NSW Law Reform Commission

REPORT 36 OUTLINE (1983) - DE FACTO RELATIONSHIPS

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Participants

New South Wales Law Reform Commission

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. Pursuant to section 12A of the Act the Chairman has constituted a Division for the purposes of the De Facto Relationships reference. The members of the Division are:-

Chairman

Professor Ronald Sackville

Full-time Commissioner

Mr. Denis Gressier.

Part- time Commissioners

Mrs. Bettina Cass

The Hon Mr. Justice PE Nygh

All members of the Division have been involved in the preparation of the Report on De Facto Relationships.

Members of the Commission's staff who participated in the preparation of the Report are the Research Director, Ms. Marcia Neave, and Ms. Helen Mills.

Preface

The Commission has a reference to inquire into and review the law relating to family and domestic relationships, with particular reference to de facto relationships. The terms of reference are set out in full in the first paragraph of this Outline. Pursuant to this reference we have published a Report on De Facto Relationships which has been presented to the Attorney General and Minister of justice, the Honourable DP Landa, LLB, MP.

Copies of the Report may be obtained from the Commission The Outline is published to assist those who prefer to read a summary of the Report rather than the full document In the event of inconsistency, the Outline yields to the terms of the Report.

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Outline of Report

I. INTRODUCTION

On 13 July 1981 the then Attorney General of New South Wales, the Hon. FJ Walker, QC, MP, made the following reference to the Commission:

> "To inquire into and review the law relating to family and domestic relationships, with particular reference to the rights and obligations of a person living with another person as the husband or wife de facto of that other person, and including the rights and welfare of children of persons in such relationships."

The terms of reference speak of “the law relating to family and domestic relationships”, but specifically direct attention to the rights and obligations of couples living in de facto relationships. The Report deals exclusively with de facto relationships and does not recommend changes to laws affecting other forms of domestic relationships, for example, homosexual relationships, or groups of people sharing a common household.

When we use the expression “de facto relationship” we mean the relationship between

> “a man and woman who, although not legally married to each other, live together as husband and wife on a *bona fide* domestic basis”.

Although this is our basic definition we sometimes recommend that de facto partners should be required to satisfy additional criteria before the law should confer benefits or impose obligations upon them. In particular we suggest that, in certain cases, rights and duties should be imposed only when the parties have lived together for a specified period.

II. THE CONSTITUTIONAL AND LEGISLATIVE BACKGROUND

The Australian Constitution gives the Commonwealth power to legislate with respect to marriage and divorce. Under this power it has enacted the Family Law Act 1975, which creates the Family Court of Australia and governs the financial and other consequences of marriage breakdown. The Commonwealth's power does not extend to de facto relationships, which accordingly remain subject to State law.

This division of legislative responsibility has a variety of consequences. One consequence is that in general the custody of children born within marriage is determined by the Family Court, while the custody of children born within de facto relationships is determined by State courts. Several States, including New South Wales, have discussed the possibility of referring to the Commonwealth legislative power over the custody and guardianship of all children If the reference of power proceeds, the effect will be to allow the Family Court to decide custody disputes relating to all children, including children of de facto partners.

In making our recommendations we have been directed to take into account the proposed reference of powers.

III. THE SOCIAL SETTING

Surveys conducted by the Australian Bureau of Statistics and the Institute of Family Studies in 1982 revealed the following information:

> In that year, 4.7 per cent of all couples in Australia were living in de facto relationships. The proportion of de facto couples in New South Wales was identical with the national figure and amounted to approximately 116,200 people. These figures are minimum estimates.

The incidence of de facto relationships had increased markedly over the period 1976 to 1982.

While de facto relationships were particularly common among people under the age of 30, more than 40 per cent of all people living in a de facto relationship were older than 30.

A majority (nearly 59 per cent) of current de facto relationships had continued for at least two years. About 20 per cent had continued for more than five years, and eight per cent for more than 10 years.

Over one third of de facto couples (36 per cent) had dependent children in their households-, IS per cent had the care of children born during their current relationship. Where the female partner was between 25 and 44 years (the period usually associated with family formation), children were present in 51 per cent of families.

De facto partners could not readily be distinguished from married people in terms of education or religious affiliation but were more likely to have been born in Australia or in another English speaking country.

Except that they tended to be younger than married people, de facto partners did not constitute a distinct sub-group of the Australian population

The large and apparently increasing numbers of people living in de facto relationships suggests that any injustice inflicted by the present law is an important problem warranting careful attention by policy makers.

Our surveys of legal practitioners, welfare workers and chamber magistrates, together with our case study program, indicated that de facto partners encounter legal problems. The legal difficulties most commonly experienced by de facto partners concern claims to property and financial adjustment on separation or on the death of one party. Other matters on which advice is often sought include maintenance and custody of children protection from domestic violence and agreements concerning the financial aspects of the parties' continuing relationship.

IV. CURRENT LAW AND POLICY

Commonwealth and State law have, for a long time and for a variety of purposes, specifically acknowledged the existence and prescribed the consequences of de facto relationships. The scope of this recognition has been gradually, if not systematically extended over the years. Examples of legislation recognising de facto relationships include the following.

Commonwealth Legislation

In general the Social Security Act 1947 places de facto partners and married people in the same position for the purpose of claiming pensions and benefits. For example, a woman who lived with a man in a de facto relationship for at least three years prior to his death and who was maintained by him, maybe eligible for a widows' pension. The legislation also specifically provides that de facto partners should not be treated more favourably than married couples in determining their eligibility for social security.

The Family Law Act recognises the need, in determining claims between married couples for maintenance or division of property, to take into account the financial responsibilities associated with de facto relationships. For example, in deciding such claims the Family Court is directed to consider "the responsibilities of either party to support any other person." This has been interpreted as including a husband's moral obligation to support his current family, even if he has not remarried but is living in a de facto relationship.

New South Wales Legislation

The Anti-Discrimination Act 1977, makes it unlawful in specified cases such as the provision of employment, to discriminate against a person on the grounds of his or her" marital status". This term is defined to include the status of living in a de facto relationship.

The Worker's Compensation Act, 1926, provides that the surviving de facto partner of a worker who dies as the result of a work- related injury is entitled to compensation if he or she was wholly or partly dependent for support on the worker at the time of the death.

The Family Provision Act, 1982, allows the de facto partner of a deceased person to apply to a court for a share in the estate of the deceased person, whether or not the deceased person left a will. The court may make an order if satisfied that the claimant has not been adequately provided for by the deceased.

New remedies for domestic violence protect a person who fears violence from his or her spouse or de facto partner.

This widespread legislative recognition of de facto relationships demonstrates that the law no longer attempts to discourage such relationships by penalising or withholding advantages from people living together outside marriage. It follows that the important policy question is not whether the law should recognise de facto relationships, but whether the law should regulate further the consequences of those relationships. Further regulation would not mark a sharp departure from the trend already apparent in the law.

V. THE POLICY QUESTIONS

The Need for Changes

We are firmly of the view that despite recent legislative changes, the law in New South Wales concerning de facto relationships is seriously deficient and that reform is warranted. We have been influenced by several factors.

First, as we have seer a substantial and increasing number of people live in de facto relationships and are affected by the current law.

Secondly, the existing law produces serious injustices and anomalies. These have been identified by judges and by other commentators and have provoked many calls for reform of the law. We refer later to the specific areas of injustice, but they include the principles governing property and financial adjustment between de facto partners, compensation for fatal accidents, remedies for domestic violence and the procedures for determining custody of children of de facto partners.

Thirdly, there is a broad acceptance of the need for reform both within the legal profession and in the wider community. Our survey of legal practitioners, for example, revealed a high degree of dissatisfaction with the existing law. Moreover, widespread support for reform was expressed in submissions to us. In general church groups, while rejecting any suggestion that the legal consequences of de facto relationships should be equated with those of marriage, accepted that the current law inflicted injustices in particular areas and that these injustices should be remedied. The consensus among non-church groups was in favour of substantial reforms.

The Policy Options

Although we think that the law concerning de facto relationships should be reformed, it does not necessarily follow that the change should take the form of treating de facto partners as married people for all legal purposes. We identify three main approaches that could be taken to reform.

Equating De Facto Relationships and Marriages

The most sweeping change would be to equate the rights and duties of de facto partners with those of married couples. This approach has been suggested in New South Wales in a report of the Anti- Discrimination Board, although it received little support in submissions.

There are formidable constitutional and legal obstacles to the implementation of a policy of legal equivalence between de facto relationships and marriages. Regardless of these difficulties, we reject the policy, on two grounds.

> First, marriage has a special status in the community that is derived, in part, from the public commitment undertaken by the parties. To adopt a policy of equivalence, without regard to the individual circumstances of the de facto partners or the context in which the issue arises, would detract from the special significance of marriage as an institution and violate a perception of marriage shared widely in the community.
>
> Secondly, the policy of equivalence would limit the freedom of couples who make a conscious decision not to marry precisely because they wish to avoid the legal rights and obligations of married people. The freedom of people to choose their own relationships should not be impaired to the extent of automatically imposing a legal regime they consider inappropriate.

Granting Rights to De Facto Partners on Proof of Dependence

This approach, which was recommended by the Tasmanian Law Reform Commission, would give de facto partners rights and obligations in certain areas, but only on proof that the claimant was dependent on the other partner. Again, we have two grounds for rejecting this option.

> Dependence reflects older, stereotyped notions of the roles of men and women. It does not take into account the interdependence which may exist between the partners in a de facto relationship, regardless of their financial arrangements. It may lead to arbitrary results in cases where both parties contribute to the family's resources, so that it is difficult to draw the line between independence and partial dependence.
>
> Even a person who is not financially dependent on his or her de facto partner may suffer serious injustice under the current law. A prime example is a person who has made substantial financial and non-financial contributions to the relationship, but whose contributions cannot be taken into account by the courts in determining a property dispute between that person and his or her de facto partner.

Remedying Injustice in Specific Areas

The third approach requires policy makers to examine specific areas of law, to ascertain whether there are injustices or significant anomalies and, if so, to decide what remedial action should be taken. This approach was supported by the overwhelming majority of submissions. It has the additional advantage that it can be applied without necessarily imposing on de facto partners the same legal rules as govern married couples and without detracting from the significance of marriage as an institution Accordingly, we have adopted this approach as the most satisfactory route to reform.

In examining each area of law, we have been guided by a number of principles. They include the following:

> The policy of the law is not, and should not be, actively to discourage de facto relationships, whether by withholding benefits, imposing penalties or otherwise. In a pluralist society, people may choose to live together in such relationships.
>
> The basis for the intervention of law, in conferring rights or imposing obligations on de facto partners, should be the minimisation of injustice or the removal of significant anomalies.

It should not be assumed that the rights and obligations of de facto partners should be the same as those of married couples. In some cases it may be appropriate for the law to distinguish between them.

Conflicting claims may be made by a person's spouse and by his or her de facto partner. There is no uniform solution to this problem. In some cases, such as succession on intestacy or property disputes, the legitimate expectations of a spouse should be protected against the claims of a party to a short-term relationship.

In general, the law should not impose a regime on de facto partners that may be inconsistent with their specific wishes, particularly in relation to financial matters.

Where proposals affect children, their welfare should be the primary concern.

In defining the basis on which rights are conferred or obligations imposed, it is not necessarily appropriate that uniform criteria should be employed in all cases. In particular, a requirement that the relationship should have continued for a specific period will be appropriate in some cases, but not in others.

VI. THE QUESTION OF DEFINITION

We have already referred to the basic definition of a de facto relationship which we have adopted for the purposes of our Report. Our definition is adapted from that used in the Commonwealth Social Security Act 1947, and refers to

> "the relationship between a man and woman who, although not legally married to each other, live together as husband and wife on a *bona fide* domestic basis."

As will become clear, we have not applied this definition without modification in all areas we have examined. For example, for the purposes of our recommendations on financial adjustment succession on intestacy and adoption, we have included an additional requirement that the parties have lived together for a minimum period.

Because this definition is taken from Commonwealth legislation we expect that New South Wales courts will be assisted in its interpretation by the decisions of the Administrative Appeals Tribunal and the Federal Court of Australia on the Commonwealth provisions. These decisions show that the following factors may be important in deciding whether or not a particular relationship amounts to a de facto relationship:

the nature and extent of common residence;

the duration of the relationship;

the degree of financial interdependence between the partners;

the ownership, use and acquisition of property;

whether or not the couple have children;

the organisation of the household;

the degree of mutual commitment and moral support; and

"public" aspects of the relationship.

Some or all of these (which are not listed in any particular order) are likely to be factors considered by a State court.

We recommend that there should be a procedure whereby a person can apply to the Supreme Court for an authoritative declaration that he or she was living in a de facto relationship with another person on a particular date or for a particular period.

We now turn to the areas where injustice exists under the present law.

VII. PROPERTY

In Australia, one system of law is applied to determine property disputes between married couples, and another to determine disputes between de facto partners. The Family Law Act 1975 (a Commonwealth Act) gives the Family Court power to alter the property rights of husband and wife. The Court must take into account a number of matters set out in the Act, but it can decide future ownership of property according to what is "just and equitable", irrespective of which party has the formal title to the property. As has been noted, the Family Law Act does not apply to property disputes between de facto partners. These disputes are decided under State law, which does not give the court any discretion to alter the parties' property rights, even where an alteration may be necessary to achieve a fair result.

In disputes between de facto partners, the partner with the formal legal title is generally entitled to the property. In some cases a partner who has made a direct financial contribution to the property will be held to have a beneficial interest proportionate to the contribution. However, the fact that a partner has made substantial contributions, for example, to the household or to the well-being of the family, will not of itself allow the court to award that partner a beneficial interest in disputed property. The court can take contributions of this kind into account, only if there was a "common intention" between the parties that a beneficial interest in property would be obtained in return for the contributions. The courts have made it clear that the intention must be an actual intention not the intention the parties might have had if they had applied their minds to the question or an imputed intention that would allow the courts to reach a fair result.

The major deficiency of the present law is that where legal title is in the name of one partner, the fact that the other partner has made substantial indirect contributions to the well-being of the family, such as sharing household expenses or undertaking household tasks and child care, is not sufficient to give the contributor an interest in the property. It is often difficult to prove the existence of the requisite common intention, even in "deserving" cases. On a number of occasions New South Wales judges have recognised that the failure of the present law to recognise contributions of this kind leads to serious injustice, and have called for reform.

In order to overcome this injustice we recommend that, in disputes between de facto partners relating to property, the law should be changed to give the court power

> to take into account a wide range of contributions, by either partner, to the acquisition conservation or improvement of assets and to the welfare of the other partner or the family generally; and
>
> to adjust the property rights of the partners where it is just and equitable to do so having regard to these contributions.

VIII. MAINTENANCE

Under New South Wales law, a person living in a de facto relationship is under no legal obligation to support his or her partner, either during the relationship or after it has ended. In other words, the courts have no power to award maintenance in favour of one de facto partner against the other, although maintenance can be awarded in favour of children of the relationship.

We think that the current law often causes serious injustice by failing to provide a means of alleviating financial hardship caused by the breakdown of a de facto relationship. Even where

the needs clearly arise from and are attributable to the relationship, the law does not allow the needy partner to claim support, regardless of the resources available to the other partner.

In our view, it is not appropriate to alleviate the injustice caused by the current law by giving courts the same broad power to award maintenance as the Family Court has in relation to married couples. The Family Court may require a married person to support his or her spouse where the spouse's needs are created by circumstances, such as chronic illness, which are not necessarily connected with the marriage relationship. We think the law should reflect the fact that marriage involves a public commitment that is not a necessary part of a de facto relationship.

Consequently we suggest that the obligation of support between de facto partners should be more restrictively defined than the obligation between married persons. In general the parties should be required to support themselves, but the law should provide for maintenance in two specific cases where the existing law creates hardship.

> The first is where one party has the care and control of a child of the de facto relationship and is unable to support himself or herself by reason of child care responsibilities.
>
> The second is where a person's earning capacity has been adversely affected by the de facto relationship (for example, because domestic responsibilities have precluded that person acquiring skills needed for employment), and some training or retraining is required to enable the person to undertake gainful employment.

Accordingly, we have recommended that the court should have power to award maintenance if (and only 10 the applicant cannot support himself or herself adequately for either of these reasons. In general orders on the first ground (child care maintenance) should not continue beyond the date on which the youngest child in the applicants care attains the age of 12. Orders on the second ground (rehabilitative maintenance) should not continue beyond three years from the date on which the order is made.

A majority of the Division consider that maintenance should not supplant social security as the primary source of support for a de facto partner in needy circumstances. Thus the Report recommends that, in considering an application for maintenance, the court should take into account the eligibility of either partner for social security and should, wherever practicable, make orders preserving the applicants eligibility for social security.

IX. THE NEW FINANCIAL ADJUSTMENT JURISDICTION

The Report deals with the principles and procedures which should be followed by the court in exercising its new powers to adjust property rights and to award maintenance. We call applications to the court for the exercise of these powers “proceedings for financial adjustment”.

Invoking the New Jurisdiction

An important question is whether all de facto partners (or former de facto partners) should be entitled to commence proceedings for financial adjustment, or whether additional requirements must be satisfied before an application can be commenced. We think it is important to avoid the danger of trivial or unmeritorious claims being brought by people whose de facto relationships have lasted for only a relatively short time. Moreover, we do not think it is appropriate to create rights and obligations in relation to financial matters that apply to people as soon as they enter into a de facto relationship.

For these reasons, the Report recommends that, in general an applicant should be able to institute proceedings for financial adjustment only where the parties have lived together in a de facto relationship for at least a specified period. The Division is equally divided as to the

length of this period: two members favour a period of two years, and the remaining two favour a period of three years.

However, to avoid injustice, the court should be permitted to hear a claim for financial adjustment in three special cases, even where the de facto relationship has continued for less than the specified period. These cases are where

the partners have had a child;

the claimant has made substantial contributions to the relationship which would not otherwise be recognised; or

the claimant has the care and control of the other partner's child.

In the second and third cases the Report recommends that the court should be permitted to hear the application only if satisfied that failure to do so may lead to serious injustice.

Special care should be taken in cases involving an application both for the adjustment of property, which must be based on the applicant s contributions, and for maintenance, which !trust be based on a limited range of needs directly attributable to the relationship. The court ,should consider each claim separately, to ensure that only the appropriate criteria are taken into account.

Competing Claims: Spouse and De Facto Partner

There may be competing claims between a spouse and a de facto partner, for example, in relation to property. The court hearing the application by the de facto partner should have power to adjourn proceedings to allow the Family Court to decide the spouse's claim.

Matters of Procedure

The Report also deals with a range of consequential matters concerning proceedings for financial adjustment These include the following.

Both the Supreme Court and Local Courts (formerly called Courts of Petty Sessions) should be able to adjust property rights and award maintenance. In the case of Local Courts, this jurisdiction should be subject to the usual monetary limit, currently $5,000.

The court should have power to vary or terminate a maintenance order on the application of either partner. Maintenance orders should automatically cease on the death of either partner, and where the partner for whose benefit the order was made marries or remarries. Two members of the Division think that maintenance orders should automatically cease on entry into a new de facto relationship by the person for whose benefit the order was made, the other two members think that this should not occur automatically and that whether the order should cease should depend on the circumstances.

Provision should be made for orders to be set aside in cases of fraud, duress or similar circumstances, or where it is impracticable for the order to be carried out.

The court should have power to set aside transactions designed to defeat claims for property or maintenance.

The court should have power to adjourn proceedings, or to make a deferred order, where one partner has a prospective entitlement such as a claim to superannuation which will mature in the near future.

We also make detailed recommendations as to the effect of the death of either partner on proceedings for financial adjustment.

Finalising the Relationship

Claims for financial adjustment should be brought shortly after a relationship ends. In addition, wherever possible, the court should make orders in such a way that the financial relationship between the partners is settled once and for all. The latter is the “clean break” principle recognised under the Family Law Act. Accordingly, the Report recommends that proceedings for financial adjustment should normally be brought within two years of the end of the relationship and that the court should, as far as practicable, make orders which will finally settle their financial affairs.

The Court's Powers

The court should have wide and flexible powers in deciding claims for financial adjustment. For this purpose we suggest the following the model of the Family Court. On this model the court would have power to order (among other things) the transfer of property, the sale of property and division of the proceeds, payment of a lump sum whether in one amount or by instalments; and payment of interim maintenance. In addition, the court should have wide ancillary powers, including the power to issue injunctions.

X. COHABITATION AND SEPARATION AGREEMENTS

Public Policy

A number of submissions expressed the view that de facto partners should be able to regulate their own financial affairs by means of enforceable cohabitation and separation agreements. By a cohabitation agreement we mean an agreement between a man and woman made in contemplation of entering a de facto relationship or after they have begun living together a separation agreement is one entered into by the parties in contemplation of separation or after they have separated. At present there is some doubt about the validity of cohabitation and separation agreements.

We agree with the view expressed in submissions, principally because cohabitation and separation agreements are a means by which de facto partners can regulate their own affairs and avoid a regime they consider inappropriate. Upholding such agreements is consistent with the principle of respecting the freedom of choice and autonomy of de facto partners. Accordingly, the Report recommends that the law should be clarified to ensure that cohabitation and separation agreements should be enforceable under the general law, and should not be held invalid on the ground that they are contrary to public policy. Under this recommendation an agreement would be enforceable between the parties as an ordinary contract.

Agreements and Proceedings for Financial Adjustment

This leaves open the question of the relationship between cohabitation and separation agreements, on the one hand, and proceedings for financial adjustment, on the other. There then is a tension between the policy of allowing de facto partners the freedom to regulate their own affairs by agreement, and that of giving the Court power to adjust the partners' financial affairs in a manner that is fair and reasonable. We have attempted to achieve a fair balance between these policies.

We consider that the terms of a cohabitation or separation agreement should override the court s powers to order financial adjustment, provided that the de facto partners have complied with certain requirements. These are designed to ensure that the partners have received appropriate advice and are aware of the consequences of the agreement. The safeguards include requirements that the agreement be in writing and that each partner receive independent legal advice before entering the agreement Where the requirements have been satisfied, the agreement should not be capable of being varied or overturned by a court in proceedings for financial adjustment In other words, the court would be unable to use

its power to adjust property rights or to award maintenance in a manner inconsistent with the agreement.

There should be one exception to this general rule. In proceedings for financial adjustment, the court should have power to override a cohabitation agreement where the parties' circumstances have so changed since the date of the agreement that enforcement of its terms would lead to serious injustice. The exception should not apply to *separation* agreements, which are entered into by the parties at a time when the relationship either has ended or is about to end.

XI. DISTRIBUTION OF PROPERTY ON DEATH

The Current Law

The law provides for the distribution of the property of a deceased person in three ways.

> The deceased may leave a will by which he or she disposes of property to named beneficiaries.
>
> The deceased may die without leaving a valid will ("intestate"). In this case legislation provides for distribution to surviving family members according to specified formulae.
>
> The terms of the deceased person's will, or the effect of the statutory provisions that apply on intestacy, may be altered by a court order under the Family Provision Act 1982. Such an order can be made in favour of certain family members where the will or the statutory provisions fall to make provision for their "maintenance, education or advancement in life".

At present in New South Wales the surviving de facto partner of a person who dies intestate is not entitled under the statutory scheme to a share in the deceased person's estate. However, the survivor is eligible to apply to the court under the Family Provision Act, for provision out of the estate. While this is an important reform, we do not think it will solve all the problems of a person whose de facto partner dies intestate. Court proceedings may be time consuming and expensive, and may not be worthwhile where the estate is small.

The Proposal

For these reasons we suggest that, in general a surviving de facto partner of a person who dies intestate should be entitled to the same share that a surviving spouse would have had in the estate. We would, however, impose conditions on a de facto partner who is claiming a share in the estate in competition with the spouse or children of the deceased (other than children of the de facto relationship). The effect of our approach is that a de facto partner of a person dying intestate will have to satisfy a two year cohabitation period in order to claim on the intestacy, except where

> the deceased person left no surviving spouse or children; or
>
> the deceased person's only surviving children were children of the de facto relationship.

XII. FATAL ACCIDENTS

Workers' Compensation

Where an employed person is killed in a work related accident, workers' compensation is paid by the employer to his or her surviving dependants. Under the Workers' Compensation Act 1926, a de facto partner of a deceased worker may be eligible to claim compensation as a dependent, for the death of the worker. The Act imposes no minimum period of cohabitation as a condition of eligibility.

Wrongful Death

Despite the position under the Workers' Compensation Act, a surviving de facto partner of a deceased person cannot claim damages for the "wrongful death" of that person where death is not caused by a work related accident. The Compensation to Relatives Act 1897, permits wrongful death actions, for example where the death is caused by the negligence of a third party, but does not allow claims by a surviving de facto partner of the deceased.

The policy of the Compensation to Relatives Act is to compensate a family unit for the loss of support provided by a family member where the loss is caused by the wrongful actions of a third person. We think it is anomalous to exclude a surviving de facto partner, who has suffered loss of support, from the class of eligible claimants. Therefore we recommend that the Act should be amended to allow a de facto partner to bring a claim under the Act. There is no need to specify a minimum period of cohabitation because a court will only award compensation where real economic loss has been sustained by the claimant.

To overcome any difficulties that may arise where the deceased is survived by both a spouse and a de facto partner, we recommend that the Act should provide that the spouse and the de facto partner should be separate parties to the action. We see no particular problem for the court in deciding how much compensation should be awarded to each party in these circumstances. Courts have already been faced with similar conflicts and have developed principles for dealing with them.

Nervous Shock

At present, where a de facto partner suffers nervous shock as a result of the death or injury of his or her partner, he or she cannot bring an action for damages under section 4(1) of the Law Reform (Miscellaneous Provisions) Act, 1944. We recommend that such an action should be possible. This places a de facto partner in the same position as a parent husband or wife who suffers nervous shock as the result of death or injury of a child or spouse. We see no need for a minimum period of cohabitation to apply in this case.

XIII. DOMESTIC VIOLENCE

The legal remedies protecting individuals against domestic violence in New south Wales have recently been extended and improved by the Crimes (Domestic Violence) Amendment Act, 1982. This Act applies equally to married persons and people living in de facto relationships. Despite this legislation de facto partners still do not have the same protection against domestic violence as the law affords to married persons. In particular, where de facto partners are involved:

- no court in New South Wales has a specific statutory jurisdiction in *civil proceedings* to issue injunctions to restrain further violence or harassment; and

- the quasi-criminal powers of Local Courts under the new legislation do not extend to molestation and harassment falling short of actual or threatened violence.

We think that the law should provide the fullest protection against domestic violence. Accordingly, we recommend that:

- the Supreme Court be given specific statutory power to issue injunctions for the personal protection of de facto partners; and

- Local Courts be given power to restrain molestation and harassment falling short of actual violence.

We intend that Local Courts should have the main responsibility for dealing with cases of actual or threatened domestic violence. We expect that the powers conferred on the Supreme Court would be used mainly in cases where proceedings for financial adjustment are already before the court, and it is convenient to dispose of all issues in the one proceedings.

XIV. CHILDREN

Custody and Guardianship of Children

We have referred to the division of legislative responsibility in family law matters between the Commonwealth and the States. The division of power has created considerable difficulties in relation to the custody, guardianship and maintenance of children. Indeed, in some cases no single court has jurisdiction to make orders concerning the custody and maintenance of all children living in a common household. This state of affairs has been judicially described as “disgraceful” and in urgent need of review.

We have also referred to the proposed reference of powers which, if it proceeds, would allow the Family Court to decide custody disputes relating to all children. We have been directed to take the proposed reference of powers into account and, accordingly, we have prepared our Report on the assumption that the proposal will proceed. For this reason, we do not make recommendations for changes in *State law* to overcome or ameliorate the problems of the divided jurisdiction.

However, if the reference of powers does not go ahead, we consider that State law concerning the custody, maintenance and guardianship of children should be reviewed. The following matters require examination:

- rationalisation of the fragmented State legislation on custody, maintenance and guardianship of children within a single Act;

- removal of anachronistic provisions relating to parental fault and misconduct from any restatement of the general principles which should cover custody, guardianship and maintenance of children;

- replacement of the present system of separate State courts, with overlapping jurisdictions, with a new specialist State "family" court; and

- provision of support services, such as counselling for children and adults, in State courts having jurisdiction in family law matters.

We would be prepared to undertake this review in a supplementary report if the reference of State powers to the Commonwealth does not proceed.

Adoption

State law on adoption is not affected by the proposed reference of State powers concerning children. Accordingly the Report considers the effect of the current law of adoption and, in particular, the failure of the law to permit de facto partners jointly to adopt a child. We recommend that the policy be changed so as to permit de facto partners, who have lived together for at least three years, to apply jointly to adopt a child *of one of the partners.* We also recommend that de facto partners who have lived together for that period ought to be permitted to adopt a child who is related to one of the partners. However, this should be permitted only where the child has been brought up by the partners as their child and there are special circumstances justifying an adoption order.

We do not recommend at this stage that de facto partners should be able to adopt children with whom they have had no previous relationship.

We also recommend that the law should be changed so that a father's consent to the adoption of his child by someone else should be required, where he has lived in a de facto relationship with the child's mother. At present the consent of the father of ex- nuptial child is not required before the child may be adopted, even though he is a guardian of the child for other purposes. Under the existing law, subject to limited exceptions, the consent of the mother is always required.