative changes. To do so, however, it must be mindful of the constitutional constraints on its own legislative powers. In particular, it would need to consider whether the adoption of the FLA model for splitting and flagging superannuation entitlements would conflict with Commonwealth legislation, and, for that reason, be invalid.[21]

8.17 It would be necessary for the Commonwealth to legislate to empower a Court in New South Wales to exercise similar powers to the Family Court to split or flag the superannuation interests of parties on the breakdown of a relationship. The need arises from the Commonwealth's extensive regulation of the superannuation industry.[22] Although State law can, generally, deal with superannuation to the extent to which it is capable of operating concurrently with Commonwealth law,[23] State legislation allowing for the splitting or flagging of superannuation interests would directly conflict with obligations (for example, in respect of payment and contribution and benefit accrual standards) that attach under the Commonwealth's regulatory regime.[24] That regime exempts splitting or flagging orders under the FLA from the impact of such obligations.[25] Orders made by a New South Wales Court under the PRA would require similar exemption. It is with a view to giving the Family Court of Western Australia the same powers to deal with the superannuation interests of de facto couples that Western Australia has referred legislative power to the Commonwealth in relation to the superannuation interests of de facto partners whose relationship has broken down.[26]

Submissions

8.18 Of the submissions that addressed the issue of superannuation, most agreed that the simplest and most effective way to ensure that the new superannuation splitting arrangements applied to de facto couples was for the State to refer powers to the Commonwealth.[27] The Equity Division of the Supreme Court submitted that a referral of State powers to the Commonwealth would provide benefits beyond superannuation, as it would enable custody and property matters relating to de facto relationships to be heard in the one court.

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21. See *Commonwealth Constitution* s 109.
22. The basis for Commonwealth regulation is discussed in ALRC, *Collective Investments: Superannuation* (Report 59, 1992) Ch 7.
23. For example, *Superannuation Industry (Supervision) Act 1993* (Cth) s 350; *Retirement Savings Accounts Act 1997* (Cth) s 197. See further *Attorney-General for the Commonwealth v Breckler* (1999) 197 CLR 83 at 101 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
24. For example, *Superannuation Industry (Supervision) Act 1993* (Cth) Pt 3.
25. For example, *Superannuation Industry (Supervision) Regulation 1993* (Cth) Pt 7A.
26. *Commonwealth Powers (De Facto) Relationships Act 2005* (WA).
27. NSW Young Lawyers, *Submission* at 12-13; Law Society of NSW, *Submission* at 9.

8.19 The Victorian Bar submitted that it would be prudent to wait and see how the new provisions operate in the federal sphere before adopting parallel laws in the PRA, assuming that the constitutional difficulties can be overcome. It submitted, in a more general way extending beyond the treatment of superannuation, that there should be a distinction in arrangements between families with children and those without.

8.20 The Equity Division of the Supreme Court stressed the significance of the limitations on the power of the New South Wales Parliament to make laws with respect to superannuation. New South Wales cannot make laws that are inconsistent with Commonwealth laws about the administration of superannuation. In order to implement parallel laws, and thus treat superannuation as a form of property capable of division under the PRA, rather than being simply a financial resource, Commonwealth laws would need to be amended. Any such amendment would thus require the co-operation of the Commonwealth and New South Wales legislatures. It is not an initiative which the New South Wales Parliament can achieve alone.

8.21 The judges of the Equity Division further submitted that if superannuation is presently being ignored as a factor in litigation under the PRA, this is not due to a defect in the PRA but to the legal presentation of the case. The PRA, they submit, clearly permits contributions to financial resources to be taken into account.

The Commission's view

8.22 The current uncertainty surrounding, and limitations on, the division of superannuation entitlements under the PRA is unsatisfactory, especially when contrasted with the exhaustive regime that is now set up under the FLA for married couples (and opposite sex de facto couples). While the Commission acknowledges the limitations on the State government to make unilateral legislative reform, this is an area where reform is obviously highly desirable, particularly in light of the relative financial importance that superannuation represents for many households in New South Wales. For this reason, the State government should take what steps are necessary to make such reform possible. The Commonwealth has recently been willing to make legislative amendments to include same sex couples within other areas of federal regulation, such as migration and taxation law. There is no reason why it should not be similarly open to extend reform of superannuation laws to same sex relationships. Such reform would fall well short of a general recognition of same sex relationships in federal law.

Recommendation 31

New South Wales should pass legislation to mirror the FLA Part 8B (if constitutional difficulties can be resolved).

CONTRIBUTIONS MADE BEFORE OR AFTER THE RELATIONSHIP

8.23 There has been much debate in the case law about whether financial and non-financial contributions of the kind contemplated in s 20, but made before or after the relationship, can be taken into account by the Court under the PRA.

8.24 The narrower view, espoused by Justice Powell in *Roy v Sturgeon*, was that only contributions made during the course of a relationship could be taken into account. Contributions that were made before a de facto relationship commenced, or after it ended, were held to be outside the scope of s 20 and therefore could not be taken into account. Consequently, when a de facto relationship commenced and when it ended became of critical importance to the outcome of a claim for property adjustment.

8.25 Another significant, and related, issue is how the Court should treat breaks in the relationship. At one end of the spectrum, some judges took the view that moving out of the common residence, irrespective of how long, indicated the end of the relationship. If the parties resumed cohabitation at some later stage, such resumption constituted the beginning of a second and discrete period of cohabitation. This quite restrictive approach had a number of repercussions in terms satisfying the jurisdictional requirements under the PRA, such as whether the parties satisfied the minimum two year period of cohabitation and whether a claim was brought within two years of the end of the relationship. It also had significant implications in terms of what contributions the Court could take into account when exercising its discretion under s 20.[28] By contrast, physical separation in the context of a marriage, does not in itself terminate the relationship. Only divorce will end a marriage.

When does a de facto relationship end?

8.26 Determining when a de facto relationship ends is a question of fact, and one that cannot be answered merely by the presence, or absence, of cohabitation. Although moving out of the common residence will, in many cases, be an indication of the end of a de facto relationship, periods of separation for the purpose of a holiday, business trip or due to illness will not affect the continuation of the relationship.[29] A "trial separation", usually taken when the relationship is rocky and the parties need time out from each other in order to decide whether or not to continue in the relationship, has been interpreted differently in several cases. The narrow view is that if a party decides not to live with the other and moves out, even if merely to decide whether to stay in the relationship, the relationship is considered ended.[30] The other,

28. See discussion in DP 44 at para 6.53-6.57.
29. *Howland v Ellis* [1999] NSWSC 1142 at para 38.
30. *Hibberson v George* (1989) 12 Fam LR 725, followed in *Theodoropoulos v Theodosiou* (1995) 38 NSWLR 424. But compare *George v Hibberson* (1987) DFC 95-054 (Cohen J) at first instance.

more beneficial approach, is that a small hiccup in an otherwise lengthy relationship should not be enough to terminate it.[31]

8.27 In DP 44, the Commission asked whether the PRA should be amended to provide some criteria to guide the Court when determining the date at which a relationship ends. None of the submissions which addressed this issue thought it was appropriate to prescribe in legislation what matters a Court should take into account when determining when the relationship came to an end. New South Wales Young Lawyers stated that the very nature of personal relationships makes it unsuitable to try to measure against a hard and fast rule, for example the time at which, or the way in which, they terminate. Each case needs to be considered in isolation. However, some of the factors to be considered should include the date of physical separation, whether the parties expressed an intention for the relationship to end, whether they believed that reconciliation was possible and whether they intended to attempt reconciliation. They noted that incorporating de facto and domestic relationships under the aegis of the Family Court would mean that the remedial discretion would lie in one court which could build expertise in handling similar relationship situations.[32]

8.28 The Commission agrees that it is appropriate to leave this issue as a question of fact to be determined by the Court in the circumstances of each individual case.[33] In any case, the issue appears to have been settled by the Court of Appeal's decision in *Jones v Grech,*[34] which is outlined below.

Effect of periods of separation

8.29 Until the decision of the Court of Appeal in *Jones v Grech*, there had been a wide divergence of views among judges in relation to how periods of separation between parties in a domestic relationship should be treated. The restrictive approach espoused by Justice Powell was that the Court could not have regard to contributions made prior to the commencement of a relationship.[35] Justice Bryson declined to follow this approach in *Foster v Evans*[36] as did several Family Court judges in matters heard under cross-vesting legislation.[37]

8.30 In *Jones v Grech*, the parties had been involved in a series of de facto relationships over a 32 year period from 1965 to 1997, punctuated by several breaks. At first instance, the Master formed the view that only the most recent period of cohabitation, from 1995 to 1997, could be considered in the application for a property

31. *Gazzard v Winders* (1998) 23 Fam LR 716.
32. NSW Young Lawyers, *Submission* at 9.
33. Equity Division of the Supreme Court of NSW, *Submission* at para 51.
34. (2001) 27 Fam LR 711, followed in, eg, *Greenwood v Merkel* [2004] NSWSC 43; *Hughes v Egger* [2005] NSWSC 18; *Karlos v Sarbutt* [2006] NSWCA 11.
35. *Roy v Sturgeon* (1987) 11 NSWLR 454.
36. *Foster v Evans* (NSW SC, No 4439/95, Bryson J, 31 October 1997, unreported).
37. See, for example, *Griffiths and Brodigan* (1995) 20 Fam LR 822; *Fuller v Taaffe* (1997) 23 Fam LR 702.

adjustment order as only it was brought within the limitation period. However, the Court of Appeal held that contributions made prior to that relationship, and occurring during an earlier relationship, could be considered in an application to adjust property interests.[38] In particular, Justice Ipp noted that:

> *It is not uncommon for parties to a de facto relationship to terminate their relationship and, thereafter, at a later date, to re-commence living in a de facto relationship. On occasions, the same parties may live in a de facto relationship over many intermittent periods. The question therefore arises whether, for the purposes of [the adjustment of property power], each one of the intermittent periods is to be regarded as constituting a separate and different de facto relationship, or whether the aggregate of the intermittent periods is to be considered as being one de facto relationship to which the court should have regard.*[39]

8.31 His Honour concluded that this was the proper view, as it was consistent with the legislative purpose of the PRA:

> *The purpose of the Act is remedial. It is intended to remedy injustice, inter alia, because the law prior to the Act had "the effect of permitting a de facto partner to be enriched at the expense of the contributions, whether financial or non-financial, made by the other partner". For that intention to be adequately fulfilled, it is necessary, in my view, for the contributions made by a de facto partner to be assessed by reference to the entire period of the de facto relationship, irrespective of whether it is made up of a series of broken or intermittent periods or whether it is constituted by one continuous period of cohabitation.*

8.32 Echoing the sentiments of Chief Justice Gleeson and Justice McLelland in *Evans v Marmont*, Justice Davies (who was in the majority with Justice Ipp) held that it was important, in determining whether to make an order under s 20, to look at the totality of the relationship, including events which occurred before the last period of the relationship. His Honour said:

> *The actions of the parties must be placed into context and given weight and relevance according to the incidents of their relationship over time. Including during any prior time when a relationship existed between them.*

8.33 The prevailing view, consequently, is that for the purposes of s 20, the Court must take into account the aggregate of the periods during which the parties lived in a de facto relationship regardless of whether it was made up of a series of broken periods or one long continuous period of cohabitation. All contributions made by a

38. Per Davies and Ipp JJA; Powell JA dissenting.
39. At 729.

party, whether made before the relationship began or after it ended, should be taken into account.[40]

Post separation contributions

8.34 There is now a preponderance of authority which favours the view that post separation contributions, both financial and non-financial, made in the period between separation and hearing, can and should be considered by the Court when determining whether to make a property adjustment order under s 20.[41] If there is still some doubt as to whether this is the correct view in matters brought under the PRA, amendment of s 20 as recommended by the Commission in the preceding Chapter[42] to confer a wider discretion on the Court to consider other relevant factors in property adjustment proceedings will certainly remove any such doubt. In a case under the ACT legislation, which reflects the provisions of the FLA, Justice Crespin found that there was no doubt that post-separation contributions to the welfare of a child could be considered under s 15 of the *Domestic Relationships Act 1996* (ACT).[43]

40. *Grech v Jones* at 82.
41. See, eg, *Chanter v Catts* [2004] NSW 1025 (Macready AJ); *Foster v Evans* (NSW SC, No 4439/95, Bryson J, 31 October 1997, unreported); approved by Campbell J in *Nguyen v Scheiff* [2002] NSWSC 151 at [104]-[111]. See also *Dridi v Fillmore* [2001] NSWSC 319 and *McDonald v Stelzer* [2000] NSWCA 302 (Bergin J).
42. See para 7.104 and Recommendation 27.
43. *Crellin v Robertson* [2004] ACTSC 92.

9. Domestic violence and property adjustment

- Introduction
- Experiences of domestic violence
- The Family Court's approach to domestic violence
- The approach in New South Wales
- Recognising violence as relevant to property proceedings
- Ways of taking account of domestic violence in property proceedings

INTRODUCTION

9.1 In Chapter 7, the Commission discussed the criteria which the Courts should apply when deciding what is just and equitable in the division of property under Part 3 of the *Property (Relationships) Act 1984* ("the PRA"). In this Chapter, we consider what should be the impact of evidence of domestic violence on the property adjustment process. Specifically, we ask whether the incidence, or threat, of domestic violence should be an express legislative factor that the Court must take into account when making an order under s 20 of the PRA. We examine the ways the Courts currently take account of evidence of domestic violence in the adjustment process, and in what ways they *should* take account of such evidence, if at all. This is an issue that has attracted some attention, and controversy, in the context of Family Court disputes between spouses. It has been discussed, though to a lesser extent, in the context of property disputes between de facto couples in New South Wales.

9.2 Given the State's referral of powers to the Commonwealth,[1] the main issues for the Commission to consider are:

- the incidence and nature of domestic violence in same sex and close personal relationships;
- whether, as a matter of policy, the law should recognise as relevant to the adjustment of interests in property, evidence of domestic violence in such relationships; and
- in what ways the law should take account of such evidence, with special consideration of the advantages in maintaining uniformity with the Family Court's treatment of evidence of domestic violence in this setting, balanced with arguments against adopting that approach.

EXPERIENCES OF DOMESTIC VIOLENCE

9.3 Until recently, problems of domestic violence in the gay and lesbian community were met with "an unhealthy silence".[2] While domestic violence has received increasing attention over the last few decades as a serious social problem, most of that attention has focused on violence in heterosexual relationships, predominantly violence by men against women. Yet there is now growing and more vocal concern expressed about the incidence of domestic violence in the homosexual community,

1. See *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); see para 1.33.
2. See "Domestic violence: analysis of domestic violence in lesbian communities" (March 2000) 7 *Domestic Violence Action and Resources* 4.

with a call for more research and provision of services to meet the particular needs of victims of violence in same sex relationships.[3]

9.4 There is little empirical research on the incidence of domestic violence in same sex relationships in Australia. However, there are estimates that the rate of domestic violence in gay and lesbian relationships is comparable to that in same sex relationships. At the least, the incidence of domestic violence is significant enough to be described as a major issue facing the homosexual community.[4] Yet it continues to be a problem that is largely unacknowledged, or downplayed. A number of reasons have been suggested for this.[5] For example, there are said to be certain myths surrounding same sex relationships, which serve to keep the problem of violence hidden, myths such as that violence cannot occur between two apparent equals (two men, two women), that lesbians do not engage in violent abuse because women are not violent, that men cannot be victims of domestic violence, or that violence is just a normal part of how some same sex relationships work. Moreover, in order to raise public awareness of domestic violence in same sex relationships, not only must the homophobia expressed by some sections of the general public be overcome, but the gay and lesbian community must also be prepared to acknowledge domestic violence openly as a problem. This is something that many may be reluctant to do, for fear of

3. See, for example, V McQuarrie, "When love turns bad" (Feb 1995) 141 *Outrage* 38; D Bagshaw and D Chung, "Gender politics and research: male and female violence in intimate relationships" 2000 (8) *Women Against Violence* 4 at 11-12; L Vickers, "The second closet: domestic violence in lesbian and gay relationships: a Western Australian perspective" (1996) 3(4) *Murdoch University Electronic Journal of Law*; C Renzetti, *Violent Betrayal – Partner Abuse in Lesbian Relationships* (Sage Publications, Newbury Park, 1992); K O'Sullivan, "The violent betrayal" (February 1995) *Campaign* 35; P Jablow, "Note: victims of abuse and discrimination: protecting battered homosexuals under domestic violence legislation" (1999-2000) 28 *Hofstra Law Review* 1095; G Mason, "Boundaries of sexuality: lesbian experience and feminist discourse on violence against women" (1997) 7 *Australasian Gay and Lesbian Law Journal* 41. In October 1994, a conference, Violence in Lesbian and Gay Relationships, was held in Sydney, which brought together service providers, the police, and gay and lesbian activists, to discuss the complexities of gay and lesbian domestic violence: see K O'Sullivan, "The violent betrayal" (February 1995) *Campaign* 35 at 39.
4. See L Vickers, "The second closet: domestic violence in lesbian and gay relationships: a Western Australian perspective" (1996) 3(4) *Murdoch University Electronic Journal of Law* at para 17-22; V McQuarrie, "When love turns bad" (Feb 1995) 141 *Outrage* 38; D Bagshaw and D Chung, "Gender politics and research: male and female violence in intimate relationships" (July 2000) *Women Against Violence* 4 at 11-12.
5. See, for example, L Vickers, "The second closet: domestic violence in lesbian and gay relationships: a Western Australian perspective" (1996) 3(4) *Murdoch University Electronic Journal of Law* at para 17-22; V McQuarrie, "When love turns bad" (Feb 1995) 141 *Outrage* 38.

attracting further discrimination and stigma upon their community, and threats to community cohesion.

9.5 As in opposite sex relationships, domestic violence in same sex relationships is described as being essentially about power and control, and can manifest itself not just through physical assaults, but also through sexual, psychological, emotional and economic abuse.[6] As in opposite sex relationships, victims of abuse in same sex relationships may feel embarrassed or ashamed to tell others about the abuse, may feel isolated, may blame themselves for the abuse or may try to trivialise it and blame external factors such as alcohol or stress. In addition, special and unique problems face victims of same sex domestic violence. For example, they may fear reporting the abuse for fear of "coming out" to their family. They may feel that, by reporting the abuse, they are betraying their community, which is already marginalised and stigmatised. They may fear hostile and homophobic responses from the police and service-providers if they seek help, or that they will be subjecting their partner to a homophobic criminal justice system. These factors may all contribute to silencing victims of same sex domestic violence and preventing them from seeking help.

9.6 Domestic violence also arises in other domestic relationships, such as in carer relationships where a person, often an older person, is abused by the person who cares for him or her (whether that be a partner, child, other family member, or friend). As with domestic violence in same sex relationships, abuse of the elderly by carers is described as a largely hidden problem, while at the same time becoming increasingly significant.[7] As in other situations of domestic violence, "elder abuse" can comprise physical or sexual assaults, as well as psychological or financial abuse, and neglect. Abuse of carers by those being cared for has also been identified as a problem in New South Wales.[8]

9.7 It is clear that domestic violence is a problem that is not confined to heterosexual relationships. In discussing the distribution of property upon the

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6. See L Vickers, "The second closet: domestic violence in lesbian and gay relationships: a Western Australian perspective" (1996) 3 *Murdoch University Electronic Journal of Law* at para 9-10; D Bagshaw and D Chung, "Gender politics and research: male and female violence in intimate relationships" (2000) 8 *Women Against Violence* at 12.
7. See, for example, P Livermore, R Bunt, and K Biscan, "Elder abuse among clients and carers referred to the Central Coast ACAT: a descriptive analysis" (2001) 20(1) *Australasian Journal on Ageing* 41; NSW Advisory Committee on Abuse of Older People in Their Homes, *Abuse of older people: the way forward* (Final Report, Ageing and Disability Department, 1997); NSW Task Force on Abuse of Older People, *Abuse of older people in their homes: final report and recommendations* (Office on Ageing, 1993).
8. P Livermore, R Bunt, and K Biscan, "Elder abuse among clients and carers referred to the Central Coast ACAT: a descriptive analysis" (2001) 20(1) *Australasian Journal on Ageing* 41; S Cahill and M Shapiro, "'I think he may have hit me once': aggression towards caregivers in dementia care" (1993) 12(4) *Australian Journal on Ageing* 10.

breakdown of same sex and other domestic relationships, it is important to keep in mind that a number of those relationships will have been affected in some way by violence. That violence is even more likely than in heterosexual relationships to have been kept hidden, and unreported. When discussing what role evidence of domestic violence should play in property proceedings in New South Wales, it should be acknowledged that this is an issue that is relevant to a fair number of such proceedings, and one that deserves some consideration.

THE FAMILY COURT'S APPROACH TO DOMESTIC VIOLENCE

9.8 To a significant extent, New South Wales has followed the approach taken by the Family Court towards evidence of domestic violence in property proceedings. However, as the Commission discusses below, that approach has not gone uncriticised, nor without proposals for reform.

9.9 Under the *Family Law Act 1975* ("the FLA"), domestic violence may be relevant to property proceedings in two ways. First, when assessing the parties' contributions, the Court may take into account, in favour of the spouse who has been subjected to the violence, evidence that, as a result of the violence, the party's contributions have been made more arduous than they otherwise would have been.[9] Secondly, in considering the s 75(2) factors, the Court would have regard to any disability resulting from the violence.

9.10 As to the first aspect, taking the violence into account in relation to the assessment of contributions, in the leading case of *Kennon* the Full Court rejected the idea that the violence should be taken into account as a "negative contribution" by the violent party. Instead, it focused on the impact of the violence on the contributions of the non-violent party. The Full Court's decision not to treat violence as a "negative contribution" probably reflects the lack of any explicit legislative reference to parties' conduct, and the FLA's departure from fault-based grounds of divorce. Indeed, in treating violence as a factor that could enhance the contributions of the non-violent spouse, the Full Court departed from a line of authorities strongly suggesting that notions of misconduct were generally irrelevant in the determination of financial matters under the FLA.[10]

9.11 As to the second aspect, the s 75(2) factors include the health of the parties, and their earning capacity. Where a party's health or earning capacity has been diminished because of domestic violence, the resulting disadvantage will be taken into account in the application of the s 75(2) factors. In this aspect, it is the consequence of the violence, rather than the violence as such, that is relevant.

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9. *In the Marriage of Kennon* (1997) 22 Fam LR 1.
10. See, for example, *In the Marriage of Soblusky* (1976) 12 ALR 699; *In the Marriage of Ferguson* (1978) 34 FLR 342; *In the Marriage of Fisher* (1990) 12 Fam LR 806, referred to in the joint judgment of Fogarty and Lindenmayer JJ in *Kennon* at 21-22.

9.12 Nevertheless, the origins of the disability in the domestic violence may have some relevance in relation to s 75(2) matters. In some circumstances, such as a health problem unrelated to the marriage and arising after the parties have separated, the Court might be inclined to give little or no weight to the disability, on the ground that it is not appropriate to use property proceedings to adjust for factors unrelated to the marriage relationship. Where a disability has been caused by domestic violence, this argument would clearly be unavailable.

THE APPROACH IN NEW SOUTH WALES

9.13 New South Wales has largely followed the approach of the Family Court in taking account of domestic violence to adjust property interests between de facto partners and others in domestic relationships, to the extent that the particular legislative framework set up by the PRA allows. A number of cases involving domestic violence between de facto partners in New South Wales have adopted the Family Court's approach of enhancing the homemaker contributions of the victim to make a property adjustment in the victim's favour. However, the Supreme Court has also appeared more inclined than the Family Court, at least in some recent cases, to adopt some form of a "negative contributions" approach in making property adjustments. That is, the Supreme Court has held that, to the extent that the perpetrator of violence makes a claim for homemaker contributions, an adjustment can be made against him on the basis that the quality of those contributions was diminished.[11] It is open to question whether these cases demonstrate a greater willingness of the Supreme Court to focus not only on the contributions of the victim, but also the perpetrator, than the Family Court has shown. Subsequent cases have, however, followed the approach in *Kennon*, by focusing only on the homemaker contributions of the victim, and the potential to enhance those contributions because of the perpetrator's violent conduct.[12]

9.14 The Supreme Court has warned against embracing too readily the decisions of the Family Court in relation to the adjustment of property interests based on consideration of parties' present and future needs, given the differences in the State and federal legislation in this respect.[13] Consequently, the approach of the Family Court, which allows it to take account of the impact of domestic violence on the victim's present and future financial circumstances, is not presently open for the State Courts to follow. However, in light of the Commission's recommendation to amend s 20 to allow the Court to take into account a wide range of factors equivalent to those

11. See *Jackson v Jackson* [1999] NSWSC 229 (upheld on appeal in *Jackson v Jackson* [2000] NSWCA 303); *Ledwos v Angilley* [2001] NSWSC 618.
12. See *Hughes v Egger* [2005] NSWSC 18, followed in *Brzezowski v Seewoo* [2005] NSWSC 505. In *Hughes v Egger*, Justice White did not expressly reject the argument that the Court could take account of violent conduct by reducing the perpetrator's contributions, but instead noted that it was not an argument pursued by the parties in the case: see para 150.
13. See *Thompson-Grandou v Grandou* [2002] NSWSC 1013; *Rose v Richards* [2004] NSWSC 315 at para 34-39.

the Family Court is able to consider under s 79,[14] we will also need to consider what impact this will, and should, have on the relevance of domestic violence to property disputes at the State level.

RECOGNISING VIOLENCE AS RELEVANT TO PROPERTY PROCEEDINGS

9.15 In considering what reforms, if any, should be made to the law in New South Wales relating to evidence of domestic violence in property proceedings, the first and fundamental question is whether evidence of domestic violence should be considered relevant at all in the process of adjusting property interests between de facto partners and others in a close personal relationship. The following is an overview of the main arguments for and against. Discussion of this issue has focused predominantly on the FLA and the Family Court. However, the approach under the PRA is sufficiently similar for the discussion to be relevant to formulating an appropriate legislative policy in New South Wales.

Arguments against recognising domestic violence

9.16 Arguments against recognising evidence of domestic violence as relevant to property proceedings are generally justified on the basis of a reluctance to return to a fault-based approach to dealing with the breakdown of relationships, and consequent distribution of property, and on a fear of "opening the floodgates".

- The Family Court's treatment of domestic violence in relation to property proceedings has been criticised for opening the way to a "punitive approach" towards property distribution. Such an approach, it has been said, is not the function of the FLA.[15] There is concern to ensure that the Family Court does not return to notions of fault in its proceedings, notions that were specifically rejected with the introduction of the FLA in 1975.[16] It has been argued that it is not the role of the Family Court to punish a violent partner through the distribution of property, although the Court can concern itself with compensating the victim of the violence for the consequences of such violence.[17] The PRA was, to a large extent, modelled on the FLA, and consequently mirrors the no fault approach which forms the basis of the federal legislation.[18]

14. See Chapter 7, Recommendation 27.
15. See P Nygh, "Family violence and matrimonial property settlement" (1999) 13 *Australian Journal of Family Law* 10 at 32.
16. See *In the Marriage of Soblusky* (1976) 12 ALR 699, cited in *Kennon* at 21 (Fogarty and Lindenmayer JJ).
17. See P Nygh, "Family violence and matrimonial property settlement" (1999) 13 *Australian Journal of Family Law* 10 at 16.
18. See para 1.4-1.8 and DP 44 at para 5.3 - 5.9, for a summary of the background to the introduction of the PRA.

- There is concern that, by taking into account evidence of domestic violence as relevant to the adjustment of property interests, the Courts may open the way for a range of conduct to come under scrutiny in property proceedings. There may be conduct that does not fall within the terms "domestic violence," or "family violence", however those terms might be defined, but which might nevertheless have an impact on a party's contributions to the welfare of the family, and which logically should also be taken into account. Indeed, the Family Court has already foreshadowed this possibility, although without any clear guidance as to what sorts of conduct should be considered.[19] It has been questioned whether it is really desirable to allow potentially for the minutiae of a relationship to be brought before the Courts for the purposes of property proceedings, or whether issues of domestic violence are more appropriately dealt with through criminal and civil actions.[20]

Arguments in favour of recognising domestic violence

9.17 There are several arguments that are typically made for allowing victims of domestic violence an increased share in property, upon the breakdown of a relationship with a violent partner. These arguments tend to be based either on a broader social policy of enhancing the disadvantaged position of victims of domestic violence, or on the grounds of consistency and fairness in light of the approach taken (by the Family Court) towards financial misconduct in the adjustment of property interests.

9.18 As a matter of social policy, the following arguments have been made (generally in the context of Family Court proceedings, typically involving women who have been the victims of their husbands' violence): [21]

- Recognising domestic violence as relevant to property proceedings is in line with society's increasing awareness of, and intolerance for, violence in the home, and its damaging effects on its victims.

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19. See *In the Marriage of Kennon* (1997) 22 Fam LR 1 at 24.
20. See Australia, Family Law Council, *Submission on the discussion paper: property and family law: options for change* (July 1999) at para 11.27-11.28.
21. See Australia, Family Law Council, *Violence and the Family Law Act: financial remedies* (Discussion Paper, August 1998) at para 2.4; Australia, Family Law Council, *Submission on the Discussion Paper, Property and Family Law: options for change* at para 11.5-11.8; Australia, Family Law Council, *Letter of advice: violence and property proceedings (Part 2)* (14 August 2001) at para 22-25; J Behrens, "Domestic violence and property adjustment: a critique of 'no fault' discourse" (1993) 7 *Australian Journal of Family Law* 9 at 20-24; W Parker, "Family violence and matrimonial property" (May 1999) *New Zealand Law Journal*151 at 153; G Sheehan and B Smyth, "Spousal violence and post-separation financial outcomes" (2000) 14(2) *Australian Journal of Family Law* 102.

- Victims (usually women) of domestic violence frequently face grave financial circumstances once they separate from their violent partner. They are reported to be frequently reliant on social security as their main source of income, and are less likely to be in paid employment than those who separate from non-violent partners.[22] To recognise these disadvantages by granting them an increased share is to provide them with some opportunity of establishing a life for themselves (dependent, of course, on the value of the property that is being divided).
- At least in Family Court proceedings, it has been reported that women who have been the victims of spousal violence fare worse in the division of property than women who report no physical abuse. The law should recognise this apparent disadvantage in property settlement and take steps to overcome it.
- Taking account of domestic violence in the adjustment of property interests provides a means of compensating the victim of the violence for the abuse. While there may be other legal avenues of redress, through a civil action or claim for criminal injuries compensation, victims of violence may be reluctant to pursue these avenues, for reasons such as the emotional and financial costs. In many ways, it may be easier for victims to pursue some form of compensation through an existing dispute over property, arising from a relationship from which their injuries have arisen in the first place.
- In response to the "floodgates" argument, there are good reasons why domestic violence should be singled out for special treatment above and beyond other forms of "blameworthy" conduct. Given that acts of domestic violence also constitute criminal offences, and given society's increasing intolerance of domestic violence and initiatives to reduce its incidence, it is appropriate to recognise the impact of domestic violence in property adjustment proceedings.

9.19 Other arguments supporting recognition of domestic violence as a factor relevant to the property adjustment process appeal to notions of rationality, fairness, and consistency:

- Violence has an obvious and important impact on a party's contributions to the welfare of the family. It will often make a victim's role, whether as child carer, homemaker, or in maintaining a position in the paid workforce, more onerous. In a system of law that recognises parties' contributions as factors relevant to

22. See G Sheehan and B Smyth, *Spousal violence and post-separation financial outcomes* (Australian Institute of Family Studies, commissioned by the Office of the Status of Women, 1999), which discloses the findings of a national survey of 398 Australian divorced men and women who separated after January 1988. The study is discussed in G Sheehan and B Smyth, "Spousal violence and post-separation financial outcomes"(2000) 14(2) *Australian Journal of Family Law* 102, and in Australia, Family Law Council, *Submission on the Discussion Paper, Property and Family Law: options for change* (1999) at para 11.5-11.6.

adjusting property interests, at both the State and federal levels, it would be irrational to ignore the impact of violence on contributions.[23]

- In response to the argument that the Courts should not return to a fault-based approach, it could be said that other forms of blameworthy conduct are taken into account as factors relevant to the adjustment of property interests. For example, the Family Court has been prepared to recognise a spouse's alcoholism, or recklessness and negligence, where they have resulted in the dissipation of funds, as factors to be considered in making an adjustment of property interests against that spouse.[24] Recognition of blameworthy conduct in this way differs from an approach that focuses on fault as a ground for granting dissolution of a marriage, which was essentially what the reforms of the FLA were rejecting. While the link between these types of blameworthy conduct and property loss may be considered more direct or obvious, it has been argued that the Courts should follow the same approach to violent conduct, which can be shown to have financial consequences, and make the perpetrator of the violence accountable for financial consequences unreasonably incurred.[25]
- At the State level, a strong argument in favour of recognising evidence of domestic violence as relevant to property proceedings is the fact that this is consistent with what appears to be a fairly well-established and accepted approach at the federal level. While the FLA makes no express provision to this effect, there is now an established body of case law at the federal level recognising the relevance of evidence of domestic violence to the adjustment of property interests, as well as moves towards entrenching this approach in the federal legislation in some way.[26] If New South Wales were to refuse to recognise evidence of domestic violence in property proceedings, it would mean that a very select proportion of the population, namely lesbian and gay de facto partners and those living in close personal relationships, would be treated differently from the rest of the population.

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23. See Australia, Family Law Council, *Submission on the Discussion Paper, Property and family law: Options for change* (1999) at para 11.27.
24. See, for example, *In the Marriage of Antmann* (1980) FLC 90-908; *In the Marriage of Benson* (1984) FLC 91-584; *In the Marriage of Kowaliw* (1989) FLC 91-092; *In the Marriage of Browne and Green* (1999) FLC 92-873. See S Middleton, "Family Court property proceedings: rethinking the approach to the 'financial consequences' of domestic violence" (2002) 5 (3) *University of New South Wales Law Journal* 704 at 712-713. It should be noted that these Family Court decisions have relied on s 75(2)(o) of the *Family Law Act 1975* (Cth), which allows the Court to take account of any fact or circumstance which the justice of the case requires to be taken into account, in making orders for maintenance, and/or property adjustment (by virtue of s 79(4)(e)). There is no provision of similar breadth in the PRA as it currently stands.
25. S Middleton, "Family Court property proceedings: rethinking the approach to the 'financial consequences' of domestic violence" (2002) 5 (3) *University of New South Wales Law Journal* 704 at 714.
26. See para 9.29 below.

Submissions

9.20 The Commission received six submissions dealing expressly with the relevance of domestic violence to property proceedings.[27] Of these, two submissions took the general view that evidence of domestic violence *should* be considered relevant to the process of adjusting interests in property,[28] whereas one submission specifically stated that consideration of such evidence should be limited to situations where the violence has affected the property held by the parties at the end of the relationship, or has affected their ongoing economic capacity or future needs.[29] One submission considered that compensation for domestic violence should be granted independently of proceedings under the PRA.[30]

The Commission's view

9.21 The Commission agrees with the majority of submissions that evidence of domestic violence should be taken into account in some way in the property adjustment process for de facto and close personal relationships. To do so does not return the law to a fault-based mentality for dealing with the breakdown of relationships: its relevance does not relate to questioning the basis on which the relationship breaks down, but rather serves to recognize the impact such violence often has on the financial realities of the victims of such violence. This approach is consistent with current government strategies at both the State and federal levels to assist victims of domestic violence, and reflects society's growing awareness of and intolerance towards domestic violence. Importantly, to consider evidence of violence as irrelevant to property adjustment proceedings involving same sex and close personal relationships would be to deprive people in these relationships of the rights and protections offered to their heterosexual counterparts. Such an approach would be discriminatory and unfair.

WAYS OF TAKING ACCOUNT OF DOMESTIC VIOLENCE IN PROPERTY PROCEEDINGS

9.22 In paragraphs 9.8-9.14, the Commission outlined the approaches of the Family Court, and the New South Wales Supreme Court, towards evidence of domestic violence in adjusting property interests. Arguably, the Supreme Court has demonstrated a greater willingness than the Family Court to take account of domestic

27. See Lesbian and Gay Solidarity, *Submission* at 3; Equity Division of the Supreme Court of NSW, *Submission* at para 41-44; Women's Legal Resources Centre, *Submission* at 14-17; Gay and Lesbian Rights Lobby Inc, *Interim submission* at 4; Law Society of NSW, *Submission* at 5; A de Costa, *Submission* at 10-11.
28. See Gay and Lesbian Rights Lobby Inc, *Interim submission* at 4; Women's Legal Resources Centre, *Submission* at 15.
29. See Equity Division of the Supreme Court of NSW, *Submission* at para 41.
30. See Lesbian and Gay Solidarity, *Submission* at 3.

violence also as a negative contribution on the part of the perpetrator of the violence, in order to make a property adjustment against him (or her). However, with no provision in the State legislation for the Courts to take account of present and future financial needs, the Supreme Court is more limited than the Family Court in its approach, and cannot currently make an adjustment in favour of the victim of violence to take account of the impact of domestic violence on that party's present and future financial needs.

Criticisms of the current approach

9.23 The approach of the Family Court has come under criticism on several grounds, and there have been some recent initiatives to reform the way in which the Court considers evidence of domestic violence in property proceedings. Given that the Family Court's approach is mirrored, to a large extent, in the approach of the State Supreme Court, it is helpful to examine these criticisms in some detail, before considering proposals for reform.

Criticisms of the positive contributions approach

9.24 The following principal criticisms have been made of the Family Court's "positive contributions" approach in adjusting property interests to recognise a history of domestic violence.

9.25 The first criticism relates to the Family Court's apparent dismissal of any notion of reducing or negating the contribution made by the perpetrator to the welfare of the family. In this respect, the approach of the New South Wales Supreme Court could be considered by some as more progressive than that of the Family Court, in so far as it appears more inclined to recognise domestic violence as a negative contribution on the part of the perpetrator. The Family Court's focus on the victim's, rather than the perpetrator's, contribution, is considered problematic for several reasons:

- It is artificial to refuse to recognise the often significantly detrimental impact of domestic violence on a family's welfare, and the fact that by behaving violently, the perpetrator reduces the value of his or her contributions.
- Refusal to examine the quality of the perpetrator's contributions is inconsistent with the approach taken in cases involving financial misconduct on the part of one spouse, or his or her wilful destruction of property. As noted in paragraph 9.19, in those types of cases, the Court may take account of the "guilty" party's responsibility for the inexcusable loss of property in making an adjustment against him or her.
- By placing the emphasis on the victim's, rather than the perpetrator's, contributions, the Court is requiring the victim to prove not only the violence that is alleged, but also the impact that it had on her or his own contributions. The perpetrator is not required to prove that domestic violence did not impact adversely on his or her own contributions. Moreover, the victim will have trouble relying on the "positive contributions" approach if she or he is not the primary homemaker in the marriage.

9.26 The second criticism relates to several uncertainties said to arise from the positive contributions approach. For example, the Family Court has commented that there could be other types of conduct, beyond violence, which the Court could consider as enhancing the contributions of a spouse, without making clear what these other types of conduct might be.[31] Those comments have since been criticised for problems in defining the conduct that can be taken into account in making adjustments to property, and the potential for opening the floodgates to scrutiny of all types of conduct that could be said to have a discernible impact on the contributions of the parties.[32]

Criticisms of the present and future financial needs approach

9.27 Criticism has also been made of the way in which the Family Court considers the impact of domestic violence on a party's present and future financial needs when adjusting property interests.[33] Such criticism is not relevant to the current approach of the State Supreme Court under the PRA. However, it becomes important to consider in the context of recommendations to amend the PRA to allow examination of parties' present and future financial needs in the property adjustment process.

9.28 The Family Court takes account of domestic violence to the extent that it has an impact on a party's present and future financial circumstances.[34] While the Court is prepared to consider the financial consequences of violence as relevant to the adjustment process, it has been criticised for its refusal to take account also of the perpetrator's responsibility for those consequences as part of the adjustment process. The Court's reluctance to make an adjustment in recognition of the perpetrator's responsibility arises from its concern not to reintroduce fault as a basis for its proceedings.[35] As the Commission noted in paragraph 9.19 above, this reluctance has been criticised for its apparent inconsistency with the Court's willingness to take account of a party's *financial* misconduct in making an adjustment against him or her.

Proposals to reform the current approach

9.29 Several proposals have been made to reform the way in which the Family Court considers evidence of domestic violence when making adjustments to property. The Family Law Council[36] has put forward a proposal for express legislative provision

31. See *In the Marriage of Kennon* at 24 (Fogarty and Lindenmayer JJ).
32. See *In Marriage of Q* (2003) 32 Fam LR 375 (Federal Magistrates Court of Australia, Brewster FM) at 381-383; Australia, Family Law Council, *Letter of advice: violence and property proceedings (Part 2)* (14 August 2001) at para 16.
33. See S Middleton, "Family Court property proceedings: rethinking the approach to the 'financial consequences' of domestic violence" (2002) 25(3) *University of New South Wales Law Journal* 704.
34. See FLA s 79(4)(e), in combination with s 75(2).
35. See *Hack* (1980) FLC ¶90-886; *Fisher* (1990) FLC ¶92-127.
36. See Australia, Family Law Council, *Letter of advice: violence and property proceedings: Part 2* (14 August 2001) at para 26-35, 44. To date, the Council's recommendations have not been adopted in legislation.

requiring the Court to consider the effects of any family violence on the contributions of the parties. Such a provision would build on the existing approach of the Family Court: the Court would not only take account of the effect of violence in enhancing the contributions made by the victim, but also as a negative contribution by the perpetrator towards the welfare of the family.

9.30 Another suggestion is to introduce into the FLA a new statutory tort, allowing the Family Court to order compensation in cases of serious physical or psychological harm, except to the extent that it has already been taken into account. Damages could be paid for pain and suffering, and assessed either according to common law principles, or according to a prescribed scale. One advantage of this proposal is said to be that it would allow the one court, a specialist court, to determine both property proceedings and damages proceedings. This would be both efficient and economical, because evidence of the financial situations of the parties would be brought before just the one court at the one time.[37] The Family Law Council ultimately rejected this proposal for reform on the basis that it would be less accessible as a form of remedy for many victims of violence, particularly those on lower incomes, with disabilities, or from a non-English speaking background, because any cause of action is likely to be expensive and complex to pursue.

Responses to DP 44

9.31 In DP 44, the Commission raised several questions about the way in which domestic violence should be taken into account in property adjustment proceedings.[38] Specifically, the Commission sought submissions on whether domestic violence should be taken into account as a factor affecting the parties' contributions, and, if so, whether the impact on those contributions needed to be proven, or whether its impact on the parties' contributions could be implied upon proof that there was violence in the relationship. Alternatively, the Commission suggested that the impact of domestic violence on the abused party's future needs be an express factor for the Court to consider. Lastly, the Commission sought submissions on whether there should be a statutory right to compensation for domestic violence, a claim for which could be brought at the same time as a property adjustment claim.

9.32 One submission took the view that domestic violence should be a matter that is taken into account when assessing both a party's future needs, and his or her financial and non-financial contributions.[39] It was submitted that, as a matter of policy, once domestic violence had been proven, it should be inferred that it will have had an impact on a party's contributions, and on his or her future needs. The degree of impact would change according to the degree of violence suffered. Another submission considered that domestic violence should be a listed element to take into account in property adjustment proceedings, but had no decided view on whether it was more appropriate to do so by way of a factor affecting contribution or as a future

37. See Australia, Family Law Council, *Submission on the government's discussion paper: property and family law: options for change* (1999) at para 11.12.
38. See DP 44 Issue 14.
39. See Women's Legal Resources Centre, *Submission* at 15.

needs factor.[40] One submission was in favour of domestic violence being taken into account where it affected the property which parties have at the end of a relationship, or affected their ongoing economic capacity or future needs, but did not favour the introduction of a new statutory right to compensation.[41] One submission focused specifically on the question of whether there should be a statutory right to compensation, and did not support the introduction of such a right limited specifically to domestic violence.[42] Another submission stated simply that compensation for domestic violence should be independent of the PRA and should be assessed before the assets are divided.[43]

The Commission's view

9.33 The Commission can see great merit in the recommendation of the Family Law Council to enshrine in legislation a requirement that the Court to consider the effects of domestic violence on not only the contributions of the victim, but also those of the perpetrator. While *Kennon* goes some way towards taking violence into account, it is inadequate in its approach because it fails to acknowledge the negative impact of the violent party in terms of contributions to both the household's financial assets and welfare. A scheme that adjusts financial interests between domestic partners should recognize the impact of one partner's violence on the family, in so far as it detracts from that partner's contributions, as well as enhancing the other partner's contributions and potentially increasing his or her present and future needs. Such an approach would also address possible uncertainty in the current law, which may require the victim to prove the effects of violence on her contributions. If legislation expressly required the Court to take account of any negative effect of violence on the perpetrator's contributions, the burden of having to establish the effects of violence is removed to a large extent from the victim.

9.34 Having said that, the Commission is faced with a dilemma. At least for the present time, the law as it applies to married couples, at the federal level, is as reflected in *Kennon*. There is no indication that the federal government will implement in legislation the recommendation of the Family Law Council, at least not in the immediate future. Once the Commonwealth takes up the States' reference of powers, the principles articulated in *Kennon* will, presumedly, apply to married couples and opposite sex de facto couples. If the Commission were to recommend reform of the PRA to reflect the Family Law Council's position, then we would be envisaging a different law applying to same sex couples, and people in close personal relationships. That difference would not stem from any inherent difference in the incidence or experience of domestic violence in those relationships, but from a difference in our vision of what is the appropriate legal response to violent relationships. The question then is whether we favour uniformity over good law.

40. See Gay and Lesbian Rights Lobby Inc, *Interim submission* at 4.
41. See Equity Division of the Supreme Court of NSW, *Submission* at para 41-43.
42. See Law Society of NSW, *Submission* at 5.
43. Lesbian and Gay Solidarity, *Submission* at 3.

9.35 Having pointed out what we consider to be the shortcomings of *Kennon*, we nevertheless do not consider it suitable to make any recommendation for legislative change to adopt the Family Law Council's approach. Ultimately, we consider that, in this situation, it is more important to maintain uniformity with the Commonwealth. It is of course possible that the case law following *Kennon* will develop on its own to provide a more sophisticated response in terms of financial adjustment, although for the moment the principles arising from *Kennon* appear to be fairly well entrenched. However, we cannot justify recommending a different approach for one section of the State's population. We do urge the Commonwealth to give further consideration to adopting the recommendation of the Family Law Council, and New South Wales could then follow suit.

9.36 While we ultimately conclude that we cannot justify recommending reform to the law in this area, nevertheless we consider that we can make recommendations for the practical handling of cases involving domestic violence in the State Courts. For example, the development and implementation of a domestic violence strategy for the Courts, similar to that of the Family

Court, would provide the courts with guidance and a protocol for practical problems that can arise when dealing with disputes between domestic partners where there is a history of violence. This matter relates more to issues of dispute resolution, and as such is dealt with in Chapter 13 of this Report.

10. Partner maintenance

- Introduction
- The relationship between maintenance and property adjustment
- Circumstances in which maintenance should be available
- Factors relevant to the Court's determination on maintenance
- Maintenance and social security

INTRODUCTION

10.1 Partner maintenance can be awarded in the context of marriage under the *Family Law Act 1975* (Cth) ("the FLA") and in the context of domestic relationships under the *Property (Relationships) Act 1984* (NSW) ("the PRA"). But the approach to maintenance under the FLA starts from a different premise to that in the PRA. Under the FLA there is a general obligation on married parties, where their spouse is unable to maintain him or herself adequately, to maintain each other to the extent to which they are reasonably able to do so,[1] while, under the PRA, a party to a domestic relationship is not liable to maintain the other, nor to claim maintenance from the other.[2] The differing starting points of the legislation do not mean much in practice since each Act immediately qualifies its general premise: the FLA by limiting the general obligation to specified circumstances; the PRA by creating exceptional circumstances in which maintenance is claimable. However, consistent with their differing premises, the circumstances in which a party to a marriage is liable to maintain the other party are wider under the FLA than the exceptional circumstances in which a party to a domestic relationship is liable to maintain the other party under the PRA.

10.2 Under the FLA a party to a marriage who is reasonably able to do so becomes liable to maintain the other party where that other party cannot support him or herself adequately because he or she has the care and control of at least one child of the marriage who has not attained 18 years of age; because he or she is unable to engage in appropriate gainful employment by reason of age or physical or mental incapacity; or for any other adequate reason.[3] In contrast, s 27 of the PRA provides that, before awarding maintenance, the Court must be satisfied that the applicant is unable to support him or herself adequately because:

- he or she has the care or control of a child of the parties to the relationship, or a child of the respondent, who is under 12 years of age (or 16 if the child has a physical or mental disability); and/or
- his or her earning capacity has been adversely affected by the circumstances of the relationship, and the Court is of the opinion that a maintenance order would increase the applicant's earning capacity by enabling the applicant to undertake training or study and, in all the circumstances of the case, it is reasonable to make such an order.

10.3 The differing approaches to maintenance under the FLA and the PRA are readily explicable. Maintenance derives from the desire, originally manifest in the more general poor laws aimed at alleviating destitution, to provide some protection for married women on the breakdown of a relationship to which the parties had publicly made a lifelong commitment, and which also generally involved further assumptions

1. FLA s 72.
2. PRA s 26.
3. FLA s 72(1).

about the procreation of children, gendered role divisions and financial dependency.[4] The justification for maintenance is found in the loss by the wife of the continuing support that she had expected to receive from her husband by reason of the spousal dependency involved in foresaking financial gain for the period of their joint lives.[5] This is a "compensatory" view of maintenance, which the Family Court has, in some cases, endorsed.[6] In contrast, relationships outside marriage involve no public commitment and their diversity makes it impossible to presume a general commitment to a lifelong relationship involving financial dependency of one partner on the other. Assumptions underlying the function of maintenance in the context of marriage cannot, therefore, be made in the case of de facto relationships generally and same sex relationships in particular, where, in contrast to heterosexual relationships, a public commitment to lifelong partnership is impossible and any role division in the relationship cannot be gendered (although there may be a power imbalance between the parties).

10.4 In de facto relationship cases, the justification for maintenance must, then, be sought elsewhere. The PRA finds that justification in concepts of "custodial" maintenance (where applicants have the care of a child of the parties or a child of the respondent) and "rehabilitative maintenance" (where applicants' earning capacity has been adversely affected by the circumstances of the relationship, and a maintenance order has the ability to increase their earning capacity through training or education).[7] While the FLA also adopts, more broadly, the custodial philosophy of maintenance,[8] its endorsement of maintenance in cases where applicants are unable to support themselves adequately "by reason of age or physical or mental incapacity for appropriate gainful employment"[9] goes beyond the PRA's concept of rehabilitation since the availability of maintenance is not restricted to incapacities that can be attributed to the relationship. Further, the FLA's authorisation of maintenance "for any other adequate reason"[10] is not expressly tied to any particular theory of maintenance. And a number of general theories of maintenance are possible, ranging from approaches based strictly on the needs of the applicant, through custodial and rehabilitative approaches, to those that openly seek to redistribute the wealth of the parties on separation against the social context in which the relationship existed.[11]

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4. See generally A Dickey, *Family Law* (4th ed, Law Book Co, 2002) at 462-465.
5. Dickey at 465-466.
6. See *Best* (1993) FLC ¶92-418; *Bevan* (1995) FLC ¶92-600; *Mitchell* (1995) FLC 92-601, discussed in J Beherns and B Smyth, *Spousal Support in Australia: A Study of Incidence and Attitudes* (Australian Institute of Family Studies, Working Paper 16, 1999) at 8-10. See also the decision of the Supreme Court of Canada in *Moge* (1993) 99 DLR (4th) 456.
7. PRA s 27(1). This is a narrow view of rehabilitative maintenance since it purports to address a condition created by the relationship: see para 10.33-10.36.
8. FLA s 72(1)(a).
9. FLA s 72(1)(b).
10. FLA s 72(1)(c).
11. See DP 44 para 8.29-8.44.

10.5 In 1983 the Commission thought that the differences between marriage and a de facto relationship dicated a much narrower power to award maintenance in de facto relationship cases than in marriage cases. We wrote that:

> *[A]ny maintenance obligation associated with a de facto relationship should be confined to meeting specific and narrowly defined categories of needs,* which can be attributed to the relationship *between the parties and for which the other party can fairly be said to share direct responsibility.*[12]

10.6 We also thought that it was important to acknowledge and encourage the trend towards parties' taking responsibility for their own support "to the maximum extent practicable" – a trend manifested in the then restrictive interpretation of the power to award maintenance under the FLA and of the criteria governing such awards.[13]

10.7 The legal context in which we revisit the issue of maintenance in 2006 differs in at least two significant respects from that which existed immediately after the implementation of our 1983 recommendations in the *De Facto Relationships Act 1984* (NSW). First, the PRA's maintenance regime now applies not only to de facto relationships but also to close personal relationships. To such relationships, the custodial basis of maintenance has no relevance. Nor, generally, does a compensatory basis, since there is no foundation for a presumption of lifelong commitment justifying continuing support. As a generalisation, maintenance would seem capable of serving, at most, a rehabilitative function in such cases by providing, for example, carers who are unable to support themselves adequately by reason of having given up paid employment to look after an elderly relative with the means of now increasing their earning capacity through training or education.

10.8 Secondly, we are now faced with the possibility that the substance of the FLA maintenance regime will in future apply to opposite sex de facto relationships,[14] as is now the case in Western Australia.[15] This possibility raises, in a more focused form, the option, raised in DP 44, of reforming the law of partner maintenance in this State by mirroring the approach of the FLA in the PRA,[16] an option supported in some submissions,[17] but rejected in others.[18] If this possibility eventuates, the justification of

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12. NSW Law Reform Commission, *Report on De Facto Relationships* (Report 36, 1983) ("Report 36") at para 8.26.
13. Report 36 at para 8.25.
14. See para 1.33.
15. See *Family Court Act 1997* (WA) especially s 205ZC, 205ZD (which also applies to same sex relationships).
16. DP 44 at para 8.53-8.54 (Option 3).
17. Lesbian and Gay Solidarity, *Submission* at 4; Women's Legal Resources Centre, *Submission* at 24-25; NSW Young Lawyers, *Submission* at 14; Law Society of NSW, *Submission* at 9.
18. P Parkinson, *Submission* at 7. See also Equity Division of the Supreme Court of NSW, *Submission* at 25; Gay and Lesbian Rights Lobby, *Interim submission* at 8 (both of the these submissions tending to favour the integrative approach that

continuing to have a separate regime under the PRA in respect of same sex relationships will have to be found either in shortcomings in the maintenance provisions of the FLA or in the unsuitability of applying those provisions to gay and lesbian relationships. Such unsuitability could be found in characteristics of same sex relationships that distinguish them from opposite sex de facto relationships, and in the inability of the maintenance provisions of the FLA to accommodate the distinctions. Absent such distinguishing factors, however, the argument for treating all de facto relationships equally would be compelling and weigh heavily in favour of the assimilation of the PRA's maintenance regime with that of the FLA, assuming that the FLA regime is otherwise acceptable.

10.9 Against this background, this Chapter investigates both the need for, and the reach of, maintenance under the PRA in its application to gay and lesbian relationships and close personal relationships. There are four live issues:

- the link between the maintenance and property adjustment provisions of the PRA;
- the circumstances in which maintenance should be available;
- the factors that ought to be relevant to the Courts' determination of maintenance; and
- the relationship between maintenance and social security.

10.10 In view of the submissions received by the Commission in response to DP 44, the views of our consultees and the responses to our Questionnaire on Same Sex Relationships and the Law, the Commission is not proposing any changes to sections of the PRA that touch on the form, duration, variation or extension of maintenance orders (including interim orders) except in so far as consequential amendments are necessary to relevant sections of Part 3 Division 3 of the PRA to accord with the recommendations in this Chapter.

THE RELATIONSHIP BETWEEN MAINTENANCE AND PROPERTY ADJUSTMENT

Is maintenance necessary?

10.11 Maintenance is one of two financial adjustment orders that a court can make under Part 3 of the PRA. The other is a property adjustment order, which is considered in Chapters 7 and 8. The ability of the courts to make property adjustment orders under s 20 raises the issue whether there is a need for a separate power to award maintenance under s 27. Two closely related questions are embedded in this issue: does maintenance have an independent function to property adjustment; and, even if it does, does it have to be considered independently of the property adjustment process?

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looks at factors traditionally relevant to maintenance in the context of propery adjustment orders).

10.12 Under the PRA as it currently stands, the answer to the first question is clearly in the affirmative. Property adjustment and maintenance orders simply serve different purposes. A property adjustment order seeks to effect a just and equitable alteration of the interests with respect to the property of the parties, having regard to their contributions to the property, to the financial resources or to the welfare of each other or their family. In contrast, a maintenance order seeks to make provision for a party to the relationship who is unable to support him or herself either because he or she has care and control of a specified child or because his or her earning capacity has been adversely affected by the relationship and that capacity can now, reasonably, be enhanced by particular training or education. It follows that in so far as a property adjustment order puts the applicant in a position to support her or himself adequately, an award of maintenance cannot be made.[19]

10.13 Apart from this, there is little room for the direct interaction of property adjustment and maintenance orders. At most, there is a danger of "double dipping", that is, of taking the same factor into account in determining a maintenance order that has already been taken into account in the determination of a property adjustment order. For example, while the applicant's desire to remain at home in a parenting role is a factor relevant to the determination of "custodial maintenance" under s 27(1)(a) of the PRA,[20] it would be inappropriate to take it into account if it had already influenced the determination of a property adjustment order or proposed order.[21] However, because property adjustment orders under s 20 have their focus on past contributions, while maintenance under s 27 is only available in closely defined custodial and rehabilitative settings, double dipping should arise infrequently, if at all.

10.14 This will change if the recommendations in this Report are implemented. The Commission has already recommended that the property adjustment provisions of the PRA should be altered to align with those of the FLA,[22] a recommendation that paves the way for some consideration of future needs in property adjustment proceedings themselves. The existing custodial and rehabilitative bases of maintenance in the PRA look to the need for future support, and, while these provisions are limited, our recommendations would widen them,[23] raising the real prospect that claims for loss of support in the future could straddle property adjustment and maintenance claims. This raises the question whether or not maintenance orders are necessary at all once property adjustment orders are available in circumstances that essentially mirror those in the FLA.

19. *Supresencia v Powell* [2002] NSWSC 773 at para 40 (Acting Master Berecry) (no maintenance where the property adjustment enabled applicant to support herself through period of retraining).
20. For example, *Cotley v Brial* [2004] NSWSC 657.
21. See *Thompson-Grandou v Grandou* [2002] NSWSC 1013 at para 82 (Master McLaughlin).
22. See Recommendation 27.
23. See Recommendations 33, 34.

10.15 As already noted, the FLA continues, to provide for maintenance orders, and the jurisprudence of the Family Court acknowledges a continuing need for them.[24] The most important reason is found in cases in which there are few property assets for division, but one spouse has a continuing need for support and the other has the capacity to provide that support.[25] Take this example: a wife has, for the period of the parties' marriage, devoted herself to the care and rearing of their family, losing the professional skills she had at the beginning of the marriage. On the breakdown of the marriage, she has significant responsibilities in support of herself and the children. In contrast, her husband has, during the marriage, developed his earning capacity to a high and ongoing level. On the breakdown of the marriage, the parties have few assets that can be made the subject of an adjustment order. In the course of dealing with just such a case (where the claim for maintenance was, however, abandoned), the Full Court of the Family Court said:

> *In cases … where there are minimal assets, but on the one side significant needs and on the other a significant future earning capacity, the power to order lump sum maintenance, which may be met by annual payments over a period of years against that income or savings from it, may be an appropriate course. In such cases, and provided that the requirements of the Act are otherwise satisfied, it may be a mistake to conclude that where there are few assets they should be divided and that that is the end of the matter other than for periodic maintenance.*[26]

10.16 The availability of (lump sum) maintenance here meets a need that a property adjustment order cannot meet conveniently, since, at the time of the proceedings, there is insufficient property to which such an order can apply.[27]

10.17 There are at least two other circumstances in which there is a need for maintenance that cannot be met by a property adjustment order. The first is where the circumstances of the parties or of the case – for example, particular uncertainties in the future – suggest the necessity for periodic maintenance variable, at the instance of either party, in the light of changing conditions.[28] Unlike a periodic maintenance order, other maintenance orders and property adjustment orders are only variable in restricted circumstances.[29] The second is where an interim maintenance order is made in favour of an applicant who is in need of immediate financial assistance but

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24. See especially B Fehlberg, "Spousal maintenance in Australia" (2004) 18 *International Journal of Law, Policy and the Family* 1 at 12-18.
25. See Equity Division of the Supreme Court of NSW, *Submission* at 25-6 (supporting an expansion of the PRA's maintenance jurisdiction to such cases, provided there was evidence of "a substantial unmet need" to deal with such cases in the context of de facto relationships).
26. *Best* (1993) FLC ¶92-418 at 80,296 (Fogarty, Lindenmayer and McGovern JJ).
27. If there were such property, an order adjusting interests in it could involve lump sum or periodic payments: PRA s 38(1)(d) and (e).
28. See PRA s 35.
29. PRA s 36, 41. See further Chapter 11.

where it is not practicable in the circumstances to make an immediate determination of what (if any) order should be made under Part 3.[30]

Empirical information

10.18 Of the respondents to the Commission's Questionnaire on Same Sex Relationships and the Law, only 10% thought that partners should never have to pay maintenance to their ex-partners.[31] This figure contrasts strongly with a 1999 study published by the Australian Institute of Family Studies ("AIFS") that found that only a little over half of the sample (54%) believed that spousal support should ever be paid on divorce. Of the sample, 62% of divorced females were in favour of spousal support being paid, but only 43% of divorced males.[32]

10.19 The majority support for spousal maintenance is not matched by its incidence in practice. The AIFS study found that spousal maintenance is awarded in less than 7% of divorces.[33] A further 10% of respondents said they had paid or received spousal maintenance through a larger share of the assets at the property division, meaning that 16% of respondents reported having paid or received some form of spousal maintenance. Behrens and Smyth comment:

> *[T]here is a substantial mismatch between attitudes to spousal support (majority in favour) and behaviour (very low levels of incidence). One explanation for this apparent disparity is the potential mismatch between the capacity to pay and the willingness to do so. There may also be a mismatch between the law about spousal support and the legal system's attitudes towards it, and broader community attitudes. Thus while a payer may be willing to pay spousal support and a receiver keen to receive it, their negotiations will take place in the 'shadow of the law', which includes the legal advice they are given. If the advice is that we do not usually pay or receive spousal support, this may impact on outcomes irrespective of individual attitudes.*[34]

10.20 There are no studies showing the incidence of maintenance in de facto relationship cases, whether opposite sex or same sex. The impression from the reported cases is that it is likely to be even lower than in marriage cases, suggesting that the legislative provisions are simply not being used. In Jenni Millbank's 2000 study of 237 matters filed in the ACT Magistrates and Supreme Courts under the ACT

30. PRA s 28.
31. See Appendix C.
32. See J Behrens and B Smyth, *Spousal Support In Australia: A Study Of Incidence And Attitudes* (Australian Institute of Family Studies, Working Paper 16, 1999) at 15.
33. The study also found that maintenance typically lasts two years and averages about $128 a week, giving rise to the comment that maintenance is "rare, minimal and brief": see Behrens and Smyth at vii, 21.
34. Behrens and Smyth at 21.

equivalent of the PRA it appears that only one file involving a heterosexual cohabiting relationship included a claim for maintenance.[35]

10.21 There are no statistics concerning the incidence of maintenance in close personal relationships. Nor do we know anything about community attitudes to maintenance in the context of such relationships.

The Commission's view

The function of maintenance

10.22 The Commission believes that maintenance has a place in the PRA and should continue to be available. Even if, in accordance with Recommendation 27 of this Report, property adjustment orders become available under the PRA under the same conditions as in the FLA, the circumstances in which maintenance may be needed are applicable, in principle, to de facto relationships, whether opposite or same sex. In particular, maintenance would seem to have a role in cases involving the breakdown of a relationship where a property adjustment order is of little help because there are few assets but a need in one party for support and a capacity in the other party to pay; as well as in cases calling for periodical and interim payments. The same is true in the case of close personal relationships. In all cases, the interaction of maintenance with property adjustment orders, particularly any attempt at double dipping, is appropriately dealt with in the discretion of the Court.

10.23 There is no empirical evidence to suggest any other approach in this context. Indeed, while a small sample, the respondents to the Commission's Questionnaire showed strong support for the continued availability of maintenance on the breakdown of gay and lesbian relationships. The reasons for the contrast of this response and that obtained in the AIFS study of divorcees (where there was a bare majority in favour of the availability of maintenance on divorce) are not known. On the one hand, disparity between support for maintenance and its incidence in practice is more easily explicable in the context of gay and lesbian relationships where fear of homophobia may prevent recourse to dispute settlement procedures.[36] On the other hand, it may be conjectured that there is generally less desire for a "clean break" on the termination of gay and lesbian relationships than there is in the case of opposite sex relationships and so less of a dislike of maintenance with its connotations of ongoing support. Only 25% of respondents to the Questionnaire favoured lump sum over weekly or monthly maintenance as a means of promoting a "clean break" between the

35. As reported in B Fehlberg, "Spousal maintenance in Australia" (2004) 18 *International Journal of Law, Policy and the Family* 1 at 28, notes 163-165, citing J Millbank, "Domestic rifts: who is using the *Domestic Relationships Act 1994* (ACT)?" (2000) 14 *Australian Family Law Journal* 163.
36. See Chapters 14 and 15.

parties,[37] although some support for the "clean break" principle was expressed in the focus groups.[38]

The independent consideration of maintenance

10.24 The Commission notes that 81% of respondents to our Questionnaire also believed that Courts should consider maintenance as part of the overall process of property division between partners on the breakdown of a relationship.[39] To the extent to which their legislative schemes permit circumstances relevant to the award of maintenance under the PRA to be taken into account in a property adjustment order, this is effectively the approach in Queensland[40] and Victoria[41] where no provision is made for maintenance orders. In the Commission's view separate provision should continue to be made for maintenance orders. While the implementation of our recommendations concerning property adjustment orders could allow the Courts to encompass within them matters relating to future support that are traditionally embodied in maintenance orders, we believe that their separate consideration and assessment not only ensures that they are addressed in practice, but also gives the Court the flexibility to issue orders that are needed in the changing circumstances of the cases mentioned in paragraphs 10.15-10.17.

CIRCUMSTANCES IN WHICH MAINTENANCE SHOULD BE AVAILABLE

10.25 The last section concluded that maintenance orders should be available in addition to property adjustment orders. This section addresses the circumstances in which maintenance orders should be made. Two overriding questions arise: first, whether the custodial and rehabilitative grounds for maintenance under the PRA are adequate as currently formulated; and, secondly, whether the custodial and rehabilitative grounds should, in any event, be expanded.

Custodial maintenance

The justification for custodial maintenance

10.26 The custodial basis for maintenance enshrined in s 27(1)(a) of the PRA reflects the recommendations of the Commission in our 1983 Report that maintenance should be claimable where one party has the care and control of a child

37. See Appendix C.
38. Sydney focus group (property); Lismore focus group (property).
39. See Appendix C.
40. *Property Law Act 1974* (Qld) Pt 19. But the Queensland Law Reform Commission had recommended extensive maintenance provisions: see Queensland Law Reform Commission, *De Facto Relationships* (Report 44, 1993) at 69-94.
41. *Property Law Act 1958* (Vic) Pt 9.

of the de facto relationship and is unable to support himself or herself by reason of child care responsibilities. We wrote:[42]

> *If the non-custodial parent has the resources to support the custodial parent in meeting his or her own needs, we think it may be appropriate for a court to order the non- custodial parent to pay maintenance. The justification is that the child care responsibilities accepted by the custodial parent relieve the other partner of commensurate responsibilities, thereby perhaps preserving that partners income earning capacity. Moreover, the child care responsibilities limit the earning capacity of the custodial parent. In those circumstances we think it is fair for the non-custodial parent, in addition to providing support for the children, to shoulder part of the economic burden of meeting the needs of the custodial parent. We also think it may well advance the welfare of children for a custodial parent to have an additional source of support beyond social security payments and child maintenance.*

10.27 We adhere to this view. We think that it applies equally in the context of the breakdown of gay and lesbian relationships. In the context of such relationships, however, the expression "child of the parties of the relationship" in PRA s 27(1)(a) needs to be understood broadly to include any child for whose day-to-day care and long-term welfare both parties exercise responsibility. Recommendation 17 of this Report is designed to achieve this objective.

Age limits on custodial maintenance

10.28 Section 27(1)(a) of the PRA currently limits the availability of custodial maintenance by reference to the ages of the children in the care and control of the resident partner (under the age of 12 years or if the child has a physical or mental disability under the age of 16 years). The legislation of some Australian jurisdictions is to like effect.[43] In contrast the FLA prescribes 18 years and makes no reference to a different age with respect to children with a disability.[44]

10.29 In their joint submission, the NSW Commissioner for Children and Young People and the National Children's and Youth Law Centre drew attention to the different treatment of married and unmarried couples in relation to custodial maintenance orders. The submission referred to the cut-off ages in the PRA as "arbitrary", pointing out that:

> *Children vary in their needs and older children sometimes require greater parental care and attention than younger children. If there are*

42. NSW Law Reform Commission, *Report on De Facto Relationships* (Report 36, 1983) at para 8.23.
43. See *Domestic Relationships Act 1994* (ACT) s 19(1)(a); *De Facto Relationships Act 1991* (NT) s 26(1)(a).
44. FLA s 72(1)(a).

> *several teenage children in the family it will be difficult for the parent or carer to work full-time.*[45]

10.30 Agreeing that the cut-off ages in the legislation may cause difficulties for resident parents in certain circumstances, NSW Young Lawyers suggested that there should be a discretion to allow maintenance for parents of older children in cases where the court may consider this appropriate.[46]

10.31 Respondents to more specific questions in the Commission's Questionnaire on Same Sex Relationships and the Law were not in agreement about the age limits that should apply in the case of custodial maintenance. 23% of respondents thought maintenance should be paid until the youngest child starts school, while 6% thought it should be paid for up to 3 years regardless of how old any children of the relationship are.[47]

10.32 The Commission is of the view that the cut-off ages of 12 and 16 in the PRA are arbitrary and cannot be justified. While rationales for these age limits can be found in the encouragement they provide custodial parents not to become reliant on maintenance, and in the likelihood of a custodial parent being able to return to the work force once a child is older, there is no guarantee that the latter is either desirable or possible, especially in the case of children with a disability. Because the circumstances are so variable, the Commission prefers that courts should have the power to make maintenance orders in any case in which applicants for maintenance are unable to support themselves because of their care or control of a minor child of the relationship.

45. NSW Commissioner for Children and Young People and National Children's and Youth Law Centre, *Submission* at 6.
46. NSW Young Lawyers, *Submission* at 13.
47. See Appendix C.

Recommedation 32

PRA s 27(1)(a) should be amended to provide an age limit of 18 years for all children. PRA s 30 (1) should be amended consequentially.

Rehabilitative maintenance

10.33 The rehabilitative basis for maintenance enshrined in s 27(1)(b) of the PRA also reflects the recommendations of the Commission in our 1983 Report. We wrote that maintenance ought to be available where:[48]

> *a person's earning capacity has been adversely affected by the de facto relationship (for example, because domestic responsibilities have precluded that person acquiring marketable skills), and some training or retraining is required to enable the person to undertake gainful employment. In these circumstances we think it may be proper to require the other party, assuming that he or she has the necessary resources, to contribute to the reasonable cost of the training, for a limited period of time. The justification for this is that the party seeking support has forgone career or training opportunities which otherwise might have been available, and devoted energies to the household. To the extent that the other party has accepted or encouraged this course of conduct, it is fair that he or she, within the limits of available resources, should bear some responsibility for the cost of restoring financial independence to the person requiring retraining.*

10.34 The FLA approach is much wider, allowing a claim where a spouse is unable to support him or herself adequately "by reason of age or physical or mental incapacity for appropriate gainful employment".[49] The legislation in Western Australia is identical to the FLA.[50] In contrast, the Tasmanian legislation retains a rehabilitative focus by allowing an applicant who cannot support him or herself adequately to claim maintenance because "the partner's earning capacity has been adversely affected *by the circumstances of the personal relationship*".[51] The same is true of the legislative provisions in the Australian Capital Territory and the Northern Territory, which mirror the New South Wales legislation.[52]

10.35 The Commission favours the FLA approach. We do not believe that the narrow rehabilitative approach that we adopted in 1983 remains appropriate. First, that approach does not sit easily with Recommendation 34 that maintenance should

48. Report 36 at para 8.24.
49. FLA s 72(1)(b).
50. *Family Court Act 1997* (WA) s 295ZC(b).
51. *Relationships Act 2003* (Tas) s 47(1)(a). But note s 47(1)(b) where "any other reason" may arise "in whole or in part from the circumstances of the personal relationship".
52. See *Domestic Relationships Act 1994* (ACT) s 19(1)(b); *De Facto Relationships Act 1991* (NT) s 26(1)(b).

be awarded for "adequate reason" not specified in the legislation. Secondly, the approach puts a premium on the distinction between marriage and de facto relationships that may well be productive of injustice in cases where the parties have committed themselves, either at the beginning of their relationship or in the course of its development, to a partnership of unlimited duration. Take the following example:[53]

> *Ms A and Ms B have lived in a de facto relationship for 20 years. They met when they were both students at University. On completion of their studies, Ms A moved in with Ms B. Ms A had previously lived with her parents and was unemployed. Ms A and Ms B have two children who, pursuant to their mutual desire and agreement, were born in the course of their relationship as a result of in vitro fertilisation procedures. Throughout the relationship, Ms A was the homemaker and supported Ms B in her career. During her successful career, Ms B accumulated substantial wealth.*

10.36 The Commission can think of no reason why maintenance (whether styled "compensatory" or "rehabilitative" in a broad sense) should operate differently in such a case depending on whether or not the parties have made a public commitment in marriage. Indeed, it must be remembered in this context that lesbian and gay partners simply cannot make that public commitment. In the instant case, if she cannot support herself adequately on the breakdown of her relationship with Ms B, it is just that Ms A should be entitled to maintenance aimed at enhancing her earning capacity, whether or not that capacity has been adversely affected by the circumstances of the relationship.

53. A variation of an example in Queensland Law Reform Commission, *De Facto Relationships* (Report 44, 1993) at 77.

Recommendation 33

PRA s 27(1)(b) should be amended to empower a court to award maintenance where it is satisfied that the applicant is unable to support himself or herself adequately by reason of age or physical or mental incapacity for appropriate gainful employment.

A catch-all provision?

The FLA, Western Australian and Tasmanian legislation

10.37 The FLA and the Western Australian legislation allow for the award of maintenance where the applicant is unable to support him or herself adequately "for any other adequate reason".[54] There is also a catch-all phrase in the recently enacted Tasmanian legislation, but it is narrower. It allows a court to make an order for maintenance where the applicant is unable to support himself or herself adequately because "of any other reason arising in whole or in part from the circumstances of the personal relationship".[55] Unlike the FLA and Western Australian provisions, the Tasmanian legislation retains a rehabilitative focus even under its catch-all provision.

The Commission's view

10.38 The main benefit of a catch-all provision is, of course, that it allows for unspecified circumstances to be considered in developing the court's jurisdiction to award maintenance. The Commission is of the view that such a provision is called for in this context because we have little or no information about the need for, and operation of, maintenance in the context of the breakdown of same sex and close personal relationships, and, indeed, how such relationships differ in this respect from marriage and other heterosexual relationships. Consistent with our lack of knowledge, we think that such a provision should be kept as wide as possible. We, therefore, favour the FLA approach to that in the Tasmanian legislation. But we express no view about how such a provision should be interpreted – for example, whether it should generally be tied to a rehabilitative rationale or not.

10.39 In this regard we draw attention to a clear tension in the responses to our Questionnaire on Same Sex Relationships and the Law between a general sentiment in favour of treating all de facto relationships equally and the specific view that the grounds of maintenance should not be expanded beyond those currently available in the PRA. While 93% of respondents were of the view that, on the breakdown of a relationship, the law should treat same sex relationships in the same way as opposite sex de facto relationships, 80% thought partners should pay maintenance to an ex-partner *in the circumstances currently set out in the PRA*.[56] And 31% of respondents were more specific: in the absence of children of the relationship, maintenance should only be paid for up to three years where its purpose is retraining or study.

54. FLA s 72(1)(c); *Family Court Act 1997* (WA) s 205ZC(c).
55. *Relationships Act 2003* (Tas) s 47(1)(b).
56. See Appendix C.

10.40 As in other contexts,[57] the tension is understandable since the approach of treating all de facto relationships equally runs the risk of overlooking significant differences between various types of relationships. In the context of maintenance, that tension is brought to the fore not only because maintenance is capable of serving a variety of purposes that, potentially, vary depending on the relationship in issue, but also because maintenance raises the prospect of a necessity for an ongoing association between the parties, especially where one party must make periodic payments to the other. This qualifies the "clean break" principle, which is variously enshrined in both the PRA[58] and the FLA,[59] and which requires a court, in making orders under the legislation, so far as is practicable, to determine finally the parties' financial relationships, and to avoid further proceedings between them. Among others, this principle has the laudable objective of encouraging both parties to move on with the rest of their lives.

10.41 The tension that we have observed can, in our view, only be addressed and resolved in the context of a developing jurisprudence reflecting the courts' experience in dealing with maintenance in the context of the breakdown of gay, lesbian and close personal relationships.

57. See Chapters 1, 8 and 9.
58. PRA s 19.
59. FLA s 81.

Recommendation 34

PRA s 27 (1) should be amended by inserting a new sub-paragraph (c) that empowers a court to award maintenance where it is satisfied that the applicant is unable to support himself or herself adequately for any other adequate reason. Consequentially:

- the words "either or both" in s 27(1) should be deleted and the words "any or all" inserted;
- PRA s 30(2) should be amended so that it applies additionally to the new s 27(1)(c); and
- section 30(3) should be amended to include a reference to the new s 27(1)(c).

FACTORS RELEVANT TO THE COURT'S DETERMINATION OF MAINTENANCE

The PRA and FLA factors

10.42 Once the threshold requirements for a maintenance order are satisfied, a court has to determine if it will make such an order and, if so, what the amount of the order should be. In doing so, the court must have regard to the factors listed in section 27(2) of the PRA, which are as follows:

> *(a) the income, property and financial resources of each party to the relationship (including the rate of any pension, allowance or benefit paid to either party to the relationship or the eligibility of either party to the relationship for a pension, allowance or benefit) and the mental and physical capacity of each party to the relationship for appropriate gainful employment,*
>
> *(b) the financial needs and obligations of each party to the relationship,*
>
> *(c) the responsibilities of either party to the relationship to support any other person,*
>
> *(d) the terms of any order made or proposed to be made under section 20 with respect to the property of the parties to the relationship, and*
>
> *(e) any payments made, pursuant to an order of a court or otherwise, in respect of the maintenance of a child or children in the care and control of the applicant.*

10.43 In contrast, section 75(2) of the FLA provides a lengthier, and non-exhaustive, list of factors that are relevant to the determination of spousal maintenance. Professor Fehlberg has grouped these factors, which have been set out in paragraph 7.20, into three broad, overlapping, categories as follows:

> *(a) the parties' post separation personal circumstances (including their age, health, earning capacity, financial resources, commitments*

> *necessary for self-support and support of others they have a duty to maintain, and any property order made under the FLA or any financial agreement binding between parties);*
>
> *(b) the past circumstances of the marriage (contributions of the applicant to the economic well being of the other party, and the extent to which the duration of the marriage has affected the applicant's earning capacity); and*
>
> *(c) the 75(2)(o) considerations of conduct (in essence, only conduct having financial consequences is considered relevant).*[60]

10.44 The Commission has already recommended that the "s 75(2) factors" be relevant to the determination of a property adjustment order under the PRA.[61] The Commission considers that, once listed in the legislation, these factors should also be relevant to an award of maintenance under the PRA. We recognise that we have left open the question whether the interpretation of the circumstances in which awards of maintenance can be made under the PRA should develop in such a way as to mirror the approach under the FLA. However, we believe that, once the jurisdictional hurdles are satisfied, the court should have as wide a discretion as possible to determine whether maintenance is appropriately awarded in the case at hand and at what level that maintenance should be. Our lack of knowledge of the operation of maintenance orders in the context of gay, lesbian and close personal relationships dictates that the discretion should, in this respect, be kept as wide and flexible as possible.

10.45 As in the case of property adjustment orders,[62] this raises the question whether any of the factors in s 75(2) need to be modified because their application would be inappropriate in the

60. B Fehlberg, "Spousal maintenance in Australia" (2004) 18 *International Journal of Law, Policy and the Family* 1 at 20.
61. See Recommendation 27.
62. See Chapter 7.

case of lesbian, gay and close personal relationships. This requires, in particular:

- consideration of factors requiring modification in drafting to allow for their application to lesbian, gay and close personal relationships; and
- discussion of entry into another domestic relationship as a factor relevant to maintenance.

Factors requiring modification in drafting

10.46 Obviously the references in s 75(2) to other sections in the FLA will need to be amended to refer to corresponding provisions in the PRA. Again, the references to "marriage" in s 75(2) will have to be replaced by "domestic relationship" or "relationship".

10.47 The Commission draws particular attention to the following points:

- Section 75(2)(c) as redrafted will refer to "a child of the parties to a domestic relationship", which will itself have been redefined in accordance with Recommendation 17.
- The references in s 75(2)(f) to pensions, allowances and benefits should remain as they are in view of Recommendation 39.
- The words "or divorced" should be deleted from s 75(2)(g).
- Section 75(2)(m) should be reformulated in accordance with Recommendation 38.
- Section 75(2)(n)(ii) should be omitted for the reason give in paragraph 7.104.

Entry into another relationship

10.48 Section 75(2)(m) of the FLA provides that if either party to a marriage is cohabiting with another person, the court is to take into account the financial circumstances relating to that cohabitation as a factor relevant to spousal maintenance. The operation of this factor is, potentially, affected by existing provisions in the PRA relating to the effect of a subsequent relationship or marriage on:

- the ability to institute an action for maintenance, the rule being that a person who has entered into another domestic relationship or married or remarried is not permitted to institute a claim for maintenance from his or her former partner;[63] and
- an existing maintenance order, the rule being that an award of maintenance in favour of a party to a domestic relationship ceases on the marriage or remarriage of that party.[64]

10.49 The FLA, as well as the legislation in the Northern Territory and Tasmania, all contain provisions relating to the effect of "re-partnering" on an exisiting maintenance order. Section 82(4) of the FLA provides that a maintenance order in

63. PRA s 29.
64. PRA s 32.

favour of a party to the marriage ceases to have effect on the re-marriage of that party unless, "in special circumstances", the court orders otherwise. The legislation in the Northern Territory agrees with the PRA provision under which a maintenance order ceases on the marriage of a de facto partner in whose favour the order was made.[65] Tasmanian law is to the same effect,[66] providing, additionally, that a maintenance order ceases to have effect where the party in whose favour the order was made enters into a deed of relationship with another person.[67] The Tasmanian legislation also accords with the PRA in prohibiting a person who has entered into a relationship with another person (or has married or remarried) from making an application for maintenance.[68]

10.50 In contrast, the Australian Capital Territory legislation says nothing about the effect of marriage, remarriage or re-partnering on existing maintenance orders or on the ability of the parties to claim maintenance. Instead, these are factors that may be considered relevant either when considering the financial resources or financial needs of the applicant[69] or when considering an application to vary an order based on change of circumstances.[70]

10.51 DP 44 asked what effect "re-partnering" should have on the availability of maintenance.[71] All respondents agreed that "re-partnering" should not be an absolute bar to the availability of maintenance, but simply a factor relevant to the determination of the availability or variation of a maintenance order.[72] New South Wales Young Lawyers also noted that the current situation is anomalous in respect of close personal relationships, providing further support for a more discretionary approach to maintenance. Just under 50% of respondents to the Questionnaire on Same Sex Relationships and the Law thought that partner maintenance should cease when the partner in whose favour the order was made begins to live with a new partner.

10.52 In 1983 this Commission was equally divided on the issue whether a maintenance order should cease when a person in whose favour it was made entered into another de facto relationship (as opposed to a marriage or remarriage).[73] The Commission is now persuaded by the majority of our respondents that entry into such a relationship ought not to have the automatic effect of (a) disqualifying a person from seeking a maintenance order or (b) causing the cessation of the order. The Commission is of the view that it can cause injustice if a new partner's financial position or mere existence automatically removes the need for the ex-partner to

65. *De Facto Relationships Act 1991* (NT) s 30(1)(b).
66. *Relationships Act 2003* (Tas) s 50(1)(c).
67. *Relationships Act 2003* (Tas) s 50(1)(d).
68. *Relationships Act 2003* (Tas) s 49.
69. *Domestic Relationships Act 1994* (ACT) s 19(2).
70. *Domestic Relationships Act 1994* (ACT) s 23(2). Compare PRA s 35.
71. DP 44 at para 8.13 (Issue 29).
72. Equity Division of the Supreme Court of NSW, *Submission* at 25; Women's Legal Resources Centre, *Submission* at 24; NSW Young Lawyers, *Submission* at 13-14; Law Society of NSW, *Submission* at 9.
73. Report 36 at para 10.27, 10.28.

provide for the applicant's maintenance. Entry into a de facto relationship may not have the effect that the applicant is now able to support himself or herself. Whether it does so or not, and what its effect ought to be, is appropriately a matter to be considered on a case by case basis in the discretion of the court. It follows that Commission supports the inclusion in the PRA of an equivalent provision to FLA s 75(2)(m).

10.53 Consequentially, the Commission recommends that s 29 of the PRA should be repealed. For the reasons just given, entry into a new de facto relationship should not by itself rule out an application for maintenance against a former partner. In addition, entry into a de facto relationship or a new close personal relationship in itself would seem to have no relevance to an application for maintenance in the case of close personal relationships. Moreover, that part of s 29 which covers the marriage or remarriage of a party to a former relationship seems unnecessary. Apart from its likely irrelevance in the context of gay and lesbian relationships, the marriage will generally have the effect of removing the necessity for a maintenance order since an obligation to maintain the applicant will now rest on the (new) spouse.[74]

10.54 What effect ought marriage to have on an existing maintenance order? As just noted, the marriage will create an obligation in the new spouse to maintain the applicant. This explains the rule in the PRA that marriage or remarriage of the person in whose favour it was made terminates an existing maintenance order PRA.[75] The FLA qualifies this by allowing the court to order otherwise "in special circumstances".[76] The Commission supports this qualification, which injects flexibility into a technical rule that otherwise must be rigidly applied.

10.55 The Commission also supports extending the rule that a maintenance order ceases on the marriage or remarriage of the person in whose favour it was made to the situation where a person in receipt of maintenance from an ex-partner enters into a registered relationship with another person (that is a relationship registered in accordance with the scheme proposed in Recommendation 15). Although entry into such a relationship does not automatically give rise to an obligation to maintain, it gives the parties the right to institute maintenance proceedings without having to satisfy the requirement that the de facto relationship has lasted for a period of two years, as would be the case if the relationship were unregistered. An amendment of s 32(1) of the PRA is necessary to achieve this and to bring the law of New South Wales into conformity with that in Tasmania.

10.56 The Commission does not believe that "re-partnering" (whether understood as marriage, remarriage or entry into a de facto relationship or another close personal relationship) has any relevance to claims for maintenance by parties in close personal relationships. This ought to be reflected in the wording of the s 75(2)(m) factor in its translation into the PRA.

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74. FLA s 72.
75. PRA s 32(1)(c).
76. FLA s 82(4).

10.57 A further change in the wording of s 75(2)(m) is necessary to remove the reference to "cohabitation", which, in accordance with Recommendation 5, will no longer form part of the definition of "de facto relationship".

Locating the 75(2) factors

10.58 The Commission notes that while the FLA's "s 75(2) factors" are located in a section of the Act dealing with spousal maintenance, the factors are relevant both to orders adjusting property and to maintenance orders. The implementation of Recommendations 27 and 35 in this Report would result in these factors being relevant to all financial adjustment orders under Part 3 of the PRA. In the Commission's view, thought should be given to listing these factors in a more obvious place in the Act than the Division that deals with maintenance.

Recommendation 35

PRA s 27(2) should be repealed and, with appropriate alteration of detail, the "s 75(2) factors" under the FLA should apply to the determination of maintenance orders under the PRA.

Recommendation 36

PRA s 29 should be repealed.

Recommendation 37

PRA s 32(1)(c) should be amended to provide that a maintenance order in favour of a party to a de facto relationship shall cease to have effect when that party enters into a marriage or remarriage or registered relationship with another person unless in special circumstances a court orders otherwise.

Recommendation 38

FLA s 75(2)(m) should be translated into the PRA as follows: "If either party has entered into a de facto relationship with another person – the financial circumstances relating to that relationship".

MAINTENANCE AND SOCIAL SECURITY

10.59 Section 27(3) of the PRA provides:

> *In making an order for maintenance, a court shall ensure that the terms of the order will, so far as is practicable, preserve any entitlement of the applicant to a pension, allowance or benefit.*

10.60 The effect of this provision is to place the primary burden of support on the State, rather than on the former partner of a person in need of financial support. Section 27(3) results from a recommendation of this Commission in 1983, and reflects a deliberate decision of the Commission to preserve the social security system as a primary means of support for two reasons: first, because the system of maintenance that the Commission was recommending was much more restricted than that available to married couples under the FLA; and, secondly, because it would be unfair if the effect of introducing a maintenance system for de facto couples would be to reduce their economic security by substituting an uncertain source of income (from a former partner) for a reliable source (from social security).[77]

10.61 In contrast, the FLA places the primary burden of support on the former spouse, rather than on the social security system. Section 75(3) of the FLA directs the court, when exercising its jurisdiction to make a maintenance order, to "disregard any entitlement of the party whose maintenance is under consideration to an income tested pension, allowance or benefit". This subsection was introduced in 1987.[78] Before then, the FLA adopted an approach that was closer to the PRA's current approach, directing the court to consider eligibility for a pension, allowance or benefit when determining an application for maintenance.[79] That subsection was amended,[80] and s 75(3) inserted, in 1987, because the government had "been concerned at the very high level of social security payments being made to divorced parties who have not made adequate provision for spousal maintenance".[81]

10.62 The proposition that the responsibility for supporting an individual in financial need should fall primarily on the social security system, rather than on the individual's former partner, can no longer be supported. This is especially the case if the Commission's recommendation to expand the PRA's maintenance provisions to reflect more closely the FLA provisions is adopted. The majority of States that provide for maintenance for de facto couples follow the FLA approach with respect to consideration of social security payments.[82] In the Commission's view, this trend reflects a more appropriate balance in the relationship between maintenance and welfare entitlements than currently exists in the PRA.

77. Report 36 at para 8.37-8.40.
78. *Family Law Amendment Act 1987* (Cth) s 39(c).
79. See s 75(2)(f), as originally enacted.
80. *Family Law Amendment Act 1987* (Cth) s 39(b).
81. Commonwealth, *Parliamentary Debates (Hansard)* House of Representatives, 29 October 1987 at 1715.
82. See *De Facto Relationships Act 1991* (NT) s 26(3); *Relationships Act 2003* (Tas) s 47(3); *Family Court Act 1997* (WA) s 205ZD(4). By contrast, s 19(3) of the *Domestic Relationships Act 1994* (ACT) expressly preserves the entitlement of the applicant for maintenance to a pension, allowance, or benefit.

Recommendation 39

PRA s 27(3) should be replaced by a section that mirrors FLA s 75(3).

10.63 The Commission has also given consideration to the possibility of incorporating into the PRA a provision that mirrors s 77A of the FLA. Section 77A requires the court to specify the portion of a payment, or transfer of property, that is a payment of maintenance (as opposed to an adjustment of property). This section is designed to assist in the determination of social security allowances that are means tested according to income, and which may therefore be affected by an entitlement to maintenance.[83] However, since the *Social Security Act 1991* (Cth) defines "partner" to exclude people in same sex relationships,[84] social security allowances which require consideration of partner maintenance will not be relevant to people in receipt of maintenance from a former lesbian or gay partner. It is therefore not necessary at this stage to recommend the adoption of a provision similar to s 77A. It may, however, become a more important consideration if relevant federal legislation is amended to encompass same sex partners.

83. See *Doig and Doig* [1999] FLC 92-869 per Kay J at 86,292; P Parkinson and J Behrens, *Australian Family Law in Context: Commentary and Materials* (3rd ed, Lawbook Co, Sydney, 2004) at 590; B Fehlberg, "Spousal maintenance in Australia" (2004) 18 *International Journal of Law, Policy and the Family* 1 at 22.
84. *Social Security Act 1991* (Cth) s 4(1) defines a "partner" in relation to a person who is a member of a couple, to mean the other member of the couple. Section 4(2) defines a member of a couple as either a member of a married couple, or as a person who has a relationship with a person of the opposite sex.

11. Aspects of financial adjustment proceedings and orders

- Disclosure
- Variation of orders and third parties
- Death of a party

11.1 This Chapter considers three miscellaneous aspects of proceedings under Part 3 of the *Property (Relationships) Act 1984* (NSW) ("the PRA"):

- the obligation of the parties to make full and frank disclosure of their financial circumstances;
- whether or not the rights of third parties are given sufficient recognition in the legislative provisions for varying or setting aside orders under Part 3; and
- the effect on proceedings of the death of the parties.

DISCLOSURE

The obligation to disclose

11.2 Neither the PRA nor the Regulations made under it explicitly require the parties to proceedings under Part 3 to disclose their financial position fully and frankly. However, it seems clear that such an obligation does exist. In the English case of *Livesey v Jenkins*, Lord Brandon said:

> *… unless a court is provided with correct, complete and up-to-date information on the matters to which … it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by [the legislation]. It follows necessarily from this that each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court.*[1]

11.3 Referring to this decision and another,[2] Master McLaughlin has said:

> *It cannot be emphasised too strongly that in proceedings under the De Facto Relationships Act, each party bears a responsibility to place before the Court full and complete information concerning the financial and material circumstances, including the assets and liabilities, of that party at the commencement of the relationship, at the termination of the relationship and at the time of the trial.* [3]

1. [1985] AC 424 at 437 (Lord Brandon). This was a case of financial provision under *Matrimonial Causes Act 1973* (UK) s 25(1). See also *Dowrick v Sissons* (1996) 20 Fam LR 499 at 472-473.
2. *Dowrick v Sissons* (1996) 20 Fam LR 499 at 472-473.
3. *Parks v Thompson* (1997) DFC ¶95-182 at 77579. See also, in the context of family provisions claims, *Fraser v Venables* (NSWSC, 30 September 1998, No. 1847/95 unreported, Master MacLaughlin), cited by Acting Master Berecry in *Foster v Foster* [1999] NSWSC 1016. See also the similar statements in *Killiner v Freeman* [2000] NSWSC 263 at para 13.

11.4 A similar approach has been taken in other jurisdictions.[4]

Effect of non-disclosure

11.5 Where it is apparent to the Court that a party to the proceedings has failed to make complete disclosure of assets, the Court may draw the inference that complete disclosure would not have assisted the party's case.[5] In particular, the Court may find that the value of an item that a party has not adequately established is as high as is consistent with the description that the Court has of it.[6] Where the Court makes an order under s 20 (or s 27) on this basis, the party who has failed to make full disclosure cannot complain if the order is more generous to the plaintiff than it might have been if the defendant had chosen to make full and complete disclosure of relevant information.[7] The Family Court has taken a similar approach in making orders under s 79 of the *Family Law Act 1975* (Cth) ("the FLA").[8]

Disclosure rules in other jurisdictions

Under the Family Law Act

11.6 Rule 13.01 of the *Family Law Rules 2004* (Cth) expressly imposes on each party a duty to the Court and to the other party to make full and frank disclosure of all relevant information in a timely manner. The duty starts with pre-action procedure and continues until the case is finalised.

11.7 Rule 13.04 particularises that duty in financial cases (which include actions under s 79 of the FLA, the equivalent of s 20 of the PRA), in the following way:

> *(1) A party to a financial case must make full and frank disclosure of the party's financial circumstances, including:*
>
> *the party's earnings, including income that is paid or assigned to another party, person or legal entity;*
>
> *any vested or contingent interest in property;*

4. *Steinbarth v Peters* [2005] VSC 87 at 8 where the Court held that it was both appropriate for it to refer to Family Court decisions which imposed a duty of disclosure on the parties, and consistent with its power under *Property Law Act 1974* (Vic) s 285 to make such property adjustment orders as appear just and equitable.
5. Applying the rule in *Jones v Dunkel* (1959) 101 CLR 298. See D Byrne and J D Heydon, *Cross on Evidence* (looseleaf edition) at para 1215.
6. The rule in *Armory v Delamirie* (1722) 1 Str 505; 95 ER 664.
7. *Parks v Thompson* (1997) DFC ¶95-182 at 77579.
8. *In the Marriage of Chang and Su* [2002] FamCA 156 at para 72 ("more robust view"); *Kannis v Kannis* [2002] FamCA 1150 headnote ("appropriate to err on the side of generosity to the party who might otherwise be seen to be disadvantaged by the lack of complete candour").

any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;

any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;

the party's other financial resources;

any trust:

(i) of which the party is the appointor or trustee;

(ii) of which the party, the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income;

(iii) of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child, spouse or de facto spouse is a shareholder or director of the corporation;

(iv) over which the party has any direct or indirect power or control;

(v) of which the party has the direct or indirect power to remove or appoint a trustee;

(vi) of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;

(vii) of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or

(viii) over which a corporation has a power mentioned in any of subparagraphs (iv) to (vii) if the party, the party's child, spouse or de facto spouse is a director or shareholder of the corporation;

any disposal of property (whether by sale, transfer, assignment or gift) made by the party, a legal entity mentioned in paragraph (c), a corporation or a trust mentioned in paragraph (f) that may affect, defeat or deplete a claim:

(i) in the 12 months immediately before the separation of the parties; or

(ii) since the final separation of the parties; and

liabilities and contingent liabilities.

(2) Paragraph (1)(g) does not apply to a disposal of property made with the consent or knowledge of the other party or in the ordinary course of business.

(3) In this rule:

legal entity *means a corporation (other than a public company), trust, partnership, joint venture business or other commercial activity.*

11.8 This obligation to make full and frank disclosure is backed up by a requirement that a party starting, or filing a response or reply to, a financial case must file a Financial Statement, set out as Form 13 in Schedule 2. That form is designed to elicit the information that must be disclosed under R 13.04. Form 13 does not have to be filed when a consent order is sought. However, the form (Form 11) that must accompany the application for a consent order effectively requires the disclosure of similar information.

In Queensland

11.9 Queensland also requires the parties to proceedings for property adjustment orders to disclose their financial circumstances in accordance with procedures laid down in the rules or a practice direction of the relevant Court. Indeed, the Court is prevented from making any order for property adjustment unless such order is complied with.[9]

Failure to disclose and varying or setting aside the order

11.10 Under s 41 of the PRA, the Court can vary or set aside an order under s 20 or s 27 of the Act (whether the result of contested proceedings or by consent)[10] where:

- there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;
- it is impracticable for the order to be carried out in the circumstances that have arisen since the order was made; or
- a person has defaulted in carrying out an obligation imposed on him or her by the order and, given the circumstances that have arisen as a result of the default, it is just and equitable to vary the order or set it aside and make another order in substitution for the order.

11.11 The equivalent provision under the FLA is wider so that the Court may vary or set aside an order for property adjustment and, if it considers appropriate, make another order in substitution for the order, where: [11]

- there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance; or

9. *Property Law Act 1974* (Qld) s 289.
10. PRA s 38(1)(j) expressly confers power on the Court to make an order by consent.
11. FLA s 79A(1).

- in the circumstances that have arisen since the order was made it is impracticable for the order to be carried out; or
- a person has defaulted in carrying out an obligation imposed on him or her by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order; or
- in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage, either the child or, the applicant (who has caring responsibility for the child) will suffer hardship if the Court does not vary or set aside the order; or
- a proceeds of crime order has been made covering property of the parties to the marriage or either of them, or a proceeds of crime order has been made against a party to the marriage.

11.12 A major difference between these two legislative approaches is that, unlike the FLA, s 41 does not expressly include "failure to disclose relevant information" as an instance of suppression of evidence. There are Family Court cases that suggest that non-disclosure of relevant assets would in any case amount to a miscarriage of justice by reason of the catch-all phrase "or any other circumstance".[12] To remove any doubt, however, the Commission proposed in DP 44 to add non-disclosure as an express ground for setting aside or varying an order made under s 20 or s 27.[13]

Submissions

11.13 All submissions addressing the disclosure issue took the view that that parties to proceedings under the PRA should be required to disclose their financial positions fully and frankly.[14] New South Wales Young Lawyers would qualify the obligation for reasons of cost or efficiency to the extent to which the parties agree otherwise.[15] The Equity Division of the Supreme Court pointed out that the principles that enable a Court to draw inferences that complete disclosure would not have assisted the case of a party failing to make such disclosure is not adequate "to deal with the situation where the evidence does not disclose the existence of some category of assets, which has been imperfectly described or valued". Moreover, those principles when applied can only produce "a very rough justice" with potential for unfair consequences.[16]

12. *Pelerman and Pelerman* [2000] FamCA 881; *Morrison and Morrison* (1995) FLC 92-573; *Suiker and Suiker* (1993) FLC 92-436.
13. See DP 44 at para 6.83.
14. Equity Division of the Supreme Court of NSW, *Submission* at para 55-58; Law Society of NSW, *Submission* at 8; Victorian Bar, *Submission* at para 57; NSW Young Lawyers, *Submission* at 8.
15. NSW Young Lawyers, *Submission* at 11.
16. Equity Division of the Supreme Court of NSW, *Submission* at para 58.

11.14 The Victorian Bar was of the view that the most appropriate way to give effect to the obligation to make disclosure was by amending the relevant Rules of Court to require the parties to sign a "Statement of Financial Circumstances", in the same way that people are required to do under the *Family Law Rules*.[17]

11.15 All submissions addressing this point supported the proposition that non-disclosure should be a ground for setting aside or varying an order. Some submissions would limit this to the situation where the non-disclosure is "material" or "significant", or, as the New South Wales Law Society put it, where the non-disclosure was "trivial or not significant", the Court should exercise its discretion.[18]

The Commission's view

11.16 The task of the Court in making an order under Part 3 of the PRA that is just and equitable is rendered more difficult if the parties fail to disclose all relevant information about their financial positions. While there is little doubt that parties are already under an obligation to disclose all relevant information, the Commission believes that a legislative statement of this important obligation would have the effect of reinforcing it. The Commission favours the statement of the general obligation in the Act itself (as is the case in Queensland), the detailed application of the obligation in financial adjustment proceedings being set out in the Regulations (as they are in the *Family Law Rules*).

11.17 In our view, the statement of the general obligation should be to the effect that a party to proceedings under Part 3 must make full and frank disclosure of all information relevant to the case in the manner prescribed by the Regulations. The Regulations that give effect to this should mirror the provisions of Rr 13.04 and 13.05 of the *Family Law Rules 2004* (Cth). The illustrative financial circumstances that a party is required to disclose under R 13.04 are equally appropriate to a claim under Part 3 of the PRA with the qualification that the reference to "the party's child" should refer not only to any legal child of the party but also to a functional child as defined in Recommendation 17 of this Report. It is appropriate that, as under the *Family Law Rules*, the Regulations should provide a standard form Financial Statement to assist parties in meeting disclosure requirements, whether in contested proceedings or in applications for consent orders under Part 3.

11.18 As to the failure of a party to comply with the disclosure obligations, we agree with the Equity Division of the Supreme Court that the adverse inferences that a Court may draw where there is a failure to make complete disclosure are of limited benefit. Although the current legislation arguably already supports this outcome, we favour an amendment of the PRA to clarify that the non-disclosure of relevant facts is a ground upon which a Court may set aside or vary an order under s 20 or s 27. This is most easily accomplished by bringing the PRA into line with the FLA by adding to

17. Victorian Bar, *Submission* at para 57.
18. Law Society of NSW, *Submission* at 8. See also NSW Young Lawyers, *Submission* at 11.

s 41(1)(a) of the PRA after the phrase "suppression of evidence" the following words in parenthesis: "(including failure to disclose relevant information)".

Recommendation 40

The PRA should be amended to provide that a party to proceedings under Part 3 must make full and frank disclosure of all information relevant to the case in a manner prescribed by the Regulations.

Recommendation 41

The *Property (Relationships) Regulation 2005* (NSW) should be amended to provide a non-exhaustive list of what a party to proceedings under PRA Part 3 must disclose about his or her financial circumstances. The list should reflect the *Family Law Rules 2004* (Cth) Rule 13.04, with the qualification that "child" must include both legal and functional children. The Regulations should also provide a form of Financial Statement that the parties must file in support of such proceedings (including applications for consent orders). The Financial Statement should reflect that in Form 13 of the *Family Law Rules 2004* (Cth).

Recommendation 42

PRA s 41(1)(a) should be amended to make it clear that the suppression of evidence includes a failure to disclose relevant information as a ground for setting aside or varying an order under Part 3.

VARIATION OF ORDERS AND THIRD PARTIES

11.19 The grounds upon which an order made under Part 3 can be set aside or varied are specified in paragraph 11.10. Those grounds do not include a failure to give sufficient recognition or protection to the interests of third parties. In DP 44 the Commission expressed concern that a Part 3 order transferring property could possibly defeat the interests of a bona fide purchaser of the property or some other third party as a result of a couple colluding to mislead the Court into making an order, most likely by consent, for the purpose of avoiding the claims of the third party. If the Court makes these orders, unaware of the competing claims, it could be seen to be a party to the sham.

11.20 The FLA likewise contains no specific ground to deal with such a case. It does, however, have a provision which states that, when setting aside or varying orders on one of the grounds listed in s 79A, the Court shall have regard to, and protect the rights of, bona fide purchasers or other interested persons.[19] This is not a ground in itself for setting aside or varying agreements, but rather a factor for the Court to consider in exercising its discretion.

19. See FLA s 79A(2).

11.21 In DP 44, the Commission asked whether it was appropriate to amend the PRA to allow the Court to vary or set aside an order under the Act where the order interferes with the rights of a third party. [20]

Submissions

11.22 New South Wales Young Lawyers submitted that interference with the rights of a third party is a factor that should be considered, but it is not appropriate for it to be a specific ground in and of itself.[21] Likewise, the New South Wales Law Society stated that while interference with the rights of third parties should not be a ground itself, it should be a factor to be considered when determining whether to set aside or vary an order.[22]

11.23 The Supreme Court's Equity Division did not, however, favour this proposal. It pointed out that many orders under the PRA will interfere with rights of third parties in a manner which is "quite unexceptional"; and that the particular mischief to which the Commission drew attention in DP 44, that is the collusive consent order whose primary aim is to remove assets from the reach of a third party, can be handled by the Court's inherent jurisdiction to avoid abuse of process. Moreover, the Equity Division pointed out that so far as the Commission's proposal was that orders interfering with the interests (as opposed to the rights) of third parties could be set aside or varied, it was too imprecise to be in legislation. If there was to be another ground for setting aside or varying an order, it should relate to property rights of third parties that the Court was unaware of at the time it made the order.[23]

The Commission's view

11.24 The Commission is generally persuaded by the submission of the Equity Division of the Supreme Court. Moreover, in our view, the PRA already provides sufficient protection for the rights (and any relevant interests) of third parties. It does so as a factor that the Court may take into account in the variation and setting aside of orders. Section 43 of the PRA provides:

> *In the exercise of its powers under this Part [ie Part 3], a court shall have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested.*

11.25 We point out that by varying or setting aside an order, the Court is exercising its powers under Part 3.

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20. See DP 44 at para 6.87 (Issue 27).
21. NSW Young Lawyers, *Submission* at 6.
22. Law Society of NSW, *Submission* at 8.
23. Equity Division of the Supreme Court of NSW, *Submission* at para 60-61.

DEATH OF A PARTY

11.26 The PRA confers a personal statutory right that abates on the death of either party. The *Law Reform Miscellaneous Provisions Act 1944* (NSW) provides for the survival of personal causes of action in certain cases. However, it expressly excludes claims made under Division 2 of Part 3 of the PRA. Apart from the specific provisions of PRA s 24, this confirms that a general doctrine of abatement applies to proceedings under the PRA.

11.27 Section 24(1) of the PRA provides that an application for a property order under s 20 *that has already been filed* may be continued by the personal legal representative of the deceased party.[24] An interlocutory application, such as one for leave to bring a substantive s 20 application out of time, would appear to be sufficient to invoke s 24(1).[25] It would also appear that the mere filing of an application will suffice to constitute the commencement of proceedings; service of the originating process is not likely to be a condition precedent to there being proceedings pending.[26]

11.28 Section 24(1) of the PRA provides the only circumstance in which a s 20 order can be made after the death of a party.[27] Under s 24(2), a Court is entitled to make an order under s 20 where it is satisfied that it would have adjusted interests in property if the deceased had not died, and it is still appropriate to adjust those interests despite the death of the deceased party.[28]

11.29 Where a property adjustment application under s 20 has not been commenced before the death of one of the parties to the domestic relationship, a surviving partner can, of course, have recourse to the provisions of the *Family Provision Act 1982* (NSW), and may rely on such other actions available at general law that are not affected by the death of the other party to the proceedings.

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24. PRA s 24(1). Emphasis added.
25. *Reid v George* *(1996) 20 Fam LR 374 (Young J).* In this case, the plaintiff, by summons, brought an application under s 18 for leave to be granted to bring a claim out of time as well as a substantive claim under s 20. The plaintiff died before the leave application was heard. Young J said there was some authority for the argument that the term "application" included the interlocutory stages of the application. He also referred to the long-standing practice of the Court, particularly in *Family Provision Act* cases, to permit applications for leave to commence proceedings and the substantive application in the one summons.
26. See *In the Marriage of Love* (1989) Fam LR 263 and *In the Marriage of Mason* (1993) 17 Fam LR 269 (which considered the equivalent provisions under the FLA s 79(8)(a)).
27. *Reid v George (1996) 20 Fam LR 374 at* 377, citing *Skene v Dale* [1990] VR 605.
28. Similar provisions apply in the FLA s 79(8)(a) and in other State de facto relationship legislation: eg, *Relationships Act 2003* (Tas) s 44(2); *Property Law Act 1958* (Vic) s 289(2); *De Facto Relationships Act 2003* (NT) s 22(2).

Where both parties die during proceedings

11.30 Whether s 24 applies in a situation where both parties die during proceedings, but before an order is made, is in some doubt. In *Werner-Zolotuchin v Public Trustee,* Master McLaughlin expressed a tentative view that s 24 probably did not apply. He said that a literal interpretation of the section, which is expressed in the singular, probably contemplates only the situation where one of the parties dies. Despite his misgivings, he went on to determine the proceedings, ultimately dismissing the action on the basis that no order for property adjustment was appropriate even if the applicant had not died. Master McLaughlin added that even if there were justifiable grounds to adjust property interests, he would not exercise his discretion to make a s 20 property order as such an order could be of no benefit to the deceased applicant. Any such order would merely be a windfall to her legal personal representative.[29]

11.31 Under s 79(8) of the FLA, which is to the same effect as s 24 of the PRA, it appears that proceedings cannot continue after the death of both of the parties.[30]

11.32 The Commission's view is that proceedings should not be capable of being continued where both parties die before an application under s 20 of the PRA is determined.

Recommendation 43

PRA s 24 should be amended to provide that an action under s 20 abates where both of the parties die before the proceedings are determined.

Enforcement of orders by or against the estate

11.33 An order for property adjustment under s 20 of the PRA can be enforced by or against the estate of the deceased partner who died after the application was brought but before the order was made.[31]

11.34 Where, however, one of the parties dies after the order was made, the PRA expressly provides that the order may be enforced against the estate of the deceased party.[32] It seems anomalous that the PRA does not accommodate the enforcement of the order *by* the estate of the deceased party. For the avoidance of doubt, the Commission believes that the PRA should be amended to make express provision for the enforcement of an order by the legal personal representative of the deceased party where that person has died after an order is made.

29. *Werner-Zolotuchin v Public Trustee* [2004] NSWSC 358.
30. See the discussion *In the Marriage of Fisher* (1986) 57 ALR 513.
31. PRA s 24 (3).
32. PRA s 25.

Recommendation 44

PRA s 25 should be amended to provide expressly that, where one of the parties dies after an order under s 20 is made, the order may be enforced by or against, as the case may require, the estate of the deceased party.

12. Financial agreements

- Background
- Making agreements under the Act
- Current powers to vary or set aside agreements
- Issues raised in DP 44
- Should solicitors be required to provide financial advice?
- Should financial advice be required under the PRA?
- On what grounds should agreements be varied or set aside?

12.1 People in domestic relationships in New South Wales, like their counterparts in other Australian jurisdictions, are permitted to contract out of the *Property (Relationships) Act 1984* (NSW) ("the PRA"), by entering into a financial agreement that sets out how they wish their assets to be divided in the event that they separate.[1] Many de facto couples will want to organise their own financial affairs without having to resort to costly litigation and the court's discretionary powers under s 20 and 27 of the PRA. Such agreements are binding on the parties and on the court, provided they satisfy the criteria set out in the PRA to ensure that they are made voluntarily and fairly. Financial agreements under the PRA are subject to the general laws of contract, and may also be set aside or varied by the court if to enforce the agreement would create injustice or hardship.

12.2 In this Chapter, the Commission examines whether the provisions of the PRA dealing with financial agreements are appropriate. In particular, the Commission seeks to establish whether the provisions have struck a correct balance between, on the one hand, giving people the freedom to order their own financial affairs if they wish to do so, and on the other hand, ensuring that adequate safeguards are in place to ensure that the enforcement of financial agreements under the PRA does not create hardship or injustice. The Commission has also taken into account the impact of private law on public resources. Provision for one family member to maintain another may mean that the dependent family member has less need to rely on public financial support. In formulating its recommendations, the Commission has taken into consideration more recent State and federal legislation that now all make provision for parties to enter into binding financial agreements. The Commission has also taken into account submissions received in response to DP 44 and the views expressed in targeted consultations with members of the gay and lesbian community.

BACKGROUND

12.3 Financial agreements between couples cohabiting outside marriage were once held to be unenforceable on the grounds that they were immoral and thus contrary to public policy.[2] They were considered to promote "immoral" relationships outside marriage and to dissuade people from marrying. However, as the incidence and community acceptance of people living together outside marriage grew, the courts began to suggest that the public policy principle no longer applied.[3] The courts noted that many areas of law had begun to recognise cohabitation outside marriage, including for example, Commonwealth laws that gave rights to "de facto widows" and

1. Since the 1999 amendments, this provision was extended to all people covered by the Act including same sex de facto couples, and people in close personal relationships.
2. DP 44 at para 4.5.
3. *Seidler v Schallhofer* (1982) NSWLR 80 (Hutley J). See also *Hagenfelds v Saffron* (Supreme Court, Equity Division, 1914 of 1985, McLelland J, 12 August 1986, unreported) where it was held that it was "not abundantly clear that, even in 1961, a contractual consideration of the kind in question would invalidate an otherwise enforceable contract": at 4.

New South Wales legislation that prohibited discrimination on the basis of marital status, defined to include a man and a woman living together otherwise than in marriage.[4] De facto partners could also by then bring proceedings under the *Family Provision Act 1982* (NSW) and had access to the same remedies as married victims of domestic violence under the *Crimes (Domestic Violence) Amendment Act 1982* (NSW). As Justice Hutley noted in *Seidler v Schallhofer* "judges can hardly characterise what legislation encourages as immoral".

12.4 Indeed, by the 1980s, as more and more property disputes between de facto partners came before the courts, it was increasingly felt that both the parties and the court would benefit if the parties were encouraged to regulate their own financial affairs by agreement.[5]

Report 36

12.5 In recognition of the growing community and judicial support for private ordering, the Commission recommended in its 1983 review that any new de facto relationship legislation should make express provision for enforceable cohabitation and separation agreements, and that these agreements should not be open to challenge on public policy grounds.[6]

12.6 The Commission adopted the widely held view that people who chose not to marry should be free to regulate their own financial affairs if they wished to do so. In particular, the Commission thought it was desirable that people who did not want the new laws to apply to them should be able to opt out of the legislative regime for property adjustment.[7]

12.7 The Commission accepted that certain safeguards needed to be put in place to ensure that the enforcement of cohabitation and separation agreements did not cause hardship or injustice to either of the parties. Those safeguards included requiring parties to obtain certified independent legal advice before signing the agreement, and allowing agreements to be challenged under general laws of contract, matters which are covered in more detail below. The Commission considered that the court should give effect to the parties' intentions as expressed in the agreement provided the parties were properly advised before signing it.

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4. *Anti-Discrimination Act 1977* (NSW) s 39.
5. *Jardany v Brown* (NSW Supreme Court, Powell J, 1 July 1981, unreported) cited in NSW Law Reform Commission, *Report on De Facto Relationships* (Report 36, 1983) ("Report 36") at para 11.7.
6. Report 36 at para 11.26-11.29. The Commission rejected the proposition that such agreements should be held invalid on the ground that they promoted immorality: see para 11.14.
7. Report 36 at para 11.2.

Property Relationships Act 1984 (NSW)

12.8 The Commission's recommendations in Report 36 were implemented in the *De Facto Relationships Act 1984* (NSW). The 1999 amendments to the Act (renamed the *Property Relationships Act 1984),* extended the coverage of the Act to include same sex cohabiting couples and persons living together in close personal relationships.[8] Persons covered by the legislation may choose to contract out of the provisions of the Act by making a domestic relationship agreement, either before or during the relationship, or a termination agreement, on separation or in anticipation of separation.

Family Law Act 1975 (Cth)

12.9 Until recently, the shift towards private ordering had almost exclusively been limited to couples cohabiting outside marriage.[9]

12.10 Over the last ten years, however, the move towards private ordering within marriage has also gathered pace in the federal arena. This was in no small measure due to the increasing divorce rate and a corresponding increase in the number of property disputes under the *Family Law Act 1975* (Cth) (" the FLA"). Although previous recommendations by various bodies to introduce binding financial agreements into the FLA were unsuccessful,[10] the Commonwealth eventually moved amendments to the FLA in 1999. These amendments, which came into effect on 27 December 2000, now allow married couples to make legally binding financial agreements,[11] both before and during marriage, as well as after marriage

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8. See Chapter 1 at para 1.9 – 1.11.

9. In SA, NT and ACT, there are provisions for the making of binding agreements in similar terms to those in the NSW Act. In contrast, Part 9 of the *Property Law Act 1958* (Vic) has no provisions for making cohabitation agreements. However, the court is able to have regard to any agreement which may exist between the couple when determining what property order, if any, to make (see for eg, *Lesiak v Foggenberger* (1995) DFC 95-167 (per Hedigan J)). Under the *Family Law Amendment Act 2001* (WA), parties to a de facto relationship may make binding financial agreements under provisions that mirror those recently inserted in the *Family Law Act 1975* (Cth).
10. Legally binding pre-nuptial agreements were first recommended by the Australian Law Reform Commission in 1987: see ALRC, *Matrimonial Property* (Report 39, 1987) at para 443 and then by a Joint Select Parliamentary Committee in 1992: see Australia, Joint Select Committee of Inquiry into Certain Aspects of the Operation and Interpretation of the Family Law Act, *Family Law Act 1975: Aspects of its Operation and Interpretation* (AGPS, 1992).
11. In 1999, the federal government introduced the *Family Law Amendment Bill 1999* (Cth). Schedule 2 of the Bill makes provision for the introduction of legally binding pre-nuptial agreements.

breakdown.[12] Provided they comply with the procedural requirements set out in the FLA, these agreements are binding on the Family Court.[13] Prior to the enactment of these provisions, the only agreements that ousted the jurisdiction of the court were maintenance agreements made after separation and approved by the court under s 87.

The reference of powers

12.11 The reference of State powers to the Commonwealth will mean that financial matters arising out of the breakdown of de facto relationships between opposite sex couples (including the effect of domestic relationship and termination agreements in that context) will be governed by Commonwealth law.[14] Part 4 of the PRA, which deals with domestic relationships and termination agreements, will continue to be relevant where such agreements are considered for purposes other than the breakdown of the relationship in question. Part 4 of the PRA will also continue to apply as the only legislative regulation of financial agreements relating to domestic relationships between persons of the same sex or in close personal relationships.

12.12 The Commission considers it appropriate that Part 4 should continue to operate in these circumstances. In particular, we are of the view that financial adjustment orders that can be made under Part 3 of the PRA should only constitute a default regime. Subject to appropriate safeguards, parties should, in principle, be able to continue to regulate by contract the financial aspects of their domestic relationships in a manner that they consider more accurately reflects their financial needs and circumstances. This applies regardless of the stage in their relationship when the agreement is entered into – whether in contemplation of its termination of after its termination. We believe that this applies equally to couples in opposite sex, gay, lesbian and close personal relationships.

12.13 Moreover, we are of the view that there is no distinction in this respect between parties who are married and those who are not. Just as parties to a marriage may wish to vary or exclude by agreement the operation of the property regime applicable during marriage or on divorce, so may parties to a domestic relationship. The only real difference is that the parties who marry may reasonably be taken to accept that they will be subject to laws governing matrimonial property and spousal maintenance. If the Commission's proposal for a registration system is adopted,[15] a similar supposition may come to be made about parties who register their relationships. No such supposition can, however, presently be made where parties

12. FLA s 90B, 90C and 90D.
13. FLA s 90G: In order to be legally binding, an agreement must be in writing, signed by both parties and each party must have received independent legal advice, a certificate of which must be annexed to the agreement. Two added clauses, namely that the agreement cannot have been terminated by a court and one party is to retain the original and the other a copy, are not included in the PRA.
14. See para 1.15 - 1.17.
15. See Recommendation 15.

enter into an unregistered de facto relationship. In such cases, there may simply be no appreciation of the need for a financial agreement to achieve a result other than that of the default regime, notwithstanding the fact that in New South Wales, attempted regulation of such relationships in various forms dates back to 1984. This lack of appreciation of the consequences of entering a de facto relationship can only be cured by education.

The use of financial agreements

12.14 There is very little empirical evidence in New South Wales, or indeed elsewhere,[16] documenting how often cohabitation agreements are entered into or how effective they are in producing outcomes that the parties consider fair. The little evidence that there is, mostly anecdotal, suggests that few cohabiting couples make agreements. In its submission in response to DP 44, the Women's Legal Resource Centre, which handles a large number of cases annually, said that it very rarely comes across people who have entered into domestic relationship agreements under the PRA. What it has found, in the rare case where a domestic relationship agreement exists, is that:

> *it is generally in a relationship in which the parties are perhaps older and have children from a previous relationship or significant pre-existing assets which they wish to quarantine.*[17]

12.15 In focus groups the Commission held with the gay and lesbian community in Sydney and Lismore, a large majority of participants were unaware that they could make financial agreements. A very small number of participants had made a domestic relationship agreement under the Act. Lesbian couples were more likely to have entered into a deed or a will in which their main concern was to nominate each other as guardians for their children.

12.16 Similar outcomes were revealed in data gathered from responses to the Commission's questionnaire, which also targeted the gay and lesbian community. Only 20% of respondents said that they knew they could make a binding financial agreement under the Act, and less than 17% of these respondents had actually entered into one. The majority did not enter into an agreement with their partner because it was too expensive; or it seemed to undermine trust in the relationship; or they simply never got around to it.[18]

12.17 These figures reflect the study conducted by the Australian Institute of Family Studies ("AIFS") in 1997 involving married couples and pre-marital

16. In jurisdictions where pre-nuptial agreements are legally binding, such as the United States, Canada and New Zealand, there is, according to anecdotal evidence, little take up of them. Unfortunately, there is a dearth of empirical evidence internationally as well as locally.
17. Women's Legal Resources Centre, *Submission* at 9.
18. See Appendix C.

agreements.[19] As part of the detailed research into the financial arrangements made by separated couples, those surveyed were asked whether they had made a pre-nuptial agreement. Of the 650 people surveyed, only 13 said that they had entered into an agreement. The data also revealed a general perception among respondents that pre-nuptial agreements did not help them, or would not have helped them, reach a fairer or more equitable settlement.[20] Given that, at the time, pre-nuptial agreements were not binding under the FLA,[21] it is not surprising that the research suggests that married couples rarely made pre-nuptial agreements.[22] Even now that they are binding, however, there is speculation that many couples will continue to avoid making financial agreements as there are no capital gains tax concessions for assets transferred under a financial agreement, as opposed to assets transferred under consent orders.[23]

MAKING AGREEMENTS UNDER THE ACT

Definition

12.18 The Act provides that notwithstanding any rule of public policy to the contrary, two persons who are not married to each other may enter into a domestic relationship agreement or a termination agreement.[24]

Domestic relationship agreement

12.19 A domestic relationship agreement is defined as an agreement made by two people, either before or during their relationship, that makes provision for financial matters. This includes matters such as maintenance for either or both parties to a domestic relationship and property and financial resources belonging to each or both of them. Parties can, for example, set out what property or financial resources each of

19. The Australian Divorce Transition Project was a random national telephone survey of divorced Australians (excluding Western Australia due to legislative differences), which examined the divorce transition and its consequences for parents.
20. B Fehlberg and B Smyth, "Binding pre-marital agreements: Will they help?" (1999) 53 *Family Matters* 55 at 57.
21. Under the FLA, at the time of the survey, only those agreements made after separation and approved by the Family Court under the FLA s 87 or via consent orders ousted the Court's power to make property adjustment orders. Agreements made before marriage were considered by the Family Court when making orders relating to property and/or maintenance, but they did not exclude or limit the Court's powers: see *In the Marriage of Plut* (1987) FLC 91-834.
22. Defined as agreements made prior to marriage which set out how the property should be divided in the event of marriage breakdown: see B Fehlberg and B Smyth, "Binding pre-marital agreements; Will they help?" (1999) 53 *Family Matters* 55 at 56.
23. A Horin, "Divorcing couples run scared from out-of-court deals" *Sydney Morning Herald* (23 August 2001).
24. PRA s 45(1).

them owns and how such property and financial resources should be divided in the event that the relationship breaks down.[25] They can stipulate which property should be completely excluded from division, or agree that the value of a particular asset (such as a business) will be included in the total pool of assets but cannot be divided. Parties can also set out in the agreement who has responsibility to pay which debts.

12.20 Agreements can also cover non-financial matters.[26] They might include for example, what accommodation arrangements should apply if the parties separate, how furniture and gifts are to be divided and who keeps the pets. "Lifestyle clauses", such as who is responsible for various household tasks and how often holidays are taken, can also be included. However, such clauses can be easily breached, which raises questions about the validity of the more significant financial provisions. To avoid such questions, it is possible to add a clause in the agreement that preserves the validity of the rest of the agreement even if one or other of the provisions is void or voidable.

Termination agreement

12.21 People in a domestic relationship can also enter into a termination agreement,[27] either after the relationship ends or in contemplation of the relationship ending. Termination agreements can deal with any financial or other matters. But if the relationship does not end within three months of the parties entering into a termination agreement, the agreement is treated as a domestic relationship agreement.[28]

12.22 The procedural requirements that apply to domestic relationship and termination agreements are outlined below. They differ in one major respect: while a court may set aside or vary a domestic relationship agreement on the ground that enforcement of all or part of it would lead to serious injustice, no similar power applies to termination agreements. Section 44(2) is therefore a safeguard against the making of termination agreements early in the relationship, thus avoiding the court's special power under the Act to set aside an otherwise properly made domestic relationship agreement.

12.23 In this Report, the Commission adopts the umbrella term "financial agreements" to indicate all such agreements, whether or not they also deal with non-financial matters except where the law distinguishes between the two.

When will an agreement be binding?

12.24 In order for an agreement to be binding and enforceable under the PRA, the agreement must be in writing and signed by each of the parties, and the parties must

25. PRA s 45(1).
26. PRA s 44(1)(b). But see, in relation to the FLA, A Dickey, "Problems concerning financial agreements" (2002) 76 *Australian Law Journal* 89.
27. Also sometimes referred to as a "separation agreement".
28. PRA s 44(2).

have obtained independent legal advice,[29] proof of which must be attached to the agreement in the form of a solicitor's certificate. This was one of the more contentious issues explored in DP 44, and is dealt with in more detail below.

Effect of a binding agreement

12.25 A binding agreement does not necessarily exclude altogether the court's jurisdiction to make orders redistributing property interests, but it prevents the court from making an order that is inconsistent with the agreement.[30] For example, if a valid and binding agreement provides that the home in which the couple resides is to remain the sole property of one partner, the court cannot alter this by ordering that it be transferred to the other, or that it be sold and the proceeds divided between them. This is because the court cannot make an order about the home that is inconsistent with the terms of the agreement. But the court could make other orders about the parties' financial affairs, for example re-allocating other assets.

12.26 Although the Court has power to depart from the agreement where it does not satisfy one or more of the conditions contained in s 47(1), it may nonetheless have regard to the terms of the agreement when making its order.[31] In these circumstances, the Court is not precluded from making an order because of a stipulation in an agreement intended to remove its jurisdiction.[32]

CURRENT POWERS TO VARY OR SET ASIDE AGREEMENTS

12.27 The PRA provides a limited number of grounds on which a court can set aside or vary an otherwise binding agreement. Basically, a financial agreement can only be varied or set aside according to:

- the provisions of the *Contracts Review Act 1980* (NSW) (the "CRA");
- the general laws of contract at common law;[33]

29. PRA s 47(1).
30. PRA s 47(1). See also *Crellin v Robertson* (ACT, Supreme Court, SC34/2001, Crispin J, 22 September 2004, unreported) where the Court held that even though an agreement did not satisfy all the conditions to make it binding under the *Domestic Relationships Act*, (and therefore the Court was not bound to make an order consistent with it), this did not mean that it was just and equitable to ignore the agreement; the Act permitted the court to take the agreement into account notwithstanding the fact that it was not binding.
31. PRA s 47(2). See for example, *Daly v Dicker* [2001] NSWSC 215, (Master McLaughlin); and *Ossedryver v Fordree* (1998) DFC 95-210.
32. PRA s 47(3).
33. PRA s 46. This is similar to FLA s 90K(1)(b) which states that an agreement can be set aside if it is void, voidable or unenforceable, which effectively invokes the common law grounds for setting aside a contract.

- s 49 of the PRA (which applies only to domestic relationship agreements not termination agreements).

Contracts Review Act 1980

12.28 Under the CRA, contracts that are found to be "unjust", including unconscionable, harsh or oppressive, can be rendered unenforceable or void or their terms can be varied by a court.[34] Section 9(2) of the CRA provides a list of factors for the court to look at when determining whether a contract is unjust, including:

- any inequality of bargaining power;
- whether there are conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party;
- whether the parties were reasonably able to protect their own interests;
- the parties' relative economic circumstances, educational background, and literacy; and
- whether independent advice was given and whether the legal and practical effect of the contract was accurately explained and understood.

12.29 The application of the CRA has many advantages to parties to a domestic relationship or termination agreement. First, parties to a financial agreement cannot "contract out" of the provisions of the CRA.[35] Secondly, the CRA gives the court a wider power than at common law to intervene in contracts.[36] This is in part due to the broad scope of the term "unjust" which has been held not to be limited to harsh, oppressive and unconscionable contracts.[37] The factors in s 9(2) have also been held not to be exhaustive indicators of injustice.[38]

12.30 A major disadvantage of the CRA, however, is that an application to challenge an agreement under the CRA must be brought within two years of the making of the contract.[39] This limitation period somewhat curtails the application of the CRA to domestic relationship agreements since the agreement is most likely to become relevant and be challenged when the relationship breaks down. Many years may have elapsed between the making of the agreement and the parties' decision to separate.

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34. CRA s 7(1). The relief sought should only be that which specifically avoids the unjust consequences of the contract: see *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 (Kirby J) and *Melverton v Cth Development Bank of Australia* (1989) ASC 55-921 (Hodgson J).
35. CRA s 17.
36. T Carlin, "The Contracts Review Act 1980 (NSW) - 20 Years On" (2001) 23 *Sydney Law Review* 125 at 127.
37. *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, at 620- 621 (McHugh JA).
38. T Carlin, "The Contracts Review Act 1980 (NSW) - 20 Years On" (2001) 23 *Sydney Law Review* 125 at 136.
39. CRA s 16.

Common law grounds to set aside or vary a contract

12.31 The four main grounds for setting aside a contract at common law are:

- duress;
- undue influence;
- unconscionability; and
- misrepresentation.

12.32 While these common law grounds overlap to a certain extent with the statutory grounds set out above, both were formulated in the context of commercial contracts. Hence the principles of contract law developed thus far may not translate easily to cases involving financial agreements between two persons in an intimate relationship where different emotional, sexual and economic factors interplay. In particular, they may not afford adequate protection to persons who enter into financial agreements under threat or fear of domestic violence or where they enter into agreements based on information about the other's financial position which later transpires to be false. Both of these specific scenarios are not uncommon in a domestic situation.

Duress

12.33 Duress occurs where one partner applies unlawful pressure on the other either in the form of actual or threatened violence,[40] or by threatening to destroy the plaintiff's property[41] or threatening to cause him or her financial difficulties.[42] If it is proved that the first person applied unlawful pressure and because of this pressure[43] the other partner signed the contract, the agreement is voidable. The plaintiff can then choose to affirm it or have the agreement set aside.[44]

12.34 Evidence of domestic violence at the time that a financial agreement was made may constitute duress to the person, either to a partner or a third party, such as a child of the relationship. There may also be grounds for economic duress where one spouse threatens to withhold financial support from the other partner and/or their children. But because these forms of duress were developed in the context of commercial contracts, they may not be able to respond to all the different forms of duress that might arise in the context of domestic financial agreements.

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40. *Barton v Armstrong* [1976] AC 104.
41. *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298.
42. *North Ocean Shipping co Ltd v Hyundai Construction Co Ltd* [1979] 1 QB 705; *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40.
43. But it need not be the only reason: *The Universe Sentinel* [1983] 1 AC 366.
44. For an affirmation to be effective, the plaintiff must know of the wrong done, that they have a right to rescind and then must communicate their affirmation unequivocally*: Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298.

12.35 Another type of pressure is emotional pressure. A case in the Northern Territory described a situation where a form of "emotional duress" was suffered by the female spouse. The judge stated that "[she] acted under duress in the sense that she felt substantial pressure from the [appellant] to sign the document, in order to secure the custody of her children."[45]

12.36 Emotional pressure is much more likely in a domestic scenario than in most commercial contracts. The question is whether proof of emotional pressure amounts to duress and is therefore sufficient to warrant setting aside an agreement.

Undue influence

12.37 In general terms, undue influence was developed to protect a person who has entered a contract due to a relationship of trust and dependence with another party. Undue influence can either be presumed or actual. If proved, either will render a contract voidable, which means that, as in the case of duress, the court will have the discretion to set the contract aside.

12.38 ***Presumed undue influence.*** Undue influence is presumed where there is a recognised prior relationship of trust between the parties, such as between a doctor and patient or a parent and child, but not, it has been suggested, between a husband and wife.[46] This exclusion would appear to extend to unmarried partners. However, some commentators suggest that rather than categorise relationships,[47] what is important is that one party trusts and depends upon the other.[48] In other words, it may be desirable to abandon presumptions that arise from defined relationships and instead rely on what can be demonstrated in each individual case. This is particularly important when considered in the context of the PRA, which recognises a range of relationships.

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45. *Jole v Cole* [2000] NTSC 18 at para 21. It should be noted though, that the agreement in that case was not set aside on the ground of duress as known in contract law, but instead was used as a factor to prove that enforcing the agreement would lead to "serious injustice" under the *De Facto Relationships Act 1991* (NT) s 46(2(a).
46. *Midland Bank Plc v Shephard* [1988] 3 All ER 17; P Parkinson, "Setting aside financial agreements" (2001) 15 *Australian Journal of Family Law* 26 at 40; *Mackenzie v Royal Bank of Canada* [1934] AC 468. Note the rule in *Yerkey v Jones* (1940) 63 CLR 649, confirmed in *Garcia v National Australia Bank* (1998) 194 CLR 395, which is based on a presumption that wives repose trust and confidence in their husbands. However, the rule is confined to the very specific case of wives providing surety for their husband's business transactions. It does not neatly fall under the general law of undue influence and was actually described in *Garcia v National Australia Bank* in terms of unconscionability: see para 31 (Gaudron, McHugh, Gummow and Hayne JJ).
47. J W Carter and D J Harland, *Contract Law in Australia* (4th edition, Butterworths, Sydney, 2002) at 485.
48. *Johnson v Buttress* (1936) 56 CLR 113.

12.39 Once the presumption of undue influence is established the onus shifts to the defendant who must rebut it and show that the contract was freely, voluntarily and knowingly entered into by the plaintiff.[49] The factors used in determining this include evidence of independent legal advice, literacy, state of mind and consideration.[50] In the case of financial agreements this last factor would probably translate into an examination of any disparity between what each party receives under the agreement.

12.40 ***Actual undue influence***. If a party to a domestic relationship cannot claim presumed undue influence, they may be able to claim actual undue influence. While there is no need to prove a prior relationship of trust, the defendant must be shown to have influenced the plaintiff, who was unable to exercise independent judgment in entering the contract. The plaintiff must prove "actual influence on the mind at the time of contract".[51]

Unconscionability

12.41 Unconscionability arises when one party has exploited or taken advantage of the other party's weaker position. A two-part test has been formulated in order to determine whether a contract is unconscionable.[52] First, there has to be evidence of a special disability affecting the weaker party. This may be poor literacy or English skills, age or infirmity. One party's weaker financial position or lesser knowledge of financial or business matters may also constitute a special disability.[53] This has clear application in many domestic relationships. Research by the AIFS has shown that, in relation to superannuation for example, many people had no idea if their partners had superannuation or what its value was.[54]

12.42 Emotional dependence can also constitute a special disability. In one case, the Court found that the plaintiff had bought the defendant a house because he was so in love with her that he was "vulnerable by reason of infatuation", which she manipulated.[55] It is likely that emotional dependence could be a relevant factor in many domestic financial agreements simply because of the nature of the personal relationship between the parties. However, because of the added requirement to show manipulation, which could be difficult to prove, the doctrine may not be as widely used in the context of financial agreements as it might otherwise have been.[56]

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49. See *Allcard v Skinner* (1887) 36 Ch D 145 and *Johnson v Buttress* (1936) 56 CLR 113.
50. *Johnson v Buttress* (1936) 56 CLR 113.
51. J W Carter and D J Harland, *Contract Law in Australia* (4th edition, Butterworths, Sydney, 2002) at 487.
52. *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
53. *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 where the Amadios' limited knowledge of business and finance was a seen as part of their "special disability".
54. See Chapter 8.
55. *Louth v Diprose* (1992) 175 CLR 621.
56. See L Sarmas, "Storytelling and the law: A case study of Louth v Diprose" (1994) 19 *Melbourne University Law Review* 701 at 722-3 where it is

12.43 Second, the stronger party needs to have had knowledge of the weaker party's disability, making it prima facie unfair or unconscionable for them to accept the weaker party's consent. The level of knowledge need not be great; only just enough to put the stronger party on notice.[57] Once both of these points have been proved, the onus is on the stronger party to show that the transaction was "fair, just and reasonable".[58] The remedies available for unconscionability are equitable in nature and include partially or wholly setting the contract aside.

12.44 Under the FLA, unconscionable conduct is expressly included as a ground for setting aside an agreement.[59] Its insertion was moved as a last-minute amendment by the Democrats. Although the Attorney General did not agree that it was necessary to include it as an added ground (as it is covered within s 90K(1)(b) which invokes the common law grounds of contract), it was passed unopposed. How the statutory concept of unconscionability will be interpreted by the court remains to be seen. Although it seems to add nothing to the common law concept, Patrick Parkinson has commented that it is questionable whether "a court can legitimately conclude that Parliament intended to enact a redundant provision" and hence it may find that there are cases of unconscionable conduct that fall under the statute but fall short of the common law ground of unconscionability.[60]

Misrepresentation

12.45 There are four basic elements of misrepresentation. First, the misrepresentation must be a false statement. The misrepresentation usually consists of positive statements or conduct, but can also be a 'half-truth', a statement that, although technically true, creates a false impression of the facts.[61] A half-truth in the context of a domestic financial agreement may arise where one party discloses only a portion of their assets and liabilities. This half-truth may create the false impression in the other party's mind that the disclosure included all that the party owned and owed.

12.46 Secondly, the misrepresentation must be a false statement of existing fact, as opposed to mere opinion or promises or assurances for the future.[62] Thirdly, the statement must be calculated to induce the party into contracting.[63] Hence, the party

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suggested that had "emotional dependence" alone been prima facie evidence of a special disability then more people, especially women, could have used unconscionability to set aside transactions entered for their partner's benefit.

57. *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 (Mason and Deane JJ).
58. *Fry v Lane* (1888) 40 Ch D 312, as approved in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
59. FLA s 90K(1)(e).
60. P Parkinson, "Setting aside financial agreements" (2001) 15 *Australian Journal of Family Law* 26 at 49.
61. *Balfour and Clark v Hollandia Ravensthorpe NL* (1978) 18 SASR 20.
62. J W Carter and D J Harland, *Contract Law in Australia* (4th edition, Butterworths, Sydney, 2002) at 335-6.
63. *Redgrave v Hurd* (1881) 20 Ch D 1.

cannot be shown to have relied on his or her own judgment.[64] Lastly, the onus is on the party claiming misrepresentation to prove that they were in fact induced by the misrepresentation to enter the agreement.[65] However, if they can prove that the statement was calculated to induce and that they did enter the contract, the court can infer that they were in fact induced and the onus then shifts to the other party to prove otherwise.[66]

Serious injustice under section 49

12.47 Section 49 of the PRA allows the court to set aside or vary an otherwise unenforceable domestic relationship agreement where it believes that circumstances between the parties have so changed since the agreement was made that to enforce it would lead to serious injustice. It does not however apply to termination agreements. The issues surrounding the application of section 49 are dealt with in more detail below.

ISSUES RAISED IN DP 44

12.48 A number of issues were considered in DP 44, mainly dealing with improving the provisions of Part 4 to ensure that the enforcement of domestic relationship agreements and termination agreements does not create injustice or hardship.

12.49 At the forefront of the Commission's considerations is the primary object of the PRA, namely, to facilitate a just and equitable distribution of the parties' financial affairs when a domestic relationship breaks down.[67] Alongside this fundamental consideration is an affirmation of the Commission's view in 1983 that people in domestic relationships should be free to regulate their own financial affairs if they wish to do so provided that the PRA contains certain safeguards to protect the weaker party (where there is a power imbalance) from being held to an unfair bargain.

12.50 The Commission acknowledges the concern of some groups, particularly women's advocates, that domestic relationships are often characterised by significant power imbalances. The Women's Legal Resource Centre, for example, has submitted that they remain strongly sceptical of domestic relationship agreements as they tend to favour the interests of men.[68] They submit that men hold the bargaining power in the great majority of heterosexual relationships, particularly in relationships where

64. *Holmes v Jones* (1907) 4 CLR 1692.
65. J W Carter and D J Harland, *Contract Law in Australia* (4th edition, Butterworths, Sydney, 2002) at 341.
66. *Redgrave v Hurd* (1881) 20 Ch D 1; *Gould v Vaggelas* (1984) 157 CLR 215.
67. See para 1.58 – 1.63 and Recommendation 1.
68. Women's Legal Resources Centre, *Submission* at 10. Their views are based on their 20 years' experience dealing with family law disputes, together with research they cite from the Australian Bureau of Statistics and the Office of the Status of Women among others, (see also ALRC, Equality Before the Law (Report 69, 1994)).

there is domestic violence. Their concern is that domestic relationship agreements will increase the feminisation of poverty. In other words, women and children will be left without access to assets or financial resources at relationship breakdown and will be more reliant on social security.[69] For this reason, the Women's Legal Resources Centre submitted that there ought to be stringent safeguards to ensure agreements are fair.

12.51 The focus of the PRA on gay, lesbian and close personal relationships means that these concerns may not be as compelling in a general sense. Gender inequality resulting in inequality of bargaining power is, in itself, absent from gay and lesbian relationships. Inequality of bargaining power in close personal relationships is as likely to be attributable to the frailty of age as to any gender inequality.

SHOULD SOLICITORS BE REQUIRED TO PROVIDE FINANCIAL ADVICE?

12.52 In its original form, the PRA required the solicitor to advise the client on the following matters:

- the effect of signing a financial agreement on his or her rights under the Act;
- whether or not it was to the party's advantage (financial and otherwise) to sign the agreement;
- and whether it was prudent for the party to do so.[70]

12.53 This requirement for a solicitor to give financial advice has been a matter of great concern among lawyers for some time. Arguably, it shifts responsibility from the parties to solicitors, thus exposing solicitors to actions in negligence.[71] For this reason, the New South Wales Law Society has advised its solicitors to decline to provide certificates of independent legal advice under the Act.

12.54 In DP 44, the Commission proposed that the PRA should be amended to provide that solicitors be required to provide legal advice only. Many submissions received by the Commission agreed that it was inappropriate to require a solicitor to give financial advice and that a solicitor's certificate should be limited to the provision of legal advice only.[72] Justice Young of the Supreme Court submitted that

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69. Women's Legal Resources Centre, *Submission,* 25 October 2002 at 10 citing *Mitchell v Mitchell* (1995) FLC 92-601.
70. PRA s 47(1)(d).
71. See DP 44 at para 4.50.
72. Victorian Bar, *Submission* at para 25, Law Society of NSW *Submission* at 3*,* Gay and Lesbian Rights Lobby Inc, *Interim submission* at 3. The NSW Young Lawyers, *Submission* at 5, suggested that solicitors could advise their clients to seek and obtain independent financial advice before providing any legal advice, and that the solicitor should inform them that it is not to the client's advantage to execute an agreement without this independent advice. This approach enables

implementing this proposal was a practical and realistic solution as it recognises the type of advice solicitors are prepared to give and would not cause injustice to the parties. He noted a practical difficulty in that the Law Society advises against solicitors giving out the type of certificates required under s 47, and yet failure to obtain adequate financial advice and the extent to which this was separate from the legal advice are factors which could provide the basis for the court setting aside a financial agreement under s 46.[73]

12.55 Following publication of DP 44, the New South Wales Parliament passed the *Financial Services Reform (Consequential Amendments) Act 2002* (NSW) which removes the s 47(1)(d) requirement for a solicitor to provide financial advice. In the words of the provision now, the parties must obtain a certificate from a solicitor, prior to signing the agreement, which states that the solicitor provided the party with *legal* advice as to:

> (1) the effect of the agreement on the rights of the parties to apply for an order under Part 3; and
>
> (2) the advantages and disadvantages, at the time the advice was provided, to the party making the agreement.

12.56 The Commonwealth Government has followed suit, amending the certification requirements in s 90G (in relation to financial agreements made before or during a marriage) and s 90J (in relation to termination agreements) in particular, to remove the reference to the provision of financial advice by a legal practitioner.[74] Now, a lawyer only has to certify that he or she has provided his or her client with independent legal advice as to the effect of the agreement on the rights of that party; and the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement.

SHOULD FINANCIAL ADVICE BE REQUIRED UNDER THE PRA?

12.57 Obtaining legal advice is, and should remain, a prerequisite for making the agreement enforceable. Where negotiations between parties to a domestic relationship are marked by power imbalances, it is essential that both parties understand that by signing the agreement, they are waiving their legal rights under the PRA to make a claim on property held in the other party's name. That is not to say that independent legal advice will necessarily provide an absolute protection to the weaker party, especially in relationships marked by domestic violence or abusive

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solicitors to meet their obligations under the legislation without attempting to provide advice beyond their realm of expertise.

73. Equity Division of the Supreme Court of NSW, *Submission*.
74. *Family Law Amendment Act 2003* (Cth).

behaviour. In such relationships, the requirement for independent legal advice may not offset the pressure on the weaker party to sign agreements.[75]

12.58 In DP 44, the Commission asked whether the PRA should also require parties to obtain financial advice in order to make the agreement binding. Very few submissions addressed the issue. One submission expressed concern that omitting the requirement to obtain financial advice may further disadvantage women, who are, in the main, already disadvantaged because of their relative lack of bargaining power.[76] The Women's Legal Resources Centre submitted that the PRA should continue to require the parties to obtain independent legal *and* financial advice.

Submissions

12.59 A potential disadvantage of requiring parties to obtain both legal and financial advice, however, is that the added cost of having to obtain financial advice may deter people from entering into financial agreements. In response to this argument, the Women's Legal Resource Centre submitted that by retaining a requirement to obtain financial advice might incline the party with more property at stake to pay for the other party's independent financial advice.[77]

12.60 The NSW Law Society agreed with the Commission's proposal in DP 44 that while it was advisable for parties to obtain financial advice, it should not be mandatory to do so.[78]

12.61 In the submission from the Equity Division of the Supreme Court, Justice Young commented that it is difficult to draw a precise distinction between legal advice and financial advice in this area of law. Even in the provision of legal advice, a solicitor cannot discharge his or her duty by providing such advice in the abstract; a solicitor has to relate such advice to the client's particular personal and financial circumstances.[79]

12.62 One might expect, consequently, that solicitors and accountants will work together more closely in this area, particularly in those cases where the parties hold valuable assets, such as business enterprises, real estate and superannuation. Solicitors would do well in appropriate cases to recommend that their clients seek financial advice on the current value of their assets and expected capital growth.

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75. Women's Legal Resources Centre, *Submission* at 10 (in relation to women). See also A Nicholson, *Proposed changes to property matters under the Family Law Act*, (Address to the Bar Association of NSW, Sydney, 20 May 1999).
76. Women's Legal Resources Centre, *Submission* at 10.
77. Women's Legal Resources Centre, *Submission* at 10.
78. Supported by the Law Society of NSW, *Submission.* at 3.
79. Equity Division of the Supreme Court of NSW, *Submission* at paras 35- 36.

The Commission's view

12.63 The practical reality, in the Commission's view, is that parties will tend to see both a solicitor and a financial expert where there are significant assets. The benefit will be twofold. Not only will the client be better informed as to how he or she may expect to fare if they were to obtain a court order under the Act, but the agreement is less likely to be varied or set aside under s 46 if the court is satisfied that the parties were fully aware of both the legal and financial consequences of signing the agreement. Accordingly, the Commission does not recommend a requirement for financial advice. This is also consistent with the position under the FLA. However, the Commission does recommend that section 47 of the PRA be amended to provide that solicitors should have a duty to draw the attention of parties to the desirability of seeking financial advice in addition to providing legal advice as to the effect of the agreement and the advantages and disadvantages of making the agreement.

Recommendation 45

PRA s 47 should be amended to provide that solicitors should have a duty to draw the attention of the parties to the desirability of seeking financial advice.

ON WHAT GROUNDS SHOULD AGREEMENTS BE VARIED OR SET ASIDE?

12.64 The second major issue discussed in DP 44 concerned the continued appropriateness and adequacy of the current grounds for setting aside or varying domestic relationship and termination agreements. In DP 44, the Commission also asked whether there should be other grounds for varying or setting aside an agreement, such as fraud and impracticability, which are contained in other State laws and in the FLA. Specifically, Issue 12 of DP 44 proposed a new discrete provision containing all the grounds on which an agreement could be set aside or varied by the court. In the next section, the Commission discusses each of these grounds.

The application of the Contracts Review Act

12.65 A domestic relationship agreement or a termination agreement under the PRA is open to challenge under the CRA.[80] This enables a court that finds an

80. PRA s 46. See *Chapman v Batman* (2004) DFC 95-293 where the plaintiff sought relief against a termination agreement under the CRA. Although all the formalities had been complied with, the Court held that the agreement was void. The plaintiff had been in a car accident some time before the agreement was made and she presented medical evidence to show that she did not understand the agreement when she signed it. Evidence also showed that the defendant did

agreement to be "unjust" to vary the terms, decline to enforce it, or set it aside. As parties to a financial agreement cannot contract out of the provisions of the CRA, it confers on courts a potent supervisory jurisdiction over agreements. However, one significant limitation is that an application must be brought within 2 years of signing the agreement. This requirement renders the CRA irrelevant in many cases because domestic relationship agreements may have been signed long before the relationship breaks down, which is when the agreement is most likely to be challenged.

Submissions

12.66 The Victorian Bar Association submitted that the provisions of the CRA could be imported into the PRA and that the statutory time limit for invoking the CRA provisions could be aligned to the general time limit for institution of proceedings, currently two years after separation.[81] The New South Wales Law Society submitted that the provisions for varying or setting aside financial agreements under the Act should generally mirror the FLA provisions. It also stated that the PRA should prescribe the nature and range of remedies available to vary or set aside agreements so as to avoid a smorgasbord of laws which may or may not apply given various time limitation periods.

12.67 Under the FLA, one of the grounds on which a financial agreement may be set aside is if the Court is satisfied that the agreement is void, voidable or unenforceable. This merely imports the common law grounds for setting aside or varying contracts. It does not bring within reach the provisions of the CRA which are arguably wider than the common law grounds.

The Commission's view

12.68 In the Commission's view, all that is required in relation to s 46 is to amend the limitation period within which a claim may be brought under the CRA so that, when dealing with a domestic relationship or termination agreement under the PRA, the limitation period of two years runs from the date of separation. To effect this change, the Commission recommends that the PRA be amended.

Recommendation 46

The PRA should be amended to provide that where proceedings are brought under the CRA to vary or set aside the terms of a domestic relationship agreement or a termination agreement, the proceedings must be brought within two years of the date of separation of the parties to a domestic relationship or termination agreement.

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much better financially under the agreement than he might have done if he had made an application to the court.

81. Victorian Bar, *Submission* at para 28.

Serious injustice under section 49 of the PRA

12.69 Another issue discussed in DP 44 was whether s 49 of the PRA should apply to termination agreements as well as domestic relationship agreements. This provision allows the court to set aside or vary an otherwise enforceable domestic relationship agreement where it believes that circumstances have so changed since the parties entered the agreement that it would cause serious injustice to enforce any or all of the agreement's provisions. Section 49 effectively provides another layer of protection against otherwise binding agreements that would be oppressive to enforce against one partner. For example, the agreement may have been made a number of years before separation, and in the interim, children may have been born, one partner could have suffered a serious injury or illness, property may have been damaged or wealth may have been acquired through inheritance or a lottery win.

12.70 Section 49, however, currently applies only to domestic relationship agreements. In DP 44, the Commission pointed out that a similar section could be found in the Northern Territory and ACT legislation, where it applies to both domestic relationship and termination agreements. An analogous, though more restrictive provision, also features in the FLA. The Family Court may set aside an agreement where a *material* change in circumstances has occurred since the making of the agreement *relating to the care, welfare and development of a child to the marriage* and serious hardship will ensue to the child or the party with caring responsibility for the child if the agreement is not set aside.[82] This provision would appear only to cover the arrival of a child to the relationship, and would not cover, for example, cases where a party has been injured. As such, it is irrelevant to gay, lesbian and close personal relationships. In comparison, the serious injury of one party would likely be enough to set aside an agreement under s 49 of the PRA.

The Commission's view

12.71 The Commission's view, supported by submissions which addressed this issue,[83] is that s 49, as it is currently worded, should be extended to cover termination agreements as well as domestic relationship agreements. Termination agreements must be made within three months of separation, or they take effect as domestic relationship agreements.[84] It is possible for events to occur within those three months, such as a serious accident or redundancy, which would cause serious injustice to a party to the agreement if any or all of the terms of the agreement were to be enforced.

Recommendation 47

PRA s 49 should be amended to cover termination agreements as well as domestic relationship agreements.

82. Section 90K(1)(d). Emphasis added. See also DP 44 at para 4.84.
83. See for example, Victorian Bar,, *Submission* at para 28.
84. PRA s 44(2).

Is domestic violence adequately covered by the PRA?

12.72 In DP 44, the Commission discussed whether the current provisions for setting aside or varying an agreement adequately protected parties to an agreement where there was domestic violence or whether domestic violence should be a specific ground for setting aside a financial agreement under the PRA.[85] Currently, agreements where violence is a factor can be challenged under the CRA as being unjust or on the common law grounds of duress, undue influence or unconscionability.[86]

12.73 Physical violence at the time a financial agreement is made may constitute duress to the person. The Family Court, for example, has held that a marriage contract can be void for duress where "threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual".[87] However, the Court added that evidence is required to show that the duress was operating *at the time* of the wedding ceremony. Whilst this can be induced by threats or pressure that occurred prior to the wedding, the extent of any time lapse between this event and the ceremony will be a relevant consideration.[88] This approach does not acknowledge the fact that domestic violence can affect the level of control one party has over another in a relationship even when there is no evidence of violence at the time the contract was made. Domestic violence can be inflicted in varying forms over a long period. Evidence of physical assault or explicit threats that occurred after the contract was made may still be indicative of pressure that the party was under when he or she signed the agreement earlier in time.

12.74 Domestic violence can also amount to actual undue influence. This ground was used in one case to challenge various contracts in which the wife guaranteed her ex-husband's business debts.[89] The judge found that:

> *even from the early days of the marriage there was a tone of aggression, particularly if any inquiry was made about business matters, and an undertone of threat … I accept that she signed [the relevant documents], whatever legal advice she had then, under the real fear of a repetition of the actual violence which had by then been applied to her.* [90]

12.75 In that case, the court found that the husband's behaviour, along with the fact that the nature and effect of the documents were not adequately explained, succeeded in overbearing the wife's will and hence the contracts were set aside for actual undue influence.

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85. DP 44 at para 4.87 – 4 .99.
86. See para 12.31 – 12.46 above.
87. *Hirani v Hirani* (1983) 4 FLR (Eng) 232 at 234, cited with approval in *Teves and Campomayor* (1995) FLC 92-578 at 81,738.
88. *Teves and Campomayor* (1995) FLC 92-578 at 81,749 and 81, 740.
89. *Armstrong v Commonwealth Bank of Australia* [1999] NSWSC 588.
90. [1999] NSWSC 588 at para 30.

Arguments for creating a separate ground of domestic violence

12.76 While courts appear likely to use general principles of law to set aside agreements made in fear of *physical* violence, agreements may be more difficult to vary or set aside under general law where domestic violence takes the form of threats of violence or emotional harassment. As stated above, the emotional and personal nature of financial agreements does not fall squarely within doctrines that have been developed in a more commercial context.

12.77 It has also been argued that using general law principles to challenge a contract where there is domestic violence furthers the risk that it will continue to go unnoticed in many cases.[91] Domestic violence is a distinct issue, which raises factors specific to it. These issues include silencing of the victim and the fact that the violence generally occurs over a long period of time and may not always be in the form of separate instances of physical violence.*[92]* By making domestic violence an express ground of relief, the law will be specifically recognising it as a serious issue and will perhaps allow the court greater scope to develop an approach that takes account of its complexities.[93]

12.78 Although it is not explicit, the FLA provides that a financial agreement can be set aside where, in respect of the making of the agreement, a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable.[94] In Tasmania, the court may set aside or vary an agreement if it thinks that the agreement was entered into under duress or by fraud.[95]

Submissions

12.79 The New South Wales Law Society submitted that the common law grounds of duress, undue influence, unconscionability and misrepresentation are enough to support an action that an agreement be varied or set aside where domestic violence is a factor.[96] The Victorian Bar Association similarly submitted that where domestic violence has been a part of the circumstances causing a party to enter into an agreement, the existing common law of duress is generally sufficient to encompass the circumstance of domestic violence so that specific reference in the legislation to domestic violence is unnecessary. It opposes the suggestion to include a section similar to s 43 of the FLA that outlines the principles to be applied by the court when exercising the jurisdiction under the Act, arguing that s 43 has had an erratic history.[97] One of the principles that the Family Court is to have regard to when exercising jurisdiction under the Act is the need to ensure safety from family violence.[98]

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91. Women's Legal Resources Centre, *Submission* at 11.
92. See Chapter 9.
93. Women's Legal Resources Centre, *Submission* at 11.
94. FLA s 90K (1)(e).
95. *Relationships Act 2003* (Tas) s 63(2)(a).
96. Law Society of NSW, *Submission* at 4.
97. Victorian Bar, *Submission* citing *Soblusky* (1976) 2 FamLR 11,528 and *Fisher* (1990) 13 FamLR 806.
98. FLA s 43 (ca)

12.80 The Women's Legal Resources Centre submitted that there should be a rebuttable presumption that agreements should be set aside if there has been domestic violence either at the time of signing the agreement or at any stage after which the agreement was signed.[99] It states:

> [Domestic violence] can be a tool of duress to force a woman to sign a [Domestic Relationship Agreement]. We submit that [domestic violence] has a devastating impact on both a woman's capacity to contribute to the relationship and her needs following the breakdown of the relationship… As such, the very existence of [domestic violence] should be regarded as a change in circumstance such that to enforce the agreement would lead to serious injustice.

12.81 The Centre further submits that the presumption (to disregard the agreement where there is evidence of domestic violence) should only be overridden when there is:

> clear proof that such injustice would not result and that the agreement is fair even after taking account of the unequal bargaining power of the parties and the impact of domestic violence on the victim's contributions and needs.

12.82 The Women's Legal Resources Centre suggest that this should be set out in a separate section to highlight the gravity of domestic violence and its effect.[100] Merely to include it in a list of things to be considered when examining an agreement would "have the effect of watering down its importance", just as the impact of domestic violence is, in the Centre's view, "watered down" in Court examinations of the factors listed in s 68F of the FLA for assessing what are the best interests of a child.[101]

12.83 The Equity Division of the Supreme Court submitted that allowing the court to set aside an agreement where it was satisfied that the agreement was "void, voidable or unenforceable (including where one of the parties has made the agreement under fear of domestic violence)" adds nothing to the current s 46, except for the reference to domestic violence. The Equity Division submitted further that if fear of domestic violence will form an alternative ground for setting aside or varying a domestic relationship or termination agreement, as distinct from or beyond the scope of duress or undue influence, then there needs to be further and clearer definition of the circumstances in which this could be used.

The Commission's view

12.84 The existence of domestic violence, or even just the threat of it, creates a power imbalance where the abused party is placed in an extremely precarious

99. Women's Legal Resources Centre, *Submission* at 11.
100. Women's Legal Resources Centre, *Submission* at 11.
101. At 11. See FLA s 60CC for the factors in revised form as amended by the *Family Law Reform (Shared Parental Responsibility) Act 2006* (Cth).

bargaining position. Many victims of domestic violence are, as a result, incapable of negotiating equitable property settlements with their violent partners.[102] This is equally true of their capacity to negotiate fair and reasonable financial agreements during their relationships. Research has shown that women with violent partners feel pressured to make agreements with their partners to end the violence and protect the children.[103] As discussed in Chapter 9, family violence is not limited to heterosexual families. It also occurs in same-sex relationships and, although perhaps not as well documented, occurs also in close personal relationships.[104] The same concerns apply.

Recommendation 48

Domestic violence should be included as a specific factor for varying or setting aside an agreement.

Should agreements be screened for domestic violence?

12.85 In a preliminary submission to the Commission from the Department for Women, it was suggested that the PRA should provide for the screening of agreements for instances of domestic violence.[105]

12.86 To the Commission's knowledge, there is no instance, in any area of law, where the contents of agreements are screened for evidence of domestic violence. In federal family law, to the extent that there is a 'screening process' it is one that goes to the procedures and process by which matters are resolved. Where there is evidence of family violence, parties are strongly discouraged from using mediation to resolve their dispute. Screening of agreements for their content raises issues of practicality. Since it would be impossible to identify those agreements where violence may be a factor, it implies that all agreements would need to be 'approved' and perhaps also registered by (probably) a court when they are first made. This would require the court to assess whether the agreement is fair and in order to make this assessment, evidence would have to be called. Such screening will inevitably add to

102. See H Astor, "The Weight of Silence: Talking About Violence in Family Mediation" in M Thornton (ed), *Public and Private; Feminist Legal Debates* (Oxford University Press, Melbourne, 1995); G Sheehan and B Smyth, "Spousal Violence and Post-Separation Financial Outcomes" (2000) 14 *Australian Journal of Family Law* 102; Illawarra Legal Centre "A Human Right to Justice: Experiences of Women in the Illawarra region" (Prepared by J Stubbs, 1993) cited in ALRC, *Equality before the law: women's access to the legal system*, (Report 67, 1994).
103. R Graycar, "Matrimonial Property Law Reform - what lessons have we learnt?", (Family Court of Australia Second National Conference, Sydney, 20 -23 September 1995) at 94.
104. See para 9.3 – 9.7.
105. NSW Department for Women, *Preliminary Submission*, at 3.

the cost and complexity of making agreements. It will also make revising or revoking the agreements when circumstances change inordinately difficult. An unintended effect of such screening is that it would discourage people from making agreements. For these reasons, the Commission is not persuaded that screening of agreements is a feasible option. Most of the submissions that addressed this issue were opposed to screening on practicality grounds.[106]

Non-disclosure of assets

12.87 A major issue in property proceedings on relationship breakdown is ensuring that each of the parties has disclosed all their assets and liabilities. Frequently, and particularly where there are businesses, farms, trust structures and superannuation accounts, the party with the weaker economic resources has little idea of the other party's finances.[107]

12.88 There is presently no statutory duty to make full disclosure when negotiating a financial agreement. In some (albeit limited) areas, such as insurance, the law has imposed a duty to disclose so that complete or partial non-disclosure constitutes a misrepresentation.[108] In fact, some earlier cases had held that property agreements between family members also entailed a duty to disclose.[109] Currently, the only way in which a financial agreement can be challenged for non-disclosure of assets is by invoking the common law principles of misrepresentation, discussed above.[110]

12.89 In some jurisdictions, however, a partner's failure to make full disclosure of all his or her assets at the time the agreement was signed is sufficient to render the agreement unenforceable.[111] In South Australia, for example, a "certificated agreement" must contain a warranty of asset disclosure.[112] After criticism of the *Family Law Amendment Bill 1999*, the Federal Government moved an amendment that expressly provides that non-disclosure of a material matter will constitute fraud,[113] and thus give grounds for setting aside the financial agreement. Fraud has been defined by the Family Court as "conscious wrongdoing or some form of deceit"[114] A false representation made knowingly, without belief in its veracity, or recklessly or

106. Law Society of NSW, *Submission* at 4, Equity Division of the Supreme Court of NSW *Submission* at 16, Victorian Bar, Submission at para 33. Women's Legal Resources Centre, *Submission* at 12, in favour.
107. See, for example, P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (AIFS and Prentice Hall, Sydney, 1986) at 222 and 230.
108. J W Carter and D J Harland, *Contract Law in Australia* (4th edition, Butterworths, Sydney, 2002) at 339.
109. *Greenwood v Greenwood* (1863) 46 ER 1339; *Tennent v Tennents* (1870) LR 2 Sc & Div 6.
110. PRA s 46. See para 4.79.
111. See, for example, *Family Law Act* RSO 1990 (Ont) s 33(4).
112. *De Facto Relationships Act 1996* (SA) s 3.
113. FLA s 90K(1)(a).
114 *In the Marriage of Kokl* (1981) 7 Fam LR 591.

carelessly as to whether it is true or false, will constitute fraud. In DP 44, the Commission proposed that a similar provision be inserted in the PRA.

Submissions

12.90 Submissions agreed with the Commission's proposal.[115] The Equity Division of the Supreme Court, said fraud should be a ground on which an agreement can be set aside or varied "provided that the question is whether the discretionary power of the court to set aside or vary a domestic relationship or termination agreement should be anchored to the grounds listed". The New South Wales Young Lawyers submitted that it would be wise to have a statutory provision that required a full and frank disclosure of assets, liabilities and financial resources at the time when the agreement was made.[116] The Women's Legal Resource Centre made the point in their submission that disclosure should relate to all assets and liabilities, including financial resources such as superannuation, of which partners are often completely unaware.[117]

The Commission's view

12.91 Contracts negotiated where one party deliberately conceals or only partially reveals the extent of all that he or she owns (or owes) or any other relevant fact, amounts to fraud in the ordinary person's understanding of that term. However, the common law notion of fraud generally only catches a non-disclosure that is deliberately or negligently made (rather than innocently made). This is unsatisfactory in this context. In our view, regardless of whether the non-disclosure was a deliberate omission, a reckless or careless omission, or an innocent mistake, the result should be the same. An agreement was reached based on incomplete or false information. If private ordering is to be encouraged and gain widespread community support, agreements need to be made honestly and fairly. The Commission believes that the PRA should be amended to give the court power to vary or set aside contracts on the ground of fraud expressly defined to include failure to disclose a material fact. This accords with the FLA and with our recommendations in regards to disclosure in the context of Part 3 orders.[118]

115 Victorian Bar, *Submission* at para 33, Law Society of NSW, *Submission* at 4, Equity Division of the Supreme Court, *Submission* at para 39, Women's Legal Resources Centre, *Submission* at 12.

116 NSW Young Lawyers *Submission* at 6.

117 J Dewar, G Sheehan and J Hughes, *Superannuation and Divorce in Australia* (AIFS, Melbourne, 1999).

118 See Recommendation 40.

Recommendation 49

The PRA should be amended to allow the court to set aside or vary a domestic relationship or termination agreement where it is satisfied that the agreement was obtained by fraud or non-disclosure of a material matter.

Impracticability

12.92 Another issue discussed in DP 44 was whether the PRA should allow the court to set aside or vary an agreement where circumstances have arisen since the time when the agreement was made making it impracticable for its provisions, or any of them, to be carried out.[119] This is intended to cover those situations where, for example, the agreement makes provision for the division of a particular asset that no longer exists. Similar provision can be found in the Northern Territory legislation and in the FLA.[120]

12.93 Currently, a party may be able to set an agreement aside under s 9(2)(d) of the CRA where a court considers compliance with the contract "unreasonably difficult". The agreement may also be able to be set aside under the common law doctrine of frustration,[121] which allows contracts to be set aside when a supervening event that was not reasonably foreseeable[122] has rendered it incapable of being performed. Hence, it would only apply to the rare cases where assets are destroyed by earthquake, accidental fire or a similar exceptional event.[123] Merely liquidating an asset constitutes self-induced frustration, for which there is no relief under the doctrine of frustration.[124] Further, as with other common law doctrines, the case law and established principles regarding frustration are commercially-based and are sometimes difficult to translate to agreements made between parties in a domestic situation.

12.94 Early Family Court cases held that "impracticable" does not mean "impossible",[125] but rather it is a term that imports a question of fact and degree.[126] In more recent cases, the term "impracticability" has been given a meaning that is fairly narrow in scope, similar to that of "frustration". In *Cawthorn and Cawthorn*,[127] the

119. *De Facto Relationships Act 1991* (NT) s 46(2)(b).
120. FLA s 90K(1)(c). This resembles s 87(8)(d) which states that the court can set aside maintenance agreements on the ground of impracticability.
121. PRA s 46.
122. *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.
123. J W Carter and D J Harland, *Contract Law in Australia* (4th edition, Butterworths, Sydney, 2002) at 716.
124. J W Carter and D J Harland, *Contract Law in Australia* (4th edition, Butterworths, Sydney, 2002) at 734 to 735.
125. See, eg, *Rohde and Rohde* (1984) FLC 91-592.
126. *Rohde and Rohde* (1984) FLC 91-592; *Jayne v National Coal Board* [1963] 2 All ER 220.
127. *Cawthorn and Cawthorn* [1998] FamCA 37.

Family Court considered the interpretation of "impracticable" as a ground for setting aside a property order. The Court cited a passage from the judgment of Kay J in *La Rocca and La Rocca*:

> My own view is that the concept of impracticability, as referred to in this section, is akin to the application of the doctrine of frustration in contractual matters. What the Parliament is concerned with and what ought to be concerning the Court is the happening of events which cannot be reasonably foreseen, which will have the effect of causing an injustice to one of the parties if the happening of such events is not given effect to.[128]

12.95 Although the Court did warn against interpreting "impracticability" by merely equating it with "frustration",[129] it held that:

> The circumstances that have arisen in which it becomes impracticable to carry out the orders are circumstances that could not reasonably have been contemplated and that in such circumstances, whilst impossibility is not the test and impracticability is, it may then become just and equitable to change the orders.
>
> The potential insolvency of one of the parties in the future is not such a matter, in my view. In every case before the Court property values may change, go up or down, business may flourish or not flourish, the vicissitudes of life may affect one of the parties.[130]

12.96 Hence it seems there are only a limited number of cases to which impracticability would apply where the general law of frustration would not. As with frustration, the court limits its application of impracticability to cases where it is not reasonably foreseeable and it is not self-induced. However, it has been suggested that the legislature actually intended to cover "obvious" contingencies when it made impracticability a ground for setting aside agreements under the FLA. These contingencies may include a partner losing his or her job, falling ill, uninsured property being stolen or destroyed, or an asset being liquidated. On this interpretation, impracticability has a wider application than the doctrine of frustration.

12.97 If the term "impracticability" is used in the PRA, there is a risk that this ground for setting aside financial agreements may be construed narrowly. While a narrow interpretation promotes finality in agreements, it may not provide adequate relief for parties who find themselves in a situation where fulfilling their obligations under the agreement would be unreasonably difficult. To avoid this, the legislation should include a note with a non-exhaustive list of the contingencies that the

128. *La Rocca and La Rocca* (1991) FLC 92-222 at 78,538.
129. [1998] FamCA 37.
130. [1998] FamCA 37.

impracticability ground is intended to cover,[131] such as those listed in the last paragraph. However, the definition of impracticability should not be widened to the extent that mere difficulty in complying with the agreement would suffice in setting it aside. The courts have avoided taking such a wide interpretation as the stability of agreements would be so threatened that there would be little advantage in entering one.

Submissions

12.98 Those submissions which addressed this issue were generally in favour of including impracticability as a ground for setting aside or varying a domestic relationship or termination agreement. The Equity Division of the Supreme Court submitted that the addition of the ground of impracticability could be of value as it would apply to cases where one of the main assets that underpinned an entire arrangement has since disappeared. At a broader level, the New South Wales Law Society submitted that the provisions of the PRA should generally mirror the FLA provisions. Although some members of the Bar Association of Victoria see the impracticability ground as having an unsatisfactory history under the FLA, and have reservations about the effectiveness of statutory illustrations, the majority supports the retention of impracticability in relation to setting aside consent orders, and, therefore, to promote consistency, support its application in relation to financial agreements made under the Act.

The Commission's view

12.99 The Commission agrees with the submissions that impracticability should be a ground for varying or setting aside domestic relationship or termination agreements. As the Equity Division pointed out, a provision to this effect would be of particular value in cases where a main asset that has formed the basis of such an agreement has since disappeared.

Recommendation 50

The PRA should allow the court to set aside or vary a domestic relationship or a termination agreement where it is satisfied that circumstances have arisen since the time when the agreement was made making it impracticable for its provisions, or any of them, to be carried out. A note in the legislation should give examples of the sort of impracticability that is envisaged.

131. Note that, depending on the width of the terms, "impracticability" may overlap to an extent with "serious injustice", discussed above at para 12.69 – 12.70.

Rights of third parties

Recent developments under the FLA

12.100 The case of *ASIC v Rich*[132] highlighted a number of significant issues in relation to the interaction of bankruptcy law and family law, not least of which was the apparent potential of parties to a marriage to make binding financial agreements under the new Part 8A of the FLA with the purpose of putting assets out of the reach of creditors. In particular, the case raised two questions. The first was whether the FLA permitted a third party to challenge a binding financial agreement made between the parties to a marriage. The second was whether the court had jurisdiction to set aside or vary an otherwise binding agreement where there was a reasonable suspicion that one of the motivating factors for making the financial agreement was as a vehicle to quarantine assets from creditors.

12.101 On the first issue, Justice O'Ryan held that the Family Court had no jurisdiction under s 90K to hear an application by a third party to set aside a financial agreement made by the parties to a marriage unless there were pending or completed proceedings under the FLA.

12.102 The situation would have been different if ASIC were seeking to challenge an order made under s 79, or a s 87 maintenance agreement, which is no longer available.[133] A third party creditor whose interests would be adversely affected by a s 79 order (whether by consent, or following a contested hearing) and who had not been given notice of the proceedings or the consent orders could challenge the order and seek to have it set aside under s 79A. Likewise, a third party creditor could also have challenged a maintenance agreement under s 87 if they had been given no notice of the agreement because such agreements were required to be registered and approved under the FLA.

12.103 The new Part 8A provisions replaced the old maintenance agreement provisions. Under Part 8A, financial agreements made before or during the marriage, or termination agreements made at the end, or in contemplation of, the end of the marriage do not require any order or approval of the Court. All that is required is that they comply with s 90G. Therefore, as Justice O'Ryan noted:

> … the creation of a formal and enforceable agreement under Part VIIIA does not involve the existence or maintenance of a proceeding of any kind.[134]

12.104 For this reason, albeit reluctantly, the Court found that it could not hear an application under s 90K to set aside the agreement by ASIC. Justice O'Ryan

132. [2003] FamCA 1114.
133. Section 87 is now repealed.
134. *ASIC v Rich* [2003] FamCA 1114 at para 76.

expressed grave concerns about the implications of his findings, and made a strong plea for reform of the law.[135]

12.105 The Court also found that dispositions of property pursuant to the terms of s 87 maintenance agreements were afforded considerable protection under the *Bankruptcy Act*. Although this Act permits a trustee in bankruptcy to seek to have certain transactions by the bankrupt declared void under the *Bankruptcy Act*,[136] the Act also provided that nothing invalidated a conveyance or transfer of property made pursuant to a maintenance agreement.[137] It defined "maintenance agreement" to include financial agreements.[138]

12.106 As previously mentioned, s 87 maintenance agreements (which are no longer available since the introduction of Part 8A financial agreements) were subject to the approval of the Family Court. The new financial agreements require no such vetting or approval by the Court. As it was considered unreasonable to shield agreements that were not subject to Court approval or supervision from the reach of the *Bankruptcy Act,* subsequent amendments to the *Bankruptcy Act* excluded financial agreements from the definition of maintenance agreement.[139]

12.107 *ASIC v Rich*[140] also prompted a number of amendments to the FLA.[141] The definition of "matrimonial cause" in s 4(1) was amended to give the court jurisdiction in an application by a third party to set aside a financial agreement the terms of which would have the effect of defeating the claims of creditors or potential creditors. Section 90K was also amended to allow a court to set aside or vary a financial agreement or a termination agreement where it is satisfied that either one of the parties entered into the agreement either for the purpose of defrauding or defeating a creditor,[142] or with reckless disregard for the interests of a creditor of the party.[143]

The position in respect of domestic relationship agreements

12.108 As the PRA makes no provision for the setting aside or variation of a domestic relationship agreement entered into for the purpose of defeating the claims of third parties, the only grounds for attacking such agreements arise under the *Bankruptcy Act 1966* (Cth) and under the *Conveyancing Act 1919* (NSW).

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135. *ASIC v Rich* at para 114-118.
136. For example, a trustee could seek to have declared void transactions that are undervalued (s 120), or where the transferee offers little or no consideration for the transfer, or which have the effect of giving a creditor a preference, priority or advantage over other creditors (s 122) and those which had as their main purpose the intention to deprive creditors access to the property.
137. *Bankruptcy Act 1966* (Cth) s 123(6) subject to s 121.
138. *Bankruptcy Act 1966* (Cth) s 5.
139. *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth).
140. [2003] FamCA 1114.
141. *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth).
142. It need not necessarily be the sole purpose: s 90K (1)(aa)(i).
143. FLA s 90K (1)(aa).

12.109 ***Bankruptcy Act.*** A transfer of property pursuant to a domestic relationship agreement can generally be set aside under the *Bankruptcy Act* where its purpose is to defeat the claims of third parties.[144] While the Act otherwise protects "maintenance agreements" against the doctrine of relation back in bankruptcy law,[145] the definition of the phrase does not cover domestic relationship agreements under the PRA.[146]

12.110 ***Conveyancing Act***. A legitimate third party creditor may currently challenge transfers of property pursuant to a domestic relationship agreement under s 37A of the *Conveyancing Act 1919* (NSW). This provides that every alienation of property made with intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced.[147] The range of property covered by s 37A is broad, defined as "real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest."[148] However, s 37A is not available to creditors to challenge transactions where a debtor opts to pay one creditor in preference to, and to the detriment of, other creditors,[149] "unless the general conduct involved alienation with intent to defraud creditors generally".[150] Nor is recourse to s 37A possible in relation to the transfer of goods of value which are not classified as real or personal property, such as cash.

12.111 The limitations of the section are illustrated in the following scenario:

> Tom and Kerry were partners in a de facto relationship. Tom owed Kerry $50,000. Tom is aware that he is about to be prosecuted for a breach of corporate regulations, and that conviction on any charges may well see him declared insolvent. Tom and Kerry enter a financial agreement whereby Tom realises his assets and transfers the cash raised to Kerry in satisfaction of the debt.

12.112 Both of the criteria excluding the operation of s 37A apply, though satisfaction of even one would create a situation where s 37A would not be available to a creditor who has been defrauded by a transaction.

Is there a need to reform the law?

12.113 The PRA has a few provisions aimed at preventing or undoing transactions that seek to defeat claims. Section 42 empowers the court, in the context of an application for an order under Part 3 of the Act, to restrain or set aside an instrument or disposition that would (regardless of intention) defeat an existing or anticipated order relating to the application. Section 43 requires the court to have regard to the interests of a bona fide purchaser or another person interested in

144. *Bankruptcy Act 1966* (Cth) s 121.
145. *Bankruptcy Act 1966* (Cth) s 123(6).
146. See *Bankruptcy Act 1966* (Cth) s 5 ("Maintenance agreement").
147. *Conveyancing Act 1919* (NSW) s 37A(1).
148. *Conveyancing Act 1919* (NSW) s 7.
149. *Alati v Wei Sheung* [2000] NSWSC 601.
150. *Alati v Wei Sheung at* para 8.

exercising its powers under Part 3, and also empowers it to make an order necessary to protect those interests.

12.114 The issue remains whether the PRA should mirror the FLA by empowering the court to set aside or vary a domestic relationship (or termination) agreement entered into for the purpose of defeating a creditor's claims. The Commission is of the view that, while a creditor should ordinarily assert such a claim under the *Bankruptcy Act*, there may be cases in which the existence of a more general power would be useful even where bankruptcy is not an issue.

12.115 The PRA makes no provision for setting aside or varying the terms of a domestic relationship agreement where the agreement was entered into in order to defeat the claims of third parties. Section 49 of the PRA only allows for the variation of domestic relationship agreements by a party to the relationship pursuant to an order under Part 3.

Recommendation 51

The PRA should be amended to provide that a court may make an order to set aside or vary a domestic relationship or financial agreement where either party entered the agreement for the purpose of, or for purposes that included the purpose of, defeating third party creditors, or made the agreement with reckless disregard for the interests of third party creditors, 'Creditor' should be defined to include a person whom a party to the agreement could reasonably have foreseen as being reasonably likely to become his or her creditor.

REVOCATION

12.116 Section 50 of the PRA allows the court to disregard an agreement if it finds that the parties have revoked the agreement or consented to its revocation by words or conduct. Conduct required to revoke an agreement includes agreeing to and then embarking upon a property division or maintenance scheme different from the one outlined in the agreement. For example, in one case the defendant submitted that the deed containing the separation agreement between himself and the plaintiff had been revoked due to her acceptance of a lesser amount of maintenance.[151] The court held:

> The fact that the plaintiff accepted a lesser amount does not discharge the liability of the defendant under the deed. If it can be established that there was an agreement, albeit not under seal, between the parties that the plaintiff would accept $700 a week instead of $1000 a week, then the plaintiff was precluded from enforcing her rights under the deed whilst the defendant continued to pay the $700 a week. He has not done so since 28

151. *Vial v Cossa* [1999] NSWSC 60.

> June 1996. Accordingly…the plaintiff cannot thereby be precluded now from enforcing her rights under the deed.[152]

12.117 Had the defendant continued to pay the lesser amount, and the plaintiff continued to accept it, their conduct would have amounted to a revocation.

12.118 In the new Part 8A of the FLA, there is no specific provision for the revocation of binding financial agreements. The grounds on which a binding financial agreement can be varied or set aside have been outlined above.[153] Binding financial agreements are also expressly subject to the principles of law and equity, including estoppel.[154]

12.119 A similar provision applies to s 87 maintenance agreements.[155] In relation to these, the Family Court has held that they can be revoked by the parties' conduct.[156] Such conduct could include:

- an agreement to terminate the contract and a waiver by one party of his or her right to insist upon the contract's performance;[157]
- the party abandoning his or her right to enforce the performance of the other party's obligations under the agreement, which can be 'inferred from a long period of inaction on both sides';[158] or
- making a later agreement which substitutes for some or all of the terms in the original contract.

12.120 In their submission to the Commission, the Victorian Bar Association claimed that s 50 potentially destabilises many agreements and should be repealed. It commented that:

> … [A] regime of enforceable agreements which admits of numerous and broad exceptions is of dubious benefit and merely increases the grounds for litigation. It is submitted that the general law of estoppel will prevent people from relying on agreements where they have induced their partners to believe that they will not do so in circumstances of detrimental reliance, and that the ground in s 50 should be repealed.

152. *Vial v Cossa* [1999] NSWSC 60 at para 26.
153. See para 12.27.
154. FLA s 90KA
155. FLA s 87(11).
156. But note that the cited cases concern agreements made prior to the provisions for binding financial agreements under the FLA.
157. *Drew and Drew* (1985) FLC 91-601 at 79,863.
158. (1985) FLC 91-601 at 79,863; see also *In Marriage of Wray* (unreported, Family Court, S6691/88, 26 February 1990).

The Commission's view

12.121 The Commission has come to the conclusion that s 50 should not be repealed. This section empowers a court to disregard an agreement, which, in its opinion, has come to an end through revocation or otherwise ceasing to have effect. As is implicit in the submission of the Victorian Bar Association, this expands the notion of when an agreement comes to an end through the lens of the law of contract (that is, by agreement) or through the lens of the law of estoppel (that is, through inducement and detrimental reliance). It does not, however, create intolerable uncertainty. Rather, it injects a desirable flexibility into the revocation of domestic relationship agreements that neither contract nor estoppel may reach. For example, it would allow a court to determine that, in the circumstances of a particular case, a domestic relationship agreement had ceased to have effect because, independently of one another, both parties had ceased to have regard to, or rely on, it over a long period of time.

13. Litigation under the PRA

- Legislative issues
- Practice issues
- Evaluation of current practice
- Costs rules

13.1 While alternative methods of dispute resolution such as mediation provide a useful and appropriate way of resolving many disputes under the *Property Relationships Act 1984* (NSW) ("the PRA"), some of these disputes will still require a decision by a court. In some cases facilitative methods will not succeed in resolving the dispute: other cases will be unsuitable for facilitative methods such as mediation, for example because of the effects of violence. The importance of litigation in developing and interpreting the law in this area is also important. When disputes under the Act go to litigation they should be appropriately managed and decided. Of particular concern in this context is that some lesbians and gay men presently avoid the formal justice system, for a number of reasons, including their fear of, or the reality of, an inhospitable environment created by a lack of understanding of, or insensitivity to, gay and lesbian relationship disputes or by homophobia.

13.2 This Chapter reviews the formal court processes, practices and jurisdictional issues in the resolution of disputes under the *Property (Relationships) Act 1984* (NSW), with particular reference to people in same sex relationships and in close personal relationships, with the aim of ascertaining whether the court processes deliver a fair and equitable outcome to all PRA litigants.

13.3 Currently, a party to a domestic relationship may apply to a court for an order for the adjustment of property interests, or for the granting of maintenance, or both.[1] Section 9 of the PRA provides that a person may apply to the Supreme Court or a Local Court for an order for relief. Proceedings instituted in a Local Court may be transferred to the District Court or the Supreme Court.[2] The District Court also has jurisdiction under its own legislation to hear claims under the PRA,[3] however there is no mention of this in the PRA.

LEGISLATIVE ISSUES

Conferring jurisdiction on the District Court

13.4 Conferring the District Court's jurisdiction in PRA matters by way of the *District Court Act 1973* (NSW) rather than by the PRA seems a somewhat indirect method of conferring jurisdiction on the District Court. In the Commission's view, it would be preferable if the PRA expressly conferred jurisdiction on the District Court to hear matters under the PRA, as it does in relation to the Local and Supreme Courts.

Recommendation 52

PRA s 9 should be amended to confer jurisdiction on the District Court in PRA matters, in addition to the Supreme Court and the Local Court.

1. PRA s 14. See also Chapters 7 and 10.
2. PRA s 12.
3. *District Court Act 1973* (NSW) s 134.

Jurisdictional limit

13.5 Generally, the District Court may handle civil cases where the amount claimed is $750,000 or less. However, in relation to applications under the PRA, the court is limited to making orders for financial adjustment not exceeding $250,000.[4] This limit refers to the amount claimed or the value of the order rather than the total value of the assets or property in dispute.[5]

13.6 In DP 44,[6] the Commission suggested removing or lifting this jurisdictional limit to allow more parties access to the District Court. DP 44 also dealt with the issue of increasing what was then a jurisdictional limit of $40,000 in the Local Courts.[7] The jurisdictional limit in the general division of the Local Courts is now $60,000 with a consent jurisdiction extending to $72,000.[8] This is consistent with the jurisdictional limit of the Local Courts to deal with civil disputes generally. Matters are transferred to the District Court or the Supreme Court where the value exceeds the Local Courts' jurisdictional limit.

13.7 Recent amendments to the *Family Law Act 1975* (Cth) ("the FLA") have repealed[9] the property limit provision contained in the FLA which prevented the Federal Magistrates Court ("the FMC") from exercising jurisdiction in property proceedings under the FLA where the value of the property exceeded $700,000 (unless both parties consented).[10] According to the explanatory memorandum to the amending legislation, the "$700,000 limit creates unnecessary rigidity in the system". As part of the package of reforms, the Family Court and the FMC are developing a combined registry for family matters "to provide a single point of entry" and to "enable

4. *District Court Act 1973* (NSW) s 134(1)(g) extends the District Court's jurisdiction to any application under the PRA. Section 134(3) qualifies that jurisdiction. Section 134(3) states that the Court has no power to make an order for financial adjustment under Part 3 of the PRA that will or may result in the amount of the adjustment so made exceeding $250,000.
5. For example, in *Howlett v Neilson* [2005] NSWCA 149, the amount of the adjustment or the value of the order made by the Court was $131,000. The total value of the assets in that case was $313,000. See also *Moore v Cureton* [2002] NSWCA 188.
6. See DP 44 at para 9.26-9.41, para 9.94-9.96.
7. See *Local Courts (Civil Claims) Act 1970* (NSW) s 12. That Act was repealed by the *Civil Procedure Act 2005* (NSW) Sch 4.
8. *Local Courts Act 1982* (NSW) s 4, s 65 and s 66. The consent jurisdiction can be either expressed, whereby the parties sign a joint memorandum agreeing to the extended jurisdiction, or implied, where one party makes an application to extend the jurisdiction and the other party does not object.
9. *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 7.
10. See *Family Law Act 1975* (Cth) s 45A and *Family Law Regulations 1984* (Cth) reg 12AC (now repealed by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 7).

property matters to be channelled to the most appropriate court and to provide opportunities for the courts to maximise their use of resources".[11]

13.8 While removing the limits may not be a viable option in New South Wales, given jurisdictional limits in other matters, the Commission is of the view that the current jurisdictional limit of the District Court in PRA matters should be increased to $750,000, in keeping with the jurisdictional limit in other civil cases. The Supreme Court should continue dealing with matters that are beyond the jurisdictional limit of the District Court. This would provide greater access to the District Court for a larger number of people.[12]

11. Revised Explanatory Memorandum to the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth) at 154.
12. The 1998 amendments to the *District Court Act 1973* (NSW) which increased the jurisdictional limit had the effect of providing greater access to the court for members of the community in both city and regional areas. It was hoped that the increased jurisdiction would enable litigants living in the country to have access to the court without having to bear the additional expense of a city agent.

Recommendation 53

The *District Court Act 1973* (NSW) should be amended to increase the jurisdictional limit for PRA matters in the District Court to $750,000 and, consequentially, to repeal s 134(3).

PRACTICE ISSUES

Supreme Court

13.9 Proceedings instituted in or transferred to the Supreme Court under the PRA are dealt with in the Equity Division of the Supreme Court.[13] The Registrar usually deals with preliminary matters such as adjournments, and can transfer proceedings either to the General List or the Master's List. Most applications to the Supreme Court under the PRA are decided by an Associate Judge (previously called a Master). There are a number of Associate Judges who deal with PRA matters. To this extent, there appears to be an informal specialisation in practice. However, the level of specialisation in such matters would be far less than is evident in the Family Court, given the comparatively small numbers of PRA matters being dealt with by the Supreme Court.

13.10 With regard to the numbers of applications, in 2005 there were 82 new cases commenced under the PRA in the Supreme Court;[14] in 2004, 100 new matters were commenced, and in 2003, 111 matters were commenced. This compares with 77 new cases in 2002, 45 in 2001 and 48 in 2000.[15] While these statistics clearly show an increase in the number of new PRA matters commenced in the Supreme Court since the 1999 amendments,[16] no statistics are kept on the breakdown of PRA matters between opposite sex de facto cases and other relationship matters. It is therefore not possible to identify with any certainty the number of same sex or close personal relationship matters that have been commenced under the PRA and whether these numbers are on the increase.

District Court

13.11 Section 9 of the *District Court Act 1973* (NSW) confers upon the Court a civil jurisdiction and a criminal jurisdiction. For the purpose of managing its workload, the Chief Judge has issued a number of Practice Notes. Practice Note 33 establishes a General List in the Court's civil jurisdiction and details the manner in which cases

13. *Supreme Court Rules 1970* (NSW) Part 77 Division 19 rule 74.
14. Information provided by Ms Jeannie Highet, Manager, Caseload Analysis Division, Supreme Court of NSW, 31 May 2006.
15. Information provided by Ms Jeannie Highet, Manager, Caseload Analysis Division, Supreme Court of NSW, 1 March 2005.
16. The 1999 amendments expanded the coverage of the PRA to include same sex de facto couples and people in close personal relationships.

within the List are managed. The Note also indicates that the Court maintains four specialist lists: the Construction List, the Commercial List, the Family Relationships List and a Defamation List.

13.12 The Family Relationships List deals with matters under the *Property Relationships Act 1984* (NSW), *Family Provisions Act 1982* (NSW) and the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW). Practice Note 46 sets out the manner in which the Court manages the Family Relationship List. Until 2004, approximately 75% of PRA matters were dealt with in Sydney.[17] In 2004, the number of PRA matters dealt with in regional areas increased to 50% of the total. Sydney matters are dealt with by directions hearings. Once matters are ready, they are referred to the General List Judge for the allocation of a hearing date in the General List. In practice, there is a special list for PRA matters and one particular judge usually deals with these matters. However, the judicial registrar does most of the preliminary work.[18]

13.13 Country matters are managed by the same judge, who issues directions by telephone. Terms of settlement and consent orders are usually faxed to the Property List judge for approval and are returned promptly. A teleconference is held between the judge and the Clerk of the Local Court or the District Court Registrar who has the file, the legal representatives and/or the parties. Orders made are noted both on the Sydney file and the court file held in the country registry. Interlocutory matters which require judicial intervention are listed before the next available circuit judge. When the matter is ready for hearing it is listed by direction in the next available sitting commencing at that court.[19]

13.14 With regard to statistics in the District Court, the Commission has been advised that in the months from January to October 2005, 88 matters were brought under the PRA in Sydney and 82 in the country. In 2004, there were a total of 191 matters equally divided between Sydney and the country, and in 2003 a total of 194 matters were filed: 102 in Sydney and 92 in regional areas.[20] The new cases commenced between 2000 and 2004 consist of both opposite sex and other relationship matters. Again, as is the case in the Supreme Court, no separate statistics are available on the number of matters commenced by people in same sex relationships or those in close personal relationships.

Local Courts

13.15 In Sydney, PRA matters are dealt with in the St James Centre Local Court. Until April 2001, this court was referred to as the Local Court (Family Matters) as it

17. Discussion with Mr Ken Sims, Policy Officer, District Court, Sydney.
18. Information provided by Judge Ainslie-Wallace of the District Court of NSW, 4 March 2005.
19. Information provided by Judge Ainslie-Wallace of the District Court of NSW, 4 March 2005.
20. Information provided by Mr Ken Sims, Policy Officer, District Court of NSW, 4 March 2005.

dealt exclusively with family matters. However, since April 2001, it deals with children's matters in addition to matters under the PRA and has been re-named St James Children's Court. Since this court deals only with family law matters, it has developed some degree of specialisation in the area. This is not however the case in Local Courts in country areas.

13.16 The *Civil Procedure Act 2005* (NSW) which has recently commenced, alters the procedures applying in the Local Court (as well as in all other NSW courts). Applications under the PRA will now commence by way of statement of claim in the civil jurisdiction of the Local Court in a similar way to proceedings in the District Court. In Sydney, statements of claim will normally be filed at the major civil registry at the Downing Centre Local Court. When matters are to proceed to a hearing it is likely that these matters will still be listed at the St James Children's Court to ensure the continued use of magistrates with specialised knowledge in this area.

13.17 No statistics were available from the Local Courts.[21]

EVALUATION OF CURRENT PRACTICE

The need for training and development

13.18 DP 44 raised the issue of whether State courts and, in particular, the District Court should have a specialist division for PRA matters. Many submissions were supportive of having such a division.[22]

13.19 One of the main advantages of a specialist system is that its judges can be appointed on the basis of their particular experience and expertise in that area. The FLA provides that judges are appointed for their suitability "to deal with matters of family law by reason of training, experience and personality".[23] Even failing previous specialist experience, judges dealing with particular matters on a daily basis may acquire a comprehensive understanding of the jurisprudence in that area.

13.20 Although the establishment of a specialist division within the courts for PRA matters has clear advantages, there are some difficulties in its implementation. First, while there is some evidence of a specialist division working in the Local Court in the St James Centre in relation to relationships matters, a specialist division would be much harder to implement in the District and Local courts in country areas since the volume of work in PRA matters would not justify such a course. Indeed, it may be

21. The Operations Manager of the Local Court informed the Law Reform Commission that the system used to process PRA matters does not allow it to sort PRA applications from others.
22. Equity Division of Supreme Court of NSW, S*ubmission* at para 70; NSW Law Society, *Submission* at 10; NSW Young Lawyers, *Submission* at 14; D Farrar, *Submission* at 3.
23. FLA s 22(2).

difficult to justify the costs of establishing a specialist division in any of the courts dealing with PRA matters.

13.21 Further, it is unlikely that economic considerations would justify the establishment of a specialist division, even in Sydney, once most defacto claims become matters of federal law.

13.22 It is evident that although the courts may be cognisant of the special skill needed to deal with relationships matters, generalist courts cannot really afford the level of specialisation that the Family Court, being a specialist court, offers to its users.

13.23 The Commission notes that the current system allows for a certain degree of informal specialisation. However, we are of the view that the litigation environment would improve if all court staff, particularly Judges and Registrars, were provided with regular training and development in dealing with relationship matters. Such training would need to focus specifically on the particular issues that face couples in gay and lesbian relationships and people in close personal relationships and would be best provided by the Judicial Commission of New South Wales.

Recommendation 54

The Judicial Commission of New South Wales should provide regular training and development sessions to court staff dealing with relationships matters, with specific emphasis on issues that affect couples in gay and lesbian relationships and close personal relationships.

Coherence in outcomes through reporting

13.24 While training and development would be of great benefit to court staff, coherence of outcomes would improve greatly through access to reported decisions. The District Court does not currently have a reporting system. If instituted, such a system would be of great benefit to lawyers and judges. Apart from ensuring some degree of predictability of outcome by reference to decided cases, the body of specialist knowledge developed over a period of time if reported and accessible in soft and hard copy would be of great value to judges who may be new to or not have much experience in the area of relationships law.

Recommendation 55

The District Court should report judgments in relationship cases.

Need for statistics and education campaign

13.25 While it is understood that there are few PRA applications by persons in same sex relationships, and it is likely that very few people in such relationships use the PRA and make an application in court, the fact that the actual numbers of PRA applications by persons in same sex relationships and close personal relationships are unknown is not helpful, and suggests a need for more detailed statistics to be kept.

13.26 Submissions and consultations with the gay and lesbian community have also revealed a general lack of awareness of the avenues available to same sex couples to resolve property disputes arising out of relationship breakdown. The Gay and Lesbian Rights Lobby submitted that many same sex couples are unaware that the PRA is available to them. Their submission suggested that the Government should fund an education campaign to increase awareness of the available recourse[24] which may result in more matters being dealt with in the courts. Many participants in the focus groups shared this view.[25] So does the Commission. We have given effect to it in Recommendation 4.

Recommendation 56

Courts should keep detailed statistics of the categories of PRA applications, that is the numbers of opposite sex, same sex, and close personal relationships applications.

COST RULES

13.27 The PRA is silent on the issue of costs between the parties. The cost rules applicable in the Supreme Court and District Court generally apply the principle that costs follow the event. Accordingly, once a dispute is determined, the Court will hear the submissions as to costs and unless there are reasons to deviate from the general rule, will award costs to the party who makes out his or her claim. There are, however, instances where indemnity costs are ordered against an unsuccessful applicant if the claim is considered high handed or where an application has no chance of success.[26]

Costs rules in the Family Court

13.28 The general rule in the Family Court is that each party to the proceedings must bear their own costs.[27] Costs can be privately funded by the parties or publicly funded through legal aid. They are not tax deductible. The Family Court may make an

24. See Gay and Lesbian Rights Lobby Inc, *Final submission* at 12.
25. See para 1.76.
26. *Kolar v Dernovsek* [2005] NSWSC 838. See also GE Dal Pont, *Law of Costs*, (LexisNexis Butterworths, Australia, 2003) Ch 7 generally.
27. FLA s 117(1).

order as to costs and security for costs if the court considers it just to do so. Matters required to be taken into consideration in making the order include the financial circumstances of each party, the conduct of the parties, and the terms of any written offers to settle the proceedings.[28] Accordingly, the Family Court has made orders as to costs in cases where, for instance, one party has failed to disclose substantial assets,[29] or where one party had disregarded earlier orders.[30] The Family Court is also empowered to dismiss proceedings or make an order as to costs if it considers the proceedings to be frivolous or vexatious.[31] The discretion to award costs in certain circumstances is considered an effective way of ensuring that proceedings are conducted effectively and efficiently by the parties.

The appropriateness of the cost rules applicable to PRA matters

13.29 In DP 44,[32] the Commission made the point that PRA matters are more comparable to matters heard under the FLA, and that there was good reason to apply to PRA matters the same cost rules applicable to FLA matters. Another option suggested in DP 44 was that costs should prima facie come out of the joint estate.

The amount ordered

13.30 There is also some concern among judges in the Equity Division of the Supreme Court that costs of applications under the PRA and the *Family Provision Act 1982* (NSW) are out of proportion to the amount ultimately awarded.[33]

13.31 In an attempt to provide some guidelines, Justice Young suggested in a family provision case[34] that ordinarily some special justification would need to be shown to warrant an order for more than $35,000 for the costs of a successful plaintiff in an application. In another family provision matter[35] which has close analogies to the powers under the PRA for adjusting property interests, Justice Young said that the plaintiff's costs be capped at an amount equal to the amount of extra provision that the Court ordered be made to the plaintiff. In similar vein, Justice Campbell, while noting that a rule of thumb cannot always be applied,[36] suggested in a PRA

28. FLA s 117(2A).
29. *Penfold v Penfold* (1980) 28 ALR 213.
30. *Gaudry v Gaudry No 2* (2004) FLC 93-203.
31. FLA s 118.
32. See DP 44 at para 9.139-9.150.
33. See, eg, *Van Zonnevald v Seaton* [2005] NSWSC 175.
34. *Moore v Moore* [2004] NSWSC 587.
35. *Carroll v Cowburn* [2003] NSWSC 248.
36. In *Van Zonneveld v Seaton* [2005] NSWSC 175, there were some complicating factors which needed to be taken into account and allowed for in making an award of costs.

matter that a useful rule of thumb in proceedings for property adjustment was that the costs awarded ought not to exceed the amount recovered. [37]

The Commission's view

13.32 The costs rules applicable in the FLA appear to be much fairer and more suitable to the type of matters heard under the PRA. In addition, wherever appropriate and possible, the Commission would favour consistency with the FLA. This is particularly important, if, as we expect, the Commonwealth takes up the reference of powers in respect of opposite sex de facto couples. The Commission recognises that people in same sex relationships and close personal relationships have similar issues to people in opposite sex relationships in relation to property settlements and hence, should, wherever possible, have access to the same laws as their opposite sex de facto couple counterparts, particularly when such laws appear to be more equitable.

13.33 Accordingly, the Commission recommends that the PRA be amended to mirror the FLA costs rules in s 117 of the FLA whereby each party pays their own costs.

13.34 The Commission also recommends that the PRA be amended to incorporate a provision similar to s 118 of the FLA which allows the court to dismiss proceedings or make such orders as to costs as it considers just, if it thinks the proceedings are frivolous or vexatious.

37. *Deves v Porter* [2003] NSWSC 878.

Recommendation 57

The PRA should be amended to mirror FLA cost rules to provide for the parties generally to pay their own costs, subject to exceptions, as set out in FLA s 117 and 118.

14. Mediation

- What is mediation?
- Why mediation?
- Incidence of court annexed mediation
- Issues for consideration
- Mandatory mediation
- Specialist mediators
- Suitability for mediation

14.1 Disputes under the *Property (Relationships) Act 1984* (NSW) ("the PRA") usually arise from an intimate relationship, and are often charged with emotion. As such, they may be more effectively dealt with informally, by means of alternative dispute resolution, rather than through litigation. Unlike the Family Court, which is specialised in the area of relationship disputes and has an in-built and well-developed alternative dispute resolution system, the State courts, particularly the District Court and Local Court, have fewer resources and less specialist experience with family dispute resolution. This Chapter considers how mediation can be used more effectively, particularly within the court system, to effect improvements in dispute resolution.

WHAT IS MEDIATION?

14.2 Mediation is a form of Alternative Dispute Resolution ("ADR") that "involves the intervention of a trained, neutral third party (or third parties in the case of co-mediation) who will assist the parties to reach their own solutions".[1] The Australian Standard defines mediation by reference to the National Alternative Dispute Resolution Advisory Council's ("NADRAC") definition as follows:

> *A process in which the parties to a dispute, with the assistance of a neutral third party (the mediator) identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.*[2]

14.3 The *Civil Procedure Act 2005* (NSW) ("the CPA") defines mediation as:

> *A structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.*[3]

14.4 Possibly the most defining feature of mediation is that it is a facilitative process where the mediator merely assists the parties to resolve their dispute. Mediation and other similar forms of alternative dispute resolution such as negotiation and arbitration, have sometimes been referred to as "additional" rather than "alternative", on the basis that they are "not in competition with the established judicial system"; rather they are "subsidiary processes in the discharge of the sovereign's

1. T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 23.
2. The Australian Standard, Guide to the Prevention, Handling and Resolution of Disputes (AS 4608, 1999).
3. *Civil Procedure Act 2005* (NSW) s 25.

responsibility".[4] Other commentators have used the phrase "assisted dispute resolution" to describe better the "A" in ADR. These additional or alternative forms of dispute resolution are meant to be informal and are "perceived to be responsive to the needs of the parties, consensual and preserving relationships as well as being quick and inexpensive".[5]

14.5 Very little is known about what actually happens during the mediation process. This is because one of the main features of mediation is its confidentiality. Although there is a need for more empirical research on the value of mediation,[6] the increasing use and support of mediation as an alternative to litigation in Australia is some evidence of its value and worth.[7]

WHY MEDIATION?

14.6 The increasing use of mediation may be attributed to many reasons. Most importantly, it occurs in an informal and less complex environment than the courtroom. While it is used in various areas of practice, it is particularly suitable for resolving relationship disputes. The parties feel they have reached an agreement themselves and are more satisfied as the process is often less adversarial and acrimonious. It also maintains privacy, which may be particularly appealing to lesbians and gay men who may not wish to reveal their relationship publicly because of fear of homophobia.[8] It may also provide a much cheaper and more effective solution.

14.7 While the above may not always be the case in that mediation may fail and therefore add to costs, or it may be acrimonious and yet effective, the success of mediation generally depends on the parties' agreement, that is their decision to avoid litigation and mediate instead, and on the mediator's neutrality. Astor and Chinkin

4. L Street, "The language of alternative dispute resolution" (1992) 66 *Australian Law Journal* 194.
5. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths Australia, 2002) at 4.
6. Some of the reviews already done include Keys Young, for the Legal Aid and Family Services Branch, *Research/Evaluation of Family Mediation Practice and the Issue of Violence* (AGPS, 1996); L Moloney, T Fisher, A Love, S Fergusson, *Managing Differences: Federally Funded Family Mediation in Sydney – Outcomes, Costs and Client Satisfaction* (AGPS, 1996). See also H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths Australia, 2002) at 136-137.
7. H Astor, "Mediation of intra lesbian disputes" (1997) 20 *Melbourne University Law Review* 953.
8. S Bryant, "Mediation for lesbian and gay families" (1992) 9 *Mediation Quarterly* 391.

refer to consensuality and neutrality as the sources from which mediation derives its "legitimacy".[9]

14.8 Consensual mediation should result in agreement since both parties choose to mediate. However, the parties can choose consensuality and yet either or both parties could operate in a manner that defeats this aim. Much depends on the mediator and how well the mediator is able to steer the process of mediation, while still staying neutral and not controlling the outcome. Thus, the role of the mediator is crucial to a successful mediation.

INCIDENCE OF COURT ANNEXED MEDIATION

14.9 Most disputes are resolved before court proceedings are commenced. Once litigation commences, a large number of disputes are still resolved by the use of ADR processes, including mediation, before the issues are determined.

14.10 In considering why court annexed mediation has been adopted consistently by courts and tribunals in Australia, Astor and Chinkin list the potential objectives of court connected ADR as follows:

- *Reduce delay, clear lists, reduce backlog of court/tribunal;*
- *Assist in management of cases (which implies a question about the objectives of case management);*
- *Be appropriate to the needs of the case/parties;*
- *Be responsive to personal as well as business needs;*
- *Produce fair, equitable outcomes in all circumstances;*
- *Achieve party satisfaction;*
- *Produce enduring agreements;*
- *Preserve ongoing relationships between disputants;*
- *Protect the interests of vulnerable third parties;*
- *Preserve, and if possible, increase party respect for and confidence in the justice system;*
- *Encourage the parties to use alternative methods in the future;*

9. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths Australia, 2002) at 146.

- *Encourage parties to use ADR earlier, including pre-filing;*
- *Achieve moral education/transformation;*
- *Educate/encourage/respond to the needs of the legal profession;*
- *Change the legal culture.*[10]

14.11 The overall effectiveness of the objects listed above may vary from case to case depending on the circumstances, the parties and the particular mediator.

14.12 The following is a review of the mediation services available in the courts in NSW.

The Supreme Court

14.13 The Supreme Court has, for the past 15 years, referred appropriate matters to alternative dispute resolution processes. The *Arbitration (Civil Actions) Act 1983* (NSW), (now repealed by the CPA), led to the resolution of significant numbers of common law Supreme and District Court actions in New South Wales over the past decade.[11]

14.14 In 2003, the NADRAC reported the following figures relating to the Supreme Court:[12]

- NSW SC civil arbitration – 2001/2002, 32 cases referred, 15 of the 32 resolved at arbitration;
- NSW SC Equity Division – 1999/2000, 131 cases referred for mediation, 91 of 131 settled at mediation;
- NSW SC Equity Division (Probate Mediations) – 2001-2 75 cases referred for mediation, 65% settled at mediation; and
- NSW SC Equity Division (Non-Probate Mediations) – 2001-2 165 cases referred for mediation, 59% settled at mediation.

14.15 For the years 2004 and 2005, the Supreme Court gave the following figures:[13]

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10. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths Australia, 2002) at 262.
11. Australian Law Reform Commission, *Alternative or Assisted Dispute Resolution* (Adversarial Background Paper 2, 1996).
12. National Alternative Dispute Resolution Advisory Council, "*ADR Statistics Published Statistics on Alternative Dispute Resolution in Australia"* (2003).
13. Information provided by Ms Jeannie Highet, Manager, Caseload Analysis, Supreme Court of NSW, 1 June 2005.

- Eight Equity matters (probate) were referred to mediation and all were recorded as court-annexed mediations conducted by a registrar of the court who is a qualified mediator;
- 371 Equity matters (non-probate) were referred to mediation, 229 of these matters were recorded as court-annexed mediations and conducted by a registrar of the court who is a qualified mediator;
- There were no recorded referrals to arbitration during this period.

14.16 Mandatory mediation is a relatively new concept in New South Wales. Since August 2000,[14] and now under the CPA, in appropriate circumstances, the Court may, by order, refer the parties to mediation,[15] and the parties who are referred must participate in good faith.[16].

14.17 However, the CPA does not prevent parties from arranging for outside mediation or for mediation under the provisions of the *Community Justice Centres Act 1983* (NSW).[17]

14.18 In recent years, Chief Justice Spigelman has observed that matters have been mediated in the Equity, Probate and Common Law Divisions and although no formal evaluation has as yet occurred, the preliminary indications are "very positive".[18] In its submission to the Commission, the Equity Division of the Supreme Court confirmed the Registrars' success "in obtaining settlement of PRA disputes through mediation, without any cost to the parties". It further submitted that the District Court could, if it had the resources, achieve comparable rates of settlement through mediation.[19]

14.19 If, after mediation has been ordered by the Court, the parties to the dispute cannot agree on a mediator, the Supreme Court may refer the parties to a court appointed mediator. Under the Joint Protocol for the nomination and appointment of mediators, the Court's Alternative Dispute Resolution Committee keeps a list of professional associations that accredit mediators and provide mediation services suitable for Supreme Court proceedings. Each of the nominating entities establishes a panel of suitable persons to whom the Court ordered mediations may be referred.[20] The CPA provides that mediation is to be undertaken by a mediator agreed by the parties or appointed by the court, who may (but need not be) a listed mediator.[21]

14.20 A recent initiative is the Court of Appeal Mediation Pilot Scheme, which ran from November 2005 until June 2006. The Attorney General's Department supported

14. Mandatory mediation was introduced by the *Supreme Court Amendment (Referral of Proceedings) Act 2000* (NSW).
15. *Civil Procedure Act 2005* (NSW) s 26.
16. *Civil Procedure Act 2005* (NSW) s 27.
17. *Civil Procedure Act 2005* (NSW) s 34.
18. J Spigelman, "Mediation and the court" (2001) 39(2) *Law Society Journal* 63.
19. Equity Division of the Supreme Court of NSW, *Submission* at para 72.
20. Supreme Court of New South Wales, Practice Note 125, 17 December 2003.
21. *Civil Procedure Act 2005* (NSW) s 26(2), (3).

this scheme by subsidising the cost of each mediation up to a maximum of $2,500, where parties opt to use a private mediator, in an attempt to encourage parties to undertake mediation. (Outside the scheme, parties either choose to use a Registrar at no cost or they pay for private mediators themselves.)

14.21 Under this scheme, the Registrar of the Court of Appeal will, at Directions Hearings, choose cases which he regards as suitable and offer the parties the opportunity to participate in the Mediation Pilot Scheme. The cases identified as suitable for this scheme include those involving family provision and PRA matters. However, as at 29 May 2006, although there have been 12 matters referred for mediation, of which 6 matters have been concluded with 5 successful mediations, none of them were matters under the PRA.[22]

The District Court

14.22 Like the Supreme Court, the District Court also has the power to refer parties to mediation in appropriate circumstances. Since the commencement of the CPA, all such matters are dealt with in the same manner as in the Supreme Court. Previously these matters were dealt with in the *District Court Act 1973* (NSW). While the District court is empowered to compile a list of mediators,[23] such a list has not been compiled to date.

14.23 Most mediations are outsourced to private providers. It is the practice of the District Court to refer long civil matters to mediation and the parties are required to organise and pay for the mediation. It is understood that mediation is rarely ordered for PRA matters as they are considered "short matters".[24] However, on 15 August 2005, the District Court Sydney initiated a mediation scheme whereby mediations are now conducted by Assistant Registrars. The List Judge and Judicial Registrar refer appropriate matters for mediation by an Assistant Registrar. The types of matters that are referred to mediation are matters where the parties do not have funds to pay for mediation and short mediations. As at December 2005, 16 cases were listed for mediation before an Assistant Registrar. Two of these matters were settled at mediation, two were vacated and the remainder were not settled.[25] The District Court does not keep statistics on the party initiated mediation or the outcome of mediation.

Local Courts

14.24 In the past, PRA proceedings commenced in Local Courts in accordance with the *Property Relationships Regulation* could not be referred to arbitration, mediation or neutral evaluation as set out in the *Local Courts (Civil Claims) Act 1970*

22. These figures were provided by the Registrar of the NSW Court of Appeal, 29 May 2006.
23. *Civil Procedure Act 2005* (NSW) s 26(3).
24. The Listing Manager of the District Court informed the Commission that mediation is usually ordered for matters requiring more than 5 hearing days.
25. Information provided by the District Court of NSW, May 2006.

(NSW).[26] In practice, however, the Magistrate at St James Centre Local Court, using the power to give directions with respect to practice and procedure,[27] sometimes refers matters to the Registrar to conduct a conciliation conference not unlike an Order 24 conference.[28] Generally, most PRA matters in the Local Court are referred to Community Justice Centres ("CJCs") for mediation. Local Courts and CJCs are likely to review the effectiveness of the Mediation Scheme during 2006.

14.25 Since the introduction of the CPA, the Local Courts now have the same powers as the Supreme and District courts in relation to mediation. As such, the Local Courts are now empowered to refer parties to mediation with or without their consent.

Mediation in the Family Court

14.26 Mediation in the Family Court has been, and continues to go through a process of refinement to meet the needs of its clients. In addition to mediation, the Family Court offers a range of other services, including conciliation, counselling and information sessions. The scheme adopted in the Family Court has been described as "the most comprehensive statutory scheme" containing "the most detailed mediation legislation in Australia to date".[29] The dispute resolution process devloped in the Family Court has been a significant distinguishing feature of the court. Being a specialist jurisdiction which deals exclusively with family law matters, the Family Court has shaped itself to the needs of its clients and the characteristics of their cases, primarily as a "helping" court. Voluntary and court ordered counselling and conciliation conferences have been provided since 1975 and voluntary mediation services since 1992, with compulsory mediation in cases of disputed parenting arrangements to be introduced later in 2006.[30]

14.27 The Family Court and the Commonwealth Attorney General's Department have, from time to time, examined the efficiency of the Family Court's mediation services. In 1999/2000, for instance, the Family Court reported that about 80% of the applications for final orders filed were resolved by mediation. However, this could be somewhat misleading since every pre-trial process is referred to as mediation.

14.28 Until the passage of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), the FLA defined three categories of family and child mediators:

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26. Although the Local Court is empowered to refer matters to arbitration, mediation and neutral evaluation, those provisions only apply to proceedings commenced under the *Local Courts (Civil Claims) Act 1970* (NSW).
27. *Property Relationships Regulation 2000* (NSW) cl 15.
28. A conference held under Order 24 of the *Family Law Rules* (Cth) is called a conciliation conference and is conducted by a legally trained Registrar. The Registrar holds the conference with the parties and their legal representatives to resolve disputes in property matters.
29. T Altobelli, "ADR legislation: some recent developments" (1996) 3(1)*Commercial Dispuite Resolution Journal* 1 at 11.
30. *Family Amendment (Shared Parental Responsibility) Act 2006* (Cth).

- a person employed or engaged by the Family Court or a Family Court of a State to provide family and child mediation services; or
- a person authorised by an approved mediation organisation to offer family and child mediation on behalf of the organisation; or
- a person, other than a person mentioned in paragraph (a) or (b), who offers family and child mediation.[31]

14.29 The *Family Law Regulations 1984* (Cth) prescribe the requirements for accreditation, training and qualification as a mediator and provide that a court mediator is approved "by reason of the person's training and experience".[32] Currently, the Regulations require family and child mediators to:

- have suitable qualifications, training and experience (a person may provide mediation services as a community mediator or a private mediator only if the person has an appropriate degree or other equivalent qualification, has completed at least 5 days training in mediation and has engaged in at least 10 hours supervised mediation in the 12 months immediately following the training);[33]
- fulfil continuing training requirements on an annual basis;[34]
- conduct an assessment of the parties, before providing mediation, to determine if mediation is appropriate;[35]
- provide written information to the parties at least one day before the mediation;[36]
- ensure that the mediation is suited to the needs of the parties;[37]
- avoid providing mediation where there the mediator has a conflict of interests;[38]
- not use any information acquired from a mediation for personal gain.[39]

Recent changes to dispute resolution in the Family Court

14.30 With the passage of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), the Commonwealth has implemented significant changes to practice and procedure with respect to parenting disputes, dispute resolution and to the case management process in the Family Court.

14.31 In order to simplify the Act, the current Parts 2 and 3 of the FLA have been repealed and replaced by a new structure that groups the provisions into four new

31. *Family Law Act 1975* (Cth) s 4.
32. *Family Law Regulations 1984* (Cth) reg 59(1) under FLA s 19P. See also para 14.48 – 14.58 below.
33. *Family Law Regulations 1984* (Cth) reg 60.
34. *Family Law Regulations 1984* (Cth) reg 61.
35. *Family Law Regulations 1984* (Cth) reg 62.
36. *Family Law Regulations 1984* (Cth) reg 63.
37. *Family Law Regulations 1984* (Cth) reg 64.
38. *Family Law Regulations 1984* (Cth) reg 65.
39. *Family Law Regulations 1984* (Cth) reg 65.

parts, by topic. The new Part 2 deals with non-court based services (including accreditation, family counselling, family dispute resolution and arbitration) and Part 3 deals with the court based services (also known as family consultants). The new Part 3A deals with obligations to inform people about non-court based services and the court's procedures and the new Part 3B sets out the court's powers in relation to court and non-court based family services.

14.32 Some of the notable changes in the context of dispute resolution include:

- The establishment of Family Relationship Centres around the country as the first point of contact for families requiring assistance, with "family counsellors" and "family dispute resolution practitioners" to conduct counselling and mediation.
- The adoption of a framework for the accreditation of family counsellors, family dispute resolution practitioners and workers in other Australian Government funded family services. The competency based accreditation standards, which will be a nationally agreed system of training and assessment in the areas of family counselling and family dispute resolution, are currently being developed by the Community Services and Health Industry Skills Council.
- The introduction of compulsory participation in family dispute resolution by parents prior to seeking court resolution subject to exceptions including family violence.
- Changes to the applicable definitions. In particular, the term 'primary dispute resolution' has been removed because it was considered confusing and did not adequately define the process[40] and "makes it difficult to differentiate specific types of intervention".[41] It has been replaced with the term "dispute resolution" which is defined to mean "procedures and services otherwise than by way of the exercise of the judicial power of the Commonwealth" and dispute resolution includes "counselling, mediation, arbitration, neutral evaluation, case appraisal and conciliation".[42]
- The introduction of a "family consultant"' to replace the current "welfare officers" who will be assigned to each case in the court involving children, and will manage the case, providing a continuing service, as it moves through the court process.

14.33 The rationale behind the changes is to move even further away from the court room and to place a much greater emphasis on the use of family dispute resolution processes. As the Explanatory Memorandum states:

40. Revised Explanatory Memorandum to the *Family Law Amendment (Shared Parenting Responsibility) Bill 2005* (Cth) at 17.
41. Revised Explanatory Memorandum to the *Family Law Amendment (Shared Parenting Responsibility) Bill 2005* (Cth) at 82.
42. *Family Law Amendment (Shared Parenting Responsibility) Act 2006* (Cth) Sch 4 item 95.

These initiatives represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed away from litigation and towards co-operative parenting.

14.34 The establishment of the Family Relationship Centres together with the accreditation program for family counsellors and family dispute resolution practitioners are aimed at delivering quality counselling and dispute resolution services in the family law system. It is expected that the court's role in delivering counselling and dispute resolution services is likely to decrease in parallel with the increasing provision of these services by the community sector.

14.35 Currently, only voluntary, that is non-profit organisations, are eligible for approval by the Minister as an approved counselling or mediation organisation. The new amending legislation will allow any organisation (whether operating on a non-profit basis or not) to be approved and receive funding as a counselling or mediation organisation. According to the explanatory memorandum, the Government's intention is that a wide range of organisations will be able to apply for approval and funding as a counselling or mediation organisation. It is expected that 15 Family Relationship Centres will commence operation in mid 2006 and that through these centres "the Australian Government is establishing a new platform to manage the interactions between the community and the family law system by establishing a new system that becomes the gateway into the system".[43]

14.36 To ensure that the professionals delivering counselling and mediation services are suitably qualified and capable of providing such services, they need to comply with the competency based accreditation rules currently being developed by the Community Services and Health Industry Skills Council Ltd (CSHISC). These rules will form the minimum requirements for all family counsellors and dispute resolution practitioners and will largely replace the current situation where counsellors and mediators can be authorised by approved organisations.[44] Existing approved services will not be affected by the changes to the approval process as transitional arrangements are provided in the legislation.[45]

14.37 The Family Law Regulations will continue to prescribe requirements to be complied with by family dispute resolution practitioners in relation to the family dispute resolution services they provide.[46] In addition, the amending legislation has provided

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43. Community Services and Health Industry Skills Council Ltd, *Family Counselling, Family Dispute Resolution and Children's Contract Services Scoping Report*, 2005 at para 1.3.1.
44. Revised Explanatory Memorandum to the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth) at 77.
45. *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 4 Pt 4.
46. FLA s 19P provides that regulations may prescribe the requirements to be complied with in relation to the mediation services they provide. This section has been replaced by a new s 10K pursuant to the restructuring of the FLA by

examples of the types of matters that should be dealt with in the Accreditation rules (prescribed in the regulations).[47] Many of these examples are already dealt with in the current Regulations. However, the following additional suggestions provide an even greater emphasis and more detail on the implementation and scrutiny of the accreditation process:

- who is responsible for monitoring compliance with ongoing requirements in the Rules;
- the consequences of accredited persons failing to comply with the provisions of this Act and the Rules;
- the obligations of accredited persons in relation to the monitoring of their compliance;
- the process of handling complaints involving accredited persons;
- who may deliver recognised training to accredited persons;
- dealing with individuals or other persons who make false or misleading representations about a person's status as an accredited person.

14.38 The services funded by the Government will meet the accreditation standards and will be subject to regular scrutiny. As such, the legislation provides that the names of the services funded by the Government to provide assistance and support to people in the family law system (such as Family Relationship Centres) and the symbols and logos used to identify these services are not to be used in an unauthorised manner to confuse and mislead the public.[48]

14.39 While the family counsellors and family dispute resolution practitioners will mainly provide services in the community, the newly created "family consultant" will be a court officer appointed by the Family Court or the Federal Magistrates Court to manage the case and provide a continuing service through the court process.[49] The main distinction between the family counsellors and family dispute resolution practitioners on the one hand, and the family consultants on the other, is that the former will provide confidential services. It is hoped that this will assist in addressing the confusion that currently exists among the public as to the roles performed by the two sectors.

14.40 One of the key operational provisions is that a court cannot hear an application for an order under Part 7 (to do with Children) unless the applicant has also filed, with the application, a certificate by a family dispute resolution

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the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). The regulations will be amended in due course to reflect the new terminology.

47. New s 10A inserted by *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 4 Pt 3 item 36.
48. *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 4 Pt 2.
49. FLA s 11A inserted by *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 4 Pt 3.

practitioner.[50] The certificate will state whether mediation is appropriate in the circumstances, which is a requirement under regulation 62 of the *Family Law Regulations 1984* (Cth). The introduction of the compulsory attendance at a dispute resolution process, prior to applying to the court for an order, is focussed on processes genuinely concerned with resolving disputes and not those concerned with personal/relationship healing which is what family counselling is directed at. The court may also order one or more parties to attend one or more appointments with a family consultant.[51]

ISSUES FOR CONSIDERATION

14.41 The place of mediation and its effectiveness in resolving PRA matters, is to a large extent dependent on the mediator's skill and training and his or her capacity to work with the parties, assess the suitability of the matter for mediation and facilitate the mediation while remaining neutral. In this context, the following issues arise for further consideration:

- When should the power to refer to mandatory mediation be exercised in PRA matters?
- Should relationship issues be referred only to mediators who are specialised in family law or PRA matters?
- Are all relationship matters suitable for mediation?

MANDATORY MEDIATION

14.42 Mediation has traditionally been seen as a voluntary process. Parties who participate voluntarily are said to be empowered by the process; they have a sense of ownership of the process and may be consequently more satisfied with the outcome which they worked towards themselves, rather than having it imposed on them.

14.43 Over time, and across many areas of law, mediation and other forms of alternative dispute resolution have become, or are in the process of becoming, mandatory. Two types of mandatory mediation have emerged: one, where a court, having regard to the general circumstances of the case or to a particular issue in the case, orders parties to attempt mediation of the dispute or of the particular issue; the other, where an applicable statute compels mediation (unless the particular dispute falls within an exception listed in the legislation).[52] In the latter case, mediation is the

50. FLA s 60I inserted by *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 1 Pt 1.
51. FLA s 11F inserted by *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 4 Pt 3.
52. For example, *Retail Leases Act 1994* (NSW) s 63 provides that, except for interim orders, a court or tribunal must not deal with an application under that Act unless (a) the Retail Tenancy Unit certifies that mediation has failed or (b) the court or tribunal is satisfied that mediation is unlikely to resolve the dispute.

first process required in the resolution of the dispute, rather than just a mode of dispute resolution that the court may require in an individual case. The CPA adopts the first, and milder, form of mandatory mediation by empowering courts to refer proceedings (or any part of them) to mediation without the consent of the parties to the proceedings. Most States in Australia have similar provisions.[53] The Family Court has the power to mandate family dispute resolution pursuant to recent amendments to the FLA.[54]

14.44 Even in its milder form mandatory mediation is controversial. It has been suggested for instance, that mandatory mediation results in a denial of a right to trial.[55] While this may not be the case because parties can choose to go to trial if the mediation fails, it has been suggested that where parties have limited financial or emotional resources, they may not be able to pursue both avenues.[56] It has also been argued that mandatory mediation is a contradiction in terms because it interferes with the consensuality of the process and by removing the "willingness" element, it undermines the effectiveness of the settlement.[57] A counter argument is that what is mandated is attendance and not settlement. However, increasingly more than attendance is required by the court that mandates the mediation. Thus, the CPA requires that parties who are referred to mediation must participate in good faith.[58]

14.45 While some regard the imposition of mandatory mediation as a retrograde step in the establishment of an ADR culture,[59] a review of a mandatory court-

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On the other hand, the recent amendments to the Family Law Act empower the FCA to order family dispute resolution, unless the circumstances fall within the specified exceptions.

53. The *Supreme Court Act 1991* (Qld) enables referral to be done with or without consent of the parties. In South Australia, the Supreme, District and Magistrates Courts permit mediation to be ordered without consent: *Supreme Court Act 1935* (SA) s 65, *District Court Act 1991* (SA) s 32, *Magistrates Court Act 1991* (SA) s 27; and mandatory mediation is permitted in Tasmania: *Supreme Court Rules 2000* (Tas) s 518. Similar provisions apply in Western Australia: *Rules of the Supreme Court 1971*(WA) o 29; the ACT: *Court Procedure Rules 2006* (ACT) o 1179, 1180; and the Northern Territory: *Supreme Court Rules* (NT) o 48.13. See also, *Supreme Court Rules (General Civil Procedure) Rules 2005* (Vic) o 50.
54. *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).
55. B Walker and A Bell, "Justice according to compulsory mediation: Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW)" (2000) *Bar News* 7.
56. Society of Professionals in Dispute Resolution (SPIDR) *Mandated Participation and Settlement Co-ercion: Dispute Resolution as it relates to the Courts*, 1991, SPIDR, United States at 7, quoted in H Astor and C Chinkin, *Dispute Resolution in Australia* at 273.
57. J David, "Designing a dispute resolution system" (1994) 1 *Commercial Dispute Resolution Journal* 26 at 32-33.
58. *Civil Procedure Act 2005* (NSW) s 27.
59. D Spencer, "Mandatory mediation and neutral evaluation: a reality in NSW" (2000) 11 *Australian Dispute Resolution Journal* 237 at 251.

connected mediation program in Ontario recently found a high level of positive response from participants about their experience of mandatory mediation.[60] The study also found that civil cases that were part of the mandatory mediation program were settled earlier,[61] saving litigants substantial amounts of money.[62] Further, it must be recognised that, in disputes where parties have come to firmly entrenched positions, the parties sometimes welcome being forced into mediation.[63]

The Commission's views

14.46 The power to mandate cases under the PRA to mediation should be exercised with caution, taking into account that these cases involve parties who may be severely emotionally affected by relationship breakdown or by violence or abuse. Where such cases are mandated to mediation, courts have a responsibility at least to ensure that an appropriate intake process is conducted and that appropriately skilled and experienced mediators are used. The American Society of Professionals in Dispute Resolution sums it up as follows:

> *Compulsory programs should be carefully designed to reflect a variety of important concerns. These concerns include the monetary and emotional costs for the parties, as well as the interests of the parties in achieving results that suit their needs and that will last; the justice system's ability to deliver results that do not harm the interests of those groups that have historically operated at a disadvantage in this society; the need to have courts that function efficiently and effectively; the importance of the public's trust in the justice system; the interests of non-parties whose lives are affected and sometimes disrupted by litigation; the importance of the courts' development of legal precedent; and the general interest in maximising party choice.*[64]

14.47 Moreover, it may, depending on the circumstances of the case, be more appropriate to encourage parties to mediate, rather than compelling them to do so. This could be achieved, as the English Court of Appeal recently observed, by drawing the parties' attention to the benefits of mediation:

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60. R G Hann and C Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -the first 23 months* (2001) at 96-101.
61. R G Hann and C Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -the first 23 months* (2001) Ch 3.
62. R G Hann and C Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -the first 23 months* (2001) Ch 4.
63. In *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427, Justice Einstein made the point at para 30 that "There is a category of disputants who are reluctant starters, but who become willing participants. It is to that category that the new power is directed."
64. Society of Professionals in Dispute Resolution (SPIDR) *Mandated Participation and Settlement Co-ercion: Dispute Resolution as it relates to the Courts*, 1991, SPIDR, United States at 2, quoted in H Astor and C Chinkin, *Dispute Resolution in Australia* at 275.

> *Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far... [W]e reiterate that the court's role is to encourage, not to compel. The form of encouragement may be robust.*[65]

SPECIALIST MEDIATORS

14.48 In practice, the referral to mediation is usually to generalist mediation services not annexed to the court. The focus on "specialist" mediation services is minimal. A possible consequence of this is that many people, particularly those in same sex relationships, may doubt the capacity of the mediators to understand their claims and the dynamics of their relationship with the other party. People in same sex relationships may also fear homophobia not only in the formal justice system, but also among mediators.

14.49 In contrast, one of the main features of the Family Court is its "specialist" nature, both in terms of judicial expertise and the mediation services available. This is consistent with one of the principal tenets of the Family Court that litigation should be a last resort and that the court has a duty to assist parties to resolve their disputes themselves wherever possible. To this end, the court's mediation services are specialised and are co-located alongside its adjudicative functions. According to the former Chief Justice of the Family Court, the court's case management process is so closely integrated with its mediation facilities that matters do not simply proceed through mediation first, and if that fails, proceed to litigation. Rather, there is a frequent movement between the mediation and litigation pathways, at all stages of the process.[66] This enables the parties to use a range of services and methods to resolve their disputes and is clearly motivated to provide an efficient and effective court annexed mediation program. There is a clear emphasis on the need for all those involved in the judicial and mediation process to be well trained and experienced, as well as sensitive to the type of matters that are to be resolved.

14.50 The need to have well trained and accredited mediators has been further recognised in the recent amendments to the FLA. Dispute resolution practitioners, as they are now to be called, will be assessed against nationally agreed competency standards and qualifications that are currently being developed by the CSHISC.[67]

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65. *Halsey v Milton Keynes General NHS Trust* (English Court of Appeal, B3/2003/1458, 11 May 2004, unreported) at para 11.
66. A Nicholson and M Harrison, "Family law and the Family Court of Australia: experiences of the previous 25 years" (2000) 24(3) *Melbourne University Law Review* 756.
67. The Community Services and Health Industry Skills Council is a nationally recognised industry skills training advisory body for community services and health, on behalf of the Commonwealth Attorney General's Department.

The profile of mediators

14.51 While mediators are required to have basic qualifications and training, the most important requirements are sensitivity and a good understanding of general relationship issues. Mediators must recognise and respect the differences and similarities between all people, regardless of sexual orientation and relationship status, if parties are to have confidence in the process.

14.52 At the same time, mediators do not act in a vacuum. As one mediator has commented:

> *The way we approach our work depends to a great extent on our families of origin and our life experiences, as well as our mediation training. It means that in our professional lives as mediators, we are not neutral: our attitudes, values and beliefs go with us into the mediation room.*[68]

14.53 It is therefore most important that mediators are sensitive, open-minded and non-judgmental. Language, both verbal and non-verbal, is the main way in which a non-judgmental attitude can be demonstrated. A mediator must be careful about the choice of language. It is also important that a mediator has an understanding of the pertinent legal issues.[69]

14.54 In this context, some commentators have argued that the only suitable mediator for disputes between gay men and lesbians is a gay or lesbian mediator. Others are of the view that this "may not be possible or necessary".[70] It has been documented that gay males and lesbians preferred heterosexual male and female co-mediators, or two heterosexual females, while lesbians also felt comfortable with one heterosexual female and one lesbian. A number of the interviewees were said to be cautious about people from their own communities being mediators fearing that their private affairs might not remain confidential, given the relatively small size of the gay and lesbian community.[71]

14.55 The key to effective mediation then appears to be that the mediator, whether heterosexual, gay or lesbian, must have the capacity to be able to work with the parties in a way that does not have a prejudicial effect on the parties by reason of their sexuality or particular circumstance. One writer suggested that this requires a mediator to take on a dual, almost contradictory role, first forgetting that the parties are gay and secondly not forgetting that the parties are gay. In other words, while

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68. L Fisher, "Working with gay and lesbian partners – process and practice issues" (2004) 15 *Australasian Dispute Resolution Journal* 273.
69. L Fisher, "Working with gay and lesbian partners – process and practice issues' (2004) 15 *Australasian Dispute Resolution Journal* 273 at 276.
70. H Astor, "Mediation and Intra-Lesbian disputes" (1997) 20 *Melbourne University Law Review* 953 at 966.
71. L Fisher, "Working with gay and lesbian partners – process and practice issues' (2004) 15 *Australasian Dispute Resolution Journal* 273 at 276-277.

same sex partners have individual needs to be taken into account, as a client group they may have particular needs that require special consideration.[72]

14.56 In developing the new competency standards for counsellors and dispute resolution practitioners in the family law area, the CSHISC have, in their scoping report, noted that all practitioners in this area of work must, in addition to the current requirements, have an understanding and capacity to apply the following:

- knowledge about the changing social, economic and political climate as it impacts on the industry;
- the principles of social justice, human rights, anti-discrimination and confidentiality;
- practices to address cross-cultural issues;
- relevant OHS and employment equity principles and practices;
- principles of a non-discriminatory service;
- the impact of personal biases and experiences;
- individual difference of clients and colleagues, including those relating to cultural, social, economic, physical and health;
- consideration of the needs and rights of the individual, the family, the community and society;
- a client centred approach;
- the diversity of relevant models and practices;
- the holistic needs and rights of clients (as individuals and as a community).[73]

14.57 No doubt, the emphasis on keeping people out of the court system as far as possible is also an important element.

14.58 It is expected that these competency standards will not only provide a national benchmark enabling consistency in the training requirements and portability but will also provide a set of specifications for measuring whether an individual is competent on an ongoing basis.[74]

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72. S Wright, "Same sex counselling with couples and families" in G Bateman (ed), *Relationships into the New Millennium* (Relationships Australia Inc, Canberra, 1999) at 192. See also L Fisher, "Working with gay and lesbian partners – process and practice issues' (2004) 15 *Australasian Dispute Resolution Journal* 273 at 276.
73. Community Services and Health Industry Skills Council, *Family Counselling, Family Dispute Resolution and Children's Contact Services Scoping Report*, 2005 at 10-11.
74. Community Services and Health Industry Skills Council, *Family Counselling, Family Dispute Resolution and Children's Contact Services Scoping Report,* 2005 at 13.

The Commission's views

14.59 Clearly, mediator understanding of gay and lesbian relationships is important. Similarly, mediators must be trained to disregard commonly held but nevertheless wrong or uninformed assumptions or prejudices.

14.60 Thus, any mediator working in this area should understand the following issues as they affect and relate to both heterosexual and gay and lesbian relationships:

- the dynamics and effects of relationship breakdown;
- the nature and disposition of property and the division of work in and out of the home;
- the prevalence, dynamics and effects of abuse, including physical, emotional and sexual abuse and economic abuse on both adults and children;
- the potential impact of violence and abuse on property;
- the nature of gay and lesbian relationships;
- social attitudes and misconceptions about such relationships;
- the impact of homophobia on such relationships.

14.61 Not every mediator has the capacity to mediate every conceivable matter. Relationship matters call on particular skills. To this end, mediators should be familiar with, sensitive to, and experienced in resolving the particular issues at hand. They also need to be familiar with the relevant provisions of the Act and the way the provisions of the Act have been interpreted by the courts. Mediation does not occur in a vacuum. As is so often said, mediation occurs in "the shadow of the law".

14.62 Several recent reports have supported developing a competency model which will provide industry benchmarks for ADR practitioners enabling consistency of training requirements as part of an overall approach to improving quality and efficiency.[75] These recommendations are now being implemented in the family law system.[76] The Commission suggests that organisations involved in training mediators should develop training programs dealing with PRA matters that at least comply with these standards.

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75. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards*, (Report to the Commonwealth Attorney General, 2001), rec 18, at 86; New South Wales Law Reform Commission, *Community Justice Centres* (Report 106, 2005) at para 7.6; Urbis Keys Young, *Review of Family Relationships Program*, (2004), at xiv; RPR Consulting, *Family Relationships Service Providers Assessments and Approval Requirements.* (Department of Community Services Issues Paper, 2005).
76. The Community Services and Health Industry Skills Council, on behalf of the Commonwealth Attorney General's Department is currently developing competency standards for the family relationships workforce within the context of the recent reforms to the family law system under the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

SUITABILITY FOR MEDIATION

14.63 While specialist court annexed mediation can provide an effective alternative to litigation, it is important to ascertain if the dispute is suitable for mediation, because not all disputes can be mediated. Thus, there are three important matters for consideration in this regard:

- who should decide the suitability of the matter for mediation;
- when should that decision be made; and
- what matters should be considered when determining suitability for mediation.

The decision to mediate

14.64 The appropriateness of a particular dispute for mediation can be determined by:

- a judicial officer;
- an intake officer in a formal intake procedure; and/or
- by the mediator any time during the mediation.

14.65 The assessment of the suitability of the parties and of the matter for mediation is of obvious importance. This assessment may call for particular skills on the part of the assessor, be it a judicial officer, intake officer or mediator.

14.66 Section 26 of the CPA provides that, if it considers the circumstances appropriate, a court may by order refer any proceedings before it, or part of any such proceedings, for mediation, either with or without the consent of the parties to the mediation.

14.67 Ordinarily, a judicial officer would refer a matter to mediation at the filing of proceedings before there has been a hearing. However, it may also occur during the course of the proceedings. Whether or not a matter is referred to mediation will depend largely on the circumstances of the case,[77] and the judicial officer's evaluation of those circumstances. This, in turn will depend on the judicial officer's experience in identifying what PRA matters are, or are not, suitable for mediation.[78] Dealing with PRA matters on a regular basis will no doubt be of benefit in this regard.[79] Apart from judicial officers, Registrars are also now actively involved in referring matters to mediation at directions hearings.

14.68 The mediator to whom the matter is referred may be a mediator agreed to by the parties, or a mediator appointed by the court, but need not be a 'listed mediator'

77. See discussion below at para 14.75 – 14.95.
78. See Recommendation 54.
79. See Chapter 13 at para 13.18 – 13.23.

meaning a mediator appointed in accordance with a practice note with respect to the nomination and appointment of persons for the purposes of the CPA.[80]

14.69 It is assumed that listed mediators have the appropriate skills to conduct mediations. However, when the mediation is referred to an outside mediator, it is imperative that the judicial officer must be satisfied that the mediator is appropriately qualified to undertake such a mediation. This is not easy to do unless there are competency standards and qualifications that are easily identifiable. In this context, the development of nationally recognised competency standards and qualifications as part of the recent reforms to the family law system is a major initiative to support quality service delivery. Referring matters to mediators who have been accredited as having met the requisite nationally agreed standards will mean that proper intake assessments will be conducted and the mediator may still, in the course of the intake assessment or mediation, decide that the mediation should not proceed. This will ensure that the clients have the utmost protection and it will also increase their confidence in mediation as an effective form of dispute resolution.

14.70 NADRAC has identified "a variety of analytical and interpersonal skills used to conduct a sound assessment of a dispute for any particular ADR process or processes". These skills can be demonstrated by:

- accurately and concisely analysing the issues presented to assess the most suitable process
- accurately and effectively referring parties to other services which may be more appropriate
- assessing parties' capacity to negotiate
- understanding the emotions and expectations of parties
- determining the parties' readiness to consider and commit to ADR processes, rather than continue the fight
- preparing and counselling parties in preparation for an ADR process
- assessing power differentials between parties, including the timely and effective exclusion of ADR where appropriate
- providing accurate, timely and relevant information about the ADR processes available, and other resources
- evaluation of factors such as apprehension of violence, security issues, age of the parties, issues affecting a party from a non-English speaking background, the need to seek advice, the legal or factual complexity of the matter, the precedential value of a formal resolution of an issue and the need for public sanctioning of particular conduct
- reassessing when necessary during the process in the light of new information.[81]

80. *Civil Procedure Act 2005* (NSW) s 26(3).
81. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney General, 2001) at 105.

14.71 Ideally, each party should be interviewed separately to ascertain the background and circumstances of the parties. Even then, it is possible that parties do not reveal the details required to make the correct decision. It is therefore essential that officers should receive adequate training in eliciting the relevant information upon which they are able to make an apporpiate decision as to suitability for mediation.

14.72 In our Report on CJCs, the Commission suggested that CJCs should investigate the desirability of diverting further resources into pre-mediation, including pre-mediation training, with a view to the overall improvement of their mediation service.[82]

14.73 Under the *Family Law Regulations 1984* (Cth), approved mediators must assess the suitability of the parties to mediate. They cannot mediate if they consider that mediation is inappropriate in the circumstances of the particular matter at hand. [83]

14.74 It is imperative that judicial officers, intake officers and mediators are aware of, and take factors such as violence and the emotional state of parties into consideration, when referring to or conducting the mediation. Whether factors that might impact on mediation are known at the outset when determining whether the matter is suitable for mediation or become apparent during the mediation process, it is important that intake officers and mediators are capable of identifying and dealing with the issues appropriately. A legislative requirement that such matters be considered before mediation commences is in the Commission's view warranted, to achieve the just and fair outcome of any dispute.

82. New South Wales Law Reform Commission, *Community Justice Centres* (Report 106, 2005) at 92.
83. *Family Law Regulations 1984* (Cth) reg 62.

Recommendation 58

The PRA should provide that, before referring a matter under the PRA to mediation, a judicial officer must be satisfied that the mediation provider will undertake an initial assessment of the suitability of the matter for mediation.

Matters to be considered when determining suitability for mediation

14.75 In determining whether mediation is appropriate in a family law matter, an intake officer must consider whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:

(a) a history of family violence between the parties;

(b) the likely safety of the parties;

(c) the equality of bargaining power among the parties (for example, whether a party is economically disadvantaged in comparison with another party);

(d) the risk that a child may suffer abuse;

(e) the emotional, psychological and physical health of the parties;

(f) any other matter that the mediator considers relevant to the proposed mediation.[84]

14.76 Further, one of the exceptions to the requirement in the *Family Law Rules 2004* (Cth) to comply with pre-action procedures, (including attempting to resolve the dispute using primary dispute resolution methods), is that the case involved family violence or fraud.[85]

14.77 The Commission's CJC Report recommended that the CJCs Act should include a list of the following factors that must be taken into account when considering whether a particular dispute is suitable for mediation:

(a) the safety of all parties to the mediation;

(b) any ADVOs or APVOs that may have been granted or that are pending;

(c) the degree of equality (or otherwise) in the bargaining power of the parties;

84. *Family Law Regulations 1984* (Cth) reg 62.
85. *Family Law Rules 2004* (Cth) rule 1.05.

(d) the occurrence of violence and/or the risk of future violence between the parties or between one of the parties and a third party (including children of the relationship);

(e) the mental, physical and psychological state of the parties;

(f) the relationship between the parties;

(g) whether one of the parties may be using the mediation tactically to delay or gain some other improper advantage;

(h) the extent to which the issues in dispute are related to any violence between the parties;

(i) whether the party who has committed or threatened violence is a child; and

(j) any other matter relevant to the proposed mediation and the parties.[86]

14.78 Clearly, it is the overall safety of parties and their capacity to mediate that must be considered in determining whether a particular matter is appropriate for mediation. In this context, factors such as violence, the mental and physical condition of the parties and lack of good faith are particularly important matters for consideration.

Matters involving violence

14.79 Chapter 9 of this Report considered the impact of any evidence of domestic violence on the property adjustment process and specifically, whether the incidence, or threat, of domestic violence should be an express legislative factor that the court must take into account when making an order under s 20 of the PRA. After careful consideration, the Commission favoured the Family Law Council's recommendation to consider the effects of domestic violence on the contributions of the victim and those of the perpetrator. However, we did not feel justified in recommending these changes as they would apply only to one section of the State's population, being those in same sex relationships and close personal relationships. We do consider it appropriate, to make recomendations that will improve the practical handling of cases involving domestic violence in State courts. This includes a consideration of how domestic and other violence should be considered, particularly in the context of mediation.

14.80 As discussed in Chapter 9, violence can be actual or threatened and it occurs in a high percentage of all intimate relationships, whether heterosexual or homosexual. There appears little statistical evidence on the incidence of violence in

86. New South Wales Law Reform Commission, *Community Justice Centres* (Report 106, 2005) at 76.

same sex relationships.[87] Violence can, and does, also occur in non-intimate but caring relationships.[88]

14.81 There are divergent views in relation to the appropriateness of mediation in circumstances where violence has occurred. While violence itself cannot be mediated, as it is a criminal offence, it is the view of some mediators that disputes about property adjustment and care of children may be mediated even where there is violence, provided there are appropriate safeguards and the mediation is conducted by experienced mediators.

14.82 In this context, the NSW Women's Legal Resources Centre ("WLRC") was concerned about the increased willingness to mediate in relationships marked by domestic violence. The WLRC noted that it had observed this trend in relation to Legal Aid Family Conferencing, mediation sessions conducted both through Family Court Counselling and through private providers and was concerned that "engaging in mediation between parties whose relationship has involved domestic violence, can provide some implicit endorsement of the violence and fail to adequately appreciate the extent of its impact on the parties and any interaction they have".

14.83 The WLRC also queried the durability and workability of many consent orders negotiated during or as part of a mediation process, especially when domestic violence is present.[89]

14.84 There are many reasons why mediation may be inappropriate where there is domestic violence. Where there is violence, there is clearly a power imbalance. In such an environment it is very unlikely that a "consensual" agreement can be made between the parties and one party would be compromised.

14.85 Fear of repercussions following the mediation can also vitiate the voluntary nature of the agreement. The mediation process itself can become a vehicle for further abuse, control and intimidation of the victim. As Astor observes:

> *the imbalance of power created by violence is extreme and is too great for a neutral mediator to redress; the nature and history of the relationship between the parties makes consensual decision making impossible; mediation places an extreme burden on the target of violence; mediation can endanger the safety of women who are the target of violence and the children in their care; mediation is highly likely to result in unjust and exploitative agreements where there has been violence.*[90]

87. See Chapter 9 at para 9.5.
88. See Chapter 9 at para 9.6.
89. Women's Legal Resources Centre, *Submission* at 26.
90. H Astor, "Violence and family mediation" (1994) 8 *Australian Journal of Family Law* 3.

Consideration of 'violence' under the FLA

14.86 Many provisions of the FLA refer to aspects of family violence, and particularly to the court's role in protecting individuals and particularly children from the effects of such violence.

14.87 Currently, s 60D of the FLA defines "family violence" to mean "conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety". Under the recent amending legislation, the definition of family violence has been moved to the general definition provision in section 4(1).[91] It has also been amended to include an objective element of "reasonableness": fear or apprehension of violence must be reasonable.

14.88 This change is not intended to suggest that violence is acceptable nor will it make it harder for people to disclose family violence. As the Explanatory Memorandum states: "Given the serious consideration that courts give to family violence in making parenting orders, these matters should be objectively tested".[92]

14.89 Family violence is a particularly relevant issue when determining whether mediation is appropriate in the circumstances of the case. The *Family Law Regulations 1984* (Cth) provide that in determining this matter, the mediator must consider whether the ability of any party to negotiate freely is affected by issues such as a history of family violence, the fears for the safety of the parties or the risk that a child may suffer abuse.[93] Under the recent amendments to the FLA, a new section 60I provides for compulsory attendance at family dispute resolution in a range of circumstances, prior to lodging an application with the court. However, attendance at family dispute resolution is not required where the court is satisfied that there are reasonable grounds to believe that there has been or would be a risk of abuse of the child if there were to be a delay in applying for the order, or if there has been or would be a risk of family violence by one of the parties to the proceedings.[94]

14.90 In recognition of the impact of family violence on all aspects of the court's operations, the Family Court has adopted a Family Violence Strategy covering five key areas: information and communication, safety, training, resolving the dispute and making the decision.

14.91 In relation to training, the FCA has recognised the need for all court staff to be trained and has developed an internal family violence training plan to ensure that

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91. *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) Sch 1 Pt 1 item 3.
92. Revised Explanatory Memorandum to the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth) at 9.
93. *Family Law Regulations 1984* (Cth) reg 62.
94. New s 60I(9)(b) of the FLA (as introduced by the *Family Law Amendment(Shared Parental Responsibility Act 2006* (Cth) Sch 1 item 11).

new and existing staff members are equipped to understand and deal with issues of family violence within the court context.[95]

14.92 In relation to resolving disputes, the Family Court has recognised that while not all circumstances are appropriate for resolution by mediation, all clients of the court participate in conferences which provide assessments and decisions about the best possible way of dealing with the dispute. Thus the Family Court recognises the need to review conferencing and mediation policies to ensure that people participate in conferences in a safe manner and are able to make informed decisions regarding their circumstances.[96]

Mental and physical condition of the parties

14.93 Another range of factors to be taken into account in determining if mediation is appropriate lies in the mental and physical condition of the parties. This range of factors includes:

- the emotional and psychological state of any of the parties;[97]
- the physical health of any of the parties;[98]
- a psychiatric or psychological disability in any of the parties;
- the parties' age, maturity or intellectual capacity; and
- an alcohol or drug dependency in any of the parties.

14.94 Any of these factors will have an influence over the party's capacity to participate effectively, and on equal terms with the other party, during mediation.

Lack of good faith

14.95 Mediation may also be inappropriate in circumstances where one of the parties is not approaching the mediation in good faith. Examples include situations where it becomes clear that one of the parties is using the mediation for the purposes of delaying legal proceedings or to gain some other inappropriate advantage,[99] or where one of the parties has a history of breaking promises. Or it may simply be the case that there is no possibility of the parties reaching agreement on any issues, and that time is being wasted.

95. Family Court of Australia, *Family Violence Strategy 2004-2005* at 10.
96. Family Court of Australia, *Family Violence Strategy 2004-2005* at 11.
97. *Family Law Rules 1984* (Cth) o 25A r 5(d); *Family Law Regulations 1984* (Cth) reg 62(2)(e).
98. *Family Law Regulations 1984* (Cth) reg 62(2)(e).
99. *Family Law Rules 1984* (Cth) o 25A r 5(e).

The Commission's views

14.96 The Family Court has recognised the need regularly to review and refine its policies and practices. This has taken the form of legislative reform as well as the development and implementation of policies such as the Family Violence Strategy. While much research has been done on the power differentials resulting from violence in heterosexual relations, the same is possibly true of power differentials from violence in same sex de facto relationships and caring relationships. The development and implementation of a domestic violence strategy for the courts, similar to that of the Family Court, would in the Commission's view, provide the courts with guidance and a protocol for dealing with practical problems that can arise in disputes between domestic partners where there is a history of violence.

14.97 The Commission is also of the view that the PRA should list the factors to be taken into account in determining the suitability of a matter under the PRA for mediation. In making this recommendation we re-iterate the arguments in our Report on Community Justice Centres for the legislative recognition of the danger involved in referring mediation matters involving violence.[100]

Recommendation 59

The PRA should provide that the following factors must be taken into account in considering the suitability of any dispute under the Act for mediation:

(a) the safety of all parties to the mediation;

(b) any ADVOs or APVOs that may have been granted or that are pending;

(c) the degree of equality (or otherwise) in the bargaining power of the parties;

(d) the occurrence of violence and/or the risk of future violence between the parties or between one of the parties and a third party (including children of the relationship);

(e) the mental, physical and psychological state of the parties;

(f) the relationship between the parties;

(g) whether one of the parties may be using the mediation tactically to delay or gain some other improper advantage;

100. New South Wales Law Reform Commission, *Community Justice Centres* (Report 106, 2005) Ch 4.

(h) the extent to which the issues in dispute are related to any violence between the parties;

(i) whether the party who has committed or threatened violence is a child;

and

(j) any other matter relevant to the proposed mediation and the parties.

Appendices

- Appendix A: Submissions received
- Appendix B: Focus groups
- Appendix C Part A
- Appendix C Part B

APPENDIX A: SUBMISSIONS RECEIVED

Presbyterian Women's Association of Australia in NSW, 29 September 2002

Presbyterian Church of Australia, 9 October 2002

Lesbian and Gay Solidarity, 28 September 2002

Victorian Bar, 30 September 2002

Equity Division of the Supreme Court of NSW, 1 October 2002

Centacare Sydney, 27 September 2002

Anglican Diocese of Sydney, 30 July 2002

M Moskvitch, 24 June 2002

Bi Pride Australia, 29 July 2002

Women's Legal Resources Centre, 25 October 2002

NSW Commission for Children and Young People, National Children's and Youth Law Centre, October 2002

D Farrar, 23 September 2002

Gay and Lesbian Rights Lobby Inc, *Interim submission*, 30 September 2002

Gay and Lesbian Rights Lobby Inc, *Final submission*, 8 May 2003

Anti-Discrimination Board of NSW, 12 September 2002

A de Costa, 21 August 2002

NSW Young Lawyers, 16 August 2002

G Fox, 28 June 2002

S Landers, 5 July 2002

V Palfreeman, 25 June 2002

Law Society of NSW, 24 February 2003

L Scheps, 20 May 2003

P Boers, 26 February 2004

APPENDIX B: FOCUS GROUPS

Focus groups relating to same sex relationships and property

1. Sydney focus group, 25 August 2004

   (Mr D Madeddu, facilitator)

2. Lismore focus group, 31 August 2004

   (Mr T Childs, facilitator)

Focus groups relating to same sex relationships and parenting

1. Sydney focus group, 26 August 2004

   (Mr D Madeddu, facilitator)

2. Lismore focus group, 28 August 2004

   (Mr T Childs, facilitator)

APPENDIX C: PART A: QUESTIONNAIRE

SAME SEX RELATIONSHIPS AND THE LAW QUESTIONNAIRE

NSW Law Reform Commission

About the questionnaire

The purpose of this survey is to find out from members of the gay and lesbian community how you feel about the way the *Property Relationship Act 1985* (NSW) (the "PRA") operates and if it should be changed to mirror the provisions of the *Family Law Act 1975* which is going to apply to heterosexual de facto couples. We are also interested in your views about how the law should be changed to give greater recognition to same sex families, in particular to recognise non-biological parents as legal parents.

The survey is divided into 6 parts:

- **A.** How property is divided when a couple splits up
- **B.** Partner maintenance
- **C.** Domestic relationship agreements
- **D.** Recognising same sex relationships
- **E.** Recognising non-biological parents
- **F.** Child support
- **G.** Other comments
- **H.** About you

You may answer **all** or **part** of the survey.

Definitions

*A "**Domestic Relationship**" under the PRA is:*

(a) a de facto relationship where 2 adult people live together as a couple and are not married to one another or related by family; **or**

(b) a close personal relationship where 2 people, whether or not they are related to each other, live together and where one or each provides the other with domestic support and personal care

A "***Domestic relationship agreement***" under the PRA is an agreement between 2 persons made before or during a domestic relationship, that makes provision for financial matters (including property, maintenance and financial resources)

"***Partner maintenance***" refers to an obligation on a partner to pay financial support to the other after a relationship ends, where there is a need for support and the means by the first partner to provide it. This is different from the obligation to pay financial support for the costs of raising children of the relationship (which is generally now referred to as child support)

THE SURVEY IS CONFIDENTIAL

Completed questionnaires must be returned to the Commission by 7 September 2004.

A. HOW PROPERTY IS DIVIDED WHEN A COUPLE SPLITS UP

1. Should the law treat same sex de facto relationships in the same way as heterosexual de facto relationships?

☐ Yes

☐ No

Why or why not?

_____

2 Which of the following things do you think should be taken into account when the court is asked to divide property when a couple splits up? Tick **all those** which you think should be considered.

☐ Direct financial contributions to the purchase, maintenance or improvement of property of either of the parties (eg paying the deposit or the mortgage)

☐ Direct financial contributions to the financial resources of the parties or either of them (eg investing in a superannuation fund)

☐ Indirect financial contributions to the purchase, maintenance or improvement of property of either of the parties (eg doing renovations, freeing up the other person so they can work etc)

☐ Indirect financial contributions to the financial resources of either of the parties (eg agreeing to pay the household expenses while your partner invests more into their superannuation account)

☐ Home making contributions, including parenting contributions, which benefit the other party or the family (including children of the parties, or a child accepted into the household) such as cooking, washing, taking care of the children etc

☐ The effect of any order on a party's earning capacity

☐ Any child support payments

☐ The terms of any financial agreement entered into by the parties

3. The following are additional matters that a court may take into account under the Family Law Act (when dividing property after the end of a marriage). Which of these things should also apply to people in same sex de facto relationships under the PRA? Tick **all those** which you think should be considered.

- ☐ The age and health of the parties
- ☐ Whether the parties have the care and control of any child of the relationship who is under 18 years
- ☐ Whether the parties have any responsibilities to support any other person
- ☐ The income, property and financial resources of the parties, including their eligibility to receive government assistance
- ☐ The length of the relationship and the extent to which it has affected the earning capacity of the parties
- ☐ What standard of living is reasonable for each of the parties in all the circumstances
- ☐ The contributions made by either of the parties to the income and earning capacity of the other

4. Are there any other things you think a court should consider when making an order dividing up property between the parties?

_____

5. Do you think that people in a domestic relationship should have lived together for any length of time in order to be able to claim a share of each other's property if they split up.

- ☐ Yes
- ☐ No (*please go to Question 7*)
- ☐ Not sure

6. Do you think that before a partner can claim a share of their ex-partner's property, the two should have lived together for:

- ☐ 1 year
- ☐ 2 years
- ☐ 3 years
- ☐ Not sure

B. PARTNER MAINTENANCE

7. Tick those statements with which you **agree**.

- ☐ Partners should never have to pay maintenance to their ex-partner after they have split up.
- ☐ Partners should pay maintenance to an ex-partner only if the ex-partner has the ongoing care of a child of the relationship, or because their earning capacity was affected by the relationship and they need to do some re-training or study.
- ☐ Maintenance should only be paid for up to 3 years if there is no child of the relationship, and the maintenance is for re-training or study.
- ☐ Where there are children of the relationship, maintenance should be paid until the youngest child starts school.
- ☐ Maintenance should be paid for up to 3 years regardless of how old any children of the relationship are.
- ☐ Maintenance should stop if the partner receiving maintenance begins living with a new partner.
- ☐ The courts should consider maintenance as part of the overall process of how to divide the property of the partners between them.
- ☐ Where possible, maintenance should be paid in a lump sum rather than weekly or monthly etc so that the parties can have a "clean break" and get on with their lives.

C. DOMESTIC RELATIONSHIP AGREEMENTS

8. Did you know that the PRA allows partners to enter into a binding domestic relationship agreement?

☐ Yes

☐ No

9. Have you entered into a written agreement with your partner?

☐ Yes

☐ No (please go to Question 12)

10. Did you ask a solicitor to prepare the agreement?

☐ Yes

☐ No

11. Did each of you receive independent legal advice before you signed the agreement?

☐ Yes

☐ No

12. If you haven't made an agreement, why haven't you?

_____

_____

D. RECOGNISING SAME SEX RELATIONSHIPS

13. Do you think there should be a registration system for same sex couples?

☐ Yes

☐ No

☐ Not sure

Why?

_____

14. Would you register your relationship if there were a registration system?

- ☐ Yes, but only if legal consequences were attached to registration
- ☐ Yes, whether or not legal consequences were attached to registration
- ☐ No
- ☐ Not sure

15. Tick which option you **prefer**.

- ☐ A person should be covered automatically under the PRA if they are in a domestic relationship as defined by the Act without the need to register their relationship
- ☐ Only those who register their relationship should be covered by the PRA
- ☐ Both those who register their relationship and those who meet the PRA's definition of a domestic relationship should fall within the operation of the PRA

16 Would you like to make any comments about a registration system?

_____

E. RECOGNISING NON-BIOLOGICAL PARENTS

17. Have you faced any practical or emotional difficulties because you are not a legal parent of a child that you are raising?

_____

18. Have you sought a parenting order under the *Family Law Act 1975*?

- ☐ Yes
- ☐ No

19. If so, what were your experiences of the application process and have you found the order useful?

_____

20. Should gay and lesbian step-parents be eligible to adopt a child in the same way as heterosexual step-parents?

☐ Yes

☐ No

Why?

_____

21. If a couple decide to have a child together through artificial insemination procedures, the male partner of the woman is presumed to be the legal parent of her child. That is not the case if the woman's partner is a woman (the "co-mother"). Should a co-mother be presumed to be the legal parent of her child in this type of situation?

☐ Yes

☐ No

Why?

_____

22. If you had a choice, which would you prefer as a means of creating a legal parental relationship between a co-mother and her child?

☐ To be able to adopt my child

OR

☐ To be automatically presumed to be my child's parent at birth

F. CHILD SUPPORT

23. There is no statutory obligation on a co-mother to provide financial support for a child should the relationship between the co-mother and birth mother end (and the child remains in the care of the birth mother). Should an automatic duty to support a child be imposed on co-mothers?

☐ Yes, but only if co-mothers are recognised as legal parents

☐ Yes, whether or not co-mothers are recognised as legal parents

☐ No

G. OTHER COMMENTS

24. If you would like to make any comment on any of the issues raised in the questionnaire, please write them here.

_____

_____

H. ABOUT YOU

You do not have to answer the following questions but it would be helpful to our research if you did.

25. Are you

☐ Female?

☐ Male?

26. How old are you?

☐ 16-17

☐ 18-35

☐ 36–55

☐ 56 and over

27. Are you in a same sex de facto relationship now, or have you been in a same sex de facto relationship?

☐ Yes

☐ No

28. Do you live with your partner?

☐ Yes

☐ No

Please print and fax to: 02 9228 8225 or mail to: NSW LRC, GPO Box 5199, Sydney NSW 2001

APPENDIX C: PART B: RESPONSES TO THE QUESTIONNAIRE: SAME SEX RELATIONSHIPS AND THE LAW

INTRODUCTION

C.1 This Part to Appendix C sets out and analyses the responses to the Commission's questionnaire on same sex relationships and the law. The questionnaire itself is reproduced as Part A to this Appendix.

BACKGROUND

C.2 In Chapter 1, the Commission discussed the reference by New South Wales to the Commonwealth of its powers to legislate over financial matters relating to the breakdown of de facto relationships. As we explained,[1] a likely consequence of the referral of powers is that the *Property (Relationships) Act 1984* (NSW) ("the PRA") will apply predominantly to people in same sex and close personal relationships. We therefore decided to conduct targeted consultations with members of the gay and lesbian community through both a series of focus groups[2] and through the use of a questionnaire.

PURPOSES OF THE QUESTIONNAIRE

C.3 The questionnaire was designed to obtain qualitative and quantitative information from the gay and lesbian community in New South Wales about the current operation of the PRA, and to invite feedback on options for legislative reform, including the option to adopt a scheme for financial adjustment similar to the scheme under the *Family Law Act 1975* (Cth) ("the FLA").[3] The questionnaire also sought views from the gay and lesbian community on a range of other issues raised in this Report, including the possibility of a registration system for de facto couples, and legal recognition of non-biological parents.

1. See Chapter 1 at para 1.15-1.37.
2. The details of the focus groups are set out in Chapter 1, at paragraph 1.76, and responses from focus groups participants are referred to throughout this Report, where relevant to the particular issue under consideration.
3. See Chapter 7 for discussion of the FLA scheme for financial adjustment.

METHODOLOGY

Development of the questionnaire

C.4 The Commission developed the questionnaire, and sent it in draft form for comment to several people with particular experience in consulting with the gay and lesbian community.[4]

Recruitment of questionnaire respondents

C.5 The Commission posted the questionnaire on its website and invited responses by September 2004. People who wished to respond could do so by printing out a copy of the questionnaire and either faxing it or mailing it to us. We advertised the questionnaire in the gay and lesbian press, in the *Sydney Star Observer* and *Lesbians On The Loose*. We also sent emails to contact people in gay and lesbian networks,[5] alerting them to the questionnaire and asking them to forward the information to others. Lastly, we left flyers advertising the questionnaire in the offices of several organisations with contacts with the gay and lesbian community, such as the Gay And Lesbian Rights Lobby, and the Aids Council of New South Wales.

RESPONDENTS

Response rates

C.6 A total of 69 respondents completed this questionnaire. Respondents suggested that there would have been a much greater response rate if the questionnaire had been available to complete and submit online. Unfortunately, the Commission was unable to facilitate this. Respondents were therefore required to print the document, complete it and send it back to the Commission by mail or fax.

Characteristics of respondents

C.7 Respondents' ages ranged from 18 to 56 years and over. Most respondents (61%) were in the 36-55 year age range. A substantial number (30%) were in the 18-35 year age group and 3% of respondents were over 56 years of age. There were no respondents aged 16-17. Six per cent of respondents did not answer this question.

C.8 The number of female respondents was 42 (61%) and the number of male respondents was 24 (35%). Six per cent of respondents did not answer this question.

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4 Ms Jackie Braw, (then) Gay and Lesbian Liaison Officer, NSW Attorney General's Department; Mr Daniel Madeddu.

5 These contact people were sourced through Ms Braw, (then) Gay and Lesbian Liaison Officer of the NSW Attorney General's Department.

C.9 Most of the respondents (93%) had been or were at the time in a same sex de facto relationship.

C.10 Most of the respondents (81%) lived with their partner at the time of response.

SUMMARY OF FINDINGS

The division of property

C.11 Part A of the questionnaire sought views on how property should be divided up following the breakdown of a relationship.

C.12 The majority of respondents (93%) believed the law governing the division of property should be the same for both same sex and opposite sex de facto relationships.

C.13 Question 2 of the questionnaire asked respondents to indicate which of the following factors should be considered when adjusting parties' interests in property:

- Direct financial contributions to the purchase, maintenance or improvement of property of either of the parties;
- Direct financial contributions to the financial resources of the parties or either of them;
- Indirect financial contributions to the purchase, maintenance or improvement of property of either of the parties;
- Indirect financial contributions to the financial resources of either of the parties;
- Home making contributions, including parenting contributions;
- The effect of any order on a party's earning capacity;
- Any child support payments;
- The terms of any financial agreement entered into by the parties.

C.14 Nearly all respondents (94%) believed that direct financial contributions to the purchase, maintenance or improvement of property of either of the parties should be considered. 75% of respondents believed that the effect of any order on a party's earning capacity should be considered. Support for all other listed factors ranged from 84% to 93% of respondents:

- 84% considered that child support payments should be taken into account;
- 88% considered that the terms of any financial agreement between the parties should be taken into account;
- 88% considered that direct financial contributions to financial resources should be taken into account;
- 88% considered that indirect financial contributions to financial resources should be taken into account;
- 91% considered that homemaking contributions should be taken into account; and

- 93% considered that indirect financial contributions to the purchase, maintenance or improvement of the parties' property should be taken into account.

C.15 Question 3 of the questionnaire asked respondents to indicate which of the following factors (currently taken into account under s 75(2) of the FLA when dividing property after the end of a marriage) should also be considered when adjusting property interests after the break down of a same sex de facto relationship:

- The age and health of the parties;
- Whether the parties have the care and control of any child of the relationship who is under 18 years;
- Whether the parties have any responsibilities to support any other person;
- The income, property and financial resources of the parties, including their eligibility to receive government assistance;
- The length of the relationship and the extent to which it has affected the earning capacity of the parties;
- What standard of living is reasonable for each of the parties in all the circumstances;
- The contributions made by either of the parties to the income and earning capacity of the other.

C.16 Almost all participants (99%) considered that a court should take into account whether or not the parties have the care and control of any child of the relationship who is under the age of 18 years. 68% of respondents agreed that a reasonable standard of living for each party in all circumstances is an important factor. All other factors gained response rates of between 80% and 96%:

- 80% thought that responsibilities to support another person should be taken into account;
- 80% thought that the parties' age and health should be taken into account;
- 84% thought that the income, property and financial resources of the parties should be taken into account;
- 93% thought that the contributions made by either party to the income and earning capacity of the other party should be taken into account; and
- 96% thought that the length of the relationship and its effect on the parties' earning capacity should be taken into account.

C.17 In response to Question 4, concerning any other things that should be considered when dividing up property, the majority of respondents thought that a pre-existing agreement between de facto partners should be taken into account. Many respondents also thought that property that belonged to either party before the relationship began should remain the property of that party exclusively. Other matters that were commonly nominated as matters for consideration in the adjustment process included:

- Registration of the relationship;
- Any pre-existing legal arrangements; and
- Whether either party had a disability requiring ongoing support.

C.18 Several respondents commented that non-couple income (for example, inheritance) should not be included. General comments about property division almost exclusively focused on notions of equity and fairness. The general consensus was that all relationships, whether opposite sex or same sex, are based on the same principles (such as love and trust) and should be recognised as such.

Period of cohabitation

C.19 The majority of respondents (84%) thought that people in a domestic relationship should have lived together for a particular length of time in order to be able to claim a share of each other's property if they split up.

C.20 Responses were mixed as to the actual period of cohabitation that should be required in order to attract the financial adjustment scheme. Currently, the law stipulates that a person must have lived with the other for two years in order to be eligible to apply for an order for financial adjustment, unless the parties have a child together, or unless one has made substantial contributions to the relationship or takes care of the other's child.[6] Of those respondents who thought that parties should live together to make a claim on each other's property, 28% agreed that two years was appropriate, 25% thought that the period should be increased to three years, 12% said that people should only be required to live together for one year, 32% were unsure what the period should be, and 3% did not answer the question.

Partner maintenance

C.21 Question 7 of the questionnaire asked respondents to indicate which of a list of statements concerning partner maintenance they agreed with. The responses are summarised below:

- Only 10% of respondents considered that partners should never have to pay maintenance to their ex-partners after they have split up.
- 80% of respondents agreed that partners should pay maintenance to ex-partners only if either the ex-partner has the ongoing care of a child of the relationship, or because the ex-partner's earning capacity was affected by the relationship and he or she requires some re-training or study.
- In cases where maintenance is paid for the purpose of re-training or study (rather than to support children), 30% of respondents agreed that it should be paid for up to three years only.
- Where maintenance is paid to support a child or children of the relationship, then 22% of respondents took the view that it should be paid until the youngest child starts school. Conversely, 7% considered that it should be paid for up to three years, regardless of the age of the children.
- 49% of respondents agreed that the right to maintenance should end once the partner receiving maintenance begins living with a new partner.

6. See Chapters 2 and 6.

- 81% of respondents agreed that the courts should consider maintenance as part of the overall process of dividing up property between partners.
- 26% of respondents considered that maintenance should be paid in a lump sum where possible, rather than in periodic instalments.

Domestic relationship agreements

C.22 The majority of respondents (78%) did not know that the PRA allows partners to enter into a binding relationship agreement. Accordingly, the majority of respondents had not entered into a written agreement with their partner.

C.23 Of the 20% who indicated that they were aware they could make binding financial agreements under the PRA, only 17% said they had actually drawn one up.

C.24 Of those who had made an agreement, all said they had asked a solicitor to prepare the agreement.

C.25 Of those who had made an agreement, all said they had sought independent legal advice. This is a requirement under the PRA. If not satisfied, the agreement is not validly made and therefore not binding.[7]

C.26 The majority of respondents did not make an agreement because they did not know that they could do so. Those who did know but had not entered into an agreement cited cost as the major reason for not doing so. Many respondents also felt that a formal agreement was unnecessary where a relationship was based on trust.

Should there be a registration system for people in same sex relationships?

C.27 Question 13 of the questionnaire asked respondents whether they believed there should be a registration system for same sex couples.

C.28 The majority of respondents (65%) believed there should be a registration system for same sex couples, 14% disagreed and almost 20% were unsure or did not give a response.

C.29 Of those who did not support a registration system, some of the reasons given were:

- "Because there is none for de facto heterosexual couples"
- "The law and bureaucracy rely on bits of paper"
- "Same sex couples should be able to marry like heterosexual couples can, not have a separate registration process"
- "It discriminates against same sex couples"

7. See Chapter 12.

C.30 There were varied responses about the benefits or pitfalls of a registration system. 38% of respondents believed that registration would only be of benefit if it came with legal entitlements, as with marriage, while 32% of respondents believed that registration would be worthwhile regardless of whether or not legal consequences were attached to it.

C.31 Conversely, many respondents indicated that a registration system would be discriminatory as opposite sex de facto couples do not have to register their relationship and still have some legal entitlements. In addition, some respondents were concerned about potential privacy issues that may arise from having their relationship publicly documented.

C.32 Some of the comments given by respondents regarding this issue included:

- "If gay marriage is not possible, please start civil union for gay and lesbian couples"
- "I think when gay marriage is not recognised in this land we should at least have civil union"
- "A registration system needs to be set up ASAP"
- "I do not want my relationship to be seen as marriage"
- "Same sex de facto should equal heterosexual de facto. Same sex civil unions should equal heterosexual marriages"

Recognising non-biological parents

C.33 Part E of the questionnaire related to legal recognition of non-biological parents ("co-parents")[8] in same sex relationships.

C.34 The majority of respondents were unable to respond to the question regarding possible practical or emotional difficulties of not being a legal parent, as this was not applicable. A small number responded that yes, they had experienced difficulties through not being the legal parent of a child that they were raising.

C.35 Only 6% of respondents indicated that they had sought a parenting order under the *Family Law Act 1975* (Cth). Of these, there seemed to be consensus that legal representatives were helpful in this process, although the courts were unhelpful.

C.36 The majority of respondents (99%) believed that gay and lesbian step-parents should be eligible to adopt a child in the same way as opposite sex step-parents. The reasons given again focused on notions of equity and fairness. In addition, a recurring comment was that adoption would protect the rights of both the child and the non-biological parent.

C.37 In response to question 21, relating to presumption of parenthood for lesbian co-mothers, the majority of respondents (80%) believed that a co-mother should be presumed to be the legal parent of a child if the lesbian couple decided to have a child together using artificial insemination procedures. The most common reason given for this was again to protect the rights of the parent and the child. However, many

8. See Chapter 5.

respondents (80%) believed that it should not be assumed that a partner has consented to being a co-mother and that both parties need to agree to this arrangement.

C.38 Some of the comments given by respondents regarding this issue included:

- "The rights of co-mothers seem very hazy"
- "Co-mothers need to have the same access rights as afforded to biological fathers if they have been intimately involved with the child"
- "I would like to see provisions made for non-biological mothers names to appear on the birth certificate of children born into that relationship"
- "The law should provide a clear way to recognise rights of biological donor fathers not simply those of co-mothers"

Child support

C.39 Part F of the questionnaire sought respondents' views on whether or not an automatic duty to support a child should be imposed on co-mothers. 58% of respondents thought that there should only be an automatic duty for a co-mother to support a child if the co-mother is recognised as a legal parent. 39% of respondents believed that the obligation to pay child support should exist regardless of whether or not the co-mother is recognised as a legal parent. 3% of respondents did not answer. There were no respondents who answered no to the question of whether an automatic duty of child support should exist.

Other comments

C.40 There were many and varied general comments provided by the respondents. These included:

- "Changes should be fast-tracked, we've been in limbo too long!"
- "Very upset by new Marriage Act amendments"
- "It would be fair for same sex couples to have the same legal rights and responsibilities as different sex couples"
- "I would like to have the same legal rights and recognition as heterosexual couples and individuals in all areas of law"
- "I believe as human beings our relationships are the same and equal"
- "The state should not be able to discriminate against couples be they straight, gay or some other arrangement"
- "It appears that society needs to be encouraged to accept our relationships"
- "More education resources and legal information is needed in the community on parenting etc"

Conclusion

C.41 The findings of the questionnaire into same sex relationships and the law indicate that there is a general consensus among the gay and lesbian community on several key issues, including that:

- Same sex relationships should be treated by the law in the same way as opposite sex de facto relationships;
- People in a domestic relationship should have lived together for a length of time in order to be able to claim a share of each other's property if they split up;
- There should be a registration system for same sex couples;
- Gay and lesbian step-parents should be eligible to adopt a child in the same way as opposite sex step-parents; and
- A co-mother should be presumed to be the legal parent of a child and accordingly should provide financial support for the child if her relationship with the biological mother ends.

Tables

- Table of cases
- Table of legislation

Table of cases

Table of legislation

Australian Capital Territory

Commonwealth

New South Wales

Northern Territory

Queensland

South Australia

Tasmania

Victoria

Western Australia

New Zealand

United Kingdom

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Index

Financial adjustment

see also Cohabitation, Domestic relationship, Registration, Residence, Maintenance