NSW Law Reform Commission

REPORT 36 (1983) - DE FACTO RELATIONSHIPS

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Terms of Reference and Participants

New South Wales Law Reform Commission
To the Honourable D P Landa, LLB, MP

Attorney General for New South Wales.

REPORT ON DE FACTO RELATIONSHIPS

We make this Report under our reference from your predecessor, the Honourable F J Walker, QC, MP, to inquire into and review the law relating to family and domestic relationships, with particular reference to de facto relationships.

Professor Ronald Sackville

(Chairman)

Bettina Cass

(Commissioner)

Denis Gressier

(Commissioner)

The Honourable Mr Justice P E Nygh

(Commissioner)

June 1983

New South Wales Law Reform Commission

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:

Chairman

Professor Ronald Sackville

Deputy Chairman

Mr Russell Scott

Full-time Commissioners

Mr Denis Gressier

Mr James Wood, QC

Part-time Commissioners

Mr I Mc G Barker, QC

Mrs Bettina Cass

Mr Julian Disney

The Hon Mr Justice P E Nygh

The Hon Mr Justice Adrian Roden

The Hon Mr Justice Andrew Rogers

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This Report has been prepared by a Division of the Commission. The members of the Division are listed in the Preface.

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This is the thirty- sixth Report of the Commission. Its short citation is LRC 36.

Outline of Recommendations

I. INTRODUCTION

In this Outline we list the recommendations made in the Report. The more significant recommendations are printed in bold type. In some cases the words used in the Outline are different from those used either in the text of the Report or in the draft legislation appended to the Report. Where this happens, the Outline must yield to the Report and to the draft legislation.

The Outline gives cross-references to the appropriate paragraphs of the Report and to the draft legislation. The principal Bill is the De Facto Relationships Bill 1983, to which we refer as "Bill". The cross-reference in Recommendation 1, for example, is to paragraph 10.17 and to the Bill, cl.8. This draws attention to paragraph 10.17 of the Report and to clause 8 of the De Facto Relationships Bill, 1983. Where the cross-reference is to a cognate Bill (that is, one of the related Bills) a full reference is given.

In this Outline the recommendations are not listed in the same order as the recommendations made in the Report. We note at the out set that when we speak of a "de facto relationship" we mean the relationship between a man and woman "living together as husband and wife on *a bona fide* domestic basis, although not married to each other" (paragraph 17.19; Bill cl.5). Our recommendations do not, however, extend to de facto relationships which cease before the commencement of any legislation based on the Report (paragraph 9.18: Bill, cl.6).

II. PROPERTY DISPUTES

Much of the Report and many of the provisions of the Bill are concerned with disputes over property or maintenance, or both Recommendations 1-7 refer only to property disputes, 8-17 only to maintenance disputes, but 18-26 refer to disputes of both kinds.

A. Declaration of Interests in Property

Recommendation 1:

In proceedings between de facto partners with respect to existing title or rights in respect of property, the court should be expressly empowered to declare the title or rights, if any, that a partner has in that property.

(Paragraph 10.17: Bill cl.8).

B. Contributions

Recommendation 2:

The law relating to property disputes between de facto partners should be changed to allow courts to take into account contributions made by either partner to the acquisition, conservation or improvement of property and to the welfare of the other partner or the family generally. In more precise terms, the contributions to which we refer are the following:

> **the financial and non-financial contributions made directly or indirectly by or on behalf of the partners to the acquisition, conservation or improvement of their property or the property of either of them, or to their financial resources or the financial resources of either of them; and**

the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the partners to the welfare of the other partner, or to the welfare of the family constituted by the partners and any one or more of the following:

(i) a child of the partners;

(ii) a child accepted by the partners or either of them into their household, whether or note the child is a child of either of the partners.

(Paragraphs 7.44 and 7.45; Bill cl.20(1))

C. Proceedings for Adjustment of Property

1. The General Principle

Recommendation 3:

Subject to Recommendations 18-21 inclusive, de facto partners should be eligible to apply to a court for orders for the adjustment of their property or the property of either of them, and, on such applications, the court should be empowered to make such orders as to it seems just and equitable having regard to the contributions specified in Recommendation 2. The court should not, before making any such order, be required to make a declaration of the kind referred to in Recommendation 1.

(Paragraphs 7.58, 10.19-, Bill cl.14, 20)

2. Adjournment of Applications

Recommendation 4:

In addition to its ordinary powers of adjournment the court should, in proceedings between de facto partners for the adjustment of property, have a power of adjournment first, where there is a likelihood of a significant change in the financial circumstances of the partners or either of them (for example, by one of them receiving substantial superannuation benefits) and, by granting the adjournment, the court is more likely to be able to do justice between the partners; and, secondly, where proceedings in relation to the property of one of the partners or either of them are commenced in the Family Court of Australia.

(Paragraphs 10.13, 10.14, 9.36; Bill cl.21, 22)

3. Deferment of Orders

Recommendation 5:

Where an order for the adjustment of property has been made against one de facto partner and that partner is soon likely to become entitled to property which may be applied in satisfaction of the order, the court should be able to defer the operation of the order until that event happens.

(Paragraph 10.16: Bill cl.23)

4. Effect on Application of Death of Parties

Recommendation 6:

Where, before an application for the adjustment of property is determined either party to the application dies, the application should be capable of being continued by or against the estate of the deceased party.

(paragraphs 10.33 and 10.34; Bill cl.24)

5. Effect on Potential Applications of Death of Potential Parties

Recommendation 7:

Where a potential applicant for an order for the adjustment of property, or a potential respondent to any such application dies before an application is made, the potential applicant should be left to his or her rights, if any, under the Family Provision Act, 1982, and the estate of the potential respondent should cease to be at risk of any such application.

(Paragraph 10.31 and 10.34, Law Reform (Miscellaneous Provisions) De Facto Relationships (Amendment) Bill, 1983, Schedule 1, clause 1)

III. MAINTENANCE

A. The General Principle

Recommendation 8:

Subject to Recommendation 9, a de facto partner should not be liable to maintain the other partner, and a de facto partner should not be entitled to claim maintenance from the other partner.

(Paragraph 8.27; Bill cl.26)

B. Exceptions to the General Principle

Recommendation 9:

A court should be empowered to make an order for maintenance if, and only if, it is satisfied as to either or both of the following:

> **the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of both partners or of the other partner;**
>
> **the applicant is unable to support himself or herself adequately because the applicant's earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court, first, an order for maintenance would increase the applicant's earning capacity by enabling him or her to undertake a course or program of training or education and, secondly, having regard to all the circumstances of the case, it is reasonable to make the order.**

For the purposes of this Recommendation, a child is a person under the age of 12 years, or a physically or mentally handicapped person under the age of 16 years. We refer to a maintenance order made on the first ground as “child-care maintenance”, and to an order made on the second ground as “rehabilitative maintenance”.

(Paragraphs 8.27 and 8.28; Bill cl.27(2))

C. Maintenance Proceedings

1. Matters to be Taken into Account

Recommendation 10:

In determining whether to make in order for maintenance, and in fixing any amount to be paid under an order, the court shall have regard to

the income, property and financial resources of each de facto partner (including the rate of any pension, allowance or benefit paid to either partner or the eligibility of either partner for a pension, allowance or benefit) and the physical and mental capacity of each partner for appropriate gainful employment;

the financial needs and obligations of each de facto partner;

the responsibilities of either de facto partner to support any other person;

the terms of any order made or proposed to be made with respect to the property of the de facto partners; and

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.

(paragraphs 8.35 and 8.39; Bill cl.27(2))

2. Pensions, Allowances and Benefits

Recommendation 11:

The majority of the Division recommend that in proceedings for maintenance, the Court should ensure that the terms of any order, so far as is practicable, will preserve any entitlement of the applicant to a pension allowance or benefit. Mr Justice Nygh dissents from this recommendation.

(Paragraphs 8.39 and 8.40; Bill cl.27(3))

3. Duration of Periodic Maintenance Orders

Child-Care Maintenance

Recommendation 12:

The majority of the Division recommend that there should be no maximum duration imposed on a child-care maintenance order by statute, other than the attainment by the child of the maximum age specified in Recommendation 9. Mr Gressier dissents from this recommendation.

(Paragraphs 8.30-8.32; Bill cl.30(1))

Rehabilitative Maintenance

Recommendation 13:

The duration of a periodic rehabilitative maintenance order should not exceed three years from the date on which the order is made, or four years after the de facto relationship has ended, whichever is the shorter.

(Paragraph 8.33; Bill cl.30(2))

4. Death

Recommendation 14:

Where either party to an application for maintenance dies, the application should abate (terminate) and thereupon the applicant should be left to his or her rights, if any, under the Family Provision Act 1982.

(Paragraphs 10.35-36; Bill cl.31)

Recommendation 15:

Where a potential respondent to an application for maintenance dies before the survivor has made an application the survivor should also be left to his or her rights, if any, under the Family Provision Act 1982.

(Paragraph 10.15)

5. Cessation of Orders

Recommendation 16:

An order for maintenance should cease to have effect

on the death of the person for whose benefit the order was made;

on the death of the person against whom the order was made;

on the marriage or remarriage of the person for whose benefit the order was made; or

in the view of two members of the Division but not in the view of the other two members, on the entry into a de facto relationship with another person by the person for whose benefit the order was made.

An order for periodic child-care maintenance should cease to have effect when the person for whose benefit the order was made ceases to have the care and control of the child in question.

(Paragraphs 10.25-10.27; Bill cl.32, 33)

6. Variation, etc., of Orders for Maintenance

Recommendation 17:

The court should have power to vary, discharge, suspend or revive an order for periodic maintenance if, since the order was made, the circumstances have so changed that there is justification for so doing. Subject to Recommendation 25, the court should not have this power in relation to any other order for maintenance.

(Paragraphs 10.22, 10.23-, Bill cl.35, 36)

IV. PROPERTY AND MAINTENANCE PROCEEDINGS

A. Prerequisites for the Making of Orders

1. Length of Relationship

Recommendation 18:

In proceedings between de facto partners, the court should make an order for the adjustment of property or for maintenance only where the parties have lived together in a de facto relationship for not less than a specified period, unless the court is satisfied that, even though they have not lived together for that period:

they have had a child (whether as a result of sexual relations, artificial insemination or adoption); or

the applicant has made substantial contributions of the kind mentioned in Recommendation 2 for which he or she would not be adequately compensated if an order were not made, or has the care and control of a child of the respondent, and the failure to make an order would result in serious injustice to the applicant.

Two members of the Division consider that the specified period should be two years and two members consider that it should be three years.

(Paragraphs 9.7, 9.10; Bill cl.17)

2. Connection with New South Wales

Recommendation 19:

In proceedings between de facto partners, the court should make an order for the adjustment of property or for maintenance only where it is satisfied that at least one of the partners was resident in New South Wales when the proceedings were commenced, and that either both partners were resident here for a substantial proportion of their de facto relationship or that the applicant made substantial contributions of the kind mentioned in Recommendation 2 in New South Wales.

(Paragraph 9.16; Bill cl.15)

3. Time Limit

Recommendation 20:

Subject to Recommendation 21, in proceedings between former de facto partners, the court should make an order for the adjustment of property or for maintenance only where the application for the order was made before the expiration of two years after the date on which the partners ceased, or last ceased, to be de facto partners.

(Paragraph 9.23; Bill cl.18(1))

Recommendation 21:

Where the court is satisfied that greater hardship would be caused to an applicant if leave to commerce proceedings out of time were not granted than would be caused to the respondent if leave were granted, the court should be empowered to grant leave. This power should not, however, extend to an application for an order for rehabilitative maintenance.

(Paragraph 9.233; Bill cl.18(2))

B. Duty to Terminate Financial Relationship

Recommendation 22:

In proceedings between de facto partners for the adjustment of property or for maintenance, the court should, so far as practicable, make such orders as will finally determine the financial relationship between the parties and avoid further proceedings between them.

(Paragraph 9.21; Bill cl.19)

C. Orders that may be Made

1. General Orders

Recommendation 23:

In proceedings between de facto partners for the adjustment of property or for maintenance, the court should have power to do all or any of the following:

order the transfer of property;

order the sale of property and the distribution of the proceeds of sale in such proportion as the court thinks fit;

order that any necessary deed or instrument be executed (if appropriate, by an officer of the court or by some other person appointed by the court) and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

order payment of a lump sum, whether in one amount or by instalments;

order payment of a weekly, monthly, yearly or other periodic sum;

order payment of interim maintenance;

order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;

appoint or remove trustees;

make an order or grant an injunction either unconditionally or upon such terms and conditions as it thinks fit;

for the protection of or otherwise relating to the property or financial resources of the partners or either of them; or

to aid enforcement of any other order made in the proceedings, or both;

impose terms and conditions;

make an order by consent;

make any other order or grant any other injunction (whether or not of the same nature as those mentioned in the preceding paragraphs) which it thinks it is necessary to make to do justice.

(Paragraphs 9.26, 9.29; Bill cl.38, 39)

2. Ex Parte Orders

Recommendation 24:

In cases of urgency, the court should have power to make an *ex parte* order for interim maintenance or by way of injunction.

(Bill cl.40)

3. Variation and Setting Aside of Orders

Recommendation 25:

Subject to Recommendation 17, a court should be empowered to vary or set aside orders for the adjustment of property or for maintenance only where it is satisfied that

there has been a miscarriage of justice by reason of fraud, duress, the suppression of evidence, the giving of false evidence, or any other circumstances;

it is impracticable to carry out the order, or

there has been default in carrying out an obligation imposed by the order.

(Paragraph 10.24; Bill cl.41)

4. Transactions to Defeat Claims

Recommendation 26:

The court should be empowered to set aside any disposition (including any sale or gift) designed to defeat an existing or contemplated order for the adjustment of property or for maintenance or which, irrespective of intention is likely to defeat any such order.

(Paragraph 10.37; Bill cl.42)

D. Stamp Duty

Recommendation 27:

Consideration should be given to granting exemptions from stamp duty on documents executed for the purposes of, or in accordance with, an order of a court made in proceedings for the adjustment of property.

(Paragraph 10.38)

V. COHABITATION AND SEPARATION AGREEMENTS

X. Definitions

Recommendation 28:

For the purposes of the De Facto Relationships Bill 1983:

a “cohabitation agreement” should mean an agreement made between a man and a woman either in contemplation of their entering into a de facto relationship or during the existence of their de facto relationship, and which makes provision with respect to their maintenance or property;

a “separation agreement” should mean an agreement made between a man and a woman either in contemplation of the termination of their de facto relationship or after the termination of that de facto relationship, and which also makes provision with respect to their maintenance or property.

(Paragraphs 11.1 and 11.53; Bill cl.44(1))

Recommendation 29:

Where a separation agreement is made in contemplation of the termination of a de facto relationship and the relationship is not terminated within three months thereafter, the separation agreement should be deemed to be a cohabitation agreement.

(Paragraph 11.53; Bill cl.44(2))

B. Public Policy

Recommendation 30:

Notwithstanding any rule of public policy to the contrary, a man and a woman who are not married to each other should be able to enter into a cohabitation or separation agreement. These agreements should be subject to and enforceable in accordance with the ordinary law of contract, including the Contracts Review Act, 1980.

(Paragraphs 11.26, 11.29; Bill cl.45, 46)

C. Effect of Cohabitation and Separation Agreements

Recommendation 31:

Subject to Recommendations 34 and 35, in proceedings between de facto partners for the adjustment of property or for maintenance, the court must give effect to the terms of a cohabitation or separation agreement made between the partners if,

> **the agreement is in writing and signed by the partner against whom it is to be enforced; and**
>
> **each of the partners received separate and independent legal advice before entering into the agreement.**

Consequently the general principle is that the courts powers to adjust property or award maintenance should not be exercised so as to vary or override the terms of a separation or cohabitation agreement which complies with these conditions.

(Paragraph 11.37; Bill cl.47(1))

Recommendation 32:

Proof that each of the partners received separate and independent legal advice before entering into the agreement should be provided by certificates in a prescribed form furnished by the solicitors for each of the partners. The prescribed form should specifically state that the solicitor gave advice to the partner concerned in relation to the following four matters:

> the effect of the agreement on the rights of either partner to seek an adjustment of property or to claim maintenance;
>
> whether or not at the time the agreement was made, it was to the advantage, financially or otherwise, of that partner to enter into that agreement;
>
> whether or not it was, at that time, prudent for that partner to make the agreement; and
>
> whether or not, at that time, and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable.

(Paragraph 11.38; Bill cl.47(1)(d))

Recommendation 33:

If a cohabitation or separation agreement does not satisfy the conditions specified in Recommendations 31 and 32, the agreement may still be effective as a contract and its provisions may still be enforceable between the partners. However, in proceedings between the partners for the adjustment of property or for maintenance the court may exercise its powers to vary or override the terms of the agreement.

(Paragraphs 11.43, 11.44; Bill cl.48, 49(2))

D. Effect of Changed Circumstances

Recommendation 34:

The court should have power in proceedings between de facto partners for the adjustment of property or for maintenance to vary or override the terms of a cohabitation agreement, even though it complies with the conditions specified in Recommendations 31 and 32, if the circumstances of the parties have so changed since the agreement was entered into that it would lead to serious injustice to enforce the agreement. However, there should be no power to vary or override the terms of a separation agreement on this ground.

(Paragraphs 11.49, 11.51; Bill cl.49)

E. Effect of Revocation or Breach

Recommendation 35:

A court should not be required to give effect to any cohabitation or separation agreement where the agreement has been revoked or has otherwise ceased to have effect.

(Paragraphs 11.54, 11.58; Bill cl.50)

F. Effect of Death

1. Periodic Maintenance

Recommendation 36:

If a cohabitation or separation agreement requires one de facto partner to pay periodic maintenance to the other de facto partner, the agreement should not on the death of the first partner, be enforceable against his or her estate, unless the agreement otherwise provides.

(Paragraph 11.62; Bill cl.51(1))

Recommendation 37:

If a cohabitation or separation agreement requires one de facto partner to pay periodic maintenance to the other de facto partner, the agreement should not, on the death of the second partner, be enforceable by the estate of that partner.

(Paragraph 11.60; Bill cl.51(2))

2. Transfer of Property and Lump Sum Payments

Recommendation 38:

Unless it otherwise provides, a cohabitation or separation agreement which relates to property or lump sum payments should, on the death of one of the partners, be enforceable on behalf of, or against as the case may be, the estate of the deceased partner.

(Paragraphs 11.61, 11.64; Bill cl.52)

VI. SUCCESSION ON DEATH

Recommendation 39:

Where a person dies intestate, and is survived by a spouse and a de facto partner, the de facto partner should be entitled to the spouse's share on the intestacy to the exclusion of the spouse, if, and only if, the de facto partner had lived with the deceased

for a period of at least two years prior to his or her death, and the deceased had not lived with his or her spouse during any part of that two year period.

(Paragraph 12.34; Wills, Probate and Administration (De Facto Relationships) Amendment Bill 1983. Schedule 1, clause (4) (b))

Recommendation 40:

Where a person dies intestate and is survived by a de facto partner and also by children of another relationship, but not by a spouse, the de facto partner should be entitled to the share on intestacy to which a spouse of the deceased would have been entitled, if, and only if, the de facto partner had lived with the deceased for a period of at least two years prior to his or her death.

(Paragraph 12.36; Wills, Probate and Administration (De Facto Relationships) Amendment Bill 1983, Schedule 1, clause (4)(b))

Recommendation 41:

Where a person dies intestate and is survived by a de facto partner, but not by a spouse or children of any other relationship, the de facto partner should be entitled to the share on intestacy to which a spouse of the deceased would have been entitled, if, and only if, the de facto partner was living with the deceased at the time of his or her death.

(Paragraph 12.38; Wills, Probate and Administration (De Facto Relationships) Amendment Bill 1983, Schedule 1, clause (4)(b))

Recommendation 42:

Section 61D of the Wills, Probate and Administration Act 1898, should be amended to provide that where a person dies intestate and is survived by a de facto partner who is entitled to succeed on the intestacy under Recommendation 39, 40 or 4 1, and also by issue (such as children or grandchildren), the de facto partner should be entitled to elect to take the interest of the deceased in the “matrimonial” home in substitution for his or her interest on the intestacy.

(Paragraph 12.45: Wills, Probate and Administration (De Facto Relationships) Amendment Bill 1983, Schedule 1, clause (5))

Recommendation 43:

The Wills, Probate and Administration Act 1898, should be amended to enable the court to grant administration of the estate of a deceased person to a person living in a de facto relationship with that person at the time of his or her death.

(Paragraph 12.46; Wills, Probate and Administration (De Facto Relationships) Amendment Bill, 1983, Schedule 1, clause (2))

VII. FATAL ACCIDENTS: THE COMPENSATION TO RELATIVES ACT, 1897, AND THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1944

Recommendation 44:

Section 4 of the Compensation to Relatives Act, 1897, should be amended to allow an action under the Act to be brought on behalf of a de facto partner of a deceased person.

(Paragraph 13.12; Compensation to Relatives (De Facto Relationships) Amendment Bill 1983, Schedule 1, clauses (1) and (2))

Recommendation 45:

The Compensation to Relatives Act 1897, should be amended to provide that where a deceased person is survived by a spouse and a de facto partner, any action under the Act should be brought for the benefit of both. The Act should also provide that the spouse and the de facto partner shall be separate parties to the action.

(Paragraph 13.16; Compensation to Relatives (De Facto Relationships) Amendment Bill 1983, Schedule 1, clause (1))

Recommendation 46:

No minimum period of cohabitation should be prescribed as a prerequisite to the eligibility of a surviving de facto partner to claim under the Compensation to Relatives Act, 1897.

Paragraph 13.19; Compensation to Relatives (De Facto Relationships) Amendment Bill 1983, Schedule 1, clause (2)(b))

Recommendation 47:

The words “husband” and “wife” in section 4 of the Law Reform (Miscellaneous Provisions) Act, 1944, should be defined so as to include the de facto partner of a person “killed, injured or put in peril”, thus enabling a person to recover for injury or mental or nervous shock caused by the death of, or injury to, his or her de facto partner.

(Paragraph 13.28-, Compensation to Relatives (De Facto Relationships) Amendment Bill, 1983, Schedule 1, clause (2))

VIII. DOMESTIC VIOLENCE AND HARASSMENT

A. Powers of the Supreme Court

Recommendation 48:

In proceedings between de facto partners, or on the application of a de facto partner, the court should have express statutory power to make orders:

for the personal protection of a de facto partner and of a child of the household of the de facto partners against violence, molestation and other forms of harassment; and

restraining a de facto partner from entering specified places.

(Paragraph 14.34; Bill cl. 53)

Recommendation 49:

A person who has been served with an order of a court of the kind referred to in Recommendation 48, and who knowingly fails to comply with the order should be guilty of an offence.

(Paragraph 14.38; Bill cl.54)

B. Powers of Local Courts

Recommendation 50:

Section 547AA of the Crimes Act, 1900, should be amended to enable an apprehended domestic violence order to be made in cases where a complainant apprehends the commission by his or her partner of conduct consisting of harassment or molestation falling short of actual or threatened violence.

(Paragraph 14.39; Crimes (De Facto Relationships) Amendment Bill, 1983, Schedule 1, clause (2)(a))

Recommendation 51:

Complaints of conduct consisting of harassment or molestation falling short of actual or threatened violence should not render a defendant liable to arrest before the initial hearing.

(Paragraph 14.40; Crimes (De Facto Relationships) Amendment Bill, 1983, Schedule 1, clause (2)(c))

Recommendation 52:

Section 547AA of the Crimes Act, 1900, should be amended for the purpose of extending its application to domestic violence offences committed by a person against his or her former de facto partner.

(Paragraph 14.41; Crimes (De Facto Relationships) Amendment Bill, 1983, Schedule 1, clause (1))

IX. CHILDREN

A. Custody, Guardianship and Maintenance

We have been directed to take into account the proposed reference by some States to the Commonwealth of powers over the custody, guardianship and maintenance of ex-nuptial children Because of the proposed reference of powers, we make only one recommendation in relation to the custody, guardianship and maintenance of children of de facto relationships.

Recommendation 53

If the proposed reference of powers to the Commonwealth proceeds and if the Commonwealth proposes to legislate pursuant to the reference, the State of New South Wales should request the Commonwealth to confer jurisdiction on the Supreme Court to determine disputes that are subject to the reference of powers. This recommendation is not intended to detract from the primary responsibilityof the Family Court of Australia, following legislation pursuant to the reference of powers, to determine such disputes. Mr Justice Nygh dissents from this recommendation. taking the view that the Supreme Court should not continue to exercise jurisdiction in relation to the custody, guardianship and maintenance of children.

(Paragraph 15.46).

B. Adoption

Recommendation 54:

Section 19 of the Adoption of Children Act, 1965, should be amended to allow an adoption order to be made in favour of de facto partners with respect to a child of either of the partners.

(Paragraph 15.58; Adoption of Children (De Facto Relationships) Amendment Bill, 1983, Schedule 1, clause (2))

Recommendation 55:

De facto partners seeking an adoption order of the kind mentioned in Recommendation 54 should be required to show that at the time of the application for adoption they have been living together in a de facto relationship for at least three years.

(Paragraph 15.58; Adoption of Children (De Facto Relationships) Amendment Bill, 1983, Schedule 1, clause (2))

Recommendation 56:

Subject to Recommendation 55, section 19 of the Adoption of Children Act, 1965, should also be amended to provide that, where there are special circumstances which justify the making of the order, the court may make an order in favour of de facto partners with respect to a child who is a relative of one of the partners and who has been brought up, maintained and educated by the partners as their child.

(Paragraph 15.58; Adoption of Children (De Facto Relationships) Amendment Bill, 1983, Schedule 1, clause (2)

Recommendation 57:

Where the father of an ex-nuptial child has lived with the mother of the child in a de facto relationship in a household of which the child formed part, the consent of the father should be a prerequisite to any order for the adoption of the child.

(Paragraph 15.64)

X. OTHER LEGISLATION

Recommendation 58:

For the purposes of Part IX of the Mental Health Bill, 1983, (which is concerned with the carrying out of certain medical or therapeutic treatments), the term “nearest relative” should include a de facto partner of a patient.

(Paragraph 16.17)

Recommendation 59:

The State of New South Wales should discuss with the Commonwealth the desirability of Commonwealth legislation with respect to life insurance being amended for the purpose of providing protection for a surviving de facto partner of a deceased policy holder.

(Paragraph 16.18)

XI. MISCELLANEOUS

A. The Courts

Recommendation 60:

Where we speak of a “court” or “the courts”, we refer to the Supreme Court or a Local Court, or both. But, in general, a Local Court should not have Jurisdiction in relation to property or maintenance where the value or amount exceeds the amount prescribed,

for the time being, in section 12 of the Local Courts (Civil Claims) Act, 1970 (presently $5,000).

(Paragraph 10.41: Bill cl.9, 10)

Recommendation 61:

Where proceedings are instituted in a Local Court with respect to property or maintenance of a value or amount in excess of the prescribed amount. the court should, unless the parties agree to the matter continuing in the Local Court, transfer the proceedings to the Supreme Court.

(Paragraph 10.41; Bill cl.12(1))

Recommendation 62:

A Local Court should have power, of its own motion, to transfer proceedings to the Supreme Court notwithstanding any agreement between the parties.

(Paragraph 10.41; Bill cl.12(2))

Recommendation 63:

The Supreme Court should have power, of its own motion, to transfer proceedings to a Local Court where, in the opinion of the Supreme Court, it is proper to do so and the claim is within the jurisdiction of the Local Court.

(Paragraph 10.41; Bill cl.11(2))

B. Declaration as to the Existence of a De Facto Relationship

Recommendation 64:

The Supreme Court, and only the Supreme Court, should be empowered to make declarations of the kind referred to in Recommendations 65-68 inclusive.

(Paragraph 17.23; Bill cl.56(1))

Recommendation 65:

Where a person alleges that a de facto relationship exists, or has existed, at a specified date, or for a specified period, between that person and another named person, or between two named persons, he or she should be able to apply to the Supreme Court for a declaration that such a relationship exists or did exist.

(Paragraph 17.23; Bill cl.56(1),(2),(3))

Recommendation 66:

While the declaration remains in force, the persons named in the declaration should, for all purposes, be presumed conclusively to have been living in a de facto relationship at the specified date or for the specified period.

(Paragraph 17.23; Bill cl.56(6))

Recommendation 67:

Where a person whose interests would, in the opinion of the court be affected by the making of a declaration is not present or represented at the hearing, and has not had the opportunity to be present or represented the court should be empowered if it thinks that that person ought to be present or represented, to adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.

(Paragraph 17.24; Bill cl.56(4))

Recommendation 68:

The court should be empowered to make an order annulling a declaration where it appears that new facts or circumstances have arisen that have not previously been disclosed to the court. The annulment should not affect anything done in reliance on the declaration before its annulment.

(Paragraph 17.25; Bill cl.56(7), (8))

C. Enforcement of Orders

Recommendation 69:

In general orders of the courts should be enforced in accordance with existing rules and regulations but special provisions should be made for the enforcement of orders which are not merely orders for the payment of money.

(Paragraph 10.46, Bill cl.58, 59)

D. An Aid to Interpretation

Recommendation 70:

In the interpretation of any Act based on the Bill appended to this Report, it should be permissible to have regard to the Report and to that Bill.

(Bill cl.4)

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 paragraph 1.1 of this Report. This Report contains our final recommendations.
The Report has been prepared by a Division of the Commission. By virtue of the Law Reform Commission Act 1967, a Division is deemed to be the Commission for the purposes of the reference in respect of which it is constituted. The Division on De Facto Relationships consists of the following members of the Commission:

Professor Ronald Sackville (Chairman)

Mrs Bettina Cass

Mr Denis Gressier

The Honourable Mr Justice P E Nygh

We acknowledge the valuable contributions of Dr Owen Jessep, Senior Lecturer in the Faculty of Law at the University of New South Wales, and Mr John Wade, Senior Lecturer, University of Sydney Law School, in the preparation of this Report.

We also acknowledge the assistance of Mr Michael Orpwood, Deputy Parliamentary Counsel, who undertook the onerous task of preparing the draft legislation attached to this Report. We express our appreciation to the Parliamentary Counsel, Mr D R Murphy, for making available the resources of his office to enable the drafting to take place.

A number of people and organisations have made submissions to us, or participated in seminars and consultations on the reference. They are listed in the Appendices to this Report. We are most grateful to all those who have assisted us.

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

The Commission expresses its appreciation to the important contribution made by the administrative, library and secretarial staff in particular the former secretary, Bruce Buchanan, and Mrs Deborah Donnellan and Mrs Zoya Wynnyk.
REPORT 36 (1983) - DE FACTO RELATIONSHIPS

1. The Reference

I. TERMS OF REFERENCE
A. The Reference

1.1 On 13 July 1981 the then Attorney General of New South Wales, the Hon F J 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 Attorney General directed that in carrying out this reference, the Commission should take into account the work already completed by the New South Wales Anti-Discrimination Board on superannuation. [1] He noted, further, that the Commission would also take into account the proposed reference of State family law powers to the Commonwealth. [2]

1.2 On 4 December 1981 the Chairman of the Commission, pursuant to section 12A(1) of the Law Reform Commission Act, 1967, formally constituted a Division of the Commission for the purposes of the reference. The Division comprises the following members of the Commission:

Professor Ronald Sackville (Chairman)

Mrs Bettina Cass

Mr Denis Gressier

Mr Justice P E Nygh

B. Scope of the Reference

1.3 The terms of reference speak of the law relating to "family and domestic relationships", but direct attention specifically to the rights and obligations of persons living in de facto relationships. We face a preliminary question as to whether we should focus exclusively on de facto relationships in this Report, or whether we should also consider the law governing other domestic relationships. Some of the submissions made to us contended that we should adopt the broader approach. This was put on the ground that the legal problems raised by de facto relationships are not necessarily unique, but also may be presented by other domestic or household relationships, such as those constituted by parents and adult children siblings, homosexual couples or larger groups living in a common household. The Australian Council of Social Service, for example, suggested that we should not focus exclusively on de facto relationships but should consider the "interests and difficulties of persons in other sorts of domestic relationships". [3]

1.4 Despite these views, we have decided that we should not in this Report attempt to cover the whole field of "family and domestic relationships", but should limit our attention to de facto relationships. We make this decision for several reasons.

As Chapter 4 shows, the law now distinguishes between the legal position of parties to a de facto relationship and people living in other forms of domestic relationships. Therefore it is consistent with past practice to examine the law affecting de facto relationships without concurrently examining the law affecting other domestic relationships.

The distinction drawn by the law accepts that de facto relationships resemble marriage to a certain extent, although not in all respects. It is this partial resemblance which has prompted legislators and policy makers specifically to confer rights and impose obligations on de facto partners in certain situations. Other domestic relationships bear less resemblance to marriage. Accordingly they present different policy and definitional questions. For example, our proposals in Part IV for a new jurisdiction to adjust the financial relationship between de facto partners cannot be applied, at least without significant modification to other forms of domestic relationships.

To resolve all the issues implicit in a broad approach to our terms of reference would require extensive consultation and complex inquiries. This process would have substantially delayed presentation of the Report. There may well be a case for change in

> other areas of law affecting domestic relationships, but we think the necessary investigations can and should be undertaken as a separate exercise.

C. Terminology

1.5 This Report is there for limited to the law governing de facto relationships. We examine the definition of this term for the purposes of legislation in more detail later (Chapter 17). At this stage we note that when we use the term 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."

1.6 Many different terms have been used to refer to what we have called de facto relationships. One text writer prefers the phrase "de facto marriage", which he describes as

> " an unsecretive relationship between a man and a woman which actually lasts for more than a short time, and within which some, or most, of the traditional western functions of marriage are performed, and which lacks the formality or ceremony prescribed by the dominant legal system" [4]

The phrase "de facto marriage" has its analogues in legislation. For example, the Widows' Pension Act 1942 (Cth), provided benefits to "de facto widows" (although the phrase was discarded the following year), [5] while the Seamen's War Pensions and Allowances Act 1940 (Cth) continues to permit payment of a pension to a mariner's "de facto wife". [6] Our own terms of reference refer to a person living with another person as the "husband or wife de facto of that other person". Another commentator chooses the related term "informal marriage , partly to stress the resemblance between the "informal" relationship and marriage. [7]

1.7 The authors of a popular English handbook use the word "cohabitation" to refer to domestic relationships which are the social equivalents of marriage. [8] This accords with the *Oxford English Dictionary* meaning of cohabitation as "living together as husband and wife (often with the implication of not being married)". [9] By contrast, the *Macquarie Dictionary"* [10] defines "cohabit" as "to live together in a sexual relationship" and omits any reference to the concept of living together "as husband and wife". The term "cohabitation" is used in some legislation For example, the Anti-Discrimination Act, 1977, declares discrimination on the ground of marital status to be unlawful in certain areas. "Marital status" is defined to include "the status or condition of being ... in cohabitation, otherwise than in marriage, with a person of the opposite sex". [11]

1.8 Throughout our Issues Paper (see paragraph 1.11), we referred to the subject of our inquiry as "de facto relationships". We did not spell out the reasons for using this terminology, but we were influenced by what we understood to be common usage in Australia. We also decided to avoid the term "de facto marriages" mainly because it could suggest that these relationships are the equivalent of marriages in all but name and that this equivalence extends to the legal consequences that follow from (or should follow from) those relationships. [12] During our consultations we formed the impression that the expression "de facto marriages" would not be readily accepted by some people. For example, those who saw de facto relationships as a threat to the institution of marriage often said that "marriage" should not be part of the description applied to such relationships. Likewise, those who had chosen to live together to avoid the legal regime associated with marriage, often did not wish to be described as married, whether de facto or otherwise, and certainly did not want their relationship to be regarded as a second class marriage.

1.9 The language used in the Issues Paper did not escape criticism. One submission from the Director of Court Counselling at the Family Court Registry in Melbourne, argued that

> "the term 'de facto relationship' is a meaningless one. If you relate to another person, you have a relationship with that person. Cohabitation is as much a relationship as marriage. The term 'de facto' appears to me to describe the legal status of the relationship, but not the relationship itself." [13]

On the other hand, "de facto marriage" was described in a 1961 Tasmanian case as an "inaccurate euphemistic neologism" [14] although the suggested alternative of "concubine" hardly seems likely to entrench itself in popular usage.

1.10 We have concluded that no single expression is entirely satisfactory to describe the relationships with which we are concerned. In this Report we adhere to the phrase "de facto relationships", but not with the intention of suggesting that those relationships are necessarily less meaningful to the partners than other kinds of relationships, including marriage. We also use "cohabitation" as a more or less interchangeable expression although we do so on the basis that a couple may be cohabiting without necessarily having a sexual relationship. We prefer, without being dogmatic, to avoid the phrase "de facto marriages" for the reasons given in paragraph 1.8, but we recognise that any statutory definition of a de facto relationship necessarily involves a comparison with marriage. We usually refer to the parties to such a relationship as de facto partners, rather than de facto spouses. However. we do not refrain from using the terms "de facto wife" or "de facto husband" where it is convenient to do so.

II. CONDUCT OF THE REFERENCE

A. The Issues Paper

1.11 On 17 December 1981 we released an Issues Paper entitied De Facto Relationships. The Paper was 120 pages in length including tables and references. An Outline of the Paper, 13 pages in length was also published. The Paper described the law governing de facto partners and their children in all Australian jurisdictions and provided information concerning the social context in which the law operates. It also identified policy questions for the guidance of persons and organisations wishing to make submissions, and canvassed the arguments for and against further legislative regulation of de facto relationships. The Issues Paper specified four main policy options, which are discussed in Chapter 5 of this Report.

1.12 Copies of the Issues Paper and Outline were distributed to interested groups and individuals in New South Wales. In addition, copies were distributed elsewhere in Australia principally through the Family Law Council. The initial print run of 2,500 copies of the Issues Paper proved inadequate to meet demand and a further 2,000 copies were printed.

1.13 We received a total of 55 submissions in response to the Issues Paper. Submissions were made by a wide range of organisations-and individuals, identified in Appendix I. Many were carefully reasoned documents which addressed the policy questions in considerable depth. The largest group (20 submissions) comprised submissions from legal sources. Submissions from church organisations and affiliated groups made up the next largest category (13 submissions). The third category consisted of submissions from women's groups, other than those associated with churches (9 submissions). In identifying these categories we do not suggest that the views within each group were uniform. There were considerable differences of opinion within each category, although some common themes emerged from the submissions as a whole (Chapter 5).

B. Consultations

1.14 We undertook an extensive program of consultation and seminars in relation to the reference.

> Before release of the Issues Paper, preliminary discussions were held with representatives of the major churches and other interested groups.

After release, members of the Division attended and addressed a number of seminars organised by the Anglican Church (in Sydney, Parramatta and Wollongong), the Uniting Church the Hillview Community Information Service and the Women's Electoral Lobby. A detailed list of seminars is set out in Appendix II.

An "Open House" was held at the Glebe Town Hall on 22 April 1982. The purpose of the Open House, which was widely publicised, was to enable Commissioners to talk informally and privately to members of the public, who had experienced legal problems associated with de facto relationships.

Discussions were held with many of the groups and organisations making submissions to the Commission. A list of such groups and organisations is set out in Appendix III.

1.15 On 29 April 1982 we sponsored a seminar in Sydney, advertised through the Law Society Journal which attracted approximately 200 participants, principally legal practitioners. Papers were presented by Mr Justice P E Nygh ("Problems of a Divided Jurisdiction"), Ms Kaye Loder, Solicitor ("Domestic Violence and Custody"), and Mr P Rose, Barrister ("Property Disputes"). A summary was presented by Dr O Jessep, Senior Lecturer in Law, University of New South Wales.

1.16 On 21 August 1982 the Commission and the Law Council of Australia co-sponsored a seminar, primarily for lawyers, on the theme "De Factos and the Law: Time for a Change?". The seminar, which was well attended, was held in Melbourne at the Law Institute of Victoria and our Issues Paper provided a focus of discussion Papers were presented by Mr Justice K J A Asche of the Family Court of Australia ("De Facto Relationships and Federal-State jurisdiction), Ms R J Bailey, Senior Lecturer in Law, University of Adelaide ("De Facto Relationships and the Law: Domestic Violence"), Dr. I J Hardingham Reader in Law, University of Melbourne ("De Factos and the Law: Succession Upon Death"); and Mr A Monester, QC, of the Victorian Bar ("Property Rights and Financial Relationships"). A number of commentaries on these papers were also presented.

C. Research

1.17 Our research program included the following projects.

A comparative analysis of the law governing de facto relationships in other common law countries and Scandinavia.

A survey of legal practitioners, designed to provide an indication of the extent to which their clients encounter legal problems associated with de facto relationships. A similar survey of welfare workers in New South Wales was also undertaken.

A record-keeping project carried out with the co-operation of the Magistrates Courts Administration designed to provide information on legal problems associated with de facto relationships which come to the attention of chamber magistrates.

A collection of case studies, obtained by interviewing people who were living or had lived in de facto relationships.

An analysis of statistical information in Australia concerning the incidence and types of de facto relationships.

In addition, Associate Professor M Coper of the Faculty of Law, University of New South Wales, provided us with an opinion on certain constitutional and jurisdictional questions. Information from these projects is referred to in more detail elsewhere in this Report, particularly in Chapter 3.

D. Liaison with the Family Law Council

1.18 The Family Law Council is a Commonwealth body, the functions of which include advising the Commonwealth Attorney-General on matters relating to family law. [15] The Council for some years, has expressed interest in the subject of de facto relationships. After we received our reference, we made contact with the Council and it was agreed that our inquiry should be conducted in co-operation with the Council. The Council appointed a subcommittee to liaise with the Commission and several meetings were held with the subcommittee and with the full Council. The Council has agreed to circulate copies of this Report to interested parties beyond New South Wales with a view to the Council formulating advice on amendments to Commonwealth law and the merits of proposing uniform legislation throughout Australia. [16]

E. Draft Legislation

1.19 Draft legislation embodying our recommendations is attached to this Report. The main Bill is the De Facto Relationships Bill 1983. Cognate with it are

> the Adoption of Children (De Facto Relationships) Amendment Bill 1983.
>
> the Compensation to Relatives (De Facto Relationships) Amendment Bill 1983.
>
> the Crimes (De Facto Relationships) Amendment Bill 1983.
>
> the Law Reform (Miscellaneous Provisions) De Facto Relationships (Amendment) Bill, 1983.
>
> the Wills, Probate and Administration (De Facto Relationships) Amendment Bill, 1983.

The Bills have been drafted by Parliamentary Counsel pursuant to the Commission's instructions. We draw attention to clause 4 of the Bill which provides that

> "It is the intention of the Parliament that this Act and the regulations are to give effect to the recommendations made in the report of the Law Reform Commission concerning De Facto Relationships presented to the Parliament and accordingly, in the interpretation of this Act and the regulations, regard may be had to that report, including the draft legislation set out in that report."

Cross-references to the relevant clauses of the draft Bills are made in the Outline of Recommendations at the beginning of this Report.

III. THE STRUCTURE OF THIS REPORT

1.20 This Report critically analyses the present law governing de facto partners, discusses the general policy approach which should be adopted in reforming the law, and makes recommendations for change. In this section we briefly describe the structure and contents of the Report.

Introduction

> In Chapter 2 we describe the divided constitutional and legislative framework governing Australian family law. We also outline a proposal currently under consideration in several States, for a reference of State powers concerning the maintenance, custody and guardianship of children to the Commonwealth. We discuss the implications of this proposed reference of powers for our own inquiries.

The Social Context

In Chapter 3 we analyse statistical information on the incidence of de facto, relationships, and on the socioeconomic and demographic characteristics of people living in such relationships. The information was obtained from recent surveys of Australian families made by the Australian Bureau of Statistics and the Institute of Family Studies. We also discuss material we have gathered on the nature of legal problems experienced by de facto partners. The Chapter shows, among other things, that the incidence of de facto relationships in New South Wales and in Australia generally, has increased markedly in recent years. and that legal problems are frequently encountered by de facto partners.

Current and Future Policy

In Chapter 4 we describe the extent to which current Commonwealth and State law recognises de facto relationships for the purpose of conferring benefits and imposing obligations on de facto partners. We conclude that the extent of recognition is such that the present law no longer consistently discourages de facto relationships, either by penalising de facto partners or withholding advantages from them.

In Chapter 5 we argue that there are several factors indicating that the present law affecting de facto partners requires reform. These include the substantial and increasing number of people living in de facto relationships, the significant injustices produced by the present law, and a broad community acceptance of the need for change. We reject, however, the view that the legal consequences of de facto relationships should be equated with those of marriage. We argue that the fourth approach outlined in the Issues Paper on De Facto Relationships should be adopted. This approach involves examination of specific areas of the law to determine whether there are injustices or significant anomalies, and if so, to decide what remedial action should be taken. We undertake this examination in the remaining Chapters of the Report.

Financial Adjustment Between De Facto Partners

In Chapter 6 we describe the development of matrimonial property law and the law affecting maintenance between married partners. This discussion is the background to our critical evaluation in succeeding Chapters, of the modern law affecting financial disputes between de facto partners.

In Chapter 7 we describe the present law governing property disputes between de facto partners. We argue that the present inability of the law to take into account indirect contributions made by one partner to the acquisition conservation or improvement of property owned by the other partner, often leads to significant injustice. We recommend that the court should have power to adjust the property rights of the partners where it is just and equitable to do so, having regard to a wide range of contributions.

In Chapter 8 we describe the present law governing maintenance claims between de facto partners. We argue that the present law should be changed to give the court a limited power to award maintenance if the applicant is unable to support himself or herself adequately because he or she has the care of young children, or because his or her earning capacity has been affected by the relationship and re-training is required. We analyse the criteria that should be taken into account by the court in determining a maintenance claim Among other things, we recommend (by a majority) that maintenance should not supplant social security as the primary source of support for a de facto partner in needy circumstances.

In Chapter 9 we discuss in detail the operation of the proposed new jurisdiction to adjust the financial relationship between de facto partners. We take the view that, in general the court s power to adjust property, or to award maintenance, should be available only when the partners have lived together for a specified period (which should be either two or three years). However, we think these powers should also be available where the partners have had a child, or where compliance with the qualifying period would for

particular reasons, cause injustice. We argue that the court should have a wide range of powers, and that where possible, orders should be made which finally determine the financial relationship between, the partners.

In Chapter 10 we discuss a number of consequential matters arising out of our earlier recommendations concerning property and maintenance.

In Chapter 11 we discuss cohabitation agreements and separation agreements made between de facto partners. We recommend that agreements between partners with respect to financial matters concerning their relationship should no longer be held to be legally unenforceable as contrary to public policy. We also say that, in general such agreements should bind the court in proceedings between de facto partners for financial adjustment, provided that certain conditions are satisfied These are designed to ensure that the partners receive independent advice before entering the agreement and understand its significance. However, even where these conditions are satisfied, we recommend that the court should have power in financial adjustment proceedings to overturn or vary cohabitation (but not separation) agreements if circumstances have so changed that enforcement of the agreement would lead to serious injustice.

Financial Adjustment on Death

In Chapter 12 we discuss the present law on succession on death. We recommend that where a de facto partner dies without a valid will ("intestate"), the other partner should be entitled, in certain cases, to share in the deceased partner's estate. We also discuss recent changes to family provision law. The se enable a surviving de facto partner to claim provision from the estate of a deceased partner if that partner's will or the rules of intestacy do not make adequate provision for the survivor's support.

In Chapter 13 we recommend that the class of persons eligible to bring a claim for damages in respect of the wrongful death of a person under the Compensation to Relatives Act, 1897, should be extended to include a de facto partner of the deceased. We also recommend that the Law Reform (Miscellaneous Provisions) Act 1944, should be amended to enable a de facto partner of a person "killed, injured or put in peril" to recover damages for mental or nervous shock.

Domestic Violence

In Chapter 14 we discuss the problem of domestic violence which has recently been the subject of legislation in New South Wales. We recommend that the Supreme Court should have specific statutory jurisdiction to grant an injunction to protect a de facto partner, or a child of the partners, from violence, molestation or harassment by the other partner. We provide for the Supreme Court, when granting such an injunction to authorise the arrest of the respondent without warrant if the injunction is breached. We also recommend the amendment of section 547AA of the Crimes Act, 1900, to permit Local Courts to make an "apprehended domestic violence order" in cases of molestation or harassment falling short of violence.

Children

In Chapter 15 we discuss in more detail the present fragmentation of jurisdiction relating to the custody, guardianship and maintenance of children, and discuss a number of possible solutions to the jurisdictional difficulties. We also discuss the proposed reference of powers to the Commonwealth, and the consequences of federal legislation pursuant to the reference of powers. We discuss the inability of de facto partners to adopt children and make limited recommendations about the adoption of a child of one of the partners. We also discuss consents to adoption.

Miscellaneous

In Chapter 16 we refer to a variety of enactments which might be thought to raise issues relevant to a report on de facto relationships. In most cases they do not raise policy issues of general importance.

Definition

In Chapter 17 we adopt a basic definition of “de facto relationship”, namely

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

Consistently with the approach adopted in Chapter 5 we recognise that a uniform definition of a de facto relationship is not necessarily appropriate for all cases. In some cases it may be necessary to modify the basic definition by, for example, requiring a specified period of cohabitation. In this Chapter we suggest that the court should have power to declare whether a de facto relationship existed at a particular time or had continued for a specified period.

FOOTNOTES

1. See paras.4.45-4.47.

2. See paras.2.13 ff

3. Australian Council of Social Service, Submission No.26. p.2. See also NSW Bar Association, Submission No.23, p.1, not arguing in favour of a broad approach but pointing to similar issues arising out of other family arrangements.

4. J H Wade, *De Facto Marriages* in Australia (1981), p.l.

5. See paras.4.15-4.16.

6. Seamen’s War Pensions and Allowances Act 1940 (Cth), s.19. Cf. Family Relationships Act 1975 (SA), s.11(1).

7. H A Finlay, “Defining the Informal Marriage” (1980) 3 *University of New South Wales Law Journal* 279.

8. A Bottomley, K Gieve, G. Moon and A. Weir, *The Cohabitation Handbook* (1981), pp.2-3.

9. *Oxford English Dictionary* (1933), vol.2, p.598.

10. *The Macquarie Dictionary* (198 1), p.372.

11. Anti-Discrimination Act, 1977, s.4. The same language is used in the Sex Discrimination Act 1975 (SA), s.4.

12. Some submissions pointed out that there is a widespread belief that, after a certain period of living together as if they are married, a man and woman acquire the status of married persons: Legal Aid Commission of Victoria. Law Reform Committee, Submission No.50, p.3. That this belief is widespread tends to be confirmed by telephone inquiries received at the Commission from people who assumed that after a certain period the relationship matures into a marriage.

13. Director of Court Counselling, Family Court of Australia, Melbourne Registry. Submission No.51.

14. *Maddock v. Beckett* [1961] Tas SR 46, at p.52, per Burbury CJ.

15. Family Law Act 1975 (Cth), s.115(3).

16. See Family Law Council, Annual Report 1981-82, para.42.

2. The Constitutional and Legislative Background

I. A FRAGMENTED SYSTEM OF FAMILY LAW

A. The Constitutional Allocation of Power

2.1 Under the Australian Constitution power to legislate with respect to family law is divided between the Commonwealth and the States. The framers of the constitution showed considerable foresight in granting the Commonwealth Parliament power to legislate with respect to “marriage” and “divorce and matrimonial causes”. [1] This was a bold departure from the American model under which laws relating to marriage and divorce remained the responsibility of the States. While the framers were prepared to act boldly in conferring powers over marriage and divorce on the Commonwealth it is hardly surprising, in the social climate of the 1890’s, that no thought was given to empowering the national Parliament to regulate other aspects of what is now known as family law.

2.2 The Constitution enabled the Commonwealth to overcome the great variations in State law on matters of status that had plagued the United States. As events turned out, the Commonwealth Parliament did not exercise its powers, except in a limited way, until nearly 60 years after federation with the enactment of the Matrimonial Causes Act 1959 and the Marriage Act 1961. The Family Law Act 1975 (which replaced the 1959 Act) now governs divorce and other consequences of marriage breakdown while the Marriage Act 1961 established a uniform law of marriage throughout Australia.

2.3 While there is now a national law of marriage and divorce in Australia, the terms of the Australian Constitution have produced a fragmented system of family law. The conventional view is that the Commonwealth’s power to legislate with respect to “marriage” and “divorce and matrimonial cause” does not extend to important areas of family law. These include the rights and duties of de facto partners and the custody, guardianship and maintenance of ex-nuptial children whose parents have never married. These areas, which are examined in this Report, remain within the province of the States. [2]

B. An Unconventional View

2.4 The conventional interpretation of the Constitution has not gone unchallenged. It has been suggested, for example, that the Commonwealth pursuant to its power to make laws “with respect to ... marriage”, can redefine marriage to include de facto relationships and thereby regulate the rights and duties of de facto partners as between themselves and as against third parties. [3]

2.5 A paper presented at one of our seminars by Mr Justice Nygh put the argument in favour of this view. [4] The starting point for the argument is that the term” marriage” was understood in 1900 (when the Australian Constitution was passed as an enactment of the United Kingdom Parliament to extend both to ceremonial and informal marriages. This was because at common law, until Lord Hardwicke’s Act of 1753, marriage could be constituted by consent of the parties alone without a formal religious or civil ceremony. [5] The common law continued in force in the colony of New South Wales for 40 years after its foundation, [6] and as late as 1939 Scottish law recognised irregular marriages. [7] For these reasons Mr Justice Nygh suggested that it may be

> “open to the Commonwealth Parliament to provide that a marriage shall be constituted by mutual consent which is to be inferred f rom subsequent cohabitation” [8]

2.6 We asked Associate Professor M. Coper of the University of New South Wales to address this question in an opinion prepared for us. Professor Copeis conclusion was as follows: [9]

> "It is not possible ... to say definitely whether the power of the Commonwealth extends to de facto or informal marriages. There are no decisions directly in point, and if and when the matter is litigated it will turn, I think, on whether the formal aspect of marriage - the form which creates the status of marriage - is regarded as a critical part of the concept, or whether the essence of the concept is rather that which formal and (some) informal marriages have in common that is to say, the relationship itself. I suspect that the High Court would adopt the view which stresses the form - that is, the narrow view of the power - and would do so by reference to common understanding and the inherent vagueness of any other view .... [Nonetheless] it is an open question whether the power of the Commonwealth extends to de facto relationships....."

2.7 There would be obvious advantages if the Commonwealth could enact valid legislation dealing with de facto relationships. Such legislation would override State laws and achieve uniformity throughout Australia. However, we do not need to express a concluded view as to whether the Commonwealths power to make laws with respect to marriage extends to regulating the consequences of de facto relationships. It is perhaps enough to say that a strong body of opinion rejects the argument that the concept of marriage can constitutionally extend to relationships where the parties have never participated in a ceremony in the nature of a marriage celebration. The High Court has not directly addressed the question" [10] and, as Professor Coper points out, there must be significant doubt as to the constitutional position even assuming the Commonwealth were prepared to legislate in the way suggested. Consequently, we do not think that a policy-making body should proceed on the assumption that the Commonwealth can rely on the marriage power to regulate de facto relationships.

II. THE FAMILY LAW ACT 1975

2.8 The Family Law Act does not directly affect the rights of people living in de facto relationships. [11] Nonetheless it is useful to identify the major features of the Act, since it is the most significant legislation in the field of family law. Also, we often have occasion in this Report to refer to its provisions. In this section we briefly identify the main features of the Act, which applies to a variety of proceedings between the parties to a marriage or proceedings brought on behalf of a child of the marriage. [12]

2.9 The Family Law Act abandons the concept of the "matrimonial offence", which formed an integral part of the pre- existing law, and introduces a single no-fault ground of divorce. Divorce is now available only on the ground of irretrievable breakdown of marriage, established by proof of separation for at least 12 months preceding the filing of the application.

2.10 The Act proceeds on a broad view of the Commonwealth's constitutional powers, although not as broad as the unconventional view referred to earlier. Unlike the earlier Matrimonial Causes Act, the Family Law Act governs maintenance and custody proceedings between married persons even where they are instituted before an application for divorce is filed. Important amendments to the Act were introduced into the Commonwealth Parliament in October 1981. These lapsed with the dissolution of the Commonwealth Parliament in February 1983. New legislation the Family Law Amendment Bill 1983, was introduced into Parliament on 1 June 1983. If enacted this legislation will substantially expand the scope of the Act, allowing, for example, the Family Court to deal with property disputes between married persons independently of divorce proceedings.

2.11 The Family Court of Australia is a specialised federal court which has jurisdiction to hear and determine " matrimonial causes" arising under the Family Law Act. [13] The judges of the court are to be suitable "by reason of training, experience and personality to deal with matters of family law." [14] Counsellors and welfare officers are attached to the Court and have a wide

range of functions, particularly in relation to custody proceedings. State Supreme Courts no longer have jurisdiction to hear cases arising under the Act although lower courts (Local Courts in New South Wales) may continue to hear certain kinds of cases, such as disputes relating to the custody or maintenance of children.

2.12 The Act adopts a novel approach to the adjustment of the financial relationship between the parties to a marriage. Among other things, the Act specifies detailed criteria to be applied in determining a claim by one party for a transfer of property or for maintenance. These criteria ignore questions of matrimonial fault and direct attention to such matters as the financial resources and needs of the parties, their custodial and other family responsibilities and their contributions to the acquisition conservation or improvement of property in dispute. The relevant provisions of the Family Law Act are examined in more detail in Chapter 6.

III. THE REFERENCE OF POWERS

A. Background to the Proposal

2.13 The divided constitutional and legislative framework governing Australian Family law has attracted increasing concern and criticism as the inconvenient consequences of the division have become apparent. For example, serious disquiet has been expressed by judges that in certain circumstances, no single court in Australia has jurisdiction to make orders with respect to the custody of all children living within a common household (Chapter 15). One important proposal to overcome the difficulties caused by the divided jurisdiction is that the States should refer to the Commonwealth power to legislate in areas of family law not already within the Commonwealth power. Such a reference of powers, it is argued, would enable the Commonwealth to avoid the worst consequences of the current constitutional position and adopt a more coherent and systematic approach to family disputes between persons other than married couples. As already noted (paragraph 1.1), our terms of reference note that we will take into account the proposed reference of powers to the Commonwealth. We, therefore, consider briefly the terms of the reference as they stood in May 1983, bearing in mind that the language of the proposed reference might well be amended as the result of further negotiations.

2.14 During the meetings of the Australian Constitutional Convention held from 1973 to 1976 consideration was given to matters that might be referred to the Commonwealth, with particular reference to family law. The 1975 Convention resolved that the topics of illegitimacy, adoption and maintenance (other than in divorce proceedings) should be the subject of a reference of powers. [15] This resolution was affirmed at the 1976 Convention, which also rejected a proposal by the New South Wales Attorney General that the reference of power should cover property rights between parties “to a domestic relationship in the nature of marriage”. [16]

2.15 The question of a reference of power was pursued by the Standing Committee of State and Commonwealth Attorneys-General. In April 1978 it was announced that the Standing Committee was considering a draft reference to enable the Commonwealth to legislate with respect to

> the custody, guardianship and maintenance of ex-nuptial children and legitimate children of previous marriages; and
>
> property disputes between husband and wife arising before a divorce application. [17]

At about the same time the Commonwealth Attorney-General stated that he would be prepared to recommend to the Government that it act on a reference from some States only. [18]

2.16 Since 1978 discussions have been held on the proposed reference among a number of States and the Commonwealth despite repeated expressions of support for the proposal by the Family Law Council and other bodies, [19] the reference of powers has not yet been implemented. The Family Law Amendment Bill 1983, to which we have referred, covers some of the ground of the proposed reference. [20] For example, the Bill if passed, would allow the Family Court to consider a claim for the custody or maintenance of a child of one party to the marriage (such as an ex-nuptial child), where the child has been a member of the marital household. It would also empower the Family Court to determine a property dispute between married persons independently of divorce proceedings. While the Family Law Bill takes a broad view of the Commonwealths constitutional powers, it does not attempt to covet maintenance and custody claims in respect of children living with parents who have never been married to each other.

B. The Proposal

2.17 The position at May 1983 is understood to be that several States are continuing to negotiate with the Commonwealth on the form of a reference of powers. A proposal has been drafted and submitted to the Commonwealth. The reference, as drafted, provides for an agreement under which each of the original States "undertakes to submit [to its Parliament] a Bill in substantially the form of the draft reference Bill attached to the agreement". The draft Bill refers to the Commonwealth certain matters relating to property claims between married persons. It also refers legislative power on the following matters, to the extent that they are not already within Commonwealth power

> "(a) the maintenance of children and the payment of expenses in relation to children and child bearing; and
>
> (b) the custody and guardianship of children." [21]

The draft agreement provides that, as soon as practicable after each of the original States passes the reference legislation the Commonwealth must submit to Parliament legislation

> "containing provisions in respect of such of the referred matters as all of the parties ... agree should be dealt with..."

2.18 The draft agreement also provides that the Commonwealth is not to submit legislation to Parliament or propose regulations in respect of a referred matter unless the legislation or regulations comply with the provisions of the agreement and have been agreed to by each State which is a party. The most significant requirements are the following:

> An obligation to pay child maintenance cannot be imposed on persons other than "parents or step parents of children". It therefore seems that, if the Commonwealth were to accept a reference in these terms, it could not require a person to pay maintenance for the support of a child of his or her de facto partner even where the child has been accepted into the joint household and supported by that person.
>
> A continuing maintenance obligation is not enforceable against the estate of a person after his or her death except in respect of accrued arrears.
>
> A provision relating to the custody, guardianship or maintenance of children is not, so far as practicable, to differentiate between children who are legitimate and those who are not.
>
> A Commonwealth law is not to affect the status or entitlement of a child in the care of a State Minister or officer or of an adoption agency. Nor is it to affect the jurisdiction of a State court to make a child a ward of the court for a purpose other than providing for the maintenance, custody or guardianship of the child.

A Commonwealth law is not to affect the jurisdiction of a State court to make an order in respect of a neglected or uncontrollable child or a child in need of care and protection.

No provision is to be made which would derogate from a State law relating to adoption.

2.19 Under the proposed agreement an original State ceases to be a party if it does not enact legislation in the form of the draft reference Bill within six months or such further term as may be agreed. A State may withdraw from the agreement by giving notice to this effect the draft reference Bill provides for the sections referring power to the Commonwealth to cease to have effect on a date fixed by proclamation. While the agreement is in force the Commonwealth and the participating States are to use all reasonable endeavours to secure the passage of legislation in the required form. However, the proposed agreement expressly provides that it is not intended to create "legal relationships justiciable in a court of law". This indicates that the remedy for a State which considers that the agreement has been breached is to withdraw from the agreement and revoke the reference of powers as far as it is concerned.

2.20 If New South Wales and the Commonwealth become parties to the proposed reference of powers agreement, and New South Wales passes legislation in the form of the draft Bill, the principal consequences of relevance in the context of this Report will be as follows:

The Commonwealth will have power to legislate with respect to the maintenance, custody and guardianship of children in many situations where it is not already able to do so.

In exercising this power the Commonwealth must comply with the requirements specified in paragraph 2.18.

In addition, the terms of any laws proposed by the Commonwealth pursuant to the reference of powers must have the approval of each participating State.

A State may withdraw from the agreement by giving the appropriate notice, thereby effectively revoking the reference of power.

We consider further the significance of the proposed reference of powers in Chapter 15.

FOOTNOTES

1. Under s.51 of the Constitution the Commonwealth Parliament was given power to make laws with respect to "(xxi) Marriage; (xxii) Divorce and matrimonial causes; and in relation thereto parental rights and the custody and guardianship of children."

For analyses of the constitutional background to family law in Australia. see joint Select Committee on the Family Law Act- Family *Law* in Australia (1980). Vol.1. ch.2.

2. Except to the extent that the Commonwealth can affect them by its powers to legislate on other specific matters, such as social security and taxation (Chapter 4).

3. H A Finlay, "Defining the Informal Marriage"(1980) 3 *University of New South Wales Law Journal* 297. at p.302. refers to the judgment of Windeyer J in the *Marriage Act Case* (Attorney General for Victoria v. Commonwealth (1962) 107 CLR 529 at pp.576-577) as possibly lending colour to such a view. Professor Finlay adds that it is difficult to envisage the High Court as then constituted. "taking such a great leap forward".

4. P E Nygh, "Problems of a Divided Family Law Jurisdiction". Seminar Paper, 29 April 1982. See also J H Wade, "Void and De Facto Marriage" (1981) 9 *Sydney Law Review* 356, at pp.373-376.

5. For the formalities before Lord Hardwicke's Act see *Bromley's Family Law* (6th ed 1981), pp.35-36.

6. *Catterall v. Catterall* (1847) 1 Rob. Ecc. 580.

7. The doctrine of common law marriage survives in private international law, in that Australian courts may recognise an informal marriage contracted outside Australia, where compliance with the local law was impossible: *Savenis v. Savenis* [1950] SASR 304.

8. P E Nygh note 4 above, p.9.

9. M. Coper, Opinion (December 1982), para.37.

10. While the marriage power has been examined by the High Court on several occasions, the Court's attention has never been drawn to the specific issue raised here.

11. Cf. paras.4.24 ff.

12. See the definition of "matrimonial cause", Family Law Act 1975, s.4(1). The constitutional validity of the general scheme of the Act was upheld in *Russell v. Russell* (the Family Law Act Case) (1976) 134 CLR 495: *R v. Lambert*, *ex parte Plummer* (1980) 55 ALJR 71.

13. The Family Court functions throughout Australia, except in Western Australia. That State has created its own Family Court under the Family Law Act 1975, s.41.

14. Family Law Act 1975 (Cth), s.22(2) (b).

15. *Proceedings of the Australian Constitutional Convention*, Melbourne, 24-26 September 1975, xxvii, pp.101-104.

16. *Proceedings of the* Australian Constitutional Convention, Hobart, 27-29 October, 1976, pp.50 ff.

17. Commonwealth Attorney-General, Press Release, 8 April 1978.

18. Commonwealth Parliamentary Debates, Senate, 10 April 1978, p.1031.

19. See, e.g., Family Law Council, Annual Report 1981-82, para.77; Joint Select Committee, note 1 above, vol.1, pp.23-24.

20. Family Law Amendment Bill 1983, cll.3, 4.

21. The term "children" is defined to mean persons under the age of 18 and in relation to maintenance, a person over that age who has special needs because of physical or mental handicap or because he or she is engaged in a course of education or training. See cl.3(2) of the draft reference Bill.

3. De Facto Relationships: Social and Economic Aspects

I. INTRODUCTION

3.1 This Chapter describes and analyses a range of statistical and other information about

the increase in de facto relationships in the period 1971-1982;

the reasons for this increase;

the demographic characteristics of de facto partners;

the socioeconomic position of de facto partners; and the legal problems arising from de facto relationships.

3.2 Our purpose here is to outline the social and economic aspects of de facto relationships, to explore the similarities and differences between de facto cohabitation and marriage, and to provide examples of the legal issues raised by de facto relationships. In our Issues Paper we tentatively identified four major types of de facto relationships. We suggested that they vary according to economic circumstances; the socioeconomic position of the partners; their marital status, age group and stage in the life-cycle, and their motivation. We suggested that all the available evidence pointed to an increase in de facto relationships during the 1970s, and that it would be useful to seek further information on the reasons for these changes. This Chapter analyses the available information which includes some important new material and draws out policy implications.

II. STATISTICAL INFORMATION

A. The Sources of Statistical Information

3.3 In the Issues Paper, [1] we estimated the increase in the number of people living in de facto relationships. We used material gathered during the 1971 and 1976 Censuses by the Australian Bureau of Statistics (ABS). We estimated the minimum number of people, aged 15 years and over, who were living together in 1976 to be 131,876 persons or 2.2 per cent of all couples (married or de facto). It appeared that approximately 50 per cent of these de facto couples had children within their household (although not necessarily children born within the current relationship). The figures for 1976 represented an almost four-fold increase in the number of people identified in the 1971 Census as de facto partners (from 34,166 to 131,876). As we pointed out in the Issues Paper, those figures were based on inadequate information. For example, the 1976 Census form offered “de facto spouse” as a possible description but the 1971 Census did not. The figures might also have been affected by changes in the willingness of people to answer sensitive questions about their personal lives.

3.4 We said that our estimate of the number of de facto couples almost certainly understated the true position although we were confident that there had been a significant increase in the period 1971 to 1976. We concluded that additional and more reliable information was required on the incidence of de facto relationships and on the characteristics of people living in such relationships. Since publication of the Issues Paper, two important surveys of Australian families have been completed and their preliminary findings made available to us. The Australian Bureau of Statistics carried out an extensive survey of Australian families from March to June 1982 (“Australian Families 1982”). This survey sampled 15,000 dwellings with national coverage (that is, all capital cities, other urban and metropolitan areas and rural areas were included). All persons aged 15 years and over in each dwelling were interviewed, except

for school students. The findings of the survey are applicable, statistically, to the Australian population aged 15 years and over. [2]

3.5 The Institute of Family Studies (IFS) also carried out a survey of Australian families in late 1981 ("The Family Formation Project"). This survey sampled 2,548 persons aged 18 to 34 years in households in major cities, smaller urban areas and rural localities throughout Australia. The results of this survey provide valuable supplementary information on matters not covered by, or not yet available, from the ABS survey. [3]

3.6 Both surveys sought specific information on de facto cohabitation In its preliminary report, the ABS categorised cohabiting couples as either "legally married" or "living together as married/de facto". This reflects the wording used in the question on marital status asked of respondents. [4] The IFS subdivided people living in de facto relationships according to their formal marital status (never married, separated, divorced) and whether there were children in the family. In our tables we have combined these categories so as to provide sufficient numbers on which to base our analysis.

A Note on Terminology

3.7 In this Chapter we often make comparisons between de facto partners and people who have a different marital status. This causes some difficulty with the use of familiar words such as "married" and "single". We use these words in a more precise sense than is usual and also use phrases which reflect the categories used in statistical sources. Some people living in de facto relationships remain formally married to someone else, but we never include them in the category of "married". Some people living in de facto relationships have never been married, but for our purposes they are not described as "single", and with one exception are not usually described as "never-married". The one exception is in Table 3.3 and the accompanying text, where we are concerned with the formal marital status of people living in de facto relationships. We also use the term "not currently married" in a special sense: it includes people living in de facto relationships, single people, divorced, widowed and separated people. In summary:

> "married" means currently married and living with ones spouse;
>
> "de facto" is used interchangeably with "living together as married", a phrase used by the ABS, but not used elsewhere in this Report;
>
> "single" means never married and not currently living with a partner;
>
> "never-married" refers to a person's formal marital status.

B. Increase in De Facto Cohabitation in Australia, 1971-1982, and Some International Comparisons

3.8 We have referred to the four fold increase from 1971 to 1976 in the number of people living in de facto relationships (paragraph 3.3) from 34,166 to 131,876. From 1976 to 1982, the number of de facto partners increased to 337,316 - an increase of 156 percent (Table 3.1). It must be remembered, however, that the 1971 and 1976 figures are derived indirectly and are minimum estimates. By contrast the 1982 figures are derived from a careful attempt by the ABS to collect this information. Although it is possible that the 1982 figures are also underestimates (principally because of the unwillingness of some of the people being interviewed to identify themselves as de facto partners, particularly those in older age groups), [5] these figures are nevertheless much more reliable than our earlier estimates. Part of the apparent increase may therefore reflect more efficient collection of information.

Table 3.1: Trends in De Facto Cohabitation

Australia 1971-1982

	1971 [1]	**1976** [2]	**1982** [3]
Number of people living in de facto relationships	34,166	131,876	337,316
De Facto couples as a proportion of all couples (married and de facto)	0.6%	2.2%	4.7%
People living in de facto relationships as a proportion of persons not currently married aged 20 to 64 years	N/A	7.0%	12.0%
Number of de facto families containing dependent children	10,407	32,188	59,640
Proportion of de facto families containing dependent children	61%	49%	36%

1. Derived from Australian Bureau of Statistics, 1971 Census: *Population and Dwellings:* Table SP054 (unpublished).

2. Derived from Australian Bureau of Statistics, *1976 Census: Population and Dwellings:* Cross-Classified Tables (2426.0) Table 46.

3. Derived from Australian Bureau of Statistics, *Australian* Families, 1982 (Cat No.4407.0, December, 1982) and from unpublished statistics provided by ABS.

1. The Rate of Cohabitation

3.9 It appears, therefore, that between 1976 and 1982 the numbers of people living in de facto relationships more than doubled. During the same period the numbers of married people increased by only 16 per cent As a consequence, de facto couples as a proportion of all couples (married and de facto) increased from 2.2 per cent in 1976 to 4.7 per cent in 1982.

3.10 The problems of comparing international statistics on de facto cohabitation are formidable because of the unreliability of the data, and because uniform definitions are not used. However, the literature on the trend of de facto cohabitation in Europe, Britain and the United States during the 1970s shows a consistent increase in the rate of cohabitation particularly for people under 35. [6] The proportion of de facto couples to all couples in Australia in 1982 (4.7 per cent) is similar to that in the United States in 1977 and in Britain in 1979, although it is likely that the rate has increased in those countries since the late 1970s. Census figures from New Zealand in 1981 and France in 1979 show a higher rate of de facto relationships (at 6.2 per cent and 6.0 per cent respectively of all couples). Official statistics report even higher proportions for the Netherlands (7 percent in 1977) and for Denmark and Sweden (13 and 15 per cent, respectively, in the late 1970s).

Table 3.2: Marital Status of Persons Living with a Partner, by Age

Australia 1982

(individuals 15 years and over)

Marital Status

Age (years)		**Married**	**De Facto**	**Total**
15-19	N	24,930	28,240	53,170
	%	46.9	53.1	100.0
20-24	N	396,400	95,750	492,150
	%	80.5	19.5	100.0
25-29	N	787,870	70,850	858,720
	%	91.7	8.3	100.0
30-39	N	1,794,200	75,500	1,869,700
	%	96.0	4.0	100.0
40-49	N	1,358,310	39,340	1,397,650
	%	97.2	2.8	100.0
50-59	N	1,213,540	21,230	1,234,770
	%	98.0	2.0	100.0
60 and over	N	1,205,370	6,410	1,211,780
	%	99.0	1.0	100.0
Total	**N**	**6,780,620**	**337,320**	**7,177,940**
	%	**95.3**	**4.7**	**100.0**

Source: ABS, *Australian Families 1982,* Unpublished Tables.

3.11 The overall figures tend to obscure the extent of de facto cohabitation, because they are based on proportions of couples across all age groups. In all the countries studied, these proportions are highest in younger age groups. [7] The Australian figures (Table 3.2) show that in the age group 15-19, de facto couples comprise 53 percent of all couples; for those aged 20-24 the proportion is 20 per cent and in the age group 25-29 the proportion is 8 per cent. The proportion falls to 4 per cent for those aged 30-39, 3 per cent for those aged 40-49 and 2 per cent for those aged 50-59. For the age group 20-39, individuals living in de facto relationships constitutes percent of all persons living with a partner. Figures for New Zealand, for example, (derived from the 1981 census) are very similar. In the age group 20-39, de facto

couples comprise 10 per cent of all couples, with the rate falling to 3 per cent for people aged 40-59. [8] The similarities among advanced industrial societies suggest that similar economic and social factors may influence rates of de facto cohabitation.

2. Cohabitation and Marital Status

3.12 The marital history of de facto partners in Australia reflects the fact that a large proportion of them are in the younger age groups. Sixty-three per cent of de facto partners in the Family Survey had never been married, 13 per cent were separated, 23 per cent were divorced and 2 per cent were widowed. This pattern is similar to that of de facto partners in the United States [9] and in Britain. [10] (where never-married people also predominate, but not to such a marked extent). Although we cannot make accurate estimates of changes in composition since 1976, the figures suggest that the greatest increase in the incidence of de facto cohabitation has been among young, never married people. [11]

3.13 It is possible to obtain a clearer picture of the relationship between marital status and cohabitation by examining the incidence of de facto cohabitation among people who are not currently married (which includes for these purposes married people who are not living with their spouse). This group includes separated divorced and widowed persons as well as those who have never been married. Of all people who are not currently married, 9 per cent are living in a de facto relationship. However, while 8 per cent of people who have *never* married are living with a de facto partner, this proportion increases to 17 percent for separated people and 19 percent for divorced people. Only one percent of *widowed* people identified themselves as living in a de facto relationship (Table 3.3). From 1976 to 1982 the proportion of people not currently married, in the age group 20 to 64 years, who were living in a de facto relationship increased from 7 per cent to 12 per cent (Table 3. 1). The figures tend to suggest that there has been an increase in the prevalence of de facto relationships both among young, never married people and among divorced and separated people. [12]

3.14 The statistical information available to us permits only an analysis of the current position. That is, the statistics provide a “snapshot” of current patterns of married and unmarried cohabitation They tell us little of processes over the life-cycle of the people involved: for example, the extent to which cohabitation is followed by marriage; or the relationship between separation and divorce and subsequent de facto cohabitation and possibly remarriage. The British Household Survey provides some information on these processes, which may indicate possible Australian trends. Almost 20 per cent of people entering their first marriage in 1977-1979 had lived together before their marriage; and of second or subsequent marriages (for either partner) 60 per cent of couples had lived together before their marriage. The findings suggest an increasing trend towards pre-marital cohabitation particularly marked during the 1970s, with cohabitation before a second or subsequent marriage having become a majority practice in recent years. [13] There is some indirect Australian evidence which suggests a similar trend: commentators have pointed to the high rate of remarriage after divorce as a possible indication of a prior de facto relationship. [14] It is also significant that almost one-fifth of separated and divorced people were living in a de facto relationship in 1982.

Table 3.3: Incidence of De Facto Cohabitation For Persons “Not Currently Married”,* by Marital Status

Australia 1982

(Individuals 15 years and over)

	Never Married		Separated		Divorced		Widowed		Total	
	N	%	N	%	N	%	N	%	N	%
Individuals living together “as married”	211,080	8.4	43,160	17.3	76,240	18.7	6,830	1.0	337,310	8.7
All persons not currently married	2,514,890	100.0	294,040	100.0	407,410	100.0	693,150	100.0	3,864,490	100.0

Source: ABS, *Australian Families 1982*, Unpublished Tables

* Note: “Not currently married” includes all persons not currently living with a legal spouse

C. Community Attitudes Towards Cohabitation: Australia 1971-1981

3.15 An increase in de facto cohabitation (and the likelihood of the increased willingness of de facto partners to indicate this to official statisticians) has been accompanied by increased community acceptance of de facto cohabitation As is documented more fully in Appendix IV, evidence from public opinion polls in the period 1971-1977 and from the Family Formation Project in 1981 shows a marked increase in acceptance or approval of “unmarried couples living together”.

3.16 The changing proportion of people indicating *disapproval* of de facto cohabitation provides a useful index of community attitudes. In a public opinion poll of 1971-1972,51 per cent of people indicated disapproval By 1977, the proportion expressing disapproval had fallen to 35 per cent. In this period, expressions of approval increased for both men and women, but markedly so for women - resulting in almost no discernible difference in men’s and women’s attitudes on this issue. The age factor remained significant. In 1977 a small proportion (16 per cent) of people under 30 expressed disapproval of unmarried couples living together, while one-third of people aged 30 to 49 disapproved. The Family Formation Project survey in 1981 found that 22 per cent of people aged 18 to 34 disagreed with the statement that: “it is alright for a couple to live together without planning to get married”. We conclude that in the decade 1971-1981 there has been a clear trend towards increasing acceptance of de facto cohabitation that men’s and women’s attitudes have become increasingly similar and that younger age groups show the highest level of acceptance.

D. Summary

3.17 Briefly, the available statistics suggest the following conclusions:

The incidence of de facto relationships has increased markedly over the period 1976-1982.

De facto relationships occur most frequently among young people who have never been married and among divorced or separated people. De facto relationships have increased for each group.

There is evidence that a significant proportion of de facto relationships are a prelude to marriage or remarriage.

Community attitudes have changed over the last decade, with a marked drop in the proportion of people expressing disapproval of de facto cohabitation.

E. Some Reasons for the Increase

3.18 In the Issues Paper[15] we suggested that the increase in de facto relationships in the 1970s could be related to three interconnected processes:

The continuation of a tradition of informal marriage, historically associated with poorer people in insecure employment, and the difficulty and expense of divorce. [16]

Recent changes in attitudes to marriage by young, single, middle class people.

The downturn in marriage rates in Australia (and other industrial countries) which accompanied the deterioration in economic conditions and the rising unemployment of the early 1970s. There appears to be a connection between the increase in de facto relationships among the under 30 s, and the drop in the rate of first marriages. [17] This suggests that for some people living together is seen as an alternative to marriage in times of personal economic uncertainty.

We are now in a better position to make an assessment of the relative importance of these three factors in accounting for the increase in de facto relationships.

3.19 Historians have shown that while marriage patterns are sensitive to economic recession and high levels of unemployment, other factors have also produced a tradition of “informal marriage”. [18] They have suggested that sections of the working class, particularly among poorer, unemployed, seasonal and migratory workers, did not enter into formal marriages. For another group, the relative difficulty and expense of obtaining a divorce led to de facto relationships becoming “poor people’s remarriage”. [19] There cognition of de facto relationships in social welfare legislation since early this century is testimony to the place of de facto relationships in Australian domestic life. [20] It is likely, too, that the social dislocation of wartime contributed both to an increase in de facto relationships and to a willingness to recognise it for certain purposes. Two significant pieces of wartime related legislation recognising de facto relationships were the Australian Soldiers’ Repatriation Act 1920 (Cth) and the Widows’ Pension Act 1942 (Cth) (paragraphs 4.14-4.15).

3.20 While the figures (Table 3.5) show that some current de facto relationships are of very long duration, the factors mentioned in the previous paragraph standing alone, cannot account for the recent increases in de facto relationships. As will be seen, people living in de facto relationships do not appear to come from an identifiable minority group in the population (paragraphs 3.22-3.36). Most importantly, we have seen that de facto relationships have increased among young people who have never been married, and among divorced and separated people. For people within the latter category the Family Law Act has removed most of the legal impediments to remarriage. This suggests that people’s reasons for living together without formal marriage are less associated with legal difficulties than in the past.

3.21 Nor do we think that the recorded increase can be accounted for simply by increased public visibility of an old institution (although it is possible that older people in long standing de facto relationships are now more willing to be included in official statistics). It seems clear that the economic conditions prevailing since 1974 [21] and changing social attitudes over the last decade must be involved in the changes affecting recent trends in unmarried cohabitation This has significant policy implications for the direction of law reform Some of these implications are stated in paragraph 3.58.

III. DE FACTO PARTNERS IN 1982: DEMOGRAPHIC INFORMATION

3.22 In this section we present a profile of the demographic and socio-economic characteristics of de facto partners in Australia, comparing them with married people and in some cases with single people. This profile illustrates more fully the major economic issues and life-cycle processes sketched briefly in the Issues Paper, [22] and provides a basis for evaluation of legal policies. It is important to stress again however, that the information here produces a “snapshot” picture of de facto relationships. We are able to draw some inferences about life-cycle processes by putting together what is known about, say, the current age of de facto partners, and the length of time current relationships have lasted. However, there are no available studies which trace the history of relationships over time.

A. Cohabitation and Age

3.23 De facto couples are concentrated in the age group 20-29 years, where they constitute 7 per cent of all people and 13 per cent of people not currently married. The relative youthfulness of de facto partners in comparison with married people is clear from Table 3.4: 58 per cent of de facto partners are under the age of 30, compared with 18 per cent of married people-, 34 per cent of de facto partners are aged between 30 and 49, compared with 47 per cent of married people; and 8 per cent of de facto partners are 50 years and over, compared with 36 per cent of married people. This concentration in younger age groups is very similar to the British, United States, Swedish and Danish figures, [23] and has significant implications for the socioeconomic position of de facto partners (in particular, their access to income and property). However, since 42 per cent of de facto partners are *over* the age of 30, de facto cohabitation must not be seen as primarily a life-style of young, never married people. Older people, more likely to be separated or divorced, also contribute substantially to the numbers of de facto couples.

Table 3.4 Persons Living with a Partner Marital Status by Age

Australia 1982

(individuals 15 years and over)

Age (Years)	**Married**		**De Facto**	
	N	**%**	**N**	**%**
15-19	24,930	0.4	28,240	8.4
20-24	396,400	5.8	95,750	28.4
25-29	787,870	11.6	70,850	21.0
30-39	1,794,200	26.5	75,500	22.4
40-49	1,358,310	20.0	39,340	11.7
50-59	1,213,540	17.9	21,230	6.3
60 and over	1,205,370	17.8	6,410	1.9
Total	**6,780,620**	**100.0**	**337,320**	**100.1**

Source: ABS, *Australian Families 1982,* Unpublished Tables.

B. Duration of the Relationship

3.24 Table 3.5 shows the duration of Current de facto relationships: that is, those relationships which have not terminated. It *does not provide a measure of the average duration of de facto relationships,* which would require data on relationships which have been terminated. Of current relationships 39 per cent have been in existence for less than 2 years; 3 8 per cent have lasted for between 2-5 years; 13 percent have been in existence for 6-10 years; and 8 percent have existed for 11-33 years. It must be remembered that de facto relationships involve disproportionately higher numbers of young people, who are likely to have started living together more recently. In summary. approximately 59 per cent of current de facto relationships have been in existence for 2 years or more, while 43 per cent have continued for 3 years or more (the qualifying period for de facto widows under social security legislation).

Table 3.5: De Facto Relationships: Duration of Current Relationship

Australia 1982

Duration		**Couples living with Partner "as married"**
	N	**%**
Less than 1 year	21,820	12.9
1 year	44,020	26.0
2 year	26,470	15.6
3 year	17,370	10.3
4 year	13,560	8.0
5 year	7,600	4.5
6-10 year	21,510	12.7
11-20 year	10,570	6.2
21-33 year	2,660	1.6
Do not know	3,820	2.3
Total	**169,400**	**100.0**

Source: ABS, *Australian Families 1982,* Unpublished Tables.

3.25 This pattern reinforces previous observations: namely, that there has been an increase in de facto cohabitation in the last 5 years (couples who started living together within the last 5 years constitute 77 per cent of all de facto couples); that the recent increase in the rate of cohabitation is an extension of a well-established practice; and that a significant proportion of current de facto relationships have been of long duration.

C. The Presence of Children

3.26 While 18 per cent of de facto partners have children who were born during their current relationship (Table 3.6), 36 per cent of de facto couples have dependent children living in their family (Table 3.7). These children were either born during the current relationship or are

children of either partner from a previous marriage or relationship. Analysis of 1971 and 1976 census figures in comparison with data from the 1982 Family Survey shows a marked increase in the absolute numbers of de facto families containing dependent children, [24] 10,407 families in 1971; 32,188 families in 1976; and 59,640 families in 1982. The number of de facto families with children highlights the importance of the parenting role for a significant proportion of de facto couples.

Table 3.6: De Facto Relationships by Numbers of Children Born in Current Relationship

Australia 1982

Number of Children		**Women in a De Facto Relationship**
	N	**%**
0 children	137,370	82.5
1 children	20,750	12.5
2 children	5,560	3.3
3 children	2,080	1.2
4 or more children	700	0.4
Total	**166,460**	**99.9**

Source: ABS, *Australian Families* 1982, Unpublished Tables.

3.27 While there has been an increase in absolute numbers, the proportion of de facto couples who have children has decreased from 61 percent in 1971 to 49 percent in 1976 and to 36 per cent in 1982. One of the major reasons for this decrease is the increasing proportion of de facto couples who have never been married, that is, young people whose relationships are less likely to have produced children or to involve the presence of children from a former relationship's. [25]

Table 3.7: De Facto Relationships by Numbers of Dependent Children Living in the Family

Australia 1982

Numbers of Children		**Women in De Facto Relationships**
	N	**%**
No children	107,600	64.2
1 child	27,070	16.2
2 child	23,000	13.9
3 child	6,780	4.0

4 or more children	2,790	1.7
Total	**167,240**	**100.0**

Source: ABS, *Australian Families 1982,* Unpublished Tables.

3.28 The presence of children in more than one-third of all de facto relationships has significant policy implications. Our surveys of legal practitioners and welfare workers in New South Wales showed that problems concerning the maintenance and custody of children were among the most frequently occurring problems in respect of which clients in de facto relationships sought advice and assistance (paragraphs 3.67 and 3.73). We are not suggesting that de facto partners encounter legal problems in relation to children more often than married persons with children. We do suggest that the presence of children in a significant number of de facto relationships is important in view of the divided jurisdiction concerning maintenance, custody and guardianship of children (Chapter 15).[26] It is clearly a high priority that adequate rules and procedures be established to deal with custody and maintenance of children of de facto relationships.

D. Educational Qualifications

3.29 The pattern of educational qualifications for de facto partners is comparable to the pattern for married people. This is so despite the high incidence of young people among those living in de facto relationships. As with married people, 61 per cent of de facto partners have no formal educational qualifications; 29 per cent have a trade or apprenticeship qualification or other certificate or diploma (compared with 31 percent of the married); 7.5 percent have university degrees (compared with 6 percent of the married). These figures do not support the suggestion that the increase in the number of de facto relationships in the last decade is primarily the result of young, tertiary-educated people rejecting marriage as an institution. The tertiary-educated are not over-represented among de facto partners.

E. Birth-Place and Religion

3.30 De facto partners are more likely than married people to be Australian-born (78 per cent of de facto partners compared with 71 per cent of married people), or to be born in an overseas English speaking country. Compared with married people, those living with a de facto partner are much less likely to have been born in a non-English speaking country (7.2 per cent compared with 17.1 percent). This finding may reflect two factors. First, close-knit, non-English speaking migrant communities are more likely to maintain conventional patterns of legally sanctioned marriage. Secondly, it is likely that Australian-born and other English-speaking residents are more willing, in the course of a survey to identify themselves as “living together”.

3.31 Table 3.8, showing religious affillation by marital status, is derived from the IFS sample survey of people aged 18-34 years. As a result it does not contain information on the religious affiliation of older de facto partners. The table shows that the pattern of religious affiliation for de facto partners under 35 is very similar to the pattern for single people who are living away from home. The pattern differs from that of married people, because a higher proportion of de facto partners claim no religious affiliation. About 26 percent of the de facto partners in the sample were Catholic, 40 percent were affiliated with other Christian religions, 4 percent were affiliated with a non-Christian religion and 30 per cent said that they had no religious affiliation. To a certain extent these findings are related to the age distribution of the categories of people surveyed. On average, single people were the youngest group; de facto partners were somewhat older, and married people (in particular, those with children) had the highest average age. It would appear, therefore, that religious affiliation is more pronounced for the older groups, who are in turn more likely to be married.

Table 3.8: Marital Status by Religion

Australia 1982

(Age Group 18-34 years)

	Single, Left Home	De Facto	Married No Children	Married With Children
	N=508	**N=160**	**N=306**	**N=877**
	%	**%**	**%**	**%**
Catholic	24.2	26.0	27.5	29.4
Other Christian	48.0	40.0	51.0	57.8
Non-Christian	2.8	4.0	2.0	2.5
No religion	25.0	30.0	19.6	10.3
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: Institute of Family Studies, Family Formation Project, Sample Survey Unpublished Tables.

3.32 We conclude that a very large majority (93 per cent) of de facto partners are either Australian-born or migrants from the main English-speaking countries, and that a large majority (66 per cent) express affiliation with the major Christian denominations. There is no evidence to associate de facto cohabitation with identifiable minority groups. Rather, it would appear to be a domestic relationship associated with the mainstream of Australian life.

F. The New South Wales Figures

3.33 We have used Australia-wide figures collected by the ABS and the IFS because they give us a basis for historical comparisons and comparisons with other countries. However, it is possible to examine aspects of the New South Wales situation in some detail. Figures from the ABS show the marital status for individuals 15 years and over in each of the Australian States and the Territories. It is clear that the pattern in New South Wales is almost identical with the pattern for the whole of Australia. In particular, the proportion living in de facto relationships is the same as the national proportion New South Wales, with 116,200 people in de facto relationships, contributes one-third (34.4 percent) of all persons in Australia living together “as married”. This is equivalent to the State’s share of the national population aged 15 years and over. In addition, the rate of cohabitation (that is, the number of de facto couples expressed as a proportion of all couples) is identical with the Australian rate (4.7 per cent). Similarly, de facto couples are younger than married couples (60 per cent are under 30, as are 58 per cent in the whole of Australia), and they are concentrated in the age group 20-29 years, where they constitute 13 per cent of all couples, as compared with 12 per cent nationally (Table 3.9).

3.34 The duration of de facto relationships in New South Wales shows a similar pattern to the Australian figures, except that in New South Wales a higher proportion of de facto couples have been living together for relatively long periods. A slightly smaller proportion of de facto couples have commenced living together in the last 5 years (73 percent, compared with 77 per cent nationally). A larger proportion have been living together for more than 10 years (12 per cent of couples compared with 8 per cent in the whole of Australia). This suggests that, while there has been an undoubted increase in de facto cohabitation in the last 5 years, stable, long-term de facto relationships are relatively common in New South Wales (Table 3.10).

3.35 There is therefore, close similarity between the characteristics of New South Wales de facto couples and those of couples living elsewhere in Australia. It follows that we can safely accept national figures on such issues as birth-place, religion, presence of children, educational qualifications, labour force status, income and housing occupancy (which we discuss later in this Chapter), as indicating the situation in New South Wales.

Table 3.9: Persons Living with a Partner: Marital Status by Age

New South Wales 1982

(individuals 15 years and over in the State of New South Wales)

Age (years)		**Marital Status**		
		Married	**De Facto**	**Total**
15-19	**N**	9,660	11,750	21,410
	%	45.1	54.9	100.0
20-29	**N**	394,050	57,530	451.580
	%	87.3	12.7	100.0
30-39	**N**	628,040	19,260	647,300
	%	97.0	3.0	100.0
40-49	**N**	480,960	16,710	497,670
	%	96.6	3.4	100.0
50-59	**N**	433,650	9,260	442,910
	%	97.9	2.1	100.0
60 and over	**N**	434,310	1,680	435,990
	%	99.6	0.4	100.0
Total	**N**	**2,380,660**	**116,200**	**2,496,860**
	%	**95.3**	**4.7**	**100.0**

Source: ABS, *Australian Families* 1982*,* Unpublished Tables.

G. Conclusions

3.36 From demographic information we can draw the following broad conclusions:

While the majority (58 percent) of de facto partners are people under the age of 30, significant numbers of previously married older people live in de facto relationships.

A majority (59 per cent) of de facto relationships have been in existence for at least 2 years. In New South Wales 12 per cent have continued for at least 10 years.

A significant proportion (36 per cent) of de facto partners have dependent children in their households; 18 per cent have children born during their current relationship.

De facto partners cannot readily be distinguished from married couples in terms of educational background, or religious affiliation but are more likely to have been born in Australia or an English-speaking country.

Except for the fact that they tend to be younger than married people, de facto partners do not constitute a distinct sub-group of the Australian population.

Table 3.10: De Facto Relationships: Duration of Current Relationship

New South Wales 1982

(couples living together in New South Wales)

Duration		**Couples living with Partner "as married"**
	N	**%**
Less than 1 year	9,370	16.0
1 year	12,860	22.0
2 year	7,140	12.2
3 year	5,030	8.6
4 year	5,440	9.3
5 year	2,660	4.5
6-10 years	8,890	15.2
11-20 years	4,540	7.8
21 years or more	1,230	2.1
Do not know	1,310	2.2
Total	**58,470**	**99.9**

Source: ABS, *Australian* Families 1982, Unpublished Tables.

IV. THE SOCIO-ECONOMIC POSITION OF DE FACTO PARTNERS

3.37 In this section we analyse available information on four key issues which provide a good indication of the socioeconomic position of de facto partners. We compare their position with that of married couples, and in some cases with single people. The issues to be considered are: the presence of dependent children in the family, labour force status, income, housing occupancy. The data we use in this section are derived from the ABS Family Survey conducted in 1982.

A. The Presence of Dependent Children in the Family

3.38 As we have seen the ABS Family Survey shows that 18 per cent of de facto families contain dependent children born during the current relationship, while 36 per cent of couples have dependent children living in the family. Within these relationships one partner, usually the woman will be primarily responsible for child care and other domestic duties. Studies have demonstrated that the responsibility of women for dependent children is associated with a significant reduction in their levels of employment particularly in full-time employment. [27]

3.39 Table 3.11 shows the number of dependent children living in the family, according to the marital status of the partners and the age of the woman. In all age groups it is clear that, even though 36 per cent of de facto couples have children in the household de facto cohabitation is much less likely than marriage to be associated with the presence of children. This is particularly so in the age group 20-29, which is the usual period for child-bearing: where the woman is aged 20-29 years, 30 per cent of de facto couples have children in their households (compared with 63 per cent of married couples). Where the woman in a de facto relationship is aged 30-39, dependent children are more likely to be present: 65 per cent of such families contain children, probably indicating the formation of relationships by people who are divorced or separated and who have children from their previous marriages. For married couples the figure in this age group is 91 per cent. Where the woman is aged 40-44, the proportion of families with dependent children falls to 40 per cent possibly suggesting that some of the children of the family are no longer dependent. Seventy-eight per cent of married couples in this age group have dependent children The finding that de facto cohabitation is generally less likely than marriage to be associated with the presence of children is consistent with accounts of fertility and cohabitation in Western Europe. [28] However, it is also clear from British statistics that couples living together after the woman has been separated or divorced are likely to have children present in the family. [29]

B. Labour Force Status: De Facto Partners, Married Couples and Never Married People

3.40 Table 3.12 suggests that the employment situation of de facto partners is similar to that of men and women who have never been married, with a high proportion of each group either working or seeking work. Both groups show higher unemployment rates and higher levels of participation in the labour force than married people. In interpreting these figures it must be remembered that unemployment rates [30] are an index not only of joblessness, but also of active jobseeking (in the definition of unemployment used by the ABS).High unemployment rates are associated with younger age groups (15-24 years) where the experience of recorded joblessness has been concentrated. The relatively younger ages of never-married people, and of de facto partners, therefore place them at greater risk of unemployment.

3.41 For both the de facto and the never married groups, the unemployment rate for men is more than three times higher than the unemployment rate for married men (9.6 per cent for male de facto partners, 11.6 per cent for never married men and 3.0 per cent for married men). The situation is similar for women: the unemployment rate for women living in de facto relationships and for never married women is double the unemployment rate for married women (15.0 percent for de facto partners, 14.8 per cent for never married women and 7.2 per cent for married women). In the current economic recession, de facto partners experience conditions of ‘ob scarcity similar to people who have never been married. [31]

Table 3.11: Couples Living Together (married and de facto): Number of Dependent Children [(1)] and Age of Female Partner

Australia

Number of Dependent Children Present	Age of Female Partner (years)									
	15-19		**20-29**		**30-39**		**40-44**		**45 and Over**	
	Married									
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
None	13,300	64	255,200	37	84,700	9	81,700	22	1,135,600	81
One or more	7,400	36	431,200	63	833,700	91	286,300	78	267,900	19
Total	**20,700**	**100**	**686,400**	**100**	**918,400**	**100**	**368,000**	**100**	**1,403,500**	**100**
	De Facto									
	N	**%**	**N**	**%**	**N**	**%**	**N**	**%**	**N**	**%**
None	14,800	73	58,100	70	12,200	35	6,500	60	10,900	90
One or more	5,500	27	25,200	30	22,800	65	4,400	40	1,200	10
Total	**20,300**	**100**	**83,300**	**100**	**35,000**	**100**	**10,900**	**100**	**12,100**	**100**

Source: ABS, *Australian Families*, 1982, *Preliminary* (cat. No.4407.0 1982), Derived from Table 5.

Table 3.15: Labour Force Status by Marital Status by Sex

Australia 1982

(Individuals 15 years and over)

	Employed		Unemployed		In the Labour Force (Employed and Unemployed)		Not in the Labour Force		Total		Unemployment Rate (1)		Labour Force Participation Rate (2)	
	N		N		N		N		N		%		%	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Married	2,714,420	1,447,830	80,430	112,500	2,794,850	1,561,340	632,390	1,792,040	3,427,240	3,353,380	3.0	7.2	81.5	46.6
De Facto	147,340	104,710	15,590	18,490	162,930	123,200	7,930	43,260	170,860	166,460	9.6	15.0	95.3	74.0
Separated	56,720	46,160	6,200	10,710	69,920	56,870	12,910	73,170	75,830	130,040	9.9	18.8	83.0	43.7
Divorced	93,300	89,500	6,120	13,450	99,410	102,950	30,900	97,910	130,310	200,860	6.2	13.1	76.3	51.3
Widowed	29,350	57,750	4,410	4,440	33,760	62,180	90,070	500,310	123,830	562,500	13.1	7.1	27.3	11.1
Never Married	1,045,070	647,830	138,350	112,940	1,192,420	760,760	147,370	203,250	1,339,800	964,010	11.6	14.8	89.0	78.9

3.42 The labour force participation rate (the proportion of people who are either employed or actively looking for work) for men aged 20-50 years is 95 per cent for men living in de facto relationships, higher than for any other marital status group. The corresponding figure for women in de facto relationships is 74 percent which is also high: 27 percentage points higher than for married women and only 5 percentage points lower thin for never married women. This high participation rate for women in de facto relationships must be related to the fact that by comparison with wives, fewer of them in all age groups are caring for dependent children.

3.43 A more detailed analysis of the labour force situation of men and women in de facto relationships, compared with married and never married people in the same age groups, is provided in Table 3.13. We summarise some of the findings in the following paragraphs.

3.44 Of all de facto partners, 8 per cent are in the age group 15-19 years (28,240 people). Within this age group, de facto partners are more likely to be unemployed than are married people and single people. Almost one fifth of the men and more than one quarter of the women are unemployed. Single men and women also experience high levels of unemployment (15 per cent and 18 per cent respectively are unemployed), but employment levels are higher for single women than for women in de facto relationships, almost 30 per cent of whom are not in the labour force. Within this age group both married women and women in de facto relationships have low labour force participation rates in comparison with single women, because of early child care responsibilities for one third of wives and for more than one quarter of women in de facto relationships (Table 3.11). These low participation rites also indicate hidden (that is, unrecorded unemployment for many young women. Only a very small number of men under the age of 20 years are married, and all are employed.

3.45 A different pattern of employment is evident for de facto partners in the age group 20-29 years (166,595 persons, which accounts for almost 50 per cent of all de facto partners). The proportion of male de facto partners who are unemployed (11.4 per cent) is greater than for married men (4.3 per cent) and single men (9.4 per cent): and the proportion of women de

facto partners who are unemployed (8.7 per cent) is greater than for wives (5.3 per cent), and closer to the figure for single women (10.6 per cent). Women in de facto relationships are much more likely than wives to be either employed or actively looking for work: only 10 per de the labour force compared with 44 per cent of wives. This is consistent with the presence of dependent children for 30 per cent of female de facto partners by contrast with 63 per cent of wives in this age group (Table 3.11). Thus, the employment pattern for de facto partners in the age group 20-29 years is very similar to the pattern for men and women who have never been married, but differs from the employment pattern of married people within that group.

3.46 For people under the age of 30, then, de facto relationships are less likely than marriage to involve dependent children, and more likely to be characterised by the partners' economic independence (or interdependence) rather than by female dependence. This latter point can be inferred from the labour force participation rates for women. Women "not in the labour force" are likely to be economically dependent on their partner. In comparison with married couples, however, de facto partners have a higher incidence of unemployment. The evidence suggests that de facto cohabitation has become increasingly common during a period of high unemployment and economic insecurity, which has mainly affected people in the age group traditionally associated with marriage and family formation. It would be incorrect to conclude that all or most de facto partners are disadvantaged in the labour market since 86 per cent of men and 72 per cent of women in de facto relationships are employed. The relatively low unemployment rate for married men suggests, however, that formal marriage continues to be based on the husband's job security, a relationship which has been identified in previous periods of Australian history. [32] This finding supports the view expressed in the Issues Paper concerning the association between the increasing incidence of de facto relationships and the present climate of economic uncertainty.

3.47 In the age group 30-49 years (which accounts for 114,845 persons, or 34 per cent of all de facto partners) the employment situation changes. The employment pattern for men living in de facto relationships is almost identical with that for married men, although higher proportions are unemployed. The labour force participation rate for women living in de facto relationships in the age group 30-39 years is, at 70 per cent Much higher than the participation rate for wives (56 per cent). This is consistent with the presence of dependent children for 65 percent of the female de facto partners compared with 91 percent of the wives (Table 3.11). In the age group 40-49 years, when employment levels rise for all women living with a partner (indicating the easing of domestic and child care responsibilities), women in de facto relationships continue to have a higher level of labour force participation than married women in both age groups the unemployment rate for women de facto partners (averaging 14 per cent) is twice as high as the unemployment rates for married women and for single women indicating active job seeking, and a scarcity of job opportunities. [33] The much greater likelihood, in all age groups, for female, rather than male de facto partners, to be outside the labour force indicates that women's responsibility for child care persists in de facto relationships, as in marriages.

3.48 In the age group 50 years and over (comprising 27,640 people, or 8 per cent of all de facto partners) people in de facto relationships are more likely than both married and single people to be in the labour force. This is marked so for women. The proportion outside the labour force is smaller for de facto partners mainly because they are younger: there where relatively few people over the age of 59 who identified themselves as living in de facto relationships.

Table 3.13: Employment Status by Marital Status by Sex and Age

Australia 1982

Age		Employed	Unemployed	Not in Labour Force	Total	Unemployment Rate (1)
		%	%	%	%	%
15-19 Years						
MARRIED						
Males	N=2,830	100	-	-	100	-
Females	N=22,090	35.1	10.3	54.6	100	22.7
DE FACTO						
Males	N=7,200	82.2	17.8	-	100	17.8
Females	N=21,040	44.2	26.8	29.1	100.1	37.8
NEVER MARRIED						
Males	N=404,540	76.8	14.8	8.4	100	16.2
Females	N=355,210	66.2	17.8	16.0	100	21.2
20-29 Years						
MARRIED						
Males	N=487,340	94.4	4.3	1.3	100	4.4
Females	N=696,940	50.8	5.3	43.9	100	9.4
DE FACTO						
Males	N=83,410	85.6	11.4	3.0	100	11.8
Females	N=83,190	71.6	8.7	19.7	100	10.8
NEVER MARRIED						
Males	N=654,210	83.6	9.4	7.0	100	10.1
Females	N=407,410	77.6	10.6	11.8	100	12.0
30-39 Years						
MARRIED						
Males	N=902,160	95.6	2.6	1.8	100	2.6
Females	N=892,040	51.5	4.5	44.0	100	8.0
DE FACTO						
Males	N=41,850	93.3	5.6	1.1	100	5.7
Females	N=33,650	59.6	10.8	29.6	100	15.3
NEVER MARRIED						
Males	N=120,630	84.1	6.3	9.6	100	7.0
Females	N=67,380	79.4	5.5	15.1	100	6.5
40-49 Years						
MARRIED						
Males	N=703,060	94.4	2.3	3.3	100	2.4
Females	N=655,250	57.3	3.7	39.0	100	6.0
DE FACTO						
Males	N=22,750	91.5	5.9	2.6	100	6.0
Females	N=16,600	64.9	8.9	26.2	100	12.0
NEVER MARRIED						
Males	N=54,950	78.8	7.9	13.3	100	9.1
Females	N=29,580	72.4	3.4	24.2	100	4.5
50 Years and Over						
MARRIED						
Males	N=1,331,840	54.4	1.5	44.1	100	2.7
Females	N=1,087,070	23.2	0.8	76.0	100	3.3
DE FACTO						
Males	N=15,650	64.9	6.9	28.2	100	9.6
Females	N=11,990	42.1	4.4	53.5	100	9.5

NEVER MARRIED						
Males	N=105,470	48.8	4.7	46.5	100	8.8
Females	N=104,420	20.7	1.6	77.7	100	7.2

(1) The unemployment rate is defined as the number of persons unemployed expressed as a percentage of persons in the labour force.

Source: ABS, *Australian Families*, 1982, Unpublished Tables

C. Categories of De Facto Relationships

3.49 The preceding analysis of dependent children in the family and of the labour force status of de facto partners allows four broad categories of de facto cohabitation to be identified. There are differences among these categories, according to the age and extent of labour force participation of the partners and the presence of dependent children.

The first category consists of young de facto partners, between the ages of 15 and 19 years (approximately 8 per cent of all de facto partners). The unemployment rate among these de facto partners is higher for both men and women, but particularly for women in comparison with those in this age group who are married or single. Unemployment rates are 18 per cent for the women and 18 per cent for the men it can be inferred that for many in this group living together provides companionship and intimacy in a situation where the economic responsibilities associated traditionally and legally with marriage appear very difficult to fulfill. Since women typically perform child care functions, one quarter of the women in this category are responsible for the care of dependent children.

The second category comprises approximately half of all de facto partners. The partners are aged 20 to 29 years, and their employment position is very similar to that of single people. Compared with married women in this age group, women living with a de facto partner are much less likely to be outside the labour force. This may reflect the fact that slightly under one third of these de facto partners have dependent children in their family compared with 63 per cent of the married women

De facto relationships in this age group would appear to represent an alternative domestic relationship, characterised by the partners economic independence (or interdependence) and the postponement of child birth (or the decision not to have children), perhaps influenced by an insecure economic climate. The unemployment rate for the men in this group (at 12 per cent), is nearly 3 times higher than the rate for married men, while women's unemployment rate (at 11 per cent) is similar to that of other women, both married and single in this age group.

A third category of de facto partners, approximately 34 per cent of the total are aged between 30 and 49 years. The employment position of the men is very similar to that of married men, except for higher rates of unemployment. The employment position of the women is similar to that of married women which suggests that child care responsibilities and job scarcity have a similar impact on all women living with partners in this age group. 41 per cent of women in de facto relationships in this age group do not have a job, like 49 per cent of wives. The major difference is that women in de facto relationships have consistently higher labour force participation rates and higher unemployment rates. De facto relationships in this age group would appear to represent an alternative domestic relationship, very similar to marriage, with 60 per cent of families containing children of the relationship or of a previous marriage or relationship. The similarity with marriage, given the age group, suggests that a large proportion of this group consists of people who have been separated or divorced.

A small proportion of de facto partners (27,640 people, approximately 8 per cent) are 50 years of age and over. In this group only a very small proportion of women, less than 10

per cent have dependent children in the family (Table 3.11). This simply reflects a stage of the life-cycle when children whether of previous marriages or of the current relationship, have passed the age of dependence. This group probably consists largely of partners who have been previously married, and who are divorced, separated or widowed. Their pattern of employment activity shows higher unemployment rates for both men and women compared with married couples, and higher labour force participation rates, particularly for women. Like married people in this age group, at least 50 per cent of the women de facto partners are not in the labour force and therefore likely to be economically dependent.

3.50 We do not wish to give the impression that these four categories are separate and distinct. Rather they should be seen as a continuum in which the characteristics of cohabitation are determined in part by the age of the partners; their formal marital status; the presence (or absence) of dependent children, the labour force status of both partners, and the extent to which women are outside the labour force, usually because of their domestic and child care responsibilities. The categories illustrate some of the characteristics associated with cohabitation at different stages of the life- cycle. They also help identify the issues which should be considered by policy makers.

D. De Facto Partners and Income Distribution

3.51 There are no figures available on incomes of de facto partners across all age groups. For the group aged 18-34 years we have data from the Family Formation Project of the IFS. Since for men income levels rise with increasing age (at least in this age group), it is not surprising to find that men in de facto relationships earn less than married men. This is partly because the married group, on average, are older. For women, for whom in general income levels are determined by the extent of child care responsibilities and hence access to employment, de facto partners have higher incomes than married women with children. As we have seen, a smaller proportion of women in de facto relationships, compared to married women have the care of dependent children in this age group. Overall, women in de facto relationships earn less than married women without children, a finding which highlights the crucial importance of child care responsibilities in determining income.

3.52 Younger de facto partners tend to have an income pattern very similar to that of single people of similar age, and to have lower incomes on average than married men and childless wives. Women's access to income and their level of income is less than that of mean related in part to their responsibility for house- work and child care and their consequent lower rates of labour force participation and the greater likelihood that they will be working part-time.

3.53 In conclusion female de facto partners, when compared with wives are less likely to be responsible for the care of dependent children and have higher labour force participate response ton rates in all age groups. But in comparison with male de facto partners, they have consistently lower labour force participation rates and consistently lower levels of full-time employment and reduced access to income, [34] indicating both the persistence of women's responsibility for child care and housework and higher levels of female unemployment.

3.54 It would be incorrect, however, to conclude from the ABS Family Survey and the IFS Family Formation Project that all de facto partners in their own relationships follow the traditional domestic division of labour characterised by women's withdrawal from the labour force, their reduced access to earned income and their consequent financial dependence. Studies conducted by Antill and Cunningham and Sarantakos, [35] taken with the ABS data showing relatively high labour force participation rates for women de facto partners aged 20-29, suggest that a significant proportion of de facto relationships are characterised by the economic independence or interdependence of the parties, particularly where there are no children Antill and Cunningham found that de facto partners were more likely than married people to express awareness of issues concerned with women's rights and to attempt in their own relationship to change the traditional gender divisions of house work and bread-winning

tasks. However, where there are children within the relationship, it seems that the traditional division of tasks tends to re-emerge, resulting in women's reduced labour force activity and reduced income.

E. Housing Occupancy

3.55 Figures compiled by the ABS show that couples living in de facto relationships have a much lower rate of home ownership and home purchase in comparison with married couples: 34 per cent of de facto couples are living in homes which are being purchased or owned outright, in comparison with 81 per cent of married couples. A further 56 per cent of de facto couples are private tenants, 3 per cent are tenants in public authority housing, and 5 per cent are living in rent-free accommodation. By comparison, 11 per cent of married couples are private tenants, 4 per cent are tenants in public housing and 3 per cent are living in rent-free accommodation.

3.56 The apparently low rate of home ownership for de facto couples is, no doubt related to their relative youth and to their labour force and income position. As we have seem nearly two thirds of de facto partners have not been married previously. Their employment position and pattern of income distribution are, for those under 30, comparable with single people. The financial situation of young de facto couples (which, in general is less secure than that of married couples) is clearly important in explaining their relatively high rates of tenancy and lower rates of home ownership. While there is no direct evidence on this issue, it also appears likely that, in the early years of a relationship, partners may not have reached a stage of emotional commitment at which they are prepared to make the necessary long-term financial commitment involved in a substantial purchase.

3.57 Although no statistical information is available, it is probable that the 34 per cent of de facto couples who are home owners or purchasers tend to be older (that is, over 30), and to have been married previously. Other sources of information' suggest that de facto partners may live together in a home owned by one of the partners (in some cases a former matrimonial home), or in a jointly owned home. Although home ownership is less common for de facto partners, Our survey of legal practitioners (paragraph 3.67) showed that disputes over the distribution of property (usually housing) constituted one of the major problems in respect of which people living in de facto relationships sought legal advice.

F. Policy Implications

3.58 The major policy implications of this analysis of the socio-economic position of de facto partners are these:

> There is evidence (derived from labour force participation rates) that in many instances both de facto partners make financial contributions to the running and maintenance of the household. This may be important in cases where one partner holds the legal title to property and perhaps is nominally responsible for mortgage repayments on the home.
>
> A significant proportion of de facto relationships involve child care responsibilities which preclude or minimise the opportunity for income-earning employment by one partner, usually the woman. While the proportion is less than for married couples, the evidence strongly demonstrates that women contribute to de facto relationships as homemakers and parents.
>
> There is a strong attachment to the labour force (that is, to paid employment and active search for work) on the part of both men and women in de facto relationships. This is influenced by the lower proportion of de facto partners, compared to married couples, who have dependent children. It would seem that the traditional concept of female dependence and male responsibility for support is less in evidence in de facto relationships than in marriage (where this concept is also undergoing social and legal changes).

An examination of unemployment rates, income distribution and housing occupancy shows a consistent tendency for men in de facto relationships to be at a financial disadvantage in comparison with married men, particularly in the younger age groups.

V. THE NATURE OF LEGAL PROBLEMS

A. The Need for Information

3.59 People living in de facto relationships do not necessarily encounter legal problems any more often than married persons. However, knowledge of the kinds of. legal problems experienced by de facto partners is essential for an informed evaluation of the current law.

3.60 Decisions of courts in cases involving disputes between de facto partners are an obvious source of information and accordingly we have looked at a large number of reported and unreported judgments. But these cases probably represent only the tip of the iceberg. There is no ready means of determining the total number of cases involving de facto partners which are commenced in all courts in New South Wales. More to the point, many potential disputes or claims do not enter the court system. This may be because de facto partners do not perceive the problem as involving a legal issue, or do not have access to legal advice. If they do receive advice, they may be told that they have no claim under existing law, or the dispute may be settled by agreement before litigation is commenced.

3.61 We thought it important to attempt some assessment of the extent of de facto partners' contacts with the legal system, other than in the form of cases decided by superior courts. Information on explicit legal problems, or on problems which might have a legal aspect was collected from five sources.

A survey of legal practitioners practising in various parts of New South Wales, in order to ascertain the kinds of problems in respect of which de facto partners seek legal advice; the extent to which such problems are referred to legal practitioners, and the attitudes of legal practitioners to the adequacy of existing laws affecting de facto relationships.

A similar survey of welfare workers. Evidence from case studies shows that poorer people are very likely to refer family and domestic problems to social workers and welfare workers, rather than to solicitors.

Case studies compiled at an "Open House" which we conducted in the Sydney suburb of Glebe in April 1982, and which members of the public were invited to attend.

Further interviews conducted by us. People who were living, or who had lived, in a de facto relationship were invited to contact the Commission if they were willing to be interviewed about any legal or related problems associated with their relationship.

A record-keeping project designed to provide information on legal problems which come to the attention of chamber magistrates.

B. Survey of Legal Practitioners, Conducted April-June, 1982

3.62 A sample of legal practitioners was drawn from the following sources-those attending a seminar on "The Law and De Facto Relationships" held by the Commission in April 1982; a random selection of members of the Western Suburbs Law Society, the Eastern Suburbs Law Society, the Newcastle Law Society, the Wollongong and District Law Society and the Southern Tablelands Solicitors' Association, and all members of the Family Law Practitioners' Association.

3.63 Two hundred and ninety four legal practitioners replied to the questionnaire which was either mailed to them or distributed at the seminar (a response rate of 63 per cent). Of the respondents, 56 (19 per cent) indicated that they had not been approached in the previous

twelve months for legal advice about a problem arising out of a de facto relationship. The following account of the survey s findings is based on information provided by the remaining 238 legal practitioners who had advised on de facto matters in the preceding twelve months (referred to below as “the sample”).

3.64 At the outset it must be emphasised that the findings of this survey cannot be considered representative of the practices of legal practitioners throughout the State. What these findings do provide is an indication of the types of legal issues associated with de facto relationships which clients have referred to the practitioners in the sample, the frequency with which such problems were referred to them and those practitioners own attitudes to the adequacy of existing laws in this area.

3.65 Of the 238 legal practitioners in the sample who had advised on matters connected with de facto relationships in the preceding twelve months, the vast majority (82 per cent) were solicitors in private practice, 10 percent were barristers, and 7 percent were solicitors in legal centres. Among the respondents who indicated their main areas of practice, the most common were family law, followed by conveyancing and litigation More than half of the sample were located either in the Sydney central business district (27 per cent), or in Sydney’s inner and outer suburbs (31 per cent). The remainder were located in other New South Wales cities (27 per cent) and in country towns (15 per cent).

3.66 Approximately half the sample indicated that they had advised between 1 to 5 clients on matters concerned with de facto relationships in the previous twelve months; one quarter of the sample had advised between 6 to 10 clients; and a further quarter had advised more than 10 clients. A tenth of the sample indicated that more than 20 clients had sought legal advice on de facto problems in the last year. It is significant that most of the sample (90 per cent) indicated that more than half of their clients were women.

3.67 Legal practitioners were asked to indicate the frequency with which they had advised on specific legal problems arising out of a de facto relationship. They were also asked whether the problem arose while the relationship continued, after separation or after the death of a partner. Advice was most commonly sought by clients who had separated from their partner or who were considering separation, and the most frequently occurring problems were claims relating to property and maintenance, followed by problems relating to the custody, guardianship and maintenance of children Advice was also sought, but less frequently, on problems of domestic violence and on cohabitation contracts. Clients who were in a continuing de facto relationship were also most likely to seek advice on issues of property and maintenance, and on issues relating to the custody, guardianship and maintenance of children. Problems of domestic violence, advice on cohabitation contracts and on matters of succession on the death of a partner were also referred by clients in a continuing relationship, but with less frequency than matters relating to property and maintenance, and matters relating to children. The sample of legal practitioners indicated relatively few instances of advice being sought by people whose partner had died. As would be expected, all clients in this category were concerned with problems relating to succession on death including claims for provision from the estate of the deceased and property claims against that estate.

3.68 In summary the main legal problems concerning de facto relationships referred to the legal practitioners in the sample were:

- claims relating to the property and maintenance of partners;
- matters of custody, guardianship and maintenance of children;
- cases involving domestic violence;
- matters relating to succession on the death of a partner; and
- requests for advice on cohabitation contracts.

3.69 Asked for their opinion on the laws relating to de facto relationships, a significant majority of legal practitioners in the sample (80 per cent) indicated dissatisfaction with the current state of the law. In particular, existing property laws were most commonly identified as unsatisfactory and in need of reform. Issues relating to custody and access of children, succession on death and the problems created by overlapping state and federal Jurisdictions were also cited as matters of concern.

C. Survey of Welfare Workers, Conducted May-July, 1982

3.70 The sample used in this survey comprised a list of members of the Australian Association of Social Workers in New South Wales, staff of the district offices of the Department of Youth and Community Services, and welfare workers attached to Women's Refuges. The choice of the sample was not intended to be representative of social workers' and welfare workers practices. The intention was to collect information on the nature of problems arising from de facto relationships which people refer to the several points of entry into the welfare system.

3.71 Of the 134 welfare workers who replied to the questionnaire and who had advised clients on problems arising out of a de facto relationship in the previous twelve months, 30 per cent were employed in health related services, 20 per cent in the district offices of the Department of Youth and Community Services, a further 17 per cent in other agencies of State and Commonwealth government, 20 per cent in women's refuges, 10 per cent in voluntary agencies and 3 per cent in private practice. The majority of respondents were located in Sydney. 43 per cent were in the city and inner suburbs, 34 percent in the outer suburbs and the remaining 23 per cent were located in other New South Wales cities and country areas. [37]

3.72 Forty per cent of the sample had advised from 1 to 10 clients in the preceding year on matters arising from a de facto relationship. A further 40 per cent had advised 11 to 50 clients, and 20 per cent had advised more than 50 clients, One third of the sample indicated that they were approached "very often" for advice on de facto matters, that is, they saw one or more clients each week. To an even more marked extent than was noted by legal practitioners, clients of welfare workers seeking such advice are likely to be women. Three quarters of the respondents noted that over 80 per cent of their clients in this category were women. This is partially a reflection of a general tendency for women rather than men to be clients of the government and non-government welfare systems. But since the clients of legal practitioners seeking advice on de facto matters were also more likely to be women it is fair to conclude that the problems arising from de facto relationships are more likely to induce women rather than men to seek assistance and advice of either a legal or a welfare nature. It should be added that any division into "legal" or "welfare" problems is somewhat artificial since legal problems often entail a welfare component (for example, problems of maintenance), and problems which clients define as a welfare problem (for example, protection from domestic violence) also raise significant legal issues.

3.73 Welfare workers in our sample were most likely to be approached for advice by clients who had separated from a de facto partner, or who were in the process of separation. Problems relating to property and the support of the client, and those concerning maintenance and custody of children were the most common. Problems relating to social security entitlements and to domestic violence were also raised, but less frequently. Clients living in a continuing de facto relationship also sought advice on matters relating to property and personal maintenance, maintenance and custody of children, and to a lesser extent, problems of domestic violence. Social security issues arose somewhat more frequently among clients in this category. Welfare workers were less likely than are lawyers to see clients whose de facto partner had died. The problems arising for these clients were predominantly connected with succession to property.

3.74 In summary the main problems concerning de facto relationships which were referred to our sample of welfare workers were:

claims relating to property and maintenance of partners;

matters of custody, guardianship and maintenance of children;

matters relating to social security entitlements;

cases involving domestic violence; and

matters relating to succession on the death of a partner.

3.75 Asked to point to the factors which they thought led to their client need to seek assistance, the sample of welfare workers indicated, almost unanimously, that the clients lack of knowledge of the rights and obligations of de facto partners had been a contributing factor. Three quarters of the respondents indicated that further contributory factors included legal rules which do not give the same protection to de facto partners as to married persons, and the rules regulating eligibility for social security benefits. A substantial minority of the welfare workers in the sample indicated that they themselves were uncertain of the legal position of de facto partners and their families.

D. Conclusions from Legal Practitioners' and Welfare Workers' Surveys

3.76 The results of these two surveys indicate that substantial numbers of people seek professional assistance from legal practitioners and welfare workers on matters connected with their de facto relationships. Advice can be sought at various stages of the relationship, but most frequently after the parties have separated. Clients seek advice most frequently on claims concerning property and maintenance and in relation to the custody, guardianship and maintenance of children.

3.77 There can be little doubt from the evidence of both surveys, that it is predominantly women who seek advice on legal and welfare problems arising from de facto cohabitation A significant majority of the legal practitioners indicated dissatisfaction with the current laws regulating the property claims of de facto partners, and also expressed concern with issues relating to custody and access of children and the problem of divided jurisdictions in the area of family law. The majority of welfare workers indicated that their clients lacked knowledge of the rights and obligations of de facto partners and were affected by rules which do not provide the same protection to de facto partners as to married persons.

E. Analysis of Case Studies

3.78 In the following paragraphs we present information derived from 27 case studies of people who were living or who had lived in a de facto relationship. The studies are based on interviews with people who volunteered to be interviewed by the Commission and with those who attended the 'Open-House' conducted by the Commission (paragraph 1.14). These interviews provide further information, albeit of an impressionistic kind, about the nature of the legal problems and inquiries which arise out of de facto relationships. They also show the partners own perceptions of these matters.

Continuing Relationships

3.79 People living in a continuing relationship (15 of the people interviewed) perceived the major legal problem to be the need for clarification and protection of their respective property rights. In this group the period of cohabitation ranged from 2 to 11 years, and property held by the parties included the home and, in some cases, business interests.

3.80 Most interviewees believed that cohabitation contracts should be legally recognised and enforceable, and that partners should be able to use them to express and protect their respective interests. Women in this category were particularly interested in cohabitation

contracts because of their perception that New South Wales property laws do not provide them with the same protection as married women have under the Family Law Act.

3.81 Most particularly the women also believed that State property laws should recognise partners' respective contributions to the financial assets of the couple.

3.82 There was a unanimous view that the rights and obligations of de facto partners require clarification and that information should be widely disseminated through community education programs. Few were aware of their legal position in relation to wills, intestacy, accident compensation and superannuation.

3.83 Where a couple had children of the relationship or were contemplating having children, there was concern over the status of children and the custody and guardianship rights of the respective partners. One recurring issue was the partners concern about their status as each others "next-of-kin" both on death of a partner and in their dealings with third parties, for example, relatives, financial institutions, hospitals and nursing homes. There was concern that the status of de facto partners was ill defined, their rights and obligations unclear and their contributions to the relationship not as likely to be recognised as those of married people.

Separated Couples

3.84 Interviews with people who had separated, or were intending to separate, can be divided into two categories. First, those where disputes over property settlement constituted the major legal issue (6 cases) and, secondly, those where the legal welfare concerns confronting the female partner were protection from domestic violence, maintenance of self and children, clarification of matters relating to custody and access of children, and homelessness (6 cases).

3.85 Where property settlement was the major issue, typically both partners were employed and had acquired property in the form of housing and sometimes business assets. The duration of cohabitation ranged from 7 to 12 years. Partners in this situation were concerned about recognition of their respective property rights, and women in particular believed that their contributions would not be taken adequately into account.

3.86 The women who had experienced domestic violence did not mention claims to property in housing or business, but they did indicate problems of ownership of personal property (such as household furniture and appliances) and of money in Joint bank or building society accounts. The duration of cohabitation for this group was from 1 to 7 years. All the women had dependent children, were in receipt of supporting parents benefit as the only source of income, were temporarily resident in women's refuges and were, in effect, homeless. All were hoping to be placed in public authority housing, so that they would not have to return to their previous domestic situation where they feared further violence. Most women in this category did not intend to seek maintenance for their children from their former partner. The reasons they gave were that they did not believe that he could or would pay, they feared further assault, and they placed greater trust in the security of government benefit It was unusual for women in this situation to define their maintenance/housing problems as legal matters, but they did see protection from domestic violence as a legal issue and sought the same protection as that available to married women.

F. The Experiences of Chamber Magistrates

3.87 We asked chamber magistrates at a representative selection of 23 court houses distributed throughout the Sydney area and other cities, towns and rural districts to record all the requests for advice received over a four week period in June-July 1982, from people in de facto relationships. (Chamber magistrates are court officials attached to Courts of Petty Sessions, who provide a well- known legal advice service). Chamber magistrates were asked to assign these inquiries to one of 10 categories of problem. All courts except one reported

receiving some inquiries on de facto matters, with the busiest court recording 40 inquiries over the four weeks. In all 288 inquiries were recorded.

3.88 By far the largest number of inquiries related to custody, access or maintenance of children - 40 per cent of all inquiries. We made no attempt to assess at what stage in the relationship the inquiry was made, nor to differentiate between children born to de facto partners and other children living in the household. It is possible that some of these 116 inquiries did not arise out of de facto relationships in the sense in which we use the term but relate to custody and maintenance problems of ex nuptial children.

3.89 The next most frequently referred problems were domestic violence (24 per cent),and matters related to possession of personal property, and ownership or occupation of a house or flat (property matters broadly defined accounted for 24 per cent). Inquiries were also reported in relation to liability for a partner's debts, social security matters, and maintenance for self or partner.

3.90 Because of the rather haphazard nature of this sort of record-keeping exercise it is not possible to analyse the results with any precision. But we are satisfied that the rough figures show that substantial numbers of people in de facto relationships approach chamber magistrates for assistance. The most frequently sought advice relates to children, property and protection from domestic violence.

G. Conclusions

3.91 A consistent pattern emerges from the surveys of legal practitioners, welfare workers and chamber magistrates, and the interviews with de facto partners.

> Substantial numbers of people living in de facto relationships seek advice on legal and welfare problems connected with those relationships.
>
> Advice is most frequently sought in relation to property claims, both on separation or on the death of one partner. Advice is also frequently sought in relation to custody and maintenance of children Other issues, such as protection from domestic violence, status as "next of kin", and entitlement to social security, are important to many de facto partners.
>
> Both legal practitioners and welfare workers report that women de facto partners seek advice more often than men.
>
> There is considerable dissatisfaction with the current state of the law, both on the part of legal practitioners and welfare workers and their clients, particularly in relation to property claims and protection from domestic violence. There were also frequent calls for the law to be clarified and simplified.
>
> De facto partners in continuing relationships expressed interest in cohabitation agreements as a means of regulating their affairs.

FOOTNOTES

1. New South Wales Law Reform Commission, Issues Paper *De Facto Relationships* (1981), pp.14-22.

2. We are very grateful to the ABS for generously making available preliminary results of the Family Survey.

3. We are very grateful to Dr. Don Edgar, Director of the Institute of Family Studies, for making the results of the Family Formation Project available to us.

4. The form of the question on marital status in the ABS Family Survey Questionnaire was:

One of the main interests of this survey is to measure the number of different marriage and family living arrangements in Australia.

Which number on this card best describes your present arrangement:

married - 1

de facto - living with someone as married - 2

separated but not divorced - 3

divorced - 4

widowed - 5

never married - 6

The preliminary report of the Family Survey is titled: ABS, *Australian Families 1982,* Preliminary (Cat No.4407.0, December, 1982).

5. Personal communication ABS officers.

6. E D Macklin, “Non Traditional Family Forms: A Decade of Research”, 42 Journal *of Marriage and the* Family, (1980); P. Glick and G.B. Spanier, “Married and Unmarried Cohabitation in the United States”, 42 Journal *of Marriage and the Family,* (1980); J. Trost, Unmarried Cohabitation (Vasterad, 1979), A. Brown and K Kiernan, “Cohabitation in Great Britain: Evidence from the General Household Survey”, Population Trends, 25. (1981).

7. J Trost, note 6 above, Ch.3; A Brown and K Kiernan note 6 above.

8. New Zealand Census, 1981. Tables made available to the Commission by the New Zealand Department of Statistics.

9. E D Macklin, note 6 above.

10. A. Brown and K Kiernan, note 6 above.

11. In the Issues Paper we estimated that, on the 1976 Census figures, about 45 per cent of households comprised of de facto couples were “headed” by a never-married person. This compares with 63 per cent in the 1982 figures. *De Facto Relationships,* p.17.

12. The situation in Britain is very similar. The General Household Survey (1979) showed that 8 per cent of single women, 16 per cent of separated women and 20 per cent of divorced women aged 18 to 49 years were living with a partner. A. Brown and K Kiernan, note 6 above, p.3. And see also note 11 above.

13. A Brown and K Kiernan, note 6 above, p.6.

14. E Evatt R Watson and D McKenzie, “The Legal and Social Aspects of Cohabitation and the Reconstituted Family as a Social Problem”, in J M Eekelaar and S N Katz (eds), *Marriage and Cohabitation in Contemporary Societies* (Toronto, 1980), pp.398-407, at p.400.

15. *De Facto Relationships,* pp.18-20.

16. For evidence of stable, long-lasting marriage-like relationships in earlier period among poor rural populations or poor urban working class people, see P Lasiett K Ooesterveen and

P M Smith (eds.) *Bastardy and its Comparative History,* (London, 1980); PP Newcomb, “Cohabitation in America: An Assessment of Consequences” in 41 *Journal of Marriage and the Family*, (1979), pp.597-603, W O Weyrauch “Metamorphosis of Marriage: Formal and Informal Marriages in the United States” in J M Eekelaar and S N Katz (eds.), note 14 above; J Trost, “A Renewed Social Institution: Non-marital Cohabitation”', 21 *Acta Sociologica,* (1978), pp.303-315; J Trost, note 6 above.

17. J Caldwell, “Long Term Perspectives on the Australian Family” in D Davis *et al* (eds.) *Living Together Family Patterns and Life-Styles,* (Australian National University Canberra, 1980), pp.17-25.

18. P. McDonald, *Marriage in Australia: Age of First Marriage and Proportions Marrying* 1860-1971, (Australian National University, 1974).

19. K Jupp, “The Effect of the Family Law Act 1975 on the Institution of Marriage and the Family”, in Joint Select Committee, *Report on the Family Law Act*, (1980), vol.2, Appendix 3, p.27.

20. A Jordan, *As his Wife. Social Security law and policy on de Facto Marriage*, (Research paper No.16 Department of Social Security, Canberra, 1981). The legislation is discussed in detail in Chapter 4.

21. The year 1974 was a watershed in terms of marriage rates and unemployment rates: *De Facto* Relationships. p.18.

22. *Id*., pp.20-22.

23. See references given in note 6 above.

24. In the 1971 and 1976 census, dependent children were defined as children under the age of 16 years, and full-time students aged 16-20 years, In the 1982 Family Survey. Dependent children were defined as children under the age of 15 years, and full-time students aged 15-20 years.

25. See note 11 above. Similarly, a slight decrease in the proportion of de facto families with children has also been reported for the USA. See E D Macklin, note 6 above: P Glick and G B Spanier, note 6 above.

26. Cf. Fountain v. Alexander (1982) 56 ALJR 321.

27. B Cass, C Keens, D Wyndham, “The Costs of a Child: Direct and Indirect Costs” in A Graycar (ed), *Retreat from the Welfare State,* (Sydney, forthcoming).

28. P. Festy, “Aspects Demographiques de la Formation de la Famille en Europe Occidentale (with English Synopsis)” in J M Eekelaar and S N Katz. note 14 above.

29. A. Brown and K Kiernan, “Cohabitation in Great Britain: Evidence from the General Household Surveys”, *Population Trends,* 25 (HMSO, London, 1981).

30. The unemployment rate is defined as the number of persons unemployed (and actively seeking work) expressed as a percentage of the number in the labour force.

31. The position seems to be similar in the United States: P Glick and G B Spanier, note 6 above.

32. P F McDonald, note 18 above.

33. See note 30 above.

34. Analysis of unpublished information from the Institute of Family Studies.

35. J D Cunningham and J.K Antill “Cohabitation: Marriage of the Future?”, (paper presented at ANZAAS Congress. Auckland, 1979): S. Sarantako, *Living Together in Australia*, (Riverina College of Advanced Education, unpublished manuscript, 1982).

36. For example. reported court proceedings, such as *Seidler v. Schallhofer*, [1982] 2 NSWLR 80. The Department of Social Security compiles records relating to beneficiaries; see A Jordan, note 20 above; and A Jordan, *Sole Parents on Pensions*, (Research Paper No.18, Department of Social Security, Canberra, 1982).

37. We cannot draw any conclusions from this locational pattern because a similar pattern emerged for welfare workers who had not advised on de facto matters. We can only surmise that either more questionnaires reached potential respondents in the Sydney area than in the rest of the state, or that the other urban centres and rural New South Wales are less well served with social welfare facilities.

4. Current Law and Policy

I. INTRODUCTION

4.1 It is a useful if obvious, maxim in policy analysis that the right questions may yield the correct answers, while the wrong questions certainly will produce the wrong answers. One major purpose of our Issues Paper was to set out the background to the law governing de facto relationships and thereby clarify the policy questions raised by the reference.

4.2 The Issues Paper showed that the crucial issue in New South Wales (and for that matter, in Australia as a whole) is not whether the law should recognise de facto relationships. Both Commonwealth and State law have for many years, 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. The important question is how much further, if at all, the process of regulation should be taken.

4.3 To answer this question, it will be necessary to examine a range of material, including the models for change proposed in our Issues Paper and the submissions made to us in the course of the reference. It will also be necessary to identify criteria which will assist in making any policy judgments that may be required. A useful starting point is to consider the extent to which the current law recognises de facto relationships, for the purpose of both conferring benefits and imposing obligations on people living in these relationships. This not only shows the ways in which the law recognises and regulates de facto relationships, but also sheds light on the policies embodied in the existing law. This Chapter surveys current law and policy.

II. LAW AND PUBLIC POLICY

4.4 The question of the relationship between law and public policy on de facto relationships was raised in an unusually direct way in *Seidler v. Schallhofer*, [1] a decision of the Court of Appeal in New South Wales. The question for decision was whether an agreement between a cohabiting couple for a further limited period of cohabitation which was intended to be terminated either by marriage or separation was contrary to public policy (in the strict legal sense) and therefore unenforceable. The basis of the claim that the agreement contravened public policy was that it was entered into for a sexually immoral purpose, or was of a kind which would have a tendency to promote sexual immorality. Agreements of this kind have been said to infringe public policy and therefore to be illegal. [2] In this case, however, the court held that the agreement did not infringe public policy and was therefore enforceable between the parties, provided that other requirements of contract law were met Care should be taken in interpreting the scope of the actual decision, since the agreement was made between a couple who were *already* cohabiting and it contemplated, as one option, the subsequent marriage of the parties. Thus, the decision does not necessarily mean that all agreements between cohabiting couples will be held not to infringe public policy. Nonetheless, the observations on public policy made by members of the Court of Appeal are of general significance.

4.5 Mr Justice Hope (with whom Mr Justice Reynolds agreed on this issue) said he was prepared to assume that in past generations an agreement of this kind would have been regarded as infringing public policy. However, in his view, public policy was capable of change in accordance with developments in community attitudes and these had changed sufficiently to enable the agreement to be enforceable. He referred to Commonwealth and State statutes giving rights to “de facto widows” as recognising that

> “sufficient people live in such a relationship now a days that it is necessary to make provision for them in the way in which it is made for persons who have been lawfully

> married, and [as] evidence that the legislatures do not consider that the encouragement of 'illicit' relationships by the conferring of these benefits is contrary to public policy." [3]

His Honour then referred to reported decisions and other material suggesting a significant change in "acceptable moral standards".

> "It is trite to say that there have been immense social changes in the last forty to fifty years. Those social changes go beyond sexual morality, but undoubtedly the standards of sexual morality accepted by the community have undergone some change .... [T] here is a mass of publicly accessible material on the subject .... There is of course much material... rejecting any concept of extramarital cohabitation. This material must be taken into account *but it seems to me to evidence an objection to a change that has occurred and is proceeding rather than the retention of accepted standards*." [4] (Italics supplied)

4.6 Mr Justice Hope then expressed his conclusions on the legal issue before him by reference to the particular facts of the case.

> "It maybe that the ideas prevailing in this community as to the conditions necessary for its welfare have changed to the extent that the living together of a man and woman without marriage, will not generally be regarded as infringing the acceptable standards required by the community. It is however not necessary to decide this question it is only necessary to consider whether an agreement for, or tending to promote, the continuation of a cohabitation already commenced, for a limited period in order to end it by marriage or separation is not contrary to those ideas." [5]

4.7 The third member of the court, Mr Justice Hutley was, if anything, more emphatic about the legislative trend.

> "The encouragement of de facto relationships by the State and Commonwealth if occurring on a substantial scale and over a wide spectrum of legal relationships, requires... the judicial condemnations of such relationships as immoral so that they are unenforceable, to be discarded. Whatever may be the moralists' stand, judges can hardly characterise what legislation encourages as immoral." [6]

4.8 His Honour then referred to a variety of Commonwealth Acts under which persons living in de facto relationships were entitled to benefits. [7] The legislative pattern prevented it being said that Commonwealth law should refuse to recognise de facto relationships. State legislation in Mr. JusticeHutley's opinion led to a similar result. In particular, he emphasised the significance of the Anti-Discrimination Act 1977, which prohibited certain discrimination on the basis of marital status, a term defined to include "the status or condition of being ... in cohabitation otherwise than in marriage, with a person of the opposite sex". [8]

> "If an employer or a provider of accommodation cannot object to the lack of marital status of employees or lodgers, it is unrealistic to describe the relationship as legally immoral or object to the parties regulating by enforceable agreements their property relationships. Though the legal recognition of such relationships can only encourage them the legislature has already led the way in this direction so positively that it is futile for the courts to continue to protest". [9]

4.9 In our view, perhaps the most important point to emerge from the judgments of the Court of Appeal is that legislation in force in New South Wales reflects substantial changes in the policy of the law towards de facto relationships. It is no longer possible, whatever the position in earlier generations, to contend that the predominant purpose of the law in this area must be to give effect to community disapproval of cohabitation outside marriage. Current law simply does not embody a consistent policy of discouragement by penalising or withholding advantages from people choosing to live together outside marriage. The trend identified in *Seidler v. Schallhofer* has continued in New South Wales with the passage of the Family

Provision Act, 1982, which recognises a de facto partner as a "status applicant in proceedings under that Act, [10] and of the Crimes (Domestic Violence) Amendment Act, 1982, which creates identical remedies for married persons and de facto partners experiencing domestic violence. [11] This, of course, is not the same thing as saying that de facto partners must be treated as married persons for all purposes. In Chapter 5 we give our reasons for rejecting such an approach. But it does mean that any assessment of policy issues should not be based on the assumption that further regulation of de facto relationships, whether by way of conferring benefits or imposing liabilities, would necessarily involve an abrupt departure from the current law and from the policy underlying that law.

4.10 We now examine in more detail the extent to which Commonwealth and State legislation recognises and regulates de facto relationships.

III. COMMONWEALTH LEGISLATION

A. The Social Security System

1. The General Philosophy

4.11 In Australia, income maintenance programs are largely the responsibility of the Commonwealth, the legislative framework being provided by the Social Security Act 1947. [12] In our Issues Paper, after explaining some of the benefits available to de facto spouses under the legislation we said that:

> "[e]ntitlement to social security benefits in Australia is governed by the general principle that an unmarried couple, living together as man and wife on a bona fide domestic basis, ought not to be treated more favourably than a married couple in a similar financial position"

The Director-General of Social Security, in response to this assessment, suggested that our

> "statement would accurately reflect the true position if the words 'or less' were inserted after the word 'more' ... [T]he policy reflected in the provisions of the Social [Security] Act is a completely even handed one. For example, whilst it is true that a woman who is living with a man as his wife on a bona fide domestic basis is not eligible to receive [a] widows' pension or supporting parents benefit she will be treated as the man's wife for the purpose [of] the application of the married rate of unemployment benefit should the man be unemployed... [S]he would be eligible for [the] wife's pension if the man was an age or invalid pensioner, subject to the normal eligibility criteria. Accordingly, I Suggest that it is inaccurate to suggest that the existence of a de facto relationship is necessarily established for a purpose wholly or largely detrimental to the woman in respect of entitlement to social security benefits." [13]

4.12 It is perhaps a slight overstatement to contend that the Social Security Act 1947 is "completely even-handed" towards de facto partners. For example, a woman whose de facto partner has died is eligible for the widows' pension only if the relationship continued for at least three years immediately before the death of the man. [14] If, however, a widows' pensioner establishes a de facto relationship with a man, she is no longer qualified to receive the pension, regardless of the duration of the relationship. [15] Nonetheless, the observations of the Director-General support the view that the general policy underlying the social security legislation is not to discourage or penalise those living in de facto relationships, but to place de facto partners in broadly the same position as married couples for the purpose of entitlement and disentitlement to pension and benefits. This policy does not appear to have been the result of a specific decision to adopt an "even-handed" approach. It has emerged over a long period through administrative and legislative changes. [16]

2. Early Moves

4.13 The earliest Commonwealth it income maintenance program was established under the Invalid and Old-Age Pensions Act 1908, which provided non-contributory, means-tested invalid and old age pensions. This Act did not refer specifically to de facto relationships, but within a very short time the administrators adopted a policy that de facto couples should not be placed in a better position than a married couple. [17] Thus, where claimants were considered to be living together "as a married couple" without being married to each other, the rate of pension was limited to that payable to a married couple, rather than that payable to two unrelated individuals.

4.14 The first specific recognition of de facto relationships in Commonwealth legislation appeared in the Australian Soldiers' Repatriation Act 1920. This Act provided a pension to the wife of a deceased or incapacitated member of the Armed Forces, including a woman

> "recognised as the wife of [the] member although not legally married to him if the [Repatriation] Commissioner is satisfied that [the woman] was wholly or partly dependent upon the earnings of that member." [18]

3. Widows' Pensions

4.15 The next major development came with the introduction of the Commonwealth widows' pension scheme which from the outset, provided for certain classes of women whose de facto partners had died. The class of eligible beneficiaries under the Widows' Pensions Act 1942 included "de facto widows". The term "de facto widow" was defined to mean

> "a woman who, for not less than the three years immediately prior to the death of a man, was wholly or mainly maintained by him and, although not legally married to him lived with him as his wife on a permanent and bona fide basis." [19]

This definition appears not to have been based on earlier legislation but to have been specifically drafted for the purposes of this Act. [20]

4.16 The Act was amended the following year to discard the term "de facto widow", which as apparently considered to be offensive to some people, especially lawful widows. [21] A more obscure term "dependent female", was preferred, although the definition of dependent female was almost identical to that of "de facto widow". [22] This terminology and definition was carried over into the consolidated Social Services Act 1947 and remains in the legislation today. [23] The legislation therefore permits a woman who has lived with a man "as his wife on a permanent and bona fide domestic basis" and was "wholly or mainly maintained by him" for a period of at least three years prior to his death to claim the widows' pension, provided she meets the other eligibility criteria specified in the Act On 30 June 1982, approximately 1,150 "dependent females" were in receipt of the widows' pension in Australia. [24]

Age and Invalid Pensions

4.17 De facto relationships are also recognised in Part III of the Social Security Act 1947, which governs the payment of age and invalid pensions. A "dependent female" is eligible for the pension payable to the "wife" of an age or invalid pensioner. [25] The resources of a dependent female are also taken into account for the purposes of the income test applied, subject to certain exceptions, to persons claiming the age or invalid pension. [26]

4.18 The definition of "dependent females" in Part III of the Act is different from the definition employed for the purposes of determining eligibility for the widows' pension. The three year qualifying period, which was formerly in the definition was removed in 1975, as was the reference to the permanence of the relationship. [27] The current definition is as follows:

> “dependent female” means a woman who is living with a man ... as his wife on a *bona fide* domestic basis although not legally married to him”.

The term “dependent female”, as used in Part III of the Act, is of course anomalous since dependence forms no part of the definition. The definition is, however, significant since eligibility for a wife’s pension (as well as liability to have income taken into account) arises as soon as the woman begins to live with a man “as his wife on a bona fide domestic basis”.

5. Unemployment and Sickness Benefits

4.19 Yet another approach has been taken towards sickness and unemployment beneficiaries. An increased benefit may be payable in the discretion of the Director-General, where a woman

> "(a) is keeping house for [the] man ... and for one or more [of his] children...;
>
> (b) is not an employee of that man; and
>
> (c) is substantially dependent on that man.”[28]

In practice this provision may be used to increase payments to a beneficiary living with a de facto partner, although only if the requirements specified in the section are met.

6. Supporting Parents’ Benefit

4.20 A parent separated from his or her de facto partner or whose partner has died maybe eligible for the supporting parents’ benefit. However, entitlement to the benefit does not depend on the claimant having been a party to a marriage or to a de facto relationship. The major requirement is that the claimant have the custody, care and control of at least one child. The beneficiary, if married, must be living apart from his or her spouse; if a party to a de facto relationship, the beneficiary must have ceased to live with his or her partner on a bona fide domestic basis. [29] On 30 June 1982, of the 118,019 females receiving the supporting parents’ benefit 15,175 were described by the Department of Social Security as “separated de facto wives”. On the same date 1,129 of the 5,923 male supporting parents’ beneficiaries were described as “separated de facto husbands”. [30]

7. The Cohabitation Rule

4.21 In paragraph 4.11 we referred to the principle embodied in the Social Security Act 1947 that an unmarried couple, living together as husband and wife on a bona fide domestic basis should not be treated more favourably than a married couple in a similar position. The most controversial manifestation of the general principle is the so-called “cohabitation rule”, applied to widows’ pensioners and supporting parents’ beneficiaries. [31] The effect of the cohabitation rule is that a pension or benefit is refused to a claimant or withdrawn from a recipient who is cohabiting with another person as his or her spouse. The Act achieves this result, in the case of a widows’ pension by excluding from the definition of widow a “woman who is living with a man as his wife on a bona fide domestic basis although not legally married to him”. [32] The definition of “supporting mother” covers only a woman who “is not living with a man as his wife on a bona fide domestic basis although not legally married to him” and the definition of “supporting father” has a corresponding exclusion. [33]

4.22 The legislation establishing the cohabitation rule has received close consideration by the Administrative Appeals Tribunal. Since 1980 this Tribunal has had jurisdiction to hear certain appeals by claimants and beneficiaries against decisions by the Department of Social Security unfavourable to them. The Tribunals decisions are of considerable general significance, since the statutory language being construed is virtually identical to that found in other

Commonwealth and State legislation. We refer to these decisions later in the context of developing a definition of a de facto relationship for the purposes of our recommendations. [34]

B. Proceedings Under the Family Law Act

4.23 The Family Law Act 1975 recognises, expressly and by implication, the need to take into account the financial responsibilities associated with de facto relationships. I t does this in the context of determining claims by married persons for maintenance and adjustment of property.

1. Responsibilities to Other Persons

4.24 In assessing the financial resources of a party to a marriage, for the purposes of making a maintenance or property order, section 75 (2) (e) of the Act directs the court to consider the "responsibilities of either party to support any other person". Before the enactment of the Family Law Act, the needs of (say) a wife or former wife were given priority over any response ability which the husband may have had to support a second family. The implication was that the husband should not have undertaken further family responsibilities until he was able to meet his financial commitment to his first family. By contrast, section 75(2)(e) has been interpreted as requiring the court, in deciding whether to order the husband to pay maintenance, to take into account his moral obligations to his current family, even if he is living in a de facto relationship. In the leading case of *Soblusky and Soblusky* [35] the Full Court of the Family Court rejected a submission that a husband's commitment to his de facto partner ought to be disregarded or at least treated as secondary to the primary obligation of the husband to support his wife. The subsection required the court

> "to consider in a realistic way the fact that a party has assumed a responsibility to support another person .... To adopt a view that in every case the responsibility ... must be subjugated to the responsibility of the party to his or her spouse is ... to unduly restrict the scope of the [section] and may in particular circumstances produce a result which is unrealistic." [36]

4.25 This view of the Full Court has not escaped criticism. [37] In one case it was held by a single judge that to confer a financial advantage on a de facto partner to the detriment of the spouse and children of the marriage would be in conflict with section 43, which directs the court to have regard "to the need to preserve and protect the institution of marriage". [38] Despite these criticisms the approach taken in *Soblusky* has now been re-affirmed by the Full Court in *Axtell and Axtell*: [39]

> "It is unrealistic to ignore the fact that a man sharing a household with a woman and her children from a former marriage may need to make some contribution to their support. If there are grounds for believing that some other person (eg. the children's father) can and should be called on to contribute to the support of the children, this may affect the weight to be given to that matter. This is quite different from attempting to determine the issue by assigning priorities to one obligation or responsibility over another."

It follows that if a married man enters into a de facto relationship with a woman who, for example, has young children and cannot support herself, the wife's claim to maintenance may fall on the ground that the husband's limited resources are insufficient to support both families.

2. Financial Circumstances of Cohabitation

4.26 If an applicant for maintenance is cohabiting with another person, the court must take into account "the financial circumstances relating to the cohabitation". [40] Under the pre-existing law, a wife was likely to lose her entitlement to maintenance if she cohabited with another man. It is now clear that the fact that a wife is cohabiting with another man does not of itself disqualify her from maintenance. It is necessary to consider the financial circumstances

of the cohabitation to determine whether her claim to maintenance should be rejected or reduced. [41] This may place a party who enters into a de facto relationship at an advantage over one who remarries, since the Act states that remarriage automatically puts an end to a maintenance order unless in special circumstances the court otherwise orders. [42] On the other hand, where the person with whom a spouse is cohabiting has independent resources, those resources may be taken into account in maintenance proceedings between the spouses, and may influence the outcome, whether the cohabiting spouse is the applicant or the respondents. [43]

3. Other Circumstances

4.27 In maintenance and property claims the court is also to consider "any fact or circumstance which in the opinion of the court, the justice of the case requires to be taken into account". [44] This provision has been interpreted as allowing the court to consider the contributions made by a party during a period of cohabitation between the parties preceding their marriage, especially where children have been born and raised during that time. Thus, in one case where the parties had lived together for ten years before marriage, the court took into account financial and other contributions made by the wife during the period of cohabitation. [45] In short where a cohabiting couple ultimately marry, the whole period of cohabitation may be taken into account for the purposes of the Family Law Act rather than the duration of the marriage alone.

C. Commonwealth Income Tax

4.28 The Income Tax Assessment Act 1936 gives only limited recognition to de facto relationships for the purposes of determining an individual's liability to income tax For example, a taxpayer who contributes to the maintenance of certain dependents may be entitled to a concessional rebate. The term "dependent" includes a "spouse", but does not extend to a de facto partner of the taxpayer. [46] Thus the rebate cannot be claimed in respect of a dependent de facto partner. However, a taxpayer may claim a "housekeeper rebate" for a person who is "wholly engaged" in keeping house for the taxpayer and in caring for one or more of the taxpayer s children or other specified dependants. [47] A de facto partner of a taxpayer may qualify as a housekeeper for the purposes of this section.

4.29 A "sole parent" rebate may be claimed by a taxpayer who has the sole care of a child under 16 or a full-time student under 25. However, where a taxpayer is married, the rebate is not available unless "the Commission is of the opinion that because of special circumstances, it is just to allow a rebate". This restriction also applies to a man and woman who, during the relevant period "have lived together as husband and wife on a bona fide domestic basis although they were not legally married to each other". [48] Consequently a de facto partner is required to show special circumstances to obtain the sole parent rebate. It has been held that where the taxpayer has the sole financial responsibility for the child's welfare, this constitutes "special circumstances" for the purposes of claiming the rebate, notwithstanding that the taxpayer is living in a de facto relationship." [49]

D. Commonwealth Superannuation Fund

4.30 Under Part VI of the Superannuation Act 1976, a "spouse's benefit" is payable in the event of the death of a member of the Commonwealth Superannuation Fund. The term spouse is defined to include

> "a person who was not legally married to the deceased person at the time of the person's death but who, for a continuous period of not less than three years immediately preceding the person's death had ordinarily lived with the person as the person's husband or wife, as the case maybe, on a permanent and bona fide domestic basis."

A de facto partner of less than three years' standing may qualify if he or she was "wholly or substantially dependent" upon the deceased at the date of death Restrictions are applied to claims by de facto partners of less than five years standing, where the relationship began after the deceased had become a pensioner and turned 60 years of age. Temporary absences or absences through illness may be disregarded in assessing the length of cohabitation. [50]

4.31 A spouse may claim if the couple were living together at the time of death or if the Couple were living apart and the survivor was wholly or substantially dependent upon the deceased. It is therefore possible for a person to die leaving both a legal spouse and a de facto partner as claimants. In this event section 110(1) of the Act allows apportionment between the claimants by the Commissioner "having regard to the respective needs of those persons and to such other matters as he considers relevant".

E. Other Commonwealth Legislation

4.32 A number of Commonwealth Acts apart from those discussed, recognise de facto relationships for the purpose of conferring benefits available to married persons. [51] The eligibility requirements in the acts vary considerably. Thus, under the Seamen's Compensation Act 1911, a de facto wife of a deceased seaman may be entitled to compensation as a "member of the family" if she

> lived with the seaman on a permanent and bona fide domestic basis for not less than three years immediately, before his death;
>
> was wholly or mainly maintained by the seaman during that period; and
>
> is maintaining one or more children under 16, or is herself not less than 50 years of age.

Under the Defence Force Retirement and Death Benefits Act 1973, the "widow" (or "widower") of a member of the Defence Force may be entitled to a pension if she (or he) has lived with the deceased person on a permanent and *bone fide* domestic basis for a continuous period of not less than three years immediately before the deceased's death. Entitlement does not require proof of dependence, nor proof that the claimant has the custody of children however, a claimant who lived with the deceased for less than three years must show that she (or he) was "wholly or substantially' dependent on the deceased at the date of death. [52]

4.33 Despite the differing eligibility requirements, the Acts employ a standard definition to describe a party to a de facto relationship. That definition subject to minor variations in wording, is as follows:

> "a person who [on a specified date] was living with [another person] as husband and wife on a bona fide domestic basis although not legally married to that person."

Where there is a minimum period of cohabitation specified, the words "permanent and" are inserted before the words "*bona fide*". These definitions, as has been seen, are also used lathe Social Security Act 1947 and the Superannuation Act 1976, although the latter introduces the further requirement that the period of cohabitation be "continuous".

IV. NEW SOUTH WALES LEGISLATION

A. Anti-Discrimination

4.34 As recognised in the judgments in *Seidler v. Schallhofer* (paragraph 4.4) the Anti-Discrimination Act 1977, extends potentially far- reaching protection to de facto relationships. Under the Act, discrimination on the grounds of race, sex, physical and intellectual impairment homosexuality and marital status is declared unlawful in specified areas. The term "marital " is defined to include "the status or condition of being ... in cohabitation otherwise than in

marriage, with a person of the opposite sex". [53] Discrimination on the ground of marital status is specifically prohibited, subject to certain exemptions, where practised by: [54]

- employers, in relation to applicants for employment or employees;
- principals, in relation to commission agents;
- trade unions, in relation to applicants for membership or members;
- trade or professional qualifying bodies in relation to current practitioners or persons applying for authority to practise;
- employment agencies, in relation to persons wishing to use their services;
- providers of services to the public, in relation to customers or intending customers;
- providers of accommodation in relation to persons seeking accommodation or wishing accommodation;
- partnerships (of six or more persons) in relation to the offer of a position as partner;
- educational authorities (apart from private educational authorities), in relation to applicants for admission as students;
- registered clubs, in relation to applicants for membership.

4.35 The Act prohibits direct discrimination such as a refusal by an employer to make an offer of employment to a qualified person solely on the ground that that person lives in a de facto relationship (that is, cohabits, otherwise than in marriage, with a person of the opposite sex). Indirect discrimination which includes rules, practices or policies which although apparently even-handed, result in discrimination is also prohibited. The Act provides procedures for making complaints that discrimination has occurred and for the investigation, conciliation and, if necessary, adjudication of those complaints, by the Anti- Discrimination Board and the Equal Opportunity Tribunal. [55]

4.36 Curiously enough, the application of the Anti-Discrimination Act to discrimination on the ground of marital status attracted relatively little attention at the time the legislation was introduced. In the course of the debate in Parliament the Premier rejected the argument that the extension of the Act to protect persons living in de facto relationships broke new ground. The law of New South Wales, in the Workers' Compensation Act and elsewhere, had "already enshrined ... the concept of a status or condition that flows from a de facto relationship between a man and a woman". [56] Since the Act came into force neither the Anti-Discrimination Board nor the Equal Opportunity Tribunal has had occasion to interpret the Act in relation to cases involving alleged discrimination against persons living in de facto relationships. The precise reach of the legislation has therefore yet to be established. The Board has, however, prepared a report which considered, among other things, discrimination on the ground of marital status in State legislation and governmental policies and practices. [57] We refer to that report at greater length in Chapter 16.

B. Workers' Compensation

4.37 The Workers' Compensation Act 1926, recognises de facto relationships for the purpose of assessing compensation in respect of the death or injury of workers. This was not always the case. In 1927 it was held by the Workers' Compensation Commission that under the Act, as then framed, the de facto widow of a deceased worker was not a "dependant" and was therefore ineligible to receive compensation in respect of his death. [58] In 1951 the Act was amended to allow the de facto widow of a deceased worker to qualify as a dependent

provided she had lived with the worker for at least three years immediately before his death on a permanent and bona fide domestic basis. She was therefore entitled to compensation subject to proving total or partial dependence at the date of the worker's death to compensation where his death resulted from an industrial accident.

4.38 In 1978 the Anti-Discrimination Board recommended that the definition of "dependants" should be extended to include the de facto husband of a deceased female worker and that the requirement of three years cohabitation be deleted from the legislation. [59] These amendments were enacted in 1981. [60] Thus the surviving de facto partner of a worker whose death resulted from an industrial accident is entitled to compensation if he or she was wholly or partly dependent for support on the worker at the time of the worker's death. If there is more than one surviving dependent (as where the worker leaves i spouse and a de facto partner) the Workers' Compensation Commission is empowered to apportion the compensation among the dependants. [61] In addition, the fact that an incapacitated worker has a de facto partner who is "totally or mainly dependent for support on the worker, may be taken into account in determining the appropriate weekly payment during a period of incapacity. [62]

C. Family Provision

4.39 In 1977 this Commission recommended changes to the Testator's Family Maintenance and Guardianship of Infants Act 1916, which then governed claims for provision from the estate of a deceased person. [63] Under that Act claims could be made only by the surviving spouse, children and, in certain cases, the grandchildren of the deceased person. In our report we suggested that a wider range of persons should be eligible to claim family provision, but that the legislation should avoid prescribing classes of eligible applicants. Our reason was that "circumstances, not status, should control eligibility". [64] Accordingly, our report recommended that eligibility to claim family provision except in the case of the widow, widower, child or grandchild of the deceased, should be based on a three-fold test. Under this test a person would have been eligible to claim if he or she was:

> at any time wholly or partly dependent upon the deceased person;
>
> at any time a member of a household of which the deceased person was a member; and
>
> a person whom the deceased person ought not, in the opinion of the court, to have left without adequate provision for his or her proper maintenance, education or advancement in life. [65]

Subject to satisfying these three requirements, a surviving de facto partner of the deceased, or a former de facto partner of the deceased, would have been entitled to claim provision.

4.40 In December 1982, the New South Wales Parliament enacted the Family Provision Act 1982, which gave effect to many of the recommendations in our earlier report. Section 7 empowers the Supreme Court, on application by an "eligible person" to make provision for the maintenance, education or advancement of that person out of the estate or notional estate of a deceased person. The court is not to make an order for provision unless satisfied that the provision made in favour of the eligible person by the deceased person during his or her lifetime or out of his or her estate is inadequate, taking into account certain criteria specified in the legislation. [66]

4.41 The term "eligible person" is defined to include the widow, widower, child or former spouse of the deceased. The term also specifically includes a surviving de facto partner of the deceased, defined as a person who, at the time of the deceased s death was living with the deceased as his wife (or her husband) on a *bona fide* domestic basis. [67]

4.42 The definition of "eligible person" includes in paragraph (d), a person

> “(i) who was, at any particular time, wholly or partly dependent on the deceased person; and
>
> (ii) ... was, at that particular time or at any other time, a member of the household of which the deceased person was a member.” [68]

This test adopts the first two limbs of the test proposed in our 1977 report and, as noted above, covers a former de facto partner of the deceased, provided that he or she can establish sometime dependence (whole or partial) on the deceased. The third limb of the test proposed in our 1977 report is reflected in a different form, in section 9(1) of the 1982 Act. This directs the court to refuse to proceed with an application made by a person claiming under paragraph (d) unless it first determines whether

> “having regard to all of the circumstances of the case (whether past or present), there are factors which warrant the making of the application.” [69]

Thus a former de facto partner of the deceased may apply for a family provision order, but must first satisfy the court that there are circumstances which warrant the application. The applicant must then show that the criteria specified in the Act have been met and that an order is justified. Thus a surviving de facto partner is now automatically eligible to apply for family provision either on the basis of cohabitation at the date of the partner's death or if the survivor satisfies the dual tests of sometime dependence upon the deceased and sometime membership of the deceased’s household.

D. Domestic Violence

4.43 New remedies for domestic violence have been enacted in New South Wales by the Crimes (Domestic Violence) Act, 1982, which is examined in Chapter 14. This Act applies equally to married persons and to persons living in de facto relationships. At this stage it is sufficient to note that the legislation inserts into the Crimes Act, 1900, provisions relating specifically to apprehended violence between married persons or de facto partners. [70] Local Courts are empowered to impose restrictions or prohibitions on the behaviour of a person where there is a reasonable apprehension that the person will commit a domestic violence offence. A wilful failure to comply with the courts order is an offence, rendering the offender liable to arrest. The Act also clarifies and defines the power of the police to investigate or prevent domestic violence.

E. Criminal Injuries Compensation

4.44 In New South Wales a victim of violent crime may apply to the Attorney General for payment of a sum not exceeding $10,000 as compensation in respect of injury or loss sustained. Since 1979 the de facto partner of a person whose death has been caused by a felony or misdemeanour may apply for compensation under the scheme. A de facto partner is described as “the person who was living with the dead person as the spouse. [71]

F. Superannuation

4.45 Superannuation schemes in New South Wales are exempted from the provisions of the Anti-Discrimination Act 1977. [72] The Anti Discrimination Board has, however, surveyed public and private sector schemes in order to identify discriminatory practices. The Board concluded, among other things, that schemes which paid benefits to the widow or widower of a deceased contributor should be obliged to pay benefits to a surviving de facto partner. [73] The Board’s survey of government superannuation schemes showed that in eight out of the 20 schemes which supplied information the fund’s administrators had a discretion to pay benefits to the survivor of a de facto relationship. The State Superannuation Fund, the major government scheme, made no provision for the surviving de facto partner, in contrast to the position in the major government schemes in Victoria, South Australia and Tasmania. [74] The survey

revealed that in a majority of the larger private schemes in New South Wales the trustees were authorised to pay benefits to the deceased contributors surviving de facto partner. In practice, this usually meant that trustees were permitted to make payments on proof that the surviving de facto partner had been dependent on the deceased contributor. [75]

4.46 In recommending that de facto relationships should be recognised for the purposes of superannuation schemes, the Board argued that the rights and obligations of the parties to a de facto relationship should be the same as those of people who are married. Noting that the Anti-Discrimination Act did not impose any "qualifying" period for the status of being in cohabitation otherwise than in marriage, with a person of the opposite sex, the Board recommended that the same approach should apply in superannuation. [76]

4.47 Following the release of the report on superannuation the Anti-Discrimination Board entered into discussions with the New South Wales Superannuation Office about proposed amendments to the State Superannuation Fund. We understand that when the amended scheme is implemented, it is intended that the surviving de facto partner of a deceased contributor will be an eligible person for the payment of a "spouse's pension", subject to various qualifications relating to the duration of the relationship and the degree of dependence on the deceased employee. [77] Our terms of reference require us to take into account the work already completed by the Anti-Discrimination Board. Later in this Report we consider the approach we should take to the question of extending superannuation benefits to de facto partners (paragraph 16.19).

V. SUMMARY

4.48 In this Chapter we have discussed the extent to which present law recognises de facto relationships for the purposes of conferring benefits and imposing obligations on de facto partners. Our discussion shows that for many years, and for a range of purposes, both Commonwealth and State legislation have acknowledged the existence, and prescribed the consequences, of de facto relationships. The number of these Acts has grown in recent years. The widespread legislative recognition of de facto relationships makes it clear that the policy of the law is no longer to penalise or withhold advantages from people living together outside marriage. Any further recognition or regulation of de facto relationships would not mark a sharp policy departure from the trend already apparent.

FOOTNOTES

1. [1982] 2 NSWLR 80. See paras.11.2-11.5 below, for further analysis.

2. *Ayerst v. Jenkins* (1873) LR 16 Eq. 275.

3. [1982] 2 NSWLR 80, at p.89.

4. *Id*., at p.90.

5. *Ibid*.

6. *Id*., at p.101.

7. The legislation referred to was the Social Security Act 1947 (Cth), ss.18, 31(2), 83A, 83B; Superannuation Act 1976 (Cth), &3 ; Defence Force Retirement and Death Benefits Act 1973 (Cth), s.3; Repatriation Act 1920 (Cth), ss.23,83; Seamen's War Pensions and Allowances Act 1940 (Cth), ss.3,19, 20; Defence Service Homes Act 1918 (Cth), s.4(3A), (3B), (3C); Home Deposit Assistance Act 1982 (Cth), s.7: Income Tax Assessment Act 1936 (Cth), s.159K

8. Anti-Discrimination Act 1977, s.4.

9. [1982] 2 NSWLR 80, at pp.102-103.

10. See paras.4.39-4.42, and Chapter 12.

11. See para.4.43 and Chapter 14.

12. For the constitutional background, see our Issues Paper, De Facto Relationships(1981), para. 3.2. Until 1982, the Social Security Act 1947 was entitled “Social Services Act 1947”.

13. Director-General of Social Security, Submission No.15, p.2.

14. Social Security Act 1947 (Cth), s.59(1); see para.4.15.

15. *Id*., s.59(1); for the precise statutory language see para.4.21.

16. For a very useful survey see A. Jordan, As His Wife: Social Security Law and Policy on De Facto Marriage (Research Paper No. 16, Department of Social Security, 198 1).

17. *Id*., at pp.15-18.

18. Australian Soldiers’ Repatriation Act 1920 (Cth), s.36@ A. Jordan, note 16 above, pp.18-19.

19. Widows’ Pensions Act 1942 (Cth), s.4.

20. A. Jordan, note 16 above, p.19.

21. *Id*., at pp.19-20.

22. Widows Pensions Act 1943 (Cth), s.3.

23. Social Security Act 1947 (Cth), s.59(1).

24. Department of Social Security, Annual Report 1981-1982, Table 23.

25. The wife’s allowance was introduced in 1943 for the non-pensioner wife of an invalid pensioner or of a permanently incapacitated or blind old-age pensioner. In 1947 the allowance was extended to a de facto wife, provided she had lived with the pensioner “on a permanent and bona fide domestic basis” for at least three years: Social Services Consolidation Act 1947 (Cth), ss.31-32. The wifes allowance was finally extended to the wife of any age pensioner(subject to a means test and other general criteria) in 1972: Social Services Act (No.4) 1972 (Cth), s.13(l).

26. Social Security Act 1947 (Cth), ss.28-29.

27. Social Services Act (No.3) 1975 (Cth), s.3.

28. Social Security Act 1947 (Cth), s.112(4A). An equivalent subsection has been in the Act since 1947.

29. *Id*., s.83AAA(1).

30. See note 24 above.

31. See generally, R. Sackville, “Cohabitation and Social Security Entitlement” in Essays on Law and Poverty (1977), pp.80-92; A Jordan, note 16 above.

32. Social Security Act 1947 (Cth), s.59(1).

33. *Id*., s.83AAA(1).

34. See paras.17.7-17.12.

35. [1976] FLC 90-124.

36. *Id*., at p.75,589.

37. See, eg. *Baber and Baber* [1980] FLC 90-901; *Lutzke and Lutzke* [1979] FLC 90-714.

38. *Ostrofski and Ostrofski* [1979] FLC 90-730.

39. [1982] FLC 91-208, at p.77,107.

40. Family Law Act 1975 (Cth), s.75(2)(m). Under proposed amendments to the Act the court will be required to examine the financial circumstances of the cohabitation of either the applicant or the respondent: Family Law Amendment Bill 1983, cl.30.

41. *Grabar and Grabar* [1976] FLC 90-147.

42. Family Law Act 1975 (Cth), s.82(4).

43. *Patterson and Patterson* [1979] FLC 90-705; *F. and F*. [1982] FLC 91-214.

44. Family Law Act 1975 (Cth), s.75(2)(o).

45. *Olliver and Olliver* [1978] FLC 90-499; see also *Collins and Collins* [1977] FLC 90-286; *Fane-Thompson and Fane-Thompson* [1981] FLC 91-053.

46. Income Tax Assessment Act 1936 (Cth), s.159J: Case P24, (1982) 82 ATC 105. As to the possibility of extending the term “Spouse” beyond a lawfully needed spouse, see Case P87, (1982) 82 ATC 421.

47. *Id*., s.159L, See Case P12 (1982) 82 ATC 56.

48. *Id*., s.159K(1), (3), (4).

49. Case P50 (1982) 82 ATC 228.

50. Superannuation Act 1976 (Cth), s.3.

51. See Seamen’s Compensation Act 1911, s.3(1) (“member of the Defence Service Homes Act 1918, s.4(1) (“widow”), (3A) (3B) (“husband”); Repatriation Act 1920, s.23 (“dependent female”), Seamen’s War Pensions and Allowances Act 1940 (“de facto wife”): Defence Force Retirement and Death Benefits Act 1973, s.3(1) (“widow”), (3) (“widower”). Cf. Home Deposit Assistance Act 1982, s.7(1) (“spouse”).

52. Defence Force Retirement and Death Benefits Act 1973, ss.3, 38. Interestingly enough the Act specifically provides for the case where a member dies leaving both a lawful widow and a surviving de facto partner. s.41.

53. Anti-Discrimination Act 1977, s.4.

54. *Id*., Part IV. The general exceptions are contained in Part VI. The Act does not apply, for example, to acts done under statutory, authority or the practices of religious bodies (ss.54, 56) Superannuation funds are exempted from the general prohibition on discrimination on the ground of marital status.

55. *Id*., Part IX.

56. NSW Parliamentary Debates, Legislative Assembly, 24 November 1976, p.3451.

57 NSW Anti-Discrimination Board, Discrimination in Legislation (1978), Vol.1.

58. Myers v. Railway Commissioners for NSW [1927] WCR 228.

59. NSW Anti-Discrimination Board, note 57 above, p.127.

60. See now Workers' Compensation Act, 1926, s.6(1).

61. *Id*., s.59.

62. *Id*., s.9(1) (c) (i), 6 (c). This provision operates only after the first 26 weeks of incapacity and only where there is no lawful spouse totally or mainly dependent on the worker for support. During the first 26 weeks compensation is usually assessed by reference to the workers pre-accident award earnings.

63. NSW Law Reform Commission, Report on the Testator's Family Maintenance and Guardianship of infants Act, 1916 (LRC 28, 1977).

64. NSW Law Reform Commission, Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916 (1974), p.64ff.

65. NSW Law Reform Commission, note 63 above, p.9.

66. Family Provision Act 1982, s.9(2),(3). The Act will come into force on a date to be proclaimed. but not before June 24, 1983-. Family Provision Act, 1982, s.2(2).

67. *Id*., s.6(1).

68. A grandchild of the deceased need not satisfy the second limb: Family Provision Act, 1982, s.6(1).

69. If a claim by a person who comes within paragraph (d) of the definition is unsuccessful costs are not to be awarded to that person out of the estate unless there are special circumstances making it just and equitable to do so: Family Provision Act, 1982, s.33(2). The requirements of ss.9(1) and 33(2) also apply to a claim by a former spouse of the deceased.

70. Crimes Act, 1900, s.547AA.

71. See Criminal Injuries Compensation Act 1967: Crimes Act 1900, s.437(4).

72. Anti-Discrimination Act, 1977, ss.36 and 49 permit discrimination in superannuation funds on the grounds of sex and marital status, respectively.

73. NSW Anti-Discrimination Board, Discrimination in Superannuation (1978), p.47. The Board's report was required under s.121 of the Anti- Discrimination Act, 1977.

74. *Id*., pp. 158, 165.

75. *Id*., pp.128-129.

76. See note 73 above.

77. Australian Financial Review, 22 September 1981. p.5, and communication from the then President of the NSW Anti-Discrimination Board, Mr Paul Stein, QC, in July 1982.

5. Policy Questions

I. INTRODUCTION

5.1 We have pointed out that the policy of the law towards de facto relationships, reflected in Commonwealth and State legislation has changed significantly over a long period. [1] As we have explained in Chapter 4 the starting point for a policy analysis is that the effect of the law is not, and for a long time has not beer simply to penalise or withhold advantages from persons living in de facto relationships.

II. SHOULD THE LAW BE CHANGED?

A. The Question

5.2 The first question is whether further changes should be made to the law affecting de facto relationships in New South Wales. We think this is the relevant question since, although some submissions expressed regret at the extent to which the law had traveled in conferring rights on de facto partners, [2] there was no significant body of opinion in favour of repealing existing legislation conferring such rights. Moreover, we have independently formed the opinion that even if it were feasible to do so, the law should not attempt to implement a policy of actively discouraging de facto relationships. To do so, as the analysis in Chapter 4 shows, would be to turn the clock back.

B. The Need for Change

5.3 We are firmly of the view that, despite recent changes, the law in New South Wales affecting de facto relationships is seriously deficient and that reform is warranted. We are influenced by three factors:

the substantial and increasing numbers of-people living in de facto relationships;

the significant injustices and anomalies produced by the existing law;

a broad acceptance of the need for some change, evident both within the legal profession and in the wider community.

1. Extent of De Facto Cohabitation

5.4 We are fortunate in having the results of the Family Survey conducted in 1982 by the Australian Bureau of Statistics. The information gained from the survey, which is analysed in detail in Chapter 3, is unique in this country and provides important insights into the numbers and characteristics of persons living in de facto relationships. The survey indicates that 4.7 per cent of all couples in Australia are currently living in a de facto relationship (approximately 337,320 people). In New South Wales the corresponding proportion is identical with the national figure and comprises approximately 116,200 people. Individuals living in de facto relationships in 1982 constituted 12 percent of all persons in the age group 20 to 64 years who are not currently married, compared with 7 per cent in 1976. For reasons outlined in Chapter 3, we believe that these figures understate the true numbers and therefore should be treated as minimum estimates. The information presented in Chapter 3 provides evidence of a significant increase in the numbers of people living in de facto relationships over the period 1971 to 1982 (paragraphs 3.3-3.21).

5.5 The survey also shows that de facto relationships are particularly common among younger people, but that many older people also enter into these relationships. Indeed, the figures indicate that more than 40 per cent of all persons living in a de facto relationship in Australia are in the age group 30 years and over. Moreover, there is clear evidence that de facto relationships cannot be dismissed as necessarily fleeting or ephemeral. According to the same survey, 43.3 per cent of current de facto

relationships have lasted for at least three years, while 58.9 per cent have continued for at least two years. Twenty per cent of de facto relationships have continued for a period in excess of 5 years, and 8 per cent of relationships have continued for more than 10 years. A significant proportion of de facto couples have dependent children living with them: 18 per cent of couples have children born during their current relationship, while overall 36 per cent of couples have dependent children in their family (that is, children of the relationship and of a previous marriage or relationship). Where the woman is aged between 25 to 44 years, (the period usually associated with family formation) children are present in 51 per cent of families.

5.6 In our view, the evidence clearly establishes that a large number of Australians live in de facto relationships, that a substantial proportion of these relationships can be regarded as involving a significant mutual commitment (in the sense that they continue for a period of at least two years); and that a significant proportion involve children within the household. To the extent that the current law inflicts injustice, the problem is not merely trivial but Substantial.

2. Injustices and Deficiencies in the Law

5.7 In the Issues Paper we draw attention to criticisms made by judges and others, of the current law affecting de facto relationships. These observations, together with our own analysis and consultations, have led us to conclude that the law often falls to deal adequately with the problems faced by people living in de facto relationships and consequently often causes injustice. We recognise that this conclusion involves assumptions as to the policies that the law should pursue, a matter to which we return (paragraph 5.67). It also anticipates our examination of specific areas of law to ascertain deficiencies and to propose appropriate means of overcoming them. This examination is taken up in succeeding Chapters. At this stage it is enough to express our view that the law is clearly deficient in some areas and that reforms are warranted.

5.8 Before referring to specific examples, we should make it clear that we do not assume that the law is necessarily deficient or unjust if it distinguishes between married persons and de facto partners. As will be seem we accept that certain distinctions can and should be drawn between the rights and duties of de facto partners and those of married persons. Our point is that there are other grounds for concluding that the current law is capable of inflicting unjustifiable hardship and injustice, even if it is assumed that the law should not necessarily equate the legal position of de facto partners with that of married persons.

Property Disputes

5.9 As we explain in Chapter 7, property disputes between de facto partners are determined in accordance with orthodox principles of law that apply to disputes between “strangers” taking no account of the intimate relationship between the partners. In practice this means that the courts place great emphasis on the formal title to the disputed property and, generally, cannot vary that title except to give effect to the “common intention” of the parties, or to intervene in cases of fraud. The courts are permitted to recognise direct financial contributions to the acquisition or improvement of an asset but cannot otherwise vary the established property rights of the parties to achieve a just result. The major deficiency, of the law is therefore that it does not allow recognition in the context of property disputes, of substantial indirect or non financial contributions made by one partner to the well-being of the family generally, or to the other partner.

5.10 It is this deficiency which has prompted sustained judicial criticism of a kind which is unusual in Australia. In a series of cases in New South Wales judges have drawn attention to the inadequacy of the rules the courts are required to apply and have called for reforms. We refer briefly to some of the comments here. A more detailed analysis of the policy issues is undertaken in Chapter 7.

5.11 In the recent case of *Muschinski v Dodds* [3] Mr Justice Waddell said that he had reached a particular conclusion “with considerable regret because ... it seems... not to produce a fair result between the parties”. He expressed the that it was unfortunate that the court had no power to vary the property rights of the parties as did the Family Court in relation to married people. On appeal to the Court of Appeal the decision was upheld, but Mr Justice Hope added his support to the calls for reform.

> "The problem is a growing one... which the Courts will not be able to solve by themselves. It is a matter to which consideration needs to be given by the appropriate authorities." [4]

In *Murray v Heggs*, [5] Mr Justice Powell commented that the application of established rules of property to disputes between de facto spouses could cause "significant hardship" and that Parliament might wish to intervene to prevent injustice. In *Blanchfield v Public Trustee*, [6] a woman failed in a property claim against the estate of her deceased de facto partner. Mr Justice Wootten stated that the case was

> "one of a significant number that come before the courts in which injustice results from the failure of the law to adapt to changing patterns of cohabitation".

The particular injustice in Blanchfield's Case may have been overcome by the enactment of the Family Provision Act 1982, but the general observations retain their force in relation to disputes between living persons.

Maintenance

5.12 The current law does not permit one de facto partner to claim maintenance in his or her own right from the other partner. This omission has not attracted judicial criticism since, unlike property claims, the courts have no occasion to deal with maintenance claims by de facto partners, except on behalf of children. It is our view, shared by the authors of a wide variety of submissions (paragraph 8.6), that this law is capable of inflicting serious injustice. Where a de facto relationship ends, the Court has no power, even on an interim basis, to alleviate, by an award of maintenance, the financial hardship suffered by one party. This is so even where the hardship is caused by needs stemming from and attributable to the relationship (for example, where the woman cannot support herself because she has responsibility for the care of children born of the relationship) and the other party has ample means to provide support at least for a transitional period. There are many complex issues associated with maintenance and the solutions are by no means obvious. We explore the questions in Chapter 8. At this stage, we note that the failure of the law to acknowledge that there are some circumstances in which special needs should be recognised by a maintenance order is a deficiency which should be rectified in an appropriate manner.

Fatal Accidents

5.13 The law provides remedies for the families of persons killed in certain kinds of accidents. As mentioned earlier, the Workers' Compensation Act, 1926, permits a survey de facto partner of a worker who has been killed in a work-related accident to claim compensation from the employer, providing the survivor can show that he or she was wholly or partly dependent on the deceased it the time of death. [7] The Compensation to Relatives Act 1897, enables the family of a person killed is the result of the negligence of a third party to claim damages in respect of the death. However, the Act does not allow claims by a surviving de facto partner, even where the survivor was wholly dependent on the person killed. Since the basic purpose of the Act is to provide protection for the family unit in respect of financial loss caused by wrongful death, we think the present law inflicts injustice.

Domestic Violence and Harassment

5.14 Recent legislation in New South Wales his greatly improved the legal protection available to victims of "domestic violence offences". [8] This term is defined to include certain kinds of offences where the victim is either married to or cohabits with the perpetrator or potential perpetrator. Among other provisions in the legislation Local Courts are given expanded powers to make restraining orders when satisfied, on the balance of probabilities, that there is a reasonable apprehension that a domestic violence offence will be committed. [9] While this has increased protection in relation to apprehended offences of violence, it does not provide a full range of protection to de facto partners against domestic violence and harassment. Unlike married people, de facto partners lack clear protection against harassment falling short of criminal conduct. They also lack the wide range of remedies available to married persons in respect of actual or threatened violence. While we do not assume that the rights of de facto partners should be identical to those of married persons, we share the almost universal view

expressed in submissions that the law should provide the fullest protection against domestic violence or harassment in de facto relationships, and that a failure to do so should be remedied.

Custody

5.15 In Australia, custody disputes often involve difficult jurisdictional issues. These arise because the custody jurisdiction of the Family Court of Australia is confined to matters concerning a "child of the marriage", as that expression is defined in the Family Law Act.[10] Custody disputes concerning other children (for example, those born to unmarried persons living in a de facto relationship) are generally dealt with by State courts under State law. The jurisdictional difficulties have provoked vehement criticisms from judges and others who have expressed concern at the consequent waste and hardship. In particular, appellate judges have repeatedly referred to the confusion and inconvenience caused by the divided jurisdiction and by doubts as to the extent of the powers of the Family Court (paragraphs 15.24-15.31). In one recent case, *Fountain v. Alexander*,[11] the Chief Judge in Equity of the Supreme Court of New South Wales described as "disgraceful" a situation in which no single court in Australia had jurisdiction to determine the custody of two children living within a single family (one being born within a de facto relationship). It is clear beyond doubt, as we explain in Chapter 15, that the Jurisdictional difficulties must be overcome as soon as possible.

3. Acceptance of the Need for Change

Incidence of Problems

5.16 In the course of our consultations, we were occasionally warned to avoid drawing too many conclusions from remarks made by judges and other commentators as to defects in the law. It was said that these might not reflect widespread problems or general dissatisfaction with the law. Our assessment of the extent of the problem rests not merely oil judicial and other remarks, but on the survey information analysed in Chapter 3 and on our program of seminars and interviews referred to in that Chapter.

5.17 The evidence from our surveys of legal practitioners, welfare workers and chamber magistrates suggests that people living in de facto relationships frequently encounter legal problems in respect of which they seek advice. This conclusion is hardly surprising, given the extent of de facto cohabitation in Australia. Nonetheless, the experience of the groups surveyed indicates clearly that the incidence of legal problems is far more widespread than a study of the reports of decided cases might suggest. As has been noted (paragraph 3.91), the major categories of problems associated with de facto relationships, include property claims (including the status of cohabitation agreements), issues concerning the custody, guardianship and maintenance of children rights of succession on death and protection against domestic violence. It is significant that the surveys support the view that these legal issues are of particular concern to women living in de facto relationships.

Professional Opinion

5.18 In the course of our survey of legal practitioners in New South Wales respondents were asked to express their opinion of the current law. As we have mentioned, the survey was not intended to reflect the view of a representative sample of the practising profession in the State, but rather to give us the benefit of the experience of a group of practitioners who had provided advice to persons living in de facto relationships. Table 5.1 shows that 80 per cent of the 235 respondents who had provided such advice said they were either very dissatisfied or had some dissatisfaction with the law, while only 14.5 per cent declared themselves to be satisfied. More detailed responses from those who were dissatisfied indicated that the law governing property disputes between de facto partners gave rise to most dissatisfaction (39.5 per cent of those dissatisfied expressing this view). A significant proportion (23.9 per cent) considered that a single court should have jurisdiction over disputes between de facto partners, while a similar proportion (21.6 per cent) offered the opinion that in general the rights of de facto spouses should approximate those of married persons. While care must be taken in interpreting the results of this survey, we think it shows that many legal practitioners who are experienced in dealing

with the legal problems presented by de facto relationships are dissatisfied to some extent with the existing law.

Table 5.1: Opinion of Legal Practitioners on Current Law Concerning De Facto Relationships

Opinion	Numbers	Percentage
Satisfied	34	14.5
Some Dissatisfaction	105	44.7
Very Dissatisfied	83	35.3
No opinion	13	5.5
Total	**235**	**100.0**

Submissions

5.19 The submissions demonstrated support from a wide variety of sources for reform of the law governing de facto relationships. A striking feature of submissions from church groups was that while they rejected any attempt to equate de facto relationships with marriages, they were generally prepared to accept that the current law inflicted injustice in particular areas and that the injustice should be remedied. This view was not unanimous, as some church bodies argued against any change in the law. However, these bodies did not represent a majority position, even among church opinion. The consensus among non-church bodies was clearly in favour of substantial reforms, although the submissions emphasised different aspects of the current law and proposed a range of solutions. We refer briefly to the opinions expressed in some of the major submissions distinguishing, for the purposes of presentation between church and non-church submissions.

Church Submissions

5.20 The Board for Social Responsibility of the Uniting Church [12] stressed that it did not support the downgrading of marriage or the encouragement of sexual relationships outside marriage. However, the Board explicitly recognised the cultural pluralism of Australian society and denied “to the dominant (force) any exclusive right to declare what is and what is not moral”. They said that as Christians they were concerned to do justice, and they acknowledged that particular forms of injustice can and do arise in de facto relationships. The Board identified the primary function of law as being to prevent patterns of exploitation deprivation and oppression. [13] It indicated that a variety of factors would need to be taken into account in assessing the case for reform in particular areas. These factors included the permanence of the relationship being examined, dependence within the relationship or attributable to it, the injustice to be redressed and the role of poverty, unemployment or insecurity in encouraging de facto relationships. The Board applied these criteria to several areas of law. It considered, for example, that the power of the Family Court to readjust the property rights of married persons should be conferred by State legislation on a State Court which could exercise the power in determining property disputes between de facto partners. The Board also suggested that a court should have power to order one de facto partner to pay maintenance to the other partner in certain circumstances, as when the birth of a child to the parties created a condition of dependence.

5.21 The New South Wales Catholic Social Welfare Committee emphasised the special significance of marriage. For the Committee, marriage involves a clear and unambiguous public ceremony and a public recognition of the responsibilities involved.

> “This differs from a de facto relationship even where the commitment is “long term” and the couple live together “as married” ..”’for a considerable period of time”... By its nature a de facto relationship

> is private, personal and not subject to public scrutiny. Without any formal process for dissolution it becomes, by its very form, a transitory relationship. The fact that it remains stable or long standing is accidental rather than essential to its nature." [14]

The submission acknowledged the argument that in a pluralist society, with a wide range of moral attitudes, the law is not justified in giving preference to moral standards that limit freedom However, the Committee pointed to the special role the law could perform.

> "[L]aw still has a pedagogic or standard-setting function in society. Not only does it reflect, but it also shapes public morality". [15]

5.22 Despite these views, the Committee was prepared to support law reform where injustices could be established, subject to the qualification that any reforms should make it clear that "marriage enjoys the favour of the law." [16] The Committee favoured relatively minor modifications to the law governing property disputes between de facto partners but supported the right of a de facto partner to claim maintenance "where the claimant has been disadvantaged or made dependent because of the nature or duration of the relationship". [17]

5.23 The Australian Catholic Social Welfare Commission supported an examination of individual areas of law to determine whether there should be further regulation of de facto relationships.

> "This approach can ensure that an individual has the means at his/her disposal to see that justice is done, whilst at the same time there need be no general definition of a de facto relationship." [18]

In the areas of property and maintenance, for example, the Commission proposed that State courts should have powers, similar to the Family Court to settle property disputes between de facto partners according to what is "just and equitable" and should have power to award maintenance where dependence is established. On the other hand the Commission (like the New South Wales Catholic Social Welfare Committee) saw no injustice in denying de facto partners the opportunity jointly to adopt a child.

5.24 The majority response of the Social Issues Committee of the Anglican Diocese of Sydney expressed the Christian belief that marriage is divinely ordained. [19] The submission pointed out that marriage, once solemnised has a permanence which is reinforced by law, in that a judicial pronouncement is required for its dissolution. The Committee argued that the law should not encourage unions which are not intended to be permanent, monogamous and heterosexual. Thus marriage as presently defined should be "preferred" by the law, when benefits are distributed or policy determined in relation to the family. Nevertheless the submission accepted that the law should regulate de facto relationships in certain circumstances. Regulation should, however, be undertaken "only In so far as is necessary to protect the parties to the relationship from financial loss or hardship" (the Committee's emphasis). The submission went on to identify a number of injustices in the existing law. These included cases where the reasonable expectations of a de facto partner to a share in the jointly established household property were defeated and where a dependent de facto partner (unlike a dependent spouse) was not entitled to claim damages in respect of the partner's death. [20]

5.25 A minority of church submissions saw any, or virtually any change in the law affecting de facto relationships as adversely affecting the institution of marriage to an unacceptable degree. [21] The authors of these submissions considered that the law has an important influence in determining social attitudes and in shaping behaviour. They argued that de facto relationships do not involve mutual commitment from the parties and are less stable than marriages. Accordingly, it is contrary to the interests of the community to encourage people to enter de facto relationships and indeed the role of the law is to discourage such behaviour by systematically withholding from de facto partners benefits available to married people. The minority submission of the Social Issues Committee of the Anglican Diocese of Sydney gave several reasons for concluding that

> "any attempt to give legal recognition to the de facto relationship as a regular group unit in society by the granting of legal rights and obligations should not be [accepted]." [22]

The reasons included the view that such an attempt would make a potentially insecure group unit seem secure, when in fact it is not. Further it would be unjust to grant legal rights to de facto partners, since they do not accept the accompanying obligations of marriage. It is implicit in this approach that even where an observer might identify significant injustice as a consequence of the current law, that injustice can be justified since it reinforces the favoured status of marriage and prevents more substantial long-term harm to the community.

Non-Church Submissions

5.26 The non-church submissions argued in favour of reforms. Some bodies, like the Women Lawyers' Association, the New South Wales Women's Advisory Council, and the Australian Council of Social Service, argued that legal regulation of de facto relationships should be extended to overcome specific injustices and to provide some of the protections and the rights and obligations of marriage. But most of the non-church organisations rejected the legal equation of de facto relationships and marriage. They did so because of their support for the view that the freedom of persons to remain outside the legal institution of marriage should be upheld in a pluralist society.

5.27 The Women Lawyers' Association considered that the "basic injustices that have been suffered by parties to de facto relationships on termination [bring] to the fore the need for legislative reform". [23] This approach led the association to examine specific areas of law (such as property and maintenance, succession rights, and protection against domestic violence) for the purpose of identifying reforms required to overcome injustice. The submission concluded that change was warranted in each of the areas examined, indicating that, in the Association's view, the primary purpose of the law should be to alleviate injustice.

5.28 The New South Wales Women's Advisory Council agreed that the basis of State intervention in de facto relationships should be the "minimisation of injustice". [24] The Council indicated its preference for a single " piece of thoroughgoing legislation" rather than "mere amendments" to existing legislation. Like the Women Lawyers' Association, the Council examined the areas of law identified in our Issues Paper and suggested appropriate reforms in each field to overcome the inadequacies of the existing law.

5.29 The Australian Council of Social Service also recommended changes to the specific areas of law identified in the Issues Paper. [25] This submission was unusual in that it urged us to take into account the wider implications of our proposals: for example, to consider whether the principles governing succession to property should be more closely integrated with those governing financial adjustment between living persons. The philosophy implicit in the submission is, however, clearly that separate areas of law should be analysed to identify injustices or anomalies and that remedial action should be taken by the legislature. A number of other groups implicitly accepted this approach with some variations in emphasis. [26]

III. MODELS FOR CHANGE

5.30 We have expressed our view that reform of the law governing de facto relationships is warranted. It does not necessarily follow, if this view is accepted, that the changes should take the form of treating de facto partners as married persons for all legal purposes. The policy options range from sweeping changes in the legal status of de facto relationships, to amendments to existing legislation designed to overcome specific injustices. In our Issues Paper we identified four models for reform that could be considered if a case for some change were made out. None of the submissions suggested that we had overlooked a plausible alternative, although some queried whether we were right to focus attention exclusively on de facto relationships as opposed to other domestic arrangements. [27]

A. Equating De Facto Relationships and Marriages

5.31 The most sweeping approach is to equate the rights and duties of de facto partners with those of married couples. This proposal was put forward in a 1978 report by the New South Wales Anti Discrimination Board. [28] The Board took the view that since the Anti-Discrimination Act , 1977, declares unlawful in certain areas discrimination on the basis of "marital status" (a term defined to include de

facto cohabitation) it follows that any legislation discriminating against persons living in de facto relationships should be amended. Accordingly, the Board recommended that

> "all legislation which affects the parties to a marriage, whether by the granting of rights, the imposition of obligations or otherwise, be amended to include the parties to a de facto relationship". [29]

The Board did not consider it necessary to examine the policy arguments for and against this conclusion treating the matter as foreclosed by the terms of the Act itself.

5.32 Leaving aside the policy questions implicit in the Board's approach there are grave constitutional difficulties facing a State which wishes to legislate to remove any legal distinction between married persons and de facto partners, in the sense of equating their legal rights and duties. It may be open to the State to declare that persons living in de facto relationships shall be deemed to be married. But such a declaration if valid, [30] would have only limited effect since it could not bind the Commonwealth. The State could not for example, legislate so as to require the Commonwealth to regard a cohabiting couple as married for the purposes of assessing liability to taxation under the Income Tax Assessment Act 1936.

5.33 An alternative would be for the State to enact a series of specific measures designed to create the same rights and duties for de facto partners as apply to married persons. The Anti-Discrimination Board itself analysed State laws differentiating between married couples and de facto partners and recommended amendments to remove the differentiation. The Board recommended, for example, that the Adoption of Children Act 1965 be amended to allow de facto partners, in addition to married couples, to adopt children. [31] Since the Board's report was confined to State legislation containing references to married persons, its recommendations could not, of themselves, fully equate the legal position of such persons and de facto partners.

5.34 The State could of course, go further and enact laws for de facto partners equivalent to Commonwealth laws applying to married persons, although this was not a matter to which the Anti-Discrimination Board gave consideration. Thus, the State could, for example, legislate for the property and maintenance rights of de facto partners in substantially identical terms to the Family Law Act 1975. Even this would not precisely equate the legal position of married persons and de facto partners, since matrimonial disputes are heard, in general in the Family Court of Australia, which is a federal court, and the States lack power to confer jurisdiction directly on a federal court to determine disputes arising under State law. Moreover, this approach would still encounter the difficulty that matters now exclusively governed by the Commonwealth such as federal income tax law, cannot be affected by State legislation.

5.35 It follows that complete equivalence between the legal position of married couples and de facto partners in New South Wales would very likely require one of three courses of action:

> a constitutional amendment conferring power on the Commonwealth to legislate with respect to de facto relationships, followed by appropriate Commonwealth legislation;
>
> a reference of power by the State to the Commonwealth to legislate with respect to de facto relationships, followed by appropriate Commonwealth legislation;
>
> Joint Commonwealth-State legislation to achieve the desired result.

None of these three courses of action is likely to be followed in the near future, although an item on the agenda for the Constitutional Convention held in April 1983 raised for consideration the assumption by the Commonwealth of greater legislative power over family law. [32] However, we do not think the legal difficulties of implementing a policy of legal equivalence between de facto relationships and marriage remove the need to discuss whether, in principle, the State should pursue that policy. We deal with this question later (paragraphs 5.43-5.57).

B. Rights on Proof of Dependence

5.36 A second approach is to extend further rights and obligations to de facto partners, but only on proof of dependence. In 1977 the Tasmanian Law Reform Commission adopted a variant of this approach arguing that cohabitation of itself, should not lead to legal consequences. Rather,

> "rights and obligations should only be conferred or imposed on proof of *dependency*, and ... this should be for the purpose of relieving hardship and injustice only." [33]

The Commission considered that eligibility for benefits should generally require proof of dependence and of twelve months continuous cohabitation although the period could be reduced in special circumstances indicating hardship. No attempt was made to define dependence for the purposes of the proposed legislation, this being a matter to be determined by a court in each case.

5.37 On the approach of the Tasmanian Law Reform Commission, de facto partners would not receive entitlements simply by virtue of their" status", no matter how long the period of cohabitation. A claimant would need to prove "dependence", presumably of a financial kind. It follows that a financially independent de facto partner would not be entitled to benefits, even if it could be shown that injustice would result from withholding those benefits. The Commission recommended amendments to give effect to the principle of dependence in relation to workers' compensation and fatal accident claims, testator s family maintenance, estate duties and the no-fault motor accidents scheme. [34] No consideration was given to the application of the principle in relation to property disputes between de facto partners or to the law of intestacy. As yet, the recommendations of the Commission have not been implemented.

C. Equating De Facto Relationships and Marriages for Certain Purposes

5.38 The strategy of equating certain kinds of de facto relationships with marriages for particular purposes is employed by the South Australian Family Relationships Act 1975. The Act allows a person who answers the statutory description of a "putative spouse" [35] to apply to a court for a declaration of his or her status as at a specified date. Once the declaration is made, the putative spouse has, at that date, the same entitlements as a married person in a number of specified areas, each of which is governed by a separate Act. The legislation equates the position of a "putative spouse" and married persons only in relation to claims consequential on the death of a partner. These include claims relating to intestate succession compensation for fatal accidents and eligibility for government superannuation schemes. The legislation does not extend, for example, to property disputes between former de facto partners nor to maintenance claims between living partners. In practice, there is perhaps little to distinguish the South Australian approach from that recommended in Tasmania, except that the definition of "putative spouse" does not employ the notion of dependence. In each case the parties to a relationship that satisfies specified statutory criteria have rights and obligations in a variety of areas.

D. Remedying Injustices in Specific Areas

5.39 Each of the three approaches referred to so far formulates a definition of a de facto relationship that is to be regarded as the legal equivalent of a marriage, either for all purposes (as recommended by the New South Wales Anti-Discrimination Board), or for a range of purposes (as recommended by the Tasmanian Law Reform Commission and adopted by the South Australian Family Relationships Act). The definitions very considerably, reflecting important policy differences, but each approach incorporates its own uniform definition. It is implicit in each that the same solution is to be applied to a range of legal problems presented by de facto relationships.

5.40 The fourth approach identified in our Issues Paper is a little different It requires attention to be directed to specific areas of law in which the rights and obligations of de facto partners are in issue. The examination is undertaken to determine whether there are injustices or significant anomalies requiring correction and, if so, what remedial action should be taken. This approach does not assume that the same criteria should always govern the entitlement of de facto partners to benefits (or their liability to comply with obligations). Their rights and obligations may be determined by different criteria in different areas, depending on the basis for legal intervention and the nature of the injustice or anomaly to be corrected. In some circumstances, it may be appropriate to confer rights on de facto partners only where the relationship has continued for a specified period. In others there may be no need for a minimum

period of cohabitation, a view now taken in New South Wales, for example, in relation to death benefits under the Workers' Compensation Act (paragraphs 4.37-4.38). Of course, this does not imply that there should be no attempt to formulate a standard "core" statutory definition of a de facto relationship, provided it can be varied in accordance with the policy demands of particular circumstances. Nor does it imply that there should be no attempt to formulate or apply a consistent philosophy in particular areas of law. While the law governing de facto relationships has developed in a piecemeal manner to date, the policy issues are capable of being assessed more systematically.

IV. ASSESSMENT OF THREE MODELS

5.41 In this section we comment on the major policy options we have identified. The submissions, to the extent that they favoured reform were almost unanimous in support of the fourth option (legislative regulation of de facto relationships in specific areas) and this is the conclusion we have reached. Nonetheless, we think it is important to consider the other options, particularly the first, as they shed light on the difficult policy questions we face.

A. The First Option - Equating De Facto Relationships with Marriage

5.42 We have said (paragraph 5.31) that the New South Wales Anti- Discrimination Board favoured this approach on the ground that continued distinctions between de facto relationships and marriages constituted "discrimination" and should be ended. In our view, a prohibition on discrimination on the grounds of a person's marital status does not necessarily mean that all legislative distinctions between married persons and de facto partners constitute discrimination of a kind which warrants repeal or amendment of the legislation. It may be that in certain circumstances such distinctions should be drawn. In substance, the Boards report simply assumes that there is always such a close similarity between marriage and de facto cohabitation as to require equivalent legal treatment. Consequently, we do not think that the report carries the argument further than posing the policy issue to be determined.

1. The Argument in Favour of Equivalence

5.43 Only one submission, that of the Council for Civil Liberties, [36] supported a policy of legal equivalence between marriage and de facto relationships. The Council did not argue the case in depth simply adopting the recommendations of the New South Wales Anti-Discrimination Board as in accordance with the

> "goal of maximum freedom for the individual to live as (s)he wishes, consistent with the freedom of others to do likewise."

The submissions therefore did not present a detailed case in favour of legal equivalence between marriages and de facto relationships. Nonetheless, we think it useful to construct an argument (not necessarily the only argument) that could be made in favour of a policy of legal equivalence.

5.44 De facto relationships are very common and are becoming increasingly common. The nature of these relationships, in terms of the expectations, behaviour and intentions of the partners, varies considerably. Except for the formal marriage ceremony, there is no necessary difference (so it can be argued) between the nature and quality of de facto relationships and the nature and quality of marriage relationships. Each, for example, may involve a high degree of stability and commitment from the partners, substantial economic, social and emotional interdependence, care and support for children and the establishment and development of relationships as a family unit with the outside community. Equally, marriages and de facto relationships might each be of relatively short duration with the parties financially independent and not having any child care responsibilities. [37] As some well qualified commentators have suggested, the

> "durability of ... families, whether within or outside marriage, may depend more on the personalities concerned, the quality of the relationship, and the degree of commitment than upon whether there is a legal marriage." [38]

5.45 There have been strong religious reasons for distinguishing sharply between marriage and cohabitation outside marriage. At one stage, family law (to use the modern term) was largely ecclesiastical law, reflecting the fact that "religion and the state formed an inseparable socio-political entity". [39] But family law in Australia has taken a long journey from a religious to a secular basis, culminating in the Family Law Act 1975, which swept away all but the last vestiges of ecclesiastical law. The Chief justice of New South Wales has emphasised, in the context of criminal proceedings involving a marriage entered into for an allegedly improper purpose, that the courts are secular and that religious precepts should not influence the administration of the criminal law.

> "But these religious or moral requirements [relating to the significance of the marriage relationship] are matters of individual conscience, varying, as they do, from church to church and from group to group. We do not, in Australia, have an established church as there is in England. Freedom of religion means not merely freedom of the individual to choose which religion he or she will embrace or to reject religion in its entirety. It imports, also, the necessity to take care lest religious precepts enter into the administration in particular, of the criminal law. The criminal courts are secular, and it is only by giving full significance to this that the criminal law can operate fairly across all members of the community, no matter what may be the particular religious persuasion, if any, of each individual Australian". [40]

5.46 While the Chief Justice's observations were directed to criminal proceedings, it can be argued that the same. comments should be applied to the civil law. The failure of de facto partners to go through a marriage ceremony may be regarded as a violation of religious values or perhaps of conventional standards of behaviour (although the empirical evidence we have gathered suggests that the latter is rather doubtful). But it can be argued that the role of the law is not to embody religious values or withhold advantages from those who choose to exercise their freedom to depart from conventional standards of behaviour, but to establish a framework for resolving commonly occurring problems by establishing rules and procedures reflecting the secular values of the community. These may or may not coincide with particular religious values. Arguably it follows that relationships serving substantially identical functions. such as marriages and de facto relationships, should be treated by the law in a substantially identical fashion.

5.47 The argument can be taken further by pointing out that de facto relationships pose the same questions for the law as marriages, with the single exception that a procedure is required for the formal dissolution of a marriage. For example, the law must provide for certain questions arising at the termination of a relationship, whether or not the parties have been married. The questions include adjustment of the parties' financial relationship (when they have separated); determination of succession rights (when one partner has died); and resolution of disputes involving the custody of children. If purely religious values are ignored, so it might be argued, there is no compelling reason for distinguishing between de facto relationships and marriages in resolving these questions.

2. The Argument Against Equivalence

5.48 Of the Submissions which specifically considered whether the law should equate marriages and de facto relationships, all but one argued against such a policy. Not surprisingly, the most detailed and vigorous arguments were presented by church groups, although their contentions were not limited to propositions founded on religious doctrine.

The "Qualitative Difference"

5.49 The submissions from churches consistently stressed the "qualitative difference" between a marriage and a de facto relationship. We referred earlier, for example, to the submission of the New South Wales Catholic Social Welfare Committee, which distinguished between the responsibilities associated with marriage and the essentially "transition" nature of de facto relationships (paragraph 5.21). The Committee noted that marriage between baptised Christians involves a religious reality and a "human reality" that is essential for the good of society. The submission acknowledged that the easy dissolution of marriage "clouds the appreciation of marriage as a permanent commitment", but contended that any further weakening of the commitment of marriage would not be in the best interests

of couples, their children or society. According to the submission the law has a standard setting function in society, and shapes public morality. A policy of legal equivalence between de facto relationships and marriages could be interpreted as making the former as acceptable as the latter, and therefore contravenes the role that the law should perform.

5.50 Other church groups, which were prepared to support changes in the law to avert injustice, also expressed their adamant opposition to a policy of equivalence. The majority response of the Social Issues Committee of Anglican Diocese of Sydney, as we have seem recognised the possibility of injustice under the existing law (paragraph 5.24), but rejected the suggestion that legislation should attempt to equate marriages with de facto relationships. To do so, in the Committee's view, would undermine marriage as a "permanent and desirable institution". [41] The Board for Social Responsibility of the Uniting Church while explicitly recognising the responsibility of the law to alleviate injustice within both marriages and de facto relationships, stated clearly that the rectification of injustice did not involve equating marriages with de facto relationships. It was not unjustifiably discriminatory for the law to confer rights and impose obligations on the parties to a formal relationship, yet take a different approach to de facto partners. [42]

Freedom of Choice and Autonomy

5.51 While the church submissions argued the case against legal equivalence most strongly, other submissions, not based on a religious view of marriage, also accepted the need for a distinction between the law governing marriages and that governing de facto relationships. The depth of community feeling on this question (insofar as it can be gauged by a consultative process) emerged even more clearly in seminars and discussions held during the course of our work on the reference. A common theme in these discussions was that the legal concept of marriage involves a public commitment and an interdependence which is not a necessary part of a de facto relationship. Accordingly, it should not be assumed that all cohabiting couples wish to be subject to the legal regime that applies to married persons. This theme was adopted not only by those who were concerned to protect marriage as an institution but also by those who wished to preserve the freedom and autonomy of people entering into de facto relationships.

5.52 Several written submissions were specifically concerned with the expectations and understanding of people who enter de facto relationships. The New South Wales Bar Association, for example, observed that the extensive legislative recognition of de facto relationships should be seen as an attempt to meet particular hardships. It did not necessarily follow from such legislation

> "that a fundamental change in status, with all its consequences, should be imposed on de facto spouses. If a new regime for de facto spouses is created, it would in effect diminish the freedom of parties to de facto relationships..." [43]

5.53 Individual commentators asserted that often the principal reason why people live together without marrying is to avoid the legal regime imposed on married persons. One such commentator said she would be shocked if the rights of cohabiting couples were equated with those of married couples. Her objections were not based on religious grounds, but on a desire to see the rights to freedom of choice by individuals maintained". [44] In her view

> "to force the laws of marriage upon those who have not willingly chosen them would be iniquitous."

This view was repeated in discussions. We were frequently told that many divorced people who live in de facto relationships deliberately refrain from remarrying because they wish to avoid experiencing again the trauma which they see as being associated with divorce.

5.54 A similar contention was put in other submissions. They acknowledged that many people maintain a de facto relationship and do not marry because they wish to avoid the obligations imposed by law on married people. In the words of the New South Wales Women's Advisory Council

> "the State must respect the individual choice of those couples who do not wish their relationship to be perceived as a mirror image of a traditional marriage."[45]

The New South Wales Catholic Social Welfare Committee also commented that

> "to legislate in such a way as to put de facto relationships more or less on the same plane as marriage tends towards paternalism. It supposes that those in such relationships ... have not made a conscious choice of this relationship rather than marriage. It may be that some have drifted into this situation without conscious choice but the majority, in our experience, have chosen this state of life for a variety of reasons." [46]

This approach led some commentators to propose that cohabiting couples should be free to contract out of any legal regime that otherwise would apply to them, particularly one concerned with their financial relationship.[47] The implication is that a policy of legal equivalence between marriages and de facto relationships is unacceptable because it would impose on cohabiting couples a regime they wish to avoid.

5.55 There are other issues which must be considered in deciding whether a policy of equivalence between marriages and de facto relationships should be implemented. These issues may also arise if less sweeping reforms are contemplated. Some commentators have pointed out that a policy of equivalence inevitably creates a conflict between the rights of a lawful spouse and of a de facto partner. [48] Equality implies that the rights of the lawful spouse may be adversely affected by the entitlement of the de facto partner, thus further undercutting the protection accorded to marriage. [49] This is not a novel issue since conflict between the rights of the lawful spouse and those of the de facto partner already occurs under the Family Law Act [50] and under the Family Provision Act 1982. However, the problems are presented more starkly if a policy of equivalence is accepted. Others have pointed to the difficulties inherent in attempting to define a de facto relationship for the purposes of identifying those relationships that are to attract the same legal regime as marriage. [51] The problem of definition must however, be tackled if the law is to recognise de facto relationships for more limited purposes and we consider this question later in this Report (Chapter 17).

3. Conclusion

5.56 In our opinion the law concerning de facto relationships should not reflect a specifically religious view of marriage as an institution. For present purposes we adopt the opinion, so powerfully expressed by the Chief justice of New South Wales in the context of the criminal law (paragraph 5.45), that religious precepts, although of central importance to many people and in shaping community attitudes, should not enter the administration of the law. As the Chief justice points out Australians are free to choose which religion to follow, or to reflect religion entirely. The parties to a relationship should not be disadvantaged, whether by the imposition of penalties or the withholding of benefits, simply on the ground that their behaviour does not accord with religious values. Indeed, as we explain in Chapter 4, the current law is inconsistent with such an approach since legislation has long conferred certain benefits on de facto partners and no longer pursues a consistent policy of active discouragement of de facto relationships.

5.57 It is, however one thing to reject the view that the law concerning de facto relationships should reflect a specifically religious view of marriage and another to argue for a policy of equivalence between de facto relationships and marriages. Our conclusion is that the law should not attempt to equate the rights and duties of de facto partners, for all purposes, with those of married persons. We reach this conclusion for two principal reasons.

> First, marriage has a special status in the community that is derived, in large part from the public commitment entered into by the parties. While de facto relationships may perform similar or even identical functions to marriages (both from the perspective of the parties and of the community generally) a public commitment is not a necessary part of such relationships. To adopt a policy of equivalence, without regard to the individual circumstances of the de facto partners, or the issues at

stake, would detract from the special significance of marriage as an institution, and violate a perception of marriage shared widely in the community.

Secondly, a policy of equivalence has the effect of subjecting de facto partners to a legal regime they may wish specifically to avoid. The freedom of persons to choose their own relationships should not be impaired by the automatic imposition of the same rights and obligations as apply to married persons.

B. The Second Option - Rights on Proof of Dependence

5.58 The second option, recommended by the Tasmanian Law Reform Commission, would extend rights and obligations to de facto partners in certain areas, but only on proof of dependence. [52] The rationale underlying this approach is obvious. A person who is dependent upon his or her partner is more likely to suffer hardship or injustice on the termination of their relationship, particularly if deprived of rights against the partner (or against his or her estate). There are, however, two major difficulties with introducing dependence as a necessary condition for establishing the entitlement of a de facto partner.

5.59 First in considering rights and duties arising out of a relationship, dependence is not the only matter to be taken into account. Dependence may be vital in certain situations (as for example in determining a person's entitlement to periodic maintenance) and is sometimes the main or only test used in some statutes. [53] But even a person living in a de facto relationship who is not financially dependent on his or her partner may suffer serious injustice under the current law. A prime example is a person who has made substantial financial contributions to the relationship but whose contributions cannot be recognised under orthodox principles of law. [54] The fact that the person concerned was not "dependent" on his or her partner does not overcome the injustice inherent in failing to recognise contributions which have enriched the other partner.

5.60 Secondly, despite the use of the term "dependent" in some legislation the concept can be criticised as a principal criterion for determining the rights and duties of parties to a relationship. The Tasmanian Law Reform Commission seems to have had in mind financial dependence, or reliance by one party on the income of the other for support, as the major legislative test to be applied in determining eligibility to claim benefits. [55] An emphasis on financial dependence is capable itself of producing injustice, since the dividing line between partial dependence and independence (for example, in a two income household) may be very fine indeed yet may produce very significant differences in entitlement. Perhaps more importantly, an exclusive or primary test of financial dependence takes insufficient account of the interdependence of the parties to a relationship, regardless of their financial arrangements. As the Family Law Act recognises, [56] relationships may involve not only economic interdependence but also emotional interdependence and mutual support in relation to such matters as the rearing of children, management of the household, and the discharge of family and social responsibilities. While this point received relatively little attention in formal submissions, [57] it was stressed more often in oral discussions with individuals and groups. The point was also made in those discussions (as we had suggested in our Issues Paper) that the criterion of financial dependence, which would most frequently be satisfied by women claimants, reinforces stereotyped conceptions of the roles of men and women within marriage and other relationships. Specifically, the notion of dependence reinforces the assumption of male dominance and female economic and psychological dependence. The analysis of the 1982 Australian Family Survey in Chapter 3 shows that de facto couples do not follow the same patterns of female dependence as married couples and that women de facto partners are less likely than wives to be caring for dependent children and are more likely to be in the labour force. This further reinforces the view that it would be inappropriate to entrench traditional concepts of dependence in the legal regulation of de facto relationships.

C. The Third Option - Equating De Facto Relationships and Marriages for Certain Purposes

5.61 The third option attracted virtually no attention in submissions and we reject it as a model for reform. We do this partly for the reasons that have caused us to reject the option of equating de facto relationships and marriages for all purposes. However, our major reason is that this option (embodied in the South Australian Family Relationships Act 1975) assumes too readily that an identical definition is

required for each area of law in which the rights and duties of de facto partners are in issue. We do not think a uniform definition is appropriate in all circumstances.

5.62 Some illustrations will make the point. The Family Provision Act, 1982 enables the Surviving party to a de facto relationship to apply for an order for family provision out of the estate of the deceased partner. The survivor is eligible to apply provided that at the date of death he or she was living with the deceased as his or her "husband or wife on a bona fide domestic basis". [58] The legislation prescribes no minimum period of cohabitation for the sound reason that a family provision order requires a determination by a court that stringent statutory criteria have been satisfied and that the circumstances warrant an order being made. There is therefore no significant danger that a party to a short term or fleeting relationship will receive an undeserved windfall as the result of a family provision order. On the other hand if, as we suggest later, a surviving de facto partner should be entitled to succeed to property on the death intestate of the other partner, in certain circumstances a qualifying period in the relevant definition would be appropriate. This is because entitlement on an intestacy is automatic, in the sense that a person answering the statutory requirements is entitled to receive a specified share of the estate, unless set aside by an order made under the Family Provision Act, 1982. In our view, it is proper that, where the deceased is survived by a spouse or children of another relationship, the surviving partner in a de facto relationship should be entitled to a share on intestacy only if the relationship has continued for a significant period (Chapter 12). Similarly, the criteria that should be satisfied before a court can make an order for financial adjustment between de facto partners (Chapter 8) are not necessarily those that should determine eligibility to claim damages from a third party for the wrongful death of a partner (Chapter 13). Accordingly, we do not think the South Australian approach provides a suitable model for reform.

V. OUR APPROACH - REMEDYING INJUSTICE IN SPECIFIC AREAS

A. The Approach

5.63 We have given our reasons for concluding that the law governing de facto relationships should be reformed. This case rests on a number of factors: the increasing incidence of de facto relationships in the community, the deficiencies in the existing law, many of which have been identified by judges and other commentators; the extent to which de facto partners encounter legal difficulties; and professional and community opinion favouring change.

5.64 We have rejected the argument that the legal consequences of de facto relationships should be equated with those of marriages. Such a policy would detract from the social significance of marriage as an institution and would impose on people living in de facto relationships a regime that they might specifically wish to avoid. We also reject a model which would provide rights only on proof of dependence. Injustice may be inflicted under the existing law even on someone who cannot demonstrate dependence; and dependence is an Unsuitable concept to constitute the basis of a new legal regime for de facto partners. The South Australian approach, which we have described as equating de facto relationships with marriage for certain purposes, is n our view unsatisfactory as a general model.

5.65 The fourth model requires policy makers to examine specific areas of law to determine whether there are injustices or significant anomalies and, if so, what remedial action should be taken As we have discussed, most submissions supported the view that reforms were needed although they were not unanimous on the changes required. Of submissions expressing this opinion an overwhelming majority favour examining individual areas of law identify the injustices and anomalies warranting attention. [59] These included a wide range of of groups and organisations, some of whose submissions we have examined earlier (paragraphs 5.19 and following).

5.66 We have been much influenced by the opinions expressed in submissions. However, as the analysis earlier in this Chapter shows, we have independently reached the conclusion that the best path to reform is to examine the areas of law specified in our Issues Paper for the purpose of identifying injustices and significant anomalies requiring correction. In our view, this can be done without

necessarily imposing on de facto partners the same legal regime as applies to married persons and without detracting from the public significance of marriage within the Australian community.

B. Governing Principles

5.67 In subsequent Chapters of this Report we examine specific areas of law in depth. We should not and cannot, undertake this task in a vacuum. Accordingly, we state the principles, derived from this and earlier Chapters, which guide us in assessing the changes, if any, that should take place in each area. These principles are as follows:

> The policy of the law is not, and should not be, actively to discourage the formation or continuation of de facto relationships, whether by means of withholding benefits, imposing penalties or otherwise. In a pluralist society, as far as the law is concerned, people may choose to live together in such relationships. In Australia, that choice is frequently exercised.
>
> The basis for the intervention of law in conferring rights or imposing obligations on de facto partners is, in general the minimisation of injustice or the removal of significant anomalies.
>
> In determining whether injustice or anomalies exist it should not be assumed that the rights and obligations of de facto partners should necessary be identical with those of married couples. Marriage is seen by the community generally as involving a public commitment that is not a necessary element in a de facto relationship. For this reason, among others, it may be appropriate to distinguish between the legal consequences of de facto relationships and those of marriages.
>
> Injustice may occur when the existing law denies rights to a person living in a de facto relationship who is dependent on his or her partner. However, the existing law is capable of creating injustice even when the person concerned is not dependent on his or her partner.
>
> If further rights are extended to de facto partners, conflicting claims many be made by a person's spouse and his or her de facto partner. This is not a novel problem and there is no uniform solution. In some areas, Such as succession on intestacy or property claims, it is appropriate that the legitimate expectations of the spouse should be protected against a party to a short term de facto relationship.
>
> The freedom of people to choose the nature of their personal relationships and to order their own affairs should be respected, unless there are powerful countervailing considerations such as the avoidance of exploitation or the protection of children. Accordingly, in general the law should not impose a regime on de facto partners, particularly in relation to financial matters, that is inconsistent with their specific wishes.
>
> In so far as proposals affect the children of a de facto relationship, or children who live within the household of the de facto partners, the proposals should be consistent with the children's welfare.
>
> In determining whether rights should be conferred and obligations imposed on de facto partners, it should not be assumed that uniform criteria should be employed in all circumstances. For example, the duration of the relationship may be important in some circumstances but not in others.

VI. SUMMARY

5.68 In this Chapter we have argued that the present law affecting de facto relationships in New South Wales requires reform. In reaching this view we have been influenced by the increasing numbers of people living in de facto relationships, by the significant injustices and anomalies produced by the existing law, and by the broad acceptance of the need for change evident both within the legal profession and in the wider community. We have discussed the four major policy options identified in the Issues Paper, and have reached the conclusion that we should adopt the fourth option This option requires us to examine specific areas of the law to determine whether there are significant injustices or anomalies, and if these exist, to determine what remedial action should be taken. We have set out the

principles which should guide us in assessing the changes which should be made in each area of the law requiring examination.

FOOTNOTES

1. See the discussion of *Seidler v. Schalthofer* [1982] 2 NSWLR 80 in para.4.4.

2. As did Hutley J.A. in *Seidler v. Schallhofer* [1982] 2 NSWLR 80, at p.103.

3. 1 July 1981, Supreme Court of New South Wales, Waddell J., Transcript of judgment p.11. See para.7.15.

4. 30 July 1982, Supreme Court of New South Wales, Court of Appeal, Transcript of judgment p.12.

5. (1980) 6 Fam LR 781.

6. 10 April 1981, Supreme Court of New South Wales Wootten J., Transcript of judgment, p.6.

7. See para.4.37.

8. Crimes (Domestic Violence) Amendment Act, 1982; Periodic Detention of Prisoners (Domestic Violence) Amendment Act, 1982. See Chapter 14.

9. See now Crimes Act, 1900, s.547AA.

10. Family Law Act 1975 (Cth), ss.4, 39(4) (c).

11. 16 February 1982, Supreme Court of New South Wales on removal of the High Court, [1982] FLC 91-218.

12. Uniting Church in Australia, NSW Synod Board for Social Responsibility, Submission No.30.

13. *Id*., p. 3.

14. New South Wales Catholic Social Welfare Committee, Submission No.36, paras.4.1, 5.4.

15. *Id*., para.9.3. On this point see Women's Action Alliance (NSW), Submission No.37, p.3.

16. *Id*., para.16.18.

17. *Id*., para.10.21.

18. Australian Catholic Social Welfare Commission, Submission No.27, p.5.

19. Anglican Diocese of Sydney, Social Issues Committee (majority response), Submission No.34(a), adopted by the Anglican Diocese of Newcastle, Submission No.43.

20. See also the submissions of the Catholic Women's League of SA Inc., Submission No.52; Catholic Family Welfare Bureau of the Archdiocese of Adelaide, Submission No.24.

21. See eg. The Australian Federation of Festival of Light, Submission No.38; Social Questions Committee of the Catholic Women's League of Victoria and Wagga Wagga, Submission No.20.

22. Social Issues Committee, Anglican Diocese of Sydney (minority response), Submission No.34(b), p.2.

23. Women Lawyers' Association of NSW, Submission No.4, para.2.2.

24. NSW Women's Advisory Council, Submission No.10, p.l.

25. Australian Council of Social Service, Submission No.26. Cf. Women's Action Alliance (NSW), Submission No.37.

26. See eg. Leichhardt Interagency, Submission No.2; Council for Civil Liberties, Submission No.31; National Marriage Guidance Council of Australia, Submission No.28; Women's Co-ordination Unit, Submission No.35; Feminist Legal Action Group, Submission No.32.

27. Australian Council of Social Service, Submission No.26. See para.1.3.

28. The report was prepared pursuant to the Board's responsibility under the Anti-Discrimination Act 1977 to review State legislation and government practices to identify discrimination referred to in the Act.

29. NSW Anti-Discrimination Board, Discrimination in Legislation (1978), vol.1, p.6.

30. Presumably the Commonwealth could expressly override such legislation by providing that only marriages celebrated or recognised under Commonwealth law are valid: Constitution, ss.51 (xxi) and 109. Cf Marriage Act 1961 (Cth), s.40(i).

31. NSW Anti-Discrimination Board, note 29 above, p.14. See Ch.15.

32. 7 *Commonwealth Record* 1781 (December 1982).

33. Tasmanian Law Reform Commission, Report on Obligations Arising from De Facto Relationships (Report No.36, 1977), p.6.

34. *Id*., pp.7-8. The Commission also recommended that de facto husbands, as well as de facto wives, should be able to claim under the Maintenance Act 1967-, s.16. See para-5.60.

35. The definition of "putative spouse", in general requires the claimant to prove that the parties were cohabiting on the relevant date (usually the death of the partner) and that either

(i) the cohabitation has lasted for at least five years before that date, or

(ii) the parties had had sexual relations resulting in birth of a child.

Family Relationships Act 1975 (SA), s.11(1). See *Lesiw v. Commissioner of Succession Duties* (1979) 20 SASR 481; In re *Fagan* (1980) 23 SASR 454.

36. Council for Civil Liberties, Submission No.31.

37. Cf. *R v. Cahill* (1978) 22 ALR 361, cited by H A Finlay, "Defining the Informal Marriage" (1980) 3 *University of New South Wales Law Journal* 297. There illegal immigrants had contracted or intended to contract marriages to Australians solely for the purpose of securing permanent entry to Australia. In criminal proceedings for conspiracy to prevent the enforcement of the Migration Act 1958 (Cth), all members of the Court of Appeal agreed that the marriages were (or would have been) lawful Street C J specifically held that to enter into a valid marriage to obtain an immigration advantage, without any deception could not be said to be "morally repugnant". Cahill and similar Australian cases are discussed in detail in J H Wade, "Limited Purpose Marriages" (1982) 45 *Modern Law Review* 159: "Marriages of Convenience in Australia" (1980) 11 *Federal Law Review* 84.

38. E. Evatt, R W Watson and D McKenzie, "The Legal and Social Aspects of Cohabitation and The Reconstituted Family as asocial Problems in J M Eekelaarand S N Katz, (eds.) Marriage and Cohabitation in Contemporary Societies (1980), p.399.

39. H A Finlay, note 37 above, at p.281.

40. *R v. Cahill* (1978) 22 ALR 361, at p.365.

41. For similar views see Anglican Home Mission Society, Submission N o.6, The Anglican Parish of St Marys, Avalon with St Davids, Palm Beach, Submission No. 18:

“De facto relationships ... are private arrangements and to varying degrees are casual and transient in nature. The parties do not make any formal commitment to each other and may intentionally not do so in order to avoid the responsibilities of marriage.”

42. Uniting Church in Australia, NSW Synod, Board for Social Responsibility, Submission No.30, p.13.

43. New South Wales Bar Association, Submission No.23, p. 1. This argument has frequently been made in the literature. See eg. R Deech “The Case Against Legal Recognition of Cohabitation in J M Eekelaar and S.N. Katz- note 38 above, pp.301-303; S M Cretney, “The Law Relating to Unmarried Partners from the Perspective of a Law Reform Agency”, *Id*., at p.365.

44. S. Kirkham, Submission No.21.

45. NSW Women’s Advisory Council, Submission No.10, p.l.

46. NSW Catholic Social Welfare Committee, Submission No.36, para.10.4.

47 See eg. Women Lawyer’s Association of NSW, Submission No.4, para.7.1.

48. See eg. D MacDougall “Policy and Social Factors Affecting the Legal Recognition of Cohabitation Without Formal Marriage” in J M Eekelaar and S N Katz. note 38 above, p.319.

49. New South Wales Catholic Social Welfare Committee, Submission No. 36, para.10.3.

50. See paras.4.24-4.25: *Axtell and Axtell* [1982] FLC 91-208.

51. D MacDougall, note 48 above, pp.318-319. The problem of definition was raised in a number of submissions. See eg. Women Lawyers’ Association of NSW, Submission No.4, paras.4.1-4.3, Australian Catholic Social Welfare Commission, Submission No.27, p.8.

52. See paras.5.36-5.37.

53. See eg. Workers’ Compensation Act 1926 (NSW), ss.6, 9(6)(c) (dependents of a deceased worker entitled to compensation on the workers death).

54. See para.5.9.

55. Tasmanian Law Reform Commission, note 33 above. pp.7, 8, 10.

56. The Family Law Act 1975 (Cth), s.79(4)(b) allows a “contribution in the capacity of home maker and parent” to be taken into account in determining a claim to property.

57. The Women’s Co-ordination Unit, for example, specifically rejected the concept of “dependence” in the definition of a de facto relationship: NSW Women’s Co-ordination Unit, Submission No.35, para-2.2.

58. Family Provision Act 1982, s.6.

59. For specific comment see Women Lawyers’ Association of NSW, Submission No.4. para.3.1; NSW Women’s Advisory Council, Submission No. 10, p. 1; Australian Council of Social Service, Submission No.26; Uniting Church in Australia, NSW Synod, Board for social Responsibility, SubmissionNo.30, p.4; Australian Catholic Social Welfare Commission, Submission No.27, p.5; NSW Catholic Social Welfare Committee, Submission No.36, para.10.2; Anglican Diocese of Sydney, Social Issues Committee (majority response), Submission No.34(a), p.2.

6. The Background to Financial Adjustment: Disputes Between Married Persons

I. INTRODUCTION

6.1 In Australia one system of law is applied to determine disputes relating to the financial affairs of married couples, and another to determine similar disputes between de facto partners. Disputes which arise between married couples when the marriage breaks down are generally heard by the Family Court applying the principles laid down in the Family Law Act 1975. This Act empowers the court to alter the interests of married couples in property owned by one, or both of them, if such an order is considered "just and equitable". [1] The Act also permits the court to order one spouse to pay maintenance to the other in defined circumstances. [2] By contrast property disputes between de facto partners are dealt with under State law. In New South Wales disputes between de facto partners are determined in accordance with principles that apply to property disputes between strangers. New South Wales law does not allow a de facto partner to claim maintenance from the other party on his or her own account although maintenance may be claimed on behalf of the children of the relationship.

6.2 As we have explained in Chapter 5, the fact that there are differences between the law affecting married persons and that affecting to de facto partners does not of itself justify change. However, a brief examination of the historical development of both areas of law assists critical evaluation of the modern law affecting de facto partners. We now make such an examination We deal first, with the development of matrimonial property law and then with the law of maintenance between married persons. We trace the development of the law of matrimonial property to the regime of "family property" embodied in the Family Law Act In the law of maintenance we note the shift in emphasis from a life-long obligation of support on the breakdown of a marriage, to a system that stresses the need for each party to become financially independent. We then explain the close and complex relationship between orders for the settlement of property and awards of maintenance under the Family Law Act and explain the key concepts of "contributions", "needs" and "resources".

II. THE DEVELOPMENT OF MATRIMONIAL PROPERTY LAW

6.3 Matrimonial property law has passed through three main stages: matrimonial unity, separate property, and family property.

A. Matrimonial Unity

6.4 At common law a wife, during marriage, had no legal existence independent of her husband Sir William Blackstone put it this way

> "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." [3]

A consequence of this was that the wife could not hold separate property of her own during the marriage. [4] The husband became entitled to all freehold lands held by his wife at the time of marriage or during the marriage. He also obtained title to all chattels belonging to his wife at the time of marriage or acquired by her during the marriage. These principles applied even after the marriage broke down, further emphasising the wife's subservience and vulnerability.

B. Separate Property

6.5 The principle that husband and wife were “one person in law” came under increasing criticism in the latter half of the nineteenth century. By a series of Acts, culminating in the Married Women’s Property Act 1882, married women in England became entitled to acquire, hold, and dispose of property in their own right as if they were unmarried. Similar legislation was passed in the Australian States. [5]

6.6 “Separation of property” improved the legal position of a married woman who had property in her own name or who earned income. But it was of little assistance to women who had no assets or did not work outside the home. Under the prevailing division of labour the husband was usually responsible for earning income and acquiring property, while the wife remained at home to care for the house and rear the children. If the marriage broke down the wife had rarely acquired assets in her own name, and thus the principle of separation of property generally worked to her disadvantage. As one commentator has noted, the principle reinforced rather than reduced sex-based inequality. [6]

6.7 In the years following the Second World War, the English Court of Appeal attempted to overcome the injustice inherent in the principle of separation of property. In a series of cases it was held that section 17 of the Married Women’s Property Act 1882 conferred a discretion on the court to vary the established property rights of the parties, if this were necessary to achieve a fair result between them. [7] The high point of the “palm-tree Justice” line of cases (as they were called) was the statement of Lord Denning in *Hine v. Hine:*

> “the jurisdiction of the court over family assets under section 17 is entirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit. This means ... that the court is entitled to make such order as appears to be fair and just in all the circumstances of the case.” [8]

6.8 For a short time it seemed that Australian courts, in interpreting equivalent legislation might follow the English approach. But in 1956 the High Court of Australia returned to a traditional view of the legislation In the leading case of *Wirth v. Wirth* [9] the High Court held that it had no power to re-allocate the property rights of married couples. Property disputes between husbands and wives were to be determined by applying the same principles of property law as those which applied to unmarried partners. In the words of Chief Justice Dixon,

> “the title to property and proprietary rights in the case of married persons no less than in that of unmarried persons rests upon the law and not upon judicial discretion.” [10]

Ultimately, the view accepted in Australia was also adopted by the House of Lords in England. [11]

6.9 Later the English Court of Appeal adopted a different strategy and extended established principles of the law of trusts to achieve a more equitable distribution of property between married persons. For example, it held that a court could impose a trust independently of the parties intentions where this was necessary to recognise financial and non-financial contributions to the acquisition or improvement of property. [12]

6.10 The Australian courts, in dealing with disputes between married persons, continued to take the traditional view that a spouse who claimed a beneficial interest in property held by the other spouse had to show that the parties had an actual intention that such an interest would be obtained, or that he or she had made a direct financial contribution to the purchase price of the property (see paragraphs 7.6-7.14). [13] However, the effects of the apparent inflexibility of orthodox common law and equitable principles in relation to matrimonial property disputes were ameliorated by the enactment of the Matrimonial Causes Act 1959 (Cth), which came into force in 1961.

C. Family Property

6.11 The Matrimonial Causes Act 1959 introduced a national divorce law and conferred power on the court to make such orders for the settlement of property as it considered just and equitable. [14] The relevant provision appeared to abandon the strict principles of property law as a basis for determining matrimonial disputes. Initially, however, it received a conservative interpretation as courts concentrated on direct financial contributions in deciding whether to make an order for the settlement of property. [15] Gradually the courts began to attach greater significance to non-financial domestic contributions to the matrimonial relationships, [16] such as a child rearing and homemaking, thereby grappling with one of the obvious deficiencies of the separate property regime. [17]

6.12 The Family Law Act 1975, which replaced the 1959 Act continued to permit the courts to re-allocate the property rights of the parties, but specified more detailed criteria for the exercise of the judicial discretion. The philosophy which now governs re-allocation of property rights has been described as a combination of "compensation for past contributions" and "allowance for future needs". [18] As a first step the court considers the parties' respective financial and non-financial contributions to the acquisition conservation and improvement of the property in dispute, including contributions made in the role of homemaker and parent. [19] As a second step, the court considers factors relating to the parties' financial resources and future needs, including their age, state of health and earning capacity and their responsibilities to children and other persons. [20] The Chief Judge of the Family Court has said that in directing contributions to be taken into account, the legislation was designed to recognise domestic contributions

> "not in a token way but a substantial way. While the parties reside together, the one earning and the other fulfilling responsibilities in the home, there is no reason to attach greater value to the contribution of one than to that of the other. This is the way they arrange their affairs and the contribution of each should be given equal value". [21]

This has led some judges to suggest that, in certain circumstances, equality is the appropriate principle to apply:

> "where a court... is dealing with jointly accrued assets or assets which are acquired or built up by the Joint efforts of the parties in a marriage that has lasted a number of years, equality is ... at least the proper starting point." [22]

6.13 Despite this recognition of domestic contributions, the Family Law Act does not go so far as to treat marriage as a full economic partnership as in community of property regimes, under which each party may be entitled to an equal share of the family assets when the relationship comes to an end. Section 79(4) (b) of the Act still appears to require a link between the "acquisition conservation and improvement of the property" and the "contribution made in the capacity of homemaker or parent'. Early cases under the Family Law Act tended to interpret this provision literally, but later decisions have not necessarily required an identifiable connection between the contribution and a particular asset. [23] The wording of the subsection has been criticised by the Joint Select Committee on the Family Law Act, and proposed amendments to the Act remove the link. [24] However, even if these amendments are made, the Act will differ from many community property regimes, the major characteristic of which is that a party to the marriage has an automatic share in the other spouse's property, either during the marriage or when it breaks down. By contrast, under the Family Law Act, the shares to be awarded to each party depend on the exercise of the courts discretion.

6.14 Recently it has been suggested that Australian matrimonial property law should move closer towards the "economic partnership" view of marriage, possibly accepting a system of division of the matrimonial property by reference to fixed shares. The Joint Select Committee on the Family Law Act, for example, acknowledged the advantages of such a system and recommended that the Family Law Act provide for a presumption of equal ownership of the matrimonial home. [25] A number of other jurisdictions have moved towards acceptance of the

concept of economic partnership as the basis for a distribution of matrimonial property. Over the last decade, New Zealand and the Canadian common law Provinces have passed legislation establishing a *prima facie* rule of equal sharing in matrimonial property. [26] The Scottish Law Commission has recently recommended a general principle of equal sharing of matrimonial property including business property, [27] while in England, in 1978, the Law Commission recommended that husband and wife should be given equal rights in the matrimonial home. [28] It is understood that an Australian inquiry into matrimonial property is to be held at federal level and this may provide further impetus towards recognition of the concept of an economic partnership between spouses.

III. THE DEVELOPMENT OF THE LAW OF MAINTENANCE

A. The Common Law

6.15 The law of maintenance between spouses has a long history and is now undergoing significant change. At common law a husband had a life-long obligation to support his wife according to his means, although in practice this obligation was impossible to enforce because the wife could not sue her husband. [29] The common law was displaced by legislation at a relatively early stage in Australia. Colonial legislation which heavily influenced family law until the second half of the twentieth century, [30] recognised and reinforced the dependent role of women and also gave effect to the principle of matrimonial fault. An “innocent wife”, who had, “without just cause or excuse”, been left by her husband without adequate means of support was generally able to obtain maintenance. The wife was not expected to seek employment and hence could be described as “without adequate means of support”, even if she were capable of entering the workforce. But a wife who was guilty of desertion or adultery had no right to maintenance even if she was destitute. In these circumstances it was said that her husband had “just cause or excuse” for his failure to maintain her. State legislation therefore, reflected the view that an innocent wife was entitled to be supported for her lifetime even if she was capable of becoming financially independent, and even if the marriage was terminated by divorce. By contrast, a husband was either unable to claim maintenance from his wife at all or was able to do so only in the rare case where, through no fault of his own, he could not maintain himself and his wife had the means to support him.

B. The Matrimonial Causes Act 1959

6.16 The Matrimonial Causes Act 1959 governed all maintenance claims which were ancillary to proceedings for principal relief (such as divorce). Section 84 of that Act empowered the court to make such order for the maintenance of a party to the marriage or of the children of the marriage as it thought proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances. Unlike State law, the Act made no formal distinction between the maintenance obligations of husbands and wives, although in practice it was usually the wife who lacked independent means and sought to recover maintenance from her husband. As in the case of the State legislation it was not necessary to show that the wife was in need before she was entitled to maintenance. The fact that a woman was capable of working and supporting herself did not deprive her of a right to maintenance but might affect the amount of the order. The conduct of the spouse was relevant in determining a claim for maintenance, although a “guilty” spouse was not always debarred from obtaining maintenance. The result was that a marriage could give rise to an indefinite obligation to Support an ex-wife, despite the fact that, after the divorce, the husband had acquired a new wife and children and even though the ex-wife might be capable of learning new skills and re-entering the work-force. [31]

C. The Family Law Act 1975

6.17 The Family Law Act 1975 governs all maintenance claims between spouses and imposes reciprocal and identical obligations of support on both parties to a marriage.

However, the Act reflects an important shift in policy in that it departs from the notion of a life-long right to support and accepts the desirability of both parties becoming financially independent. The obligation to support arises only where the other spouse cannot support himself or herself, whether because of age, or mental or physical incapacity for employment, because he or she is caring for a child of the marriage under 18 years, or for any other reason considered adequate by the court. [32]

6.18 The court is directed to take a number of factors into account in determining whether an order should be made and in fixing the amount of the order. Broadly speaking, the factors relate to the needs of the parties (for example, their age, and state of health); the financial resources of the parties (including their mental and physical capacity for employment and any eligibility they may have for a pension or benefit); and their financial obligations and responsibilities (including whether or not they have the care and control of a child of the marriage under 18 years, and whether or not they have the responsibility to support any other person). The court is also directed to consider factors such as the duration of the marriage, its effect on the applicants earning capacity, and the extent to which the party seeking maintenance has contributed to the income, earning capacity and financial resources of the other party. [33]

6.19 The court must also take into account the terms of any property order which has been made or is proposed to be made. This provision is designed to ensure that a spouse will not be able to “double up” on the advantages conferred by separate property and maintenance orders. [34] Consistently with the abandonment of the principle of matrimonial fault in the Family Law Act, the moral conduct of the parties during the marriage is not generally a relevant factor in determining whether a maintenance order should be made. [35] The rehabilitative function of maintenance is recognised by the statutory direction that the court should consider the extent to which the payment of maintenance will increase the applicant s earning capacity by enabling him or her to undertake a course of education or training or to establish himself or herself in a business. [36]

D. A Changing Philosophy

6.20 The provisions of the Family Law Act indicate a marked shift from a philosophy that marriage imposes a continuing and possibly life-long obligation of support on the husband, to one which restricts the maintenance obligation by reference to needs and resources, and emphasises its rehabilitative function. [37] A number of arguments have been put to justify the departure from the principle of life-long support. First, the duty of life-long support was based on the assumption that marriage would normally continue until the death of one party. The increasing incidence of divorce has made this assumption invalid. Hence it is no longer realistic to impose a maintenance obligation which will continue long after a marriage has come to an end. Secondly, the notion of a continuing obligation of support rested in part on the view that an innocent party was entitled to “compensation” if the other party’s action brought the marriage to an end. This view has become irrelevant with the abandonment of matrimonial fault as the sole (or indeed, any) ground for divorce. Thirdly, it is recognized that most divorced partners remarry or establish new relationships. In practice it is often impossible for a re-married partner to support both a former and a present partner. In this situation any maintenance obligation to a former spouse may cause hardship to the second family, and may the success of that relationship. Fourthly, it is argued that the concept of a life-long support obligation is based on the traditional division of labour between husbands and wives. With the increasing participation of women in the workforce, many women now attain financial independence within marriage. Thus, there is less justification for treating women as dependents. Moreover, even where a woman has played the traditional role of wife and mother before the marriage breakdown she may benefit socially and psychologically if she is encouraged to re- enter the workforce and sever her financial ties with her ex-husband. Long-term periodic maintenance may induce an attitude of dependence and helplessness on the part of the recipient. Fifthly, a continuing obligation to pay maintenance over a long period increases the likelihood of acrimony and disputation between ex-spouses and may impede

the ability of the spouse paying maintenance to form new relationships. Finally, there is a high rate of default under periodic maintenance orders after a relatively short time, making the goal of life-long maintenance largely unattainable in practice. [38]

6.21 These arguments have led to increasing support for the rehabilitative model as the basis for an award of maintenance. Proponents of this model accept that marriage may be the principal cause of a spouse's financial dependence as, for example, where a wife gives up employment opportunities in order to care for children. In this situation it is argued that maintenance should be awarded for a temporary period in order to enable the dependent spouse to take steps towards regaining economic independence. The Scottish Law Commission, for example, took the view that periodic maintenance should be designed to "enable a spouse to adjust within a relatively short period, to the cessation on divorce of any financial dependence on the other spouse". Under the Commission's proposals, maintenance would cease three years after divorce, although the court would have a discretion to continue maintenance beyond the three year limit in order to ensure fair sharing of the economic burden of caring for a child of the marriage, or to relieve grave financial hardship. [39] Similarly, the Law Commission in England has recommended that the importance of each party taking steps to become self-sufficient should be formulated in terms of a positive legislative principle. The Law Commission supports the view that, in appropriate cases, periodic financial provision should be primarily concerned to secure a transition from the status of marriage to the status of independence. [40]

IV. INTERACTION BETWEEN PROPERTY AND MAINTENANCE

6.22 Under the Family Law Act there is a very close relationship between orders for the settlement of property and maintenance awards. In assessing the amount of maintenance that should be awarded, section 75(2) instructs the court to take into account (among other things) the parties'

> property;
>
> financial resources and earning capacity;
>
> past contributions to property and financial resources;
>
> the terms of any proposed order to be made under section 79 readjusting rights in relation to property;
>
> the financial needs and obligations of each party. [41]

When determining whether an order altering property rights should be made under section 79, the court is directed to consider,

> contributions to the acquisition or improvement of the property;
>
> the effect of any proposed order upon the earning capacity of either party; and
>
> all the matters in section 75(2) "so far as they are relevant". [42]

An order for settlement of property may therefore be based entirely on contributions, entirely on needs, or on a combination of both. Similarly, a maintenance order could include both a needs and a contribution element.

6.23 In proceedings with respect to property and maintenance, section 81 of the Act imposes a duty on the court

> "as far as practicable, [to] make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them."

This "clean break" principle causes the court to lean in favour of orders for lump sum maintenance or settlement (transfer) of property, in lieu of a continuing maintenance obligation. [43] In some cases, of course, it is not feasible to terminate the parties' financial relationship. For example, a lump sum order based on the capitalisation of an obligation to pay future maintenance may be unsuitable where the respondent has no capital from which a lump sum payment can be made, or where the length of time during which periodic maintenance will be necessary is uncertain. [44] In such circumstances periodic orders may be appropriate.

6.24 The Family Court has considered the inter-relationship between property and maintenance orders and between the contributions and needs criteria specified in the Family Law Act Recent cases have suggested that an order for settlement of property under section 79 should be assessed before the question of entitlement to maintenance (within the meaning of section 72) is addressed. [45] In determining the appropriate property order, the court undertakes what has been described as a "dual exercise". [46] The first part of the exercise is to ascertain the value of the property of the parties and to make an assessment of the extent of each party's contributions to that property. The second step is to consider the financial resources (for example, income) and needs of the parties and other matters specified in section 75(2). In some cases allocation of a share of the property in recognition of the contribution entitlement may leave no outstanding needs or other factors under section 75(2) to be considered. In others it may be appropriate for the property order to contain a needs (maintenance) element as where a seriously ill spouse or a custodial parent receives a greater share of the matrimonial home than would be justified by contributions alone. [47] Even an applicant who is not entitled to be maintained by the other party within the meaning of section 72, maybe entitled to rely on the factors specified in section 75(2), to obtain a greater share of property than contributions alone would warrant. [48]

6.25 Once the court determines the nature of the property order (if any) to be made, it then considers any claim to maintenance based upon the applicant s inability to support himself or herself As noted above, it may be that the property order will satisfy the needs of the applicant so that an order for maintenance is unnecessary. [49] If not, an order for periodic maintenance may be made or, taking into account the "clean break" principle embodied in section 81, an order for lump sum maintenance. The inclusion of a maintenance or section 75(2) component in a property order does not prevent the court awarding periodic or lump sum maintenance. [50]

V. SUMMARY

6.26 In this Chapter we have traced the development of the current law governing financial adjustment between married persons. We have briefly examined the three main stages of the law of matrimonial property; matrimonial unity, which prevailed until the late nineteenth century, separate property, which prevailed until the Matrimonial Causes Act 1959; and the current family property regime, which is itself in a state of flux. We have also referred to important changes in the law of maintenance, where the emphasis has shifted from a life-long obligation of support to a system that stresses the need for each party to become financially independent. We have canvassed these areas because the principles governing financial adjustment between married persons constitute essential background material to an assessment of the current law governing de facto relationships. Many of the issues dealt with in the Family Law Act are similar to the issues we face. Developments in Commonwealth family law provide the context in which we must make our assessment of these issues. We stress, however, that the purpose of this Chapter is not to suggest that the principles embodied in the Family Law Act should necessarily apply to financial disputes between de facto partners. As will be seem our approach is similar to that of the Act but there are important differences.

FOOTNOTES

1. Family Law Act 1975 (Cth), s.79(1), (2).

2. *Id*., ss.72, 74, 75.

3. W. Blackstone, Commentaries (1st ed, 1765), vol.1, p.430.

4. W. Holdsworth, *History of English Law* (6th ed, 1934), vol.3, pp.520-533. Equity modified the common law to a limited extent through the concept of the separate estate and the restraint on anticipation: *Bromley's Family Law* (6th ed. 1981). pp.413-415.

5. In New South Wiles the legislation was the Married Women's Property Act 1893. See now Married Women's Property Act 1901, s.5.

6. K J Gray, *Re-Allocation of Property on Divorce* (1977), p.50.

7. See eg. *Rimmer v. Rimmer* [1953] 1 QB 63. Section 17 created a summary jurisdiction in the court to hear any question between husband and wife as to the title and possession of property and allowed the judge to make such order with respect to the property as he thought fit.

8. [1962] 3 All ER 345. at p.347.

9. (1956) 98 CLR 228.

10. *Id*., p.232.

11. *Pettitt v. Pettitt* [1970] AC 777.

12. See eg. *Falconer v. Falconer* [1970] 1 WLR 1333; *Hazell v.Hazell* [1972] 1 WLR 301; cf. *Gissing v.Gissing* [1971] AC 886.

13. See eg. *Pearson v. Pearson* [1961] VR 693.

14. Matrimonial Causes Act 1959 (Cth), s,86.

15. See eg. *Ackland v. Ackland* [1961] NSWR 1149; *Van Liif v. Van Liif* [1967] 1 NSWR 102.

16. This trend appears to have commenced with *Sanders v. Sanders* (1967) 116 CLR 336, at p.381 per Windeyer J. See also *Dunn v. Dunn* [1973] 1 NSWLR 590, at p.596: *Pytlowany v. Pytlowany* [1974] VR 105, at p.111. For a discussion of this change of attitude see K J Gray, note 6 above, pp.55 ff.

17. Legislation passed in England in 1970 also gave the court power to reallocate the resources of the partners, taking into account contributions made by each party to the welfare of the family Matrimonial Proceedings and Property Act 1970 (Eng), s.5(1)(f). See now Matrimonial Causes Act 1973 (Eng), s.25(1)(f).

18. R J Bailey, "Principles of Property Distribution on Divorce-Compensation, Need or Community?" (1980) 54 *Australian Law Journal* 190; J H Wade, *Property Division Upon Divorce* (1982).

19. Family Law Act 1975 (Cth), s.79(4)(b).

20. *Id*., s.75(2). For a description of the manner in which the court should proceed, *see Pastrikos and Pastrikos* [1980] FLC 90-897 (Full Court of the Family Court).

21. *Rolfe and Rolfe* [1979] FLC 90-629.

22. *Potthoff and Potthoff* [1978] FLC 90-475, at p.77,446, per Fogarty J. See also *Wardman and Hudson* [1978] FLC 90-466.

23. See *Rainbird and Rainbird* [1977] FLC 90-310: cf. *Aroney and Aroney* [1980] FLC 90-905; *Mahon and Mahon* [1982] FLC 91-242.

24. Joint Select Committee, Report on the Family Law Act (1980), vol.1; Family Law Amendment Bill 1983, cl.31. See also Family Law Act 1975 (Cth), s.75(2)(j) ("income, earning capacity, property and financial resources").

25. Joint Select Committee, note 24 above, vol.1, pp.107-108.

26. Matrimonial Property Act 1976 (NZ); A J McLean, "Matrimonial Property - Canadian Common Law Style" (1981) 31 *University of Toronto Law Journal* 363.

27. Scottish Law Commission, *Family Law: Report on Aliment and Financial Provision* (Scot. Law Corn. No.67, 1981) paras.3.65 ff. The principle of equal sharing is not to apply in certain circumstances.

28. The Law Commission, *Family Law: Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods* (Law Com.No.86, 1978). The Law Commission did not recommend equal sharing for other items of matrimonial property. See The Law Commission, *Family Law: The Financial Consequences of Divorce* (Law Com No.112, 1981).

29. See M Finer and O R McGregor, "The History of the Obligation to Maintain" in *Report of Committee on One-Parent Families* (Cmnd.5629, 1974), vol.2, Appendix 5, pp.98 ff.

30. The first maintenance legislation was enacted in the colony of New South Wales. In the 1960s all States enacted "uniform" maintenance legislation although differences in detail remained. See, e.g., Maintenance Act, 1964. The uniform legislation was displaced as far as maintenance between spouses was concerned by the Family Law Act 1975 which permitted claims for maintenance independently of proceedings for principal relief.

31. *Davis v. Davis* [1964] VK 278, at p.282, per Barry J: *Rodgers v. Rodgers* (1964) 114 CLR 608, at p.618, per McTiernam Taylor and Owen JJ.

32. Family Law Act 1975 (Cth), s.72.

33. *Id*., s.75(2).

34. *Id*., s.75(2)(n); *Aroney and Aroney* [1979] FLC 90-709, at pp.78,790, per Nygh J; on appeal [1980] FLC 90-905.

35. *Soblusky and Soblusky* [1976] FLC 90-124. For situations where fault is relevant, see J H Wade, *Property Division Upon Divorce* (1982) pp.119-121, 129-135.

36. Family Law Act 1975 (Cth), s.75 (2) (h).

37. See, generally, The Law Commission, *Family Law: The Financial Consequences of Divorce. The Basic Policy* (Discussion Paper, Law Com No.103, 1980), paras.30-35; Scottish Law Commission, note 27 above, para.3.107; K J Gray, note 6 above; L N Browm "Maintenance and Esoterism" (1968) 31 *Modern Law Review* 121; S Cretney, "The Maintenance Quagmire" (1970) 33 *Modern Law Review* 662.

38. The statistics in Australia are sparse. See Family Law Council, *Maintenance Enforcement under the Family Law Act* (Working Paper 4, 1979), pp.22 ff.

39. Scottish Law Commission, note 27 above, para.3.107.

40. Law Commission, *Family Law: The Financial Consequences of Divorce* (Law Com No.112, 1981), p.18. The Commission recognised the difficulty of giving effect to this principle, particularly where the wife was left with young children; *Id*., p.11.

41. Family Law Act 1975 (Cth), s.75(2)(b), (d), (j), (n).

42. *Id*., s.79(4)(a), (b), (c), (d).

43. *Mapstone and Mapstone* [1979] FLC 90-681, at p.78,639.

44. See eg. *Spano and Spano* [1979] FLC 90-707.

45. *Anast and Atiastopoulos* [1982] FLC 91-201; *Pastrikos and Pastrikos* [1980] FLC 90-897; *Albany and Albany* [1980] 90-905.

46. *Pastrikos and Pastrikos* [1980] FLC 90-897, at p.75,651.

47. *Dow-Sainter and Dow-Sainter* [1980] FLC 90-890; *Dench and Dench* [1978] FLC 90-469.

48. *Anast and Akiastopoulos* [1982] FLC 91-201; at pp.77,061-062.

49. *Aroney and Aroney* [1979] FLC 90-709.

50. *Akiast and Anastopoulos* [1982] FLC 91-201, at pp.77,063.

7. Property Disputes Between De Facto Partners

I. THE CURRENT LAW

A. General Principles

7.1 The Family Law Act 1975 does not, and subject to the observations made in Chapter 2, constitutionally cannot apply to disputes between de facto partners. Consequently, the Family Court which derives its powers from the Family Law Act, does not have jurisdiction to hear property disputes between de facto partners. These must be determined by State courts in accordance with State law. Since there is no State legislation which makes any special provision for Such disputes, there is no statutory basis for adjusting the property rights of de facto partners on the ground that a variation would be fair or would meet their special circumstances. Thus the rights of de facto partners are similar to those of married couples under the separate property regime which prevailed before the enactment of the Commonwealth Matrimonial Causes Act 1959 (paragraphs 6.5-6.10).

7.2 Under the separate property regime, the starting point is that the beneficial interest in a disputed asset is determined by the court in accordance with the legal title to that asset. If, for example, de facto partners acquire a house in their Joint names, they will usually be regarded as holding the beneficial interest jointly. Either party can apply to the Court seeking an order for sale and decision of the proceeds, and such can expect to receive one half of the sale price. Where title to the “matrimonial home” is held by one party, that party will generally be entitled to the full beneficial interest unless there is room for the application of the law of trusts. Thus, if title to the home is held by the man, the fact that the woman has contributed to the well-being of the family by performing household tasks, or caring for the children of the relationship will not be enough in itself to establish a claim by her to a share in it. Similarly, the fact that following the breakdown of the relationship, she has an urgent need for accommodation for herself and her children does not give the court any discretion to order that a share, or full ownership of the home be transferred to her.

7.3 The law of trusts allows courts to declare that, in certain circumstances, a person who has the legal title to property holds the property on trust for another person. For example, if two people make direct financial contributions to the purchase price of an asset a presumption arises that the asset is owned by those people in proportion to their respective financial contributions, even if the legal title to it is held by only one of them. [1] This is the principle of the “resulting in trust”. The principle applies where a wife makes a direct financial contribution to property purchased in her husband’s name. although it does not apply in the reverse situation. In that case the law presumes (the so-called “presumption of advancement”) that a *husband* who puts any property in his *wife’s* name intended to give it to her. [2] Thus, if the husband wishes to claim ownership of the property, he must rebut the presumption by establishing a positive intention on his part to retain ownership. In recent times it has been suggested that the presumption of advancement, and rules such as those relating to resulting trusts, are no longer appropriate for resolving disputes between married couples. [3] Nevertheless, Australian courts continue to apply them, [4] subject to their statutory powers to adjust property-rights. However, the High Court has recently decided that the presumption of advancement does not apply to a gift from one de facto partner to another. [5]

7.4 It is well recognised that where one person acquires the legal title to property on the basis of an agreement that another person will have an interest in the property, the person with the legal title will not be permitted to defeat the interest of the other person. A court of equity will not permit the legal title to be used to defeat the agreement since this would be “unconscionable”. [6]

7.5 Reference has been made to the attempts by the English Court of Appeal to overcome the deficiencies of the separate property regime by extending the law of trusts to achieve a more equitable distribution of property between married persons (paragraph 6.9). These attempts were overtaken by the enactment of legislation conferring power on the English courts (as had occurred in Australia) to vary established property rights of married persons. However, the same attempts were later made in the context of disputes arising between de facto partners. The English Court of Appeal was often prepared to hold that a trust had arisen in favour of a de facto partner who had made indirect contributions to the building up of assets, even though there was no evidence that the partners intended that an interest in specific property should be created. [7] Sometimes the result was reached by holding that the court could impose a trust whenever this was necessary in order to achieve a fair distribution of the property. On other occasions the court decided that it was reasonable to regard both the partners as having intended to create a property interest, even though the partners had not expressed such an intention and an actual intention could not be inferred from their conduct.

B. *Allen v. Snyder*

7.6 Australian courts have not been prepared to adapt the law of trusts as a means of adjusting the property rights of de facto partners so as to achieve a fair result. [8] In 1977 in the leading case of *Allen v. Snyder*, [9] the Court of Appeal in New South Wales insisted that Courts should adhere to orthodox doctrine, emphisising the uncertainty which would arise if the courts attempted to extend existing legal principles in order to solve new social problems.

> "The velocity of social change affecting, not only the financial balance in the relationship of husband and wife, but also producing new forms of l ' 'de marriage has, indeed, produced a flurry of litigious activities. New situations have, it appears, produced some new legal rules. It is inevitable that judge made law will alter to meet the changing conditions of society. That is the way it has always evolved. But it is essential that new rules should be related to fundamental doctrine. If the foundations of accepted doctrine be submerged under new principles, without regard to the interaction between the two, there will be high uncertainty as to the state of the law, both old and new." [10]

7.7 In *Allen v. Snyder*, the Court of Appeal had to consider the claim of a woman to a beneficial interest in a house in which she had lived with her de facto partner for eight of the thirteen years of their relationship. Since she had made no direct financial contribution to the purchase price of the house, she could not rely on the presumption that a direct contribution gives rise to a beneficial interest.

7.8 The Court of Appeal accepted that if a person makes a direct or indirect contribution to property, in reliance on a common intention of the parties that he or she will obtain a beneficial interest in the property, the person with the legal title is not permitted to deny the existence of the beneficial interest. In this situation the person with the legal title is said to be a "constructive trustee" for the contributor. However, the Court of Appeal emphasised that before this principle could apply it was necessary to show that the parties had an *actual* intention that a beneficial interest would be obtained in return for the contributions. In the words of Mr Justice Glass:

> "What is enforced is an actual intention inferred as a matter of fact, not an imputed intention which they never had, but would have had if they had applied their minds to it". [11]

Although it is necessary to show that the parties had an actual intention that a beneficial interest would be obtained by the contributor, it is not necessary to show that they had specifically discussed the matter between themselves. In some cases, the court will be prepared to deduce the existence of the intention from the parties' conduct.

7.9 Since Mrs Allen was unable to establish that she and Mr Snyder intended that she would obtain a beneficial interest in the property, she was denied that interest. The Court of Appeal stressed that its role was to declare the rights of the parties and not to vary them in accordance with considerations of fairness.

C. Application of *Allen v. Snyder*

7.10 The principles stated in *Allen v. Snyder* have been followed in New South Wales and elsewhere in Australia. The courts have now however, always been entirely consistent in their attempts to discover a common intention from the parties' conduct. In several cases in New South Wales the requirement of common intention has prevented the court from holding that a de facto partner who has made substantial contributions has obtained a beneficial interest in property. For example, in *Blanchfield v. Public Trustee* [12] a woman had lived with a man for twenty years in his home, carrying out household tasks, and caring for him when he was ill. It was held that she had not obtained a beneficial interest in the house, because there was no evidence that the man intended she should obtain such an interest in return for her services. A similar difficulty arose in Murray *v. Heggs.* [13] In that case a woman left her husband and went to live with a man in the house which he owned. During the six year period in which they lived together, which ended when the man died, the woman gave him $10,000. Despite evidence that the woman had been told on several occasions that she would have a "home for life", Mr Justice Powell held that there was no evidence that the parties' intended that the woman should have a beneficial interest in the property in return for her $10,000. Thus, no beneficial interest arose in her favour. In each of these cases the judge criticised the result he was compelled to reach as unjust and called for a change in the law. [14]

7.11 In *Feeney v. Feeney* [15] the parties agreed to live together and to pool their income to meet household expenses. The woman assisted in renovating holiday cabins owned by the man, as well as a cottage he acquired in his name. The man paid all outgoings in connection with the properties. Surplus moneys from the pool after housekeeping expenses, were paid to him. Mr Justice Powell observed that one thing

> "to emerge clearly from the various judgments in *Allen v. Snyder* is that it is no longer open to a judge... at first instance, by imputing to the parties a common intention which did not exist, or by holding that to fail to do so would be unfair or inequitable, to hold that a trust has been established." [16]

Since, on the evidence, there was no common intention in the relevant sense, Mr Justice Powell was forced with the "greatest reluctance" to reject the woman's claim to a share in the various properties owned by the man. [17]

7.12 A fourth case, *Rushworth v. Parker*, [18] further illustrates the importance of the court finding that the parties had the requisite intention. A couple lived together for seven years. The woman bore the man's child, and used her income from part-time work to defray some of the household expenses. During this time two properties were acquired. A house property was purchased in the name of the man, and land was purchased in the joint names of the parties. The court found that the woman's claim to a share in the house failed because the man had not intended that she should obtain an interest. The position was different with respect to the jointly owned land. Since the woman had made no direct financial contribution to the acquisition or improvement of the jointly owned land, the presumption was that she held her joint interest in trust for her de facto partner. However, as the man had intended that she should obtain a half interest in the land the presumption was rebutted and she was entitled to a beneficial interest in half the land. [19]

7.13 In a few cases the requirement of common intention has been interpreted liberally, to permit a finding that a de facto partner who had made substantial contributions to the welfare of the family in question obtained a beneficial interest in property. Thus, in a Victorian case, *Hohol v. Hohol*, [20] where a couple had lived together for 25 years and raised a family of four

children, the judge was able to find that the woman obtained a beneficial interest in property in the mans name because, at the time the property was purchased, the man had said “It’s for all of us, it’s for you and me.” Despite its informal character, this statement of intention coupled with the fact that the woman had moved to the property and raised the children in primitive conditions, was held sufficient to make it fraudulent for the man to deny his de facto partner a beneficial interest in the land.

7.14 Similarly, in the New South Wales case of *Hubner v. Marrinan*, [21] a couple had lived together for 11 years, during which time the woman worked and put all her wages into a common pool. Mr Justice Holland held that there had been a common intention that she should have an equal share in the house they had built on land in the mans name. His Honour found that an express agreement could be inferred from the man’s statements to the woman that she would be investing her money and the home would be a security for her, and from other statements urging her to continue saving for “our house”. [22]

7.15 The courts’ emphasis on the intention of the parties may also produce injustice where the intention was quite clear but was based on expectations that turn out to be unjustified or mistaken. In *Muschinski v. Dodds,* [23] a couple jointly owned property which had been purchased out of the proceeds of the sale of the woman’s house. When the property was bought it was intended that the man would contribute towards the building of a new house, but in fact no house was built. The relationship ended after the couple had been living together for eight years. The trial judge, Mr Justice Waddell found that the woman had contributed approximately 90 per cent and the man had contributed approximately 10 per cent to the purchase and improvement of the property. However, following the ordinary principles of property law, the man was entitled to a half interest in the property, since the woman had intended that he should have that interest. Mr Justice Waddell expressed regret at the decision he was required to reach. The Court of Appeal, which upheld the decision, [24] also saw the problem as one which the courts could not solve for themselves and for which legislative intervention was appropriate.

D. Case Studies

7.16 We have tried to ascertain whether the reported and unreported cases involving property disputes between de facto partners are isolated instances or part of a broader pattern. Other examples were brought to our attention in submissions, seminars and open houses, and by people contacting us to discuss their problems. Some people who contacted us described circumstances which in our view seemed to call for a remedy, but, because of the principles stated in *Allen v. Snyder*, no remedy was available or the chances of obtaining a remedy were slight. In some cases legal advice had been sought but the legal practitioner in question quite properly, had advised the client that the claim could not succeed. The following are illustrations of the case studies collected by us.

7.17 In one case, brought to our attention by a solicitor, [25] a woman lived with a man in a de facto relationship for seven years. During this time she kept house for him worked with him in his business, and at times, took outside employment. The money which she earned was used for household expenses and, occasionally, to purchase items of furniture. The man managed the couple’s financial affairs and during the course of the relationship he purchased a home and repaid a loan secured by a mortgage over the land. When the couple separated, the woman was unable to establish according to established principles of law, that she was entitled to an interest in the home, despite her substantial indirect contributions.

7.18 In a second case, a woman had been living with a man for 12 years. During this period she kept house for him nursed him through a serious illness, and looked after his elderly parents. During the course of the relationship, the man acquired a large home unit, the title to which was in his name. The woman decorated the unit, paid for some of the costs of decoration and contributed to the cost of a boat purchased by the man. Although the parties were still living together, the woman was contemplating separation and was concerned about

her future financial position. According to existing law it was unlikely that she could succeed in establishing a common intention enabling her to claim a beneficial interest in any of the man's property.

7.19 In a third case, the couple had been living together for nine years, and were still together at the time of the interview. During this period they had purchased a house as tenants in common, and mortgaged it to finance the purchase of a business. In the early part of the relationship, the man completed a course of training while the woman supported him. Throughout the remainder of the relationship, her salary met a considerable proportion of their living expenses, and she also worked part-time in the business. Despite her financial and non-financial contributions to the business, her partner was not prepared to admit that she had any claim on the business assets and it was clear that she would face great difficulties in establishing such a claim.

7.20 We were also approached by a middle-aged woman who had lived with a wealthy man for several years. During that period she had acted as an unpaid secretary of his company. The woman said that she was forced to leave the man when he began to treat her violently. She apparently had no legally enforceable claim to any of his property, despite the fact that she had kept house and performed a wide range of other unpaid services for him.

7.21 A committee of the Victorian Legal Aid Commission [26] drew our attention to a number of cases in which the present law had led to serious injustice. In one case, a 70 year old woman had lived in a de facto relationship for 20 years. During this period, she had worked extremely hard to maintain the house in which the partners lived and performed all domestic duties. When the man left her, the woman was advised that under current law there was no basis upon which she could make any claim to his house.

E. Other Doctrines

7.22 *Allen v. Snyder* was primarily concerned with the extent to which a person living in a de facto relationship could rely on the law of trusts to establish a claim to a share in his or her partner's assets. The requirement that a "common intention" must be found, where there is no direct financial contribution by the claimant to the property in question, has limited the value of the law of trusts to prospective claimants. In property disputes, the courts have from time to time applied or been asked to apply, other legal doctrines as a means of recognising contributions falling short of a direct financial contribution to the acquisition or improvement of a particular asset. While these doctrines may be of value in particular cases, none has the effect of ensuring that a person living in a de facto relationship, who makes a substantial indirect contribution to the economic resources of both partners, will acquire a beneficial interest in specific assets. We comment briefly on the major doctrines to which we refer.

1. Proprietary Estoppel

7.23 The doctrine of proprietary estoppel may be invoked where a person acts to his or her detriment by, for example, expending money on or making improvements to property owned by another, at the request or with the acquiescence of the other person. Where the first person acts in the expectation that he or she will acquire an interest in the property, the court may refuse to allow the owner to deny that a beneficial interest has been created. [27] This principle was applied in a South Australian case [28] in favour of a man who had built a house on his de facto partner s land, in the expectation that he would acquire a half interest in the house and land. The Full Court of the Supreme Court of South Australia held that the man was entitled to a beneficial half share in the property and ordered the woman to pay him half the value of the property.

7.24 The principle of proprietary estoppel has limited value for de facto partners, since it cannot apply unless the claimant can show that he or she has expended money on or improved the property at the request or with the acquiescence of the other spouse. De facto

partners seldom clearly define their expectations. Moreover, many contributions take the form of assistance with the general expenses of the household, or contributions in the form of child care or housework rather than expenditure of money. It is at least doubtful whether such contributions can satisfy the requirements of the doctrine of proprietary estoppel. [29] It would therefore seem that few de facto partners are able to rely on proprietary estoppel as the basis for claiming any interest in property.

2. Contractual Licences

7.25 In some cases, English courts have employed the concept of the "contractual licence" as a means of permitting one de facto partner to remain in occupation of property owned by the other partner, after the relationship has come to an end. In one case, for example, the court found that there was an implied agreement between the parties under which the woman was entitled to remain in occupation of the home until the children of the relationship finished their education. [30] This conclusion was reached despite the fact that there was no *express* agreement between the parties and despite the holding that there was no basis upon which a constructive trust could arise (paragraph 7.8).

7.26 There are several reasons why the concept of the contractual licence is of limited value in property disputes between de facto partners. First such a licence does not confer a proprietary interest on the claimant (that is, one enforceable against third parties), but only a contractual right enforceable against the other party to the relationship. [31] Secondly, before a contractual licence can be found it seems that it is necessary to establish that the parties intended to enter contractual relations and that the claimant provided consideration for the other part's "promise". [32] These requirements may be very difficult to satisfy where the parties do not formalise their rights and obligations. Thirdly, there is little indication that Australian courts are prepared to show the same willingness as the English Court of Appeal to detect a contractual arrangement in dealings between de facto partners.

3. Quantum Meruit

7.27 It has also been suggested that a de facto partner who is unable to obtain a beneficial interest in property, because he or she cannot show a common intention that an interest was to be obtained in return for contributions, may be able to recover compensation from the other partner for services provided during the course of the relationship. [33] In these circumstances, the de facto partner is said to seek compensation on the basis of a quantum meruit ("as much as he has earned").

7.28 It seems unlikely that this approach would often be successful in Australia, since a person who claims compensation for services must establish that the parties intended that some money payment would be made in return for their services. De facto partners are unlikely to undertake child care and domestic services in the expectation of payment. In the Victorian case of *Hohot v. Hohol*, [34] for example, the plaintiff argued that she was entitled to remuneration for the household and other services she had provided for the defendant and their children over a period of 25 years. Her claim on this ground was unsuccessful (although she succeeded on other grounds), since it was held that she had provided the service

> "not in any expectation of financial reward, but out of love and affection which she had for her children and the defendant". [35]

Moreover, even if this line of argument were successful in Australia, compensation for past services would not necessarily provide a de facto partner with a fair share of property which had been acquired during the course of the relationship.

II. ASSESSMENT OF THE CURRENT LAW

A. The Deficiency in the Law

7.29 In Chapter 6 we traced the development of matrimonial property law through the separate property regime to the principles of family property which allow the courts to reallocate the parties' property in accordance with statutory criteria. We indicated that the main significance of this development was the capacity of the courts to recognise the contributions of the parties, not merely to the acquisition, conservation and improvement of property, but to the relationship as a whole. While the move towards a concept of marriage as an "economic partnership" is not complete, the powers conferred by the Family Law Act have allowed the courts to overcome much of the rigidity which characterised the separate property regime.

7.30 It is apparent that the law governing the property rights of de facto partners closely resembles that which was applied to married persons in Australia before the Matrimonial Causes Act 1959. In other words, Australian courts have applied separate property principles to de facto partners, in much the same way as they did to married people in the 1950's and earlier. The separate property regime has long since been abandoned by the legislature in relation to married persons, but the courts have taken the view that they have no option but to enforce that regime in relation to de facto partners.

7.31 This means that the current law has one overriding deficiency. In dealing with disputes between de facto partners, courts can recognise direct financial contributions to the acquisition or improvement of an asset. They can also give effect to the "common intention" of the parties and provide relief in cases of deliberate fraud. But the present law often does not recognise substantial indirect contributions to the well-being of the family, whether in the form of sharing household expenses, services as a homemaker or parent, or other contributions. It is for this reason that some judges, particularly in New South Wales, have been insistent in their view that the law does not permit justice to be done in many cases and is therefore in urgent need of review.

B. The Submissions

7.32 Not all 55 submissions received by us expressed views on the law affecting the property rights of de facto partners. But of those which did, a substantial majority (20 organisations and individuals) contended that the existing law caused hardship and that reform was justified. Many submissions specifically criticised the failure of the law to take indirect contributions into account. For example, the majority of the Social Issues Committee of the Anglican Diocese of Sydney pointed out that

> "...the law at present cannot recognise that a contribution in a form other than money directly for the purchase or maintenance of an asset, is really a contribution to a joint pool of property-regardless of whatever the legal title may be. Thus the payment of household bills, buying the groceries, cleaning the house and performing the tasks now termed 'being a homemaker', even for forty years will give to the person who does those things no interest in any of the things that that contribution has enabled the other party to buy (by freeing their assets for that purpose). This allows *two specific injustices*:-
>
> > (a) the unjustifiable enrichment of the other de facto spouse (including his de jure spouse or estate) with the legal title;
> >
> > (b) the exploitation of the services and money of the homemaker.

It is obvious that the present inability of the law in New South Wales to provide a solution to or some satisfaction of, the claims of a needy and worthy de facto Spouse is not acceptable in our society. The failure of the law to be able to cope with this situation holds the law up to ridicule, allows opportunities for exploitation and permits the existence of avoidable and unjustifiable hardship." [36]

This analysis led the majority of the Anglican Committee to suggest that the Supreme Court should be empowered to vary the existing property rights of de facto spouses who have lived

together for 12 months or had satisfied certain other requirements. In the view of the Committee:

> "the quantum of the claim of the de facto spouse should be calculated on the assumption that the contribution of a party as a home-maker or a financial contribution to household expenses is a contribution to the acquisition and maintenance of the household property regardless of where the legal title lies. The claim should, therefore, be considered is a retrieval or reimbursement of that contribution." [37]

7.33 Similarly, the Australian Council of Social Service argued that existing rules often failed to provide just solutions in property disputes.

> "By focusing on questions of legal title and by an obsessive concern with 'who paid for what', the law ignores the reality of division of labour within the household, and the fact that persons in an emotional, caring relationship do not normally organise their affairs in a formal, rigid way. The traditional law of property rights, the value of domestic labour. Further, where each person has some financial resources, the fact that one party rather than another paid for a particular item may be purely fortuitous". [38]

The Council suggested that

> "State laws should be amended to give a State court power, on application by a party to a domestic relationship, to re-arrange the existing property interests of the parties in a way which is just and equitable. This power should be exercised by examination of the history of the relationship, and the various contributions made by the parties to the acquisition conservation or improvement of assets, and to the welfare of the family and household. The idea behind this Suggestion is that the court should be in a position to do broad justice between the parties." [39]

7.34 The view that the law should be changed by giving State courts power to vary the property rights of de facto partners similar to the power exercised by the Family Court in relation to married couples was widely shared, although few submissions considered in any depth whether State courts should apply identical criteria. The organisations suggesting that a change in the law was necessary included a number of church bodies [40] and a range of other organisations. [41]

C. Surveys

7.35 It was suggested to us from time to time that the problems associated with property disputes between de facto partners were not sufficiently common to warrant a significant change in the law. For example, Mr Justice M H McLelland, of the Supreme Court of New South Wales, accepted that the existing law might give rise to "occasional instances of unfairness". However, he did not agree

> "that the incidence of such cases is likely to be sufficiently high to justify the setting up of the very substantial and no doubt expensive judicial establishment necessarily involved in the creation of a discretionary power to vary property rights as between de facto spouses with all its consequences". [42]

Our survey of legal practitioners, although not designed to elicit statistically valid responses, clearly indicates that legal practitioners are often consulted in relation to property disputes between de facto partners and that there is a high degree of dissatisfaction within the profession as to the existing law (paragraphs 3.69, 5.18). The survey indicates that the dimensions of the problem go far beyond the occasional reported or unreported decision. This is reinforced by our survey of welfare workers (paragraph 3.72) and our case study program (paragraphs 3.78, 7.16). Consequently we think that, to the extent that the law is deficient, the problem is of significant proportions.

7.36 Some respondents to the survey of legal practitioners not only completed the forms, but took the trouble to write to us, expressing their concern about the rules governing property disputes. One commentator observed that

> "if one party in a de facto relationship owns the house or the place where the business is carried on (if they work together), then that person has an almost overwhelming advantage [and] the non-owning partner or de facto has an irretrievable handicap". [43]

Another respondent pointed to the difficulties in advising couples entering a relationship as to safeguards which would ensure a fair distribution of property if the relationship terminates.

> "Frequently de facto spouses contribute unequally in terms of cash deposit of borrowed funds, of contributions to repayment of borrowed funds, and in terms also of indirect contribution to acquisition of property. With married spouses in a similar situation it is frequently sufficient to advise both spouses to have at least some legal interest in the property acquired and to leave to the wide powers and discretions of the Family Court the problem of reaching a just property breakup in the event of divorce. Such an approach is, of course, not available with de facto couples". [44]

III. THE POSITION ELSEWHERE

7.37 There has been wide spread criticism of the law governing the property rights of de facto partners in common law countries. However, changes to the law have tended to come about not through statutory reforms, but by courts extending traditional principles to overcome perceived injustice. We have already referred to the use by the English Court of Appeal of the constructive trust and other doctrines as a means of achieving an equitable result in disputes arising between de facto partners (paragraphs 6.9, 7.5). Similar developments, relying on different doctrines, have taken place in other jurisdictions, including the United States, where the celebrated decision in *Marvin v. Marvin* [45] has attracted considerable attention. We refer briefly here to the position in New Zealand and Canada.

A. New Zealand

7.38 In New Zealand the Matrimonial Property Act 1976 provides for the distribution of property owned by married couples on the breakdown of a marriage. The Bill for the Act originally contained a clause giving the court a discretion to apply the provisions of the Act to property owned by couples who had lived in a de facto relationship for at least two years. [46] This clause was deleted, although the Minister for Justice, in his second reading speech, indicated that at some later time legislation might be introduced to relieve injustice and prevent hardship in property disputes between de facto partners. [47] In the meantime, the courts have on occasions been prepared to take into account indirect contributions made by de facto partners in determining property disputes, [48] although more recently the approach of the New South Wales courts appears to have been preferred. [49]

B. Canada

7.39 Until recently, courts in the common law Provinces of Canada applied orthodox principles to resolve property disputes between both married couples and de facto partners. In 1978 the Supreme Court of Canada refused to permit a person who had indirectly contributed to the acquisition or improvement of property vested in his or her spouse or de facto partner to obtain a beneficial interest in that property, unless there was evidence of an actual intention to that effect. [50]

7.40 More recently the attitude of a majority of the Supreme Court has changed. In 1981, in *Pettkus v. Becker,* [51] the Supreme Court held that a woman who had lived with her de facto partner for 17 years, and made substantial indirect contributions to the family business, was entitled to a half share in property in his name, which had been acquired by their joint efforts.

The majority criticised the view that a common intention must be found before indirect contributions can be recognised, preferring to rely on the principle of unjust enrichment. This principle may be applied, for example, when a person makes contributions of money or labour (including homemaker contributions), which confer a benefit on the other spouse or de facto partner, in the reasonable expectation of obtaining an interest in property. If the other spouse or partner accepts the benefits and knew or should have known of this expectation and if it would be unjust for that other person to retain the benefit without providing recompense, it seems that the courts in Canada will hold that the person making the contributions is entitled to a beneficial interest in the property.

7.41 The Canadian application of the principle of unjust enrichment is more flexible than the rules applied in New South Wales courts. The doctrine of unjust enrichment has been adapted in New South Wales to modify the principles of contract law, [52] but there has been no judicial attempt to apply the doctrine to property disputes between married couples or de facto partners. The authorities in New South Wales, notably *Allen v. Snyder*, and the judicial calls for legislative intervention suggest that the courts in this State are unlikely to follow the path of the Supreme Court of Canada in relation to disputes between de facto partners. Constrained as they are by precedent, the courts here can do little more than show a willingness to take a generous view of the evidence in order to find that the parties had the common intention necessary to give rise to a constructive trust.

IV. PROPOSALS FOR REFORM

7.42 We suggest that the courts should be given an “adjustive jurisdiction” to alter property rights, taking into account contributions of a kind which the current law does not adequately recognise. We look, first, at the nature of the contributions which the courts should be able to take into account. We then give our reasons for recommending a jurisdiction to adjust property rights as the best means of recognising these contributions.

A. Recognition of Contributions

7.43 In Chapter 5 we stated that the basis of any intervention of the law in de facto relationships should be the minimisation of injustice that would otherwise occur. Hence we suggested that each area of law should be examined in order to determine whether injustice exists. In our view, and in the view of many other commentators, the current law in New South Wales governing property disputes between de facto partners causes injustice. This injustice arises from the concentration of the existing law on the common intention of the parties and on direct financial contributions to the acquisition of assets. Specifically, the law fails to give sufficient recognition to two kinds of contribution to a de facto relationship:

> indirect financial and non- financial contributions by one partner to the acquisition conservation or improvement of assets, such as contributions to the family’s household expenses which assist the other partner to acquire assets in his or her own name; and
>
> financial and non-financial contributions by one partner to the welfare of the other partner or to the children of the relationship, including contributions made in the capacity of homemaker and parent.

This failure leads to injustice because it has 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. In a sense, the partner making the contributions can be said to have “earned” an entitlement to a beneficial interest in property of the other partner. The injustice is equally stark whether the contribution directly increases the value of the property in dispute, or is a contribution to the well-being of the family which frees the other partner to earn income and accumulate assets. We think that injustice of this kind should be remedied.

7.44 **We therefore recommend that the law governing property disputes between de facto partners should be changed to allow the court to take into account a wide range**

of contributions, by either party, to the acquisition, conservation or improvement of assets and to the welfare of the other partner or the family generally. The contributions to be taken into account should be the following:

> **(a) the financial and non-financial contributions made directly or indirectly by or on behalf of either de facto partner to the acquisition, conservation or improvement of the property of the partners, or either of them, or to the financial resources of the partners or either of them; or**
>
> **(b) the contributions made by either de facto partner to the welfare of the other partner or to the family constituted by the partners and any child of the relationship, including any contribution made in the capacity of homemaker or parent.**

7.45 Two expressions used in the previous paragraph call for comment. When we speak of "the court", we refer to proceedings between de facto partners with respect to the property of either or both of them and to the power of the court, in those proceedings, to adjust property rights, having regard to contributions of the kind specified made by either party. This adjustive jurisdiction as we call it, is the subject of a recommendation to be made in paragraph 7.58. Also, when we speak of "any child of the relationship", we mean any child (whether or not the biological child of either party) who has been accepted into the household by both parties. [53]

7.46 The words used in paragraph 7.44 are drawn largely from clause 31 of the Family Law Amendment Bill 1983. Clause 31 is itself drawn from section 25(1)(f) of the Matrimonial Causes Act 1973 (Eng.) That provision specifies the criteria to be taken into account in determining whether to make an order for settlement of property in proceedings between married persons. The words in sub-paragraph (a) of paragraph 7.44 are designed to make it clear that there is no need for there to be a nexus between a specific contribution and the property claimed. Paragraphs (a) and (b), taken together, ensure that a wide range of contributions will be taken into account by a court in determining the appropriate order to make with respect to property. The contributions that the court may consider include

> direct financial contributions to the acquisition or improvement of property; [54]
>
> physical labour in connection with the home or a business; [55]
>
> payments towards household expenses; [56]
>
> assistance in increasing the earning capacity of the other party (for example, supporting that party while he or she undertakes a course);
>
> the provision of housekeeping or nursing services; [57] and
>
> contributions in the form of caring for children.

7.47 Some people may contend that contributions as a home maker or parent should not be regarded as contributions for the purpose of adjusting property rights, principally because they do not relate directly to the acquisition or improvement of assets and are difficult to quantify for the purposes of ascertaining or allocating property rights. But we think it is important that such services be capable of recognition by the law. They may constitute a substantial benefit to the other party, relieving that party from domestic obligations and thereby assisting him or her to accumulate assets. This is particularly so where the relationship is long-standing. Moreover, we think that services as a homemaker and parent have an economic value and, despite the obvious difficulties, are capable of being quantified by a court. Indeed, the Family Law Act requires such contributions to be taken into account by a court in making orders with respect to property, and the problems have not proved to be insuperable.

7.48 Our recommendation in sub- paragraph (a) of paragraph 7.44 refers to contributions to property “or to the financial resources” of the partners. We have used these words because we think that contributions should be recognised, not only where they relate to property in the strict sense, but also where they relate to the acquisition of other financial resources that, strictly speaking, are not characterised as “property”. In particular, we have in mind that a substantial proportion of people employed in New South Wales (about half of the men and about one-third of women) are members of a superannuation scheme. [58] The nature of the interest of a member of a superannuation fund depends on the terms of the document or legislation establishing the fund. [59] Usually the trustees have a discretion to pay a portion of the fund to the contributor, or to relatives, on the occurrence of specified events. This means that the contributor has no property right in the sense of a legal or equitable interest, in any ascertainable portion of the fund.

7.49 In practice, the contributions of one partner to a de facto relationship may assist in building up the prospective superannuation entitlement of the other party. For example, the domestic contributions of one party may enable the otherto advance his or her career and thus become eligible for membership of a fund. Again, one partner’s earnings may be applied to household expenses, so that the other partner can afford to make payments to a superannuation fund. In these circumstances, we think that even if the court cannot make an order directly affecting the prospective superannuation entitlement (because it is not the “property” of the de facto partner), it should be able to take the applicants contributions into account in allocating the property of the parties. It may be that the sole asset of the parties is the family home, the title to which is in the name of the man and that the man can expect to receive a substantial superannuation payment at a definite time in the future. If it is established that the woman made direct or indirect contributions to the man’s superannuation entitlement these contributions could be reflected in the order made in respect of the home. [60]

7.50 Problems similar to those arising in the case of superannuation may also arise where one de facto partner has financial resources which are subject to a discretionary trust or family company arrangement. That partner may have effective management and control of assets without having any legal or equitable interest in the property. As in the case of superannuation. [61] As with this difficulty has arisen in the Family Court in relation to married persons superannuation we take the view that contributions made by one partner which assist the other to build up assets which are held by a family company or are subject to a discretionary trust should be taken into account in allocating the property of the partners. If, for example, one partner expends money and labour on improving property, the title to which is held by a family company, this contribution should be considered by the court when adjusting the property rights of the partners. [62]

B. An Adjustive Jurisdiction

The Family Law Act Approach

7.51 Inourview,themostappropriatenieansofensuringthatawiderangeofcontributions is taken into account is to follow broadly the approach adopted by the Family Law Act in relation to married couples. This would require the enactment of legislation empowering the court to make an order adjusting the property rights of de facto partners. The legislation should specify the circumstances in which such an order may be made. The circumstances need not be identical with those specified in the Family Law Act, but should include cases where the court considers it just and equitable to make an order having regard to the contributions of the kind referred to in paragraph 7.46. This approach was supported by virtually all submissions which directed attention to changes required in this area. It has the advantage that courts in Australia are now familiar with the concept of adjusting the property rights of married couples in accordance with criteria laid down by statute. We do not think that the courts would find it difficult to adjust the property rights of de facto partners. The problems which may arise are likely to be similar to those regularly encountered in the Family Court of Australia.

7.52 On the other hand, concern was expressed in a submission of the New South Wales Bar Association that a discretionary power in the court to adjust the property rights of de facto partners might lead to uncertainty. The Association said that a

> "test for recognition of new proprietary rights, or a test designed to enable a court to have the opportunity of remolding (sic) property rights, ideally requires considerable certainty, yet the more certainty is developed, the more the chance of getting injustice in borderline cases." [63]

We think that the concern about certainty can be met to a substantial extent by carefully specifying the criteria to be taken into account by the court when adjusting the property rights of the de facto partners, and by not simply leaving the matter to the unfettered discretion of the court The language used in paragraph 7.44 should achieve this result.

Amending the Law of Trusts

7.53 We considered whether the reforms we seek could be accomplished by a statutory amendment to the law of trusts requiring the court to take account of indirect and non-financial contributions by parties to any domestic relationship when determining their beneficial entitlements to property. Such an amendment would overturn the principles stated in *Allen v. Snyder* and would have an impact far beyond property disputes between de facto partners. These principles are part of the general law of trusts and must therefore be applied in New South Wales in relation to other family or domestic disputes, such as those between parents and children, siblings or homosexual couples. [64] Some submissions argued in favour of extending any new remedies to all persons involved in domestic relationships and not simply those living in de facto relationships. [65]

7.54 Changing the law of trusts generally in the manner suggested would have some advantages, but we have decided against recommending changes of this kind at this stage. We recognise that any injustices which arise out of that law are not confined to de facto partners, but can extend to other family members and to people living in other forms of domestic relationships. However we have previously given our reasons for limiting the recommendations in this Report to de facto partners (paragraph 1.4). Moreover, we have three reasons for recommending that reform should be implemented by giving the court new powers to adjust the property rights of de facto partners rather than by altering the principles governing the law of trusts.

7.55 First, a change to the law of trusts, in its orthodox sense, could have far-reaching effects on third parties, such as mortgagees and purchasers who acquire interests in land after the original trust has arisen (or is deemed to have arisen). Altering the law of trusts to recognise a wide range of contributions implies that proprietary interests would arise at the time the contributions were made. Such interests would be enforceable, not merely against the other party (or parties) to the household but, subject to the general lawo f priorities, against persons subsequently acquiring title to land or other property. A person who wished to deal with the holder of the legal title might have considerable difficulty in determining whether another person could claim an earlier interest arising out of indirect contributions, and this could create significant uncertainty. On our approach, if the court makes an order adjusting the property rights of the parties, the decision operates prospectively and, unless a policy decision is made to the contrary, without affecting the rights of third parties.

7.56 Secondly, we are influenced by the model provided by the adjustive jurisdiction of the Family Court. This model, subject to the variations we recommend in subsequent chapters, is suitable for the resolution of financial disputes between de facto partners. We take this view because, in general, the financial arrangements, or the variety of financial arrangements, made by de facto partners appear to be similar to the arrangements, or variety of arrangements, made by married couples. The financial arrangements made by other people who live together (such as siblings sharing the same household, parents and children, and

households with a number of adult members) are so varied that they do not necessarily fit within the Family Court model.

7.57 Thirdly, an adjustive jurisdiction can be created for de facto partners without great difficulty. The contributions that should be taken into account can be identified and defined by analogy with the approach taken under the Family Law Act to disputes between married couples. Moreover, despite the misgivings expressed in some submissions, we do not think there are special problems in defining the relationships that will be subject to the adjustive f indirect jurisdiction. If the law of trusts were changed to provide for the recognition of indirect contributions made within a wide range of family relationships, it would be extremely difficult for any legislation to define in advance the nature of the relationship which should be covered, and the types of contributions which should be taken into account, since the circumstances of the parties would vary greatly.

The Recommendation

7.58 **For these reasons we recommend that, in proceedings between de facto partners with respect to the property of either or both of them, the court should have power to adjust their property rights where it is just and equitable to do so, having regard to the contributions of the kind referred to in paragraph 7.44 made by each party.** For convenience, we refer to proceedings of this kind as “applications for adjustment of property” or, more simply, as “proceedings for adjustment”.

7.59 In proceedings for adjustment the courts powers to make orders affecting property would not be confined to property acquired in the course of the partners’ de facto relationship. In this respect the court’s powers would be similar to those of the Family Court. [66] It follows that the court would be able to make an order affecting property owned by one de facto partner before the couple began to live together, or property acquired by one de facto partner by gift or inheritance. In most cases the contributions made by a de facto partner would not be such as to justify the court making an order affecting property of this kind. But this would not always be the case. For example, if the parties had lived together for a lengthy period, and if one partner made substantial contributions during that period, it might be appropriate for the court to make an order affecting property owned by the other partner at the outset of the relationship. In such a case the parties may have no other property with respect to which an order can be made, or the contributions may have increased the value of the property originally owned by one partner.

V. SUMMARY

7.60 The major deficiency of the current law governing property disputes between de facto partners is that it provides no sure means of recognising substantial indirect contributions (whether financial or otherwise) to the well-being of the other partner or the family. We recommend that 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.

FOOTNOTES

1. *Dyer v Dyer* (1788) 2 Cox Eq. Cas. 92; 30 ER 42; *Gissing v Gissing* [1971] AC 886.

2. *Wirth v Wirth* (1956) 98 CLR 228, at pp.237-238.

3. *Pettitt v Pettitt* [1970] AC 777, at p.824, per Lord Diplock.

4. *Wirth v Wirth* (1956) 98 CLR 228; *Martin v Martin* (1959) 110 CLR 297; *Hepworth v Hepworth* (1963) *Leibrandt v Leibrandt* [1976] FLC 90-058; *Pickard and Pickard* [1981] FLC 91-034, cf. At p.876, 311.

5. *Napier v Public Trustee* (1980) 55 ALJ 1.

6. *Rochefoucauld v Boustead* [1897] 1 Ch.196; *Last Rosenfeld* [1972] 2 NSWLR 923.

7. See for example, *Cooke v Head* [1972] 1 WLR 518; *Eves v Eves* [1975] 1 WLR 1338.

8. For earlier cases sympathetic to the English approach see eg. *Doohan v Nelson* [1973] 2 NSWLR 320; *Oglivie v Ryan* [1976] 2 NSWLR 504.

9. [1977] 2 NSWLR 685. See generally MM Helsham “Comment: De Facto Relationships and the Imputed Trust” (1977) 8 *Sydney Law Review* 571; J H Wade, “Trusts, the Matrimonial Home and De Facto Spouses” (1979) 6 *University of Tasmania Law Review* 97.

10. [1977] 2 NSWLR 685, at p.689.

11. *Id.,* at p.690.

12. 10 April 1981, Supreme Court of New South Wales, Wootten J. See also *Biro v. Union-Fidelity Trustee Co. of Australia Ltd*. 13 December 1982, Supreme Court of New South Wales, Needham J.

13. (1980) 6 Fam LR 781.

14. See para.5.11.

15. 3 May 1979, Supreme Court of New South Wales, Powell J.

16. Transcript of Judgment, pp.22-23.

17. The woman was held entitled to a charge over property if she could prove that any part of the pool were applied, not to living expenses, but to the acquisition of specific assets. The charge would be limited to the assets so acquired.

18. 15 June 1981, Supreme Court of New South Wales, Holland J.

19. Cf *Jardany v. Brown*, 1 July 1981, Supreme Court of New South Wales, Powell K. And see *Thwaites v. Ryan*, 29 March 1983, Full Court of the Supreme Court of Victoria, which appears to require that the common intention existed at the date the property was acquired.

20. [1981] VR 221: [1980] FLC 90-824. But see now *Thwaites v. Ryan,* note 19 above.

21. 11 December 1979, Supreme Court of New South Wales, Holland J.

22. Cf. *Vince v. Morris*, 11 August 1981, Supreme Court of Tasmania, Everett J; *Chapman v. Quinlan* [1980] FLC 90-836 (Supreme Court of South Australia).

23. 1 July. 1981, Supreme Court of New South Wales, Waddell J.

24. 30 July, 1982, New South Wales Court of Appeal.

25. Ms K Loder, Solicitor, Submission No.3. This submission includes five case histories, each involving apparent injustice.

26. Law Reform Committee, Legal Aid Commission of Victoria, Submission No.50.

27. See eg. *Inwards v. Baker* [1965] 2 QB 29.

28. *Jackson v. Crosby* (No.2) (1979) 21 SASR 280. See also *Pascoe* v. Turner [1979] 2 All ER 945.

29. Cf. *Greasley v. Cooke* [1980] 1 WLR 1306.

30. *Tanner v. Tanner* [1975] 1 WLR 1346. See also *Chandler v. Kerley* [1978] 1 WLR 693.

31. Cf. *Pearce v. Pearce* [1977] 1 NSWLR 170, at pp.179-180.

32. *Horrocks v. Forray* [1976] 1 WLR 230; RJ Bailey, "Legal Recognition of De Facto Relationships" (1978) 52 *Australian Law Journal* 174, at pp.184-185.

33. *Jackson v. Crosby* (No.2) (1979) 21 SASR 280.

34. [1981] VR 221; [1980] FLC 90-824. See para.7.13.

35. [1980] FLC 90-824, at p.75,212.

36. Anglican Diocese of Sydney, Social Issues Committee (majority response), Submission No.34(a), pp.4-5; adopted by Anglican Diocese of Newcastle, Submission No.43.

37. *Id*., p.6.

38. Australian Council of Social Service, Submission No.26, p.2.

39. *Id*., p.4.

40. Australian Catholic Social Welfare Commission, Submission No.27; Catholic Women's League of South Australia, Submission No.52; Uniting Church in Australia, NSW Synod Board for Social Responsibility, Submission No.30; Anglican Home Mission Society, Submission No.6.

41. Women Lawyers' Association of NSW, Submission No.4, NSW Women's Advisory Council, Submission No.10; Women's Co-ordination Unit, Submission No.35: Sutherland Shire Information Service, Submission No.9; Law Reform Committee, Legal Aid Commission of Victoria, Submission No.50; National Marriage Guidance Council of Australia, Submission No.28. And see the argument in A Monester, QC "Property Rights and Financial Relationships", Seminar Paper, 21 August 1982.

42. Mr Justice M H McLelland, Submission No.5, p.3.

43. Mr C A Mitchelmore, College of Law, Submission No.42.

44. *Dettmann and Dettmann*, Solicitors, Submission No.40.

45. (1976) 18 Cal 3d 660; 557 P. 2d 106; 134 Cal Reptr. 815; (1979) 5 Fam LR (BNA) 24.

46. Matrimonial Property Bill 1975 (NZ), cl.49.

47. NZ Parl Deb, 7 December 1976, p.4564 (Minister for Justice).

48. See eg. *Fraser v. Gough* [1975] 1 NZLR 138; on appeal [1977] 1 NZLR 279.

49. *Hayward v. Giordani,* 23 June 1980, Moller J; cf. *Brown v. Stokes,* 6 August 1980. Court of Appeal.

50. *Murdoch v. Murdoch* (1974) 41 CLR (3d) 367; *Rathwell v. Rathwell* (1978) 83 CLR (3d) 289.

51. (1981) 117 DLR (3d) 257.

52. *Sabemo v. North Sydney Municipal Council* [1977] 2 NSWLR 880.

53. Cf. *Mahon and Mahon* (1982) FLC 91-242, where the parent made contributions as parent of a foster child.

54. Thus allowing the court to override the “common intention” of the parties and avoiding the “regrettable” decision in *Auschinski v. Dodds,* 1 July 1981. Supreme Court of New South Wales, para.7.15.

55. As in *Feeney v. Feeney,* 3 May 1979, Supreme Court of New South Wales. Powell J, para-7.11.

56. As in *Rushworth v. Parker*, 15 June 1981, Supreme Court of New South Wales, Holland J, para.7.12.

57. As in *Blanchfield v*. *Public Trustee,* 10 April 1981. Supreme Court of New South Wales. Wootten J, para.7.10.

58. Australian Bureau of Statistics, *Employment Benefits Australia: February to May* 1979 (Cat No.6334.0).

59. For a discussion of the variety of schemes which can operate, see *Bailey and Bailey* [1978] FLC 90-424, at p.77,145.

60. A rather similar Course has been followed by the Family Court which has treated an interest tinder a superannuation fund as part of the “financial resources” of the parties which are to be taken into account in maintenance and property proceedings. See *Crapp and Crapp* [1979] FLC 90-615: *Bailey and Bailey* [1978] FLC 90-424.

61. See eg. *Kelly and Kelly* (No.2) [1981] FLC 91-108: *Ascot Investments Pty. Ltd and Harper and Harper* (No.3) [1982] FLC 91-253.

62. Se, the discussion of the power to make orders affecting third parties, paras.10.2-10.8.

63. NSW Bar Association, Submission No.23, p.2.

64. See eg. *Malsbury v. Malsbury*, [1982] 1 NSWLR 226: *Vinden v. Vinden*, 21 June 1982, Supreme Court of New South Wales, Needham J.

65. See paras.1.3-1.4.

66. As to the manner in which the Family Court exercises its jurisdiction see *Crawford and Crawford* [1979] FLC 90-647; *Pickard and Pickard* [1981] FLC 91-034; *Carter and Carter* [1981] FLC 91-061 at p.76,491: ,*Macura and Macura* [1982] FLC 91-252.

8. Maintenance Claims Between De Facto Partners

I. THE CURRENT LAW

8.1 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. This is so even if the partners have lived together for many years and even if one partner is wealthy and the other destitute. Similarly, there is no legal basis on which a woman who has the custody of children born during a de facto relationship can obtain a maintenance award *for herself* from her de facto partner. [1] She may claim maintenance on behalf of the children in her care, from the father of the children. [2] In addition, if she meets the eligibility criteria laid down by the Social Security Act, she will be entitled to a pension or benefit under the Commonwealth's income maintenance program. [3] But she has no entitlement to private support in her own right. In this chapter we are concerned only with the right of a person to claim maintenance in his or her own right. We are not concerned with claims for maintenance on behalf of a child.

8.2 The law in New South Wales is the same as that in all other States except Tasmania. In Tasmania, legislation which has been in force since convict times enables a woman who has cohabited with a man for 12 months to apply to the court for maintenance. She must show that she has, without just cause or excuse, been left without adequate means of support, or that the man has been habitually intoxicated or has been guilty of such cruelty or misconduct as to render it unreasonable to expect her to live with him. [4] She must bring proceedings within six months after cohabitation has come to an end, or, if she has been maintained after cohabitation ceased within six months from the time she last received maintenance. Although the Tasmanian legislation does not enable a man to recover maintenance from his de facto partner, the Tasmanian Law Reform Commission has recommended that the Act should be amended to enable a dependent man to make a claim against a woman. The Commission has also recommended that where dependence is established, the court should have power to order payment of maintenance even though the couple have not lived together for 12 months. [5] These recommendations have not yet been implemented.

II. ASSESSMENT OF THE CURRENT LAW

A. The Deficiency in the Law

8.3 The law of maintenance is inextricably interwoven with the attitude of the law towards the obligations owed by married persons to each other. As has been seen, the philosophy underlying the law of maintenance between married persons has undergone a significant shift in a relatively short time (paragraph 6.20). In particular, the legislature and the courts have moved from the principle of life-long support owed by a husband to a wife, to an approach which emphasises the need for the parties to attain or regain financial independence, and stresses the financial rehabilitation of the claimant. In a sense, therefore, it is curious that we should be considering the extension of the maintenance obligation to de facto partners at a time when the scope of that obligation as between married people has been narrowed and the concept itself has been queried.

8.4 Nor can the question be approached in quite the same way as the law governing property disputes. Since the current law makes no provision for maintenance claims by a de facto partner (otherwise than on behalf of children) the courts have not had occasion to deal with such claims. Accordingly the judges have not had the opportunity to identify inadequacies in the law, nor to suggest appropriate amendments. Moreover, individual cases of hardship or injustice do not come to public attention through official or unofficial reports of cases.

8.5 Despite these considerations, our view is that the current law often causes serious injustice by failing to provide a means, even on a temporary basis, of alleviating financial hardship caused by the breakdown of a de facto relationship. In particular, the law refuses to recognise the needs of either or both parties as a factor in the readjustment of their financial relationship. Even where the needs clearly arise from and are attributable to the relationship (as where a woman cannot support herself adequately because of her responsibilities to care for children - born during the relationship), the law does not allow the needy partner to claim support, regardless of the resources available to the other partner.

8.6 A number of submissions pointed to the hardship involved in denying a claim to maintenance by a de facto partner, where there had been a prior period of dependence and special needs arise out of the relationship. [6] Thus, the New South Wales Catholic Social Welfare Committee supported

> "the right of a de facto spouse to seek maintenance from the other in cases where the party has been disadvantaged or made dependent because of the nature of the relationship ... Legislation should be specific in its terms and clearly define the circumstances in which such a claim can be made". [7]

The Australian Council of Social Service argued for recognition of needs attributable to the relationship, but not other kinds of needs.

> "In our view, maintenance should only be awarded for needs which arise out of the domestic relationship, eg. care of children, or career opportunities foregone as a result of domestic labour. Needs arising independently of the domestic relationship such as illness, old age, unemployment should not be seen as the responsibility of the other party, but of the wider social security system." [8]

A similar approach was taken by bodies which were concerned, for different reasons, about extending maintenance to de facto relationships. For example, the Women's Advisory Council expressed concern that the availability of maintenance might further entrench the dependence of women, but recognised that maintenance was justified where a woman was financially dependent and could not be expected to support herself. [9] The Anglican Home Mission Society made particular reference to the view that

> "marriage and de facto relationships are different in intent and indicate different levels of commitment". [10]

Nonetheless the Society argued that maintenance between de facto partners might be necessary in some circumstances to alleviate hardship.

8.7 In practice, hardship arising from the failure of the law to recognise needs as a basis for financial adjustment falls primarily on women. The information analysed in Chapter 3 shows that women living in de facto relationships are more likely than married women to be in paid employment and are therefore less likely to be financially dependent on their partner. However, the evidence also indicates that 36 per cent of de facto households have dependent children and that child care responsibilities often preclude or minimise the opportunities for employment by one partner, usually the woman (paragraphs 3.26, 3.58). Consequently, it is likely that many de facto relationships involve broadly the same internal division of labour as is typical within marriages. In these relationships one partner (usually the man) is primarily responsible for earning income to support the family, while the other partner (usually the woman) looks after the house and cares for children within the household. Under this division of roles the woman may give up career opportunities to care for the family or perform household duties, and may be ill-equipped to re-enter the workforce when the relationship breaks down particularly if child care responsibilities continue. We think that in these circumstances the man, who has shared in the decision that the woman should be financially dependent on him in return for her household services, should have at least a limited

obligation to provide for her needs after the relationship ends, provided he has the means to do so. To the extent that the law does not provide for this we think it is deficient.

B. Arguments Against Permitting Maintenance Claims

1. The Need for Public Commitment

8.8 A number of arguments can be made against allowing a de facto partner to claim maintenance in his or her own right. First, it can be said that the duty of support is based on the concept of marriage as a permanent union which "provides for mutual promises of support and help for the partners and the promise of long term commitment..." [11] While many marriages end in divorce, most people intend a life-long relationship when they marry, and in any event undertake a well-recognised public commitment which includes the possibility of providing continuing support even after the marriage breaks down. On this argument an obligation of support cannot be justified where the parties have lived together, even for a long period, without making any public, long-term commitment. In the words of the majority submission on the Social Issues Committee of the Anglican Diocese of Sydney.

> "Such an enforceable duty should arise only between parties who have married and given an open and unequivocal promise to support the other." [12]

8.9 We accept that marriage involves a public commitment that is not a necessary element in a de facto relationship and, further, that the law should reflect this difference. Nonetheless, we think that there are circumstances, for example, where a de facto relationship has created financial dependence in one party through child care responsibilities or for other reasons, that justify imposing a limited obligation of support. We think that the greater commitment implied in marriage should be acknowledged by imposing a liability to pay maintenance on de facto partners only where the claimant demonstrates particular and narrowly defined kinds of needs and, even then, the liability should apply only for limited periods.

2. Freedom of Choice

8.10 A second argument is that de facto partners may deliberately avoid marrying because they wish to avoid the legal obligations associated with marriage. We have accepted this as an important reason for not attempting to equate the legal consequences of de facto relationships with those of marriage. However, it is one thing to reach this conclusion and another to contend that de facto relationships should never involve obligations similar to those imposed on married persons. In our view, a general intention by de facto partners to avoid the obligations of marriage should give way to other circumstances giving rise to special needs, such as child care responsibilities creating financial dependence. The concerns of those who argue against equivalence between marriage and de facto relationships can be met by specifying more limited categories of needs justifying a maintenance award than those specified in the Family Law Act. Moreover, our recommendations on cohabitation agreements, referred to in Chapter 11, give effect to the philosophy that de facto partners should, in general be able to avoid the obligations similar to those of marriage by entering freely negotiated agreements, after receiving proper advice.

3. Changing Role of Maintenance

8.11 A third argument emphasises the fact that the law has moved away from the notion that marriage should impose an indefinite obligation of support on the husband after the marriage has ended and has restricted the circumstances in which an award can be made. Maintenance is increasingly regarded as a means of easing the transition between the dependence which may exist during marriage and the responsibility for self-support assumed by each partner after the relationship breaks down. Given this trend, it could be said to be anomalous to extend to de facto partners a right to claim maintenance when the relationship ends. Some submissions criticized the very concept of maintenance, largely because it

reinforces the traditional perceptions of women as dependent on men within domestic relationships. The Feminist Legal Action Group, for example, opposed maintenance obligations between individuals in any form of domestic relationship, though the group recognized that there might be some justification for a period of adjustment to enable retraining to take place. [13]

4. Social Security as the Primary Source of Support

8.12 Under the current law, the primary source of support for a person whose de facto relationship has ended and who has no independent capacity to earn income is usually social security. For example, a woman who has separated from her de facto partner and who has the care of children born of that relationship will be entitled to receive the supporting parents benefit or, in some circumstances, the widows' pension provided that she satisfies the usual eligibility criteria, including the income test. Some would argue that the current position should be preserved, since to grant one partner (usually the woman) even a limited right of support against her former de facto partner may prejudice her entitlement to social security and force her to exchange an assured source of income for one that may be irregular and difficult to enforce. This result may come about, so it can be argued, because the Social Security Act makes it a condition of eligibility for both the widows' pension (where the applicant is deserted or divorced) and the supporting parents' benefit that the applicant take such action to claim maintenance as the Director-General considers reasonable. [14] The Commonwealth has not always stringently enforced the statutory condition but policies may change from time to time.

8.13 Thus, if State law is amended to enable a person to claim maintenance from a former de facto partner, the amendment may have consequences for entitlement to social security. For example, a woman applying for the supporting parents' benefit may be compelled, irrespective of her own wishes, to institute maintenance proceedings in her own right against her former partner, although there is a question whether the current section of the Social Security Act allows the Director-General to require a supporting parent to claim maintenance for herself. [15] The penalty for non- compliance with a direction by the Director-General (assuming one can be given) may be forfeiture of her entitlement to the benefit. If a maintenance order is obtained it may have the consequence, because of the income test, of reducing the amount of the benefit to which she is entitled. Should the man not comply with the order, she may experience delays in having the Department make up any shortfall depending on the policies adopted by the Department.

8.14 It would be ironic if one effect of overcoming an injustice was to make those most in need of assistance less financially secure. Certainly the compulsory maintenance policy is capable of causing distress and hardship to applicants for pensions and benefits. [16] However, we have concluded that the Social Security Act and the policies of the Department of Social Security should not cause us to refrain from recommending changes that are otherwise desirable. We say this for several reasons.

> Most former de facto partners eligible for social security (that is, those with the care of children) are already subject to the compulsory maintenance policy, because they can be compelled to initiate maintenance proceedings on behalf of the children.
>
> The compulsory maintenance policy affects applicants for the widows' pension and supporting parents benefit, whether they are married or unmarried. An applicant required to take proceedings against a former de facto partner would therefore be in a similar position to a married person required to claim maintenance from his or her spouse.
>
> While the compulsory maintenance policy is capable of being applied harshly, it should not be assumed, in framing State laws, that it will be so applied.

The adverse impact of any harsh Departmental policies can be minimised by directing a court assessing maintenance first to consider the applicants eligibility for a pension or benefit We return to this matter later (paragraph 8.37).

8.15 We make one other point connected with social security. It is sometimes said in favour of extending maintenance rights to de facto partners that such an extension will relieve the taxpayer of a burden, by shifting the liability to maintain from the social security system to the claimants former partner. [17] We place very little weight on this argument as we consider it highly unlikely that an extension of the right to claim maintenance, especially limited in the way we later suggest will have any significant impact on the Commonwealth's income maintenance program. [18]

III. THE POSITION ELSEWHERE

A. Canada

8.16 A number of Canadian provinces have enacted legislation enabling de facto partners to obtain maintenance when the relationship comes to an end. This legislation generally follows the approach suggested by the Ontario Law Reform Commission that the imposition of support obligations on de facto partners "was an enlightened step forward in the law's search for ways to alleviate human distress." [19] However, the definitions of de facto partners who are entitled to apply for maintenance are far from uniform. The criteria adopted include the following: a fixed period of cohabitation (one year in Nova Scotia, two years in British Columbia, and five years in Ontario); [20] a fixed period of cohabitation coupled with substantial dependence (three years in New Brunswick); [21] a fixed period of cohabitation (one year in Manitoba) coupled with the birth of a child; [22] or a permanent relationship coupled with the birth of a child (Ontario and New Brunswick). [23]

8.17 Generally, the legislation sets out a number of factors which the court must take into account in deciding whether to order maintenance. In Ontario, for example, a man and woman who have lived together for five years, or who have lived in a relationship of some permanence where a child has been born may seek maintenance within a year from the breakdown of their relationship. If a claim for maintenance is made, the court must take into account a number of matters including the parties' assets, means and ability to support themselves, their age, physical and mental health the duration of the relationship, the needs of the person applying for maintenance, and the financial responsibility of the person against whom maintenance is sought. The matters mentioned specifically include contributions made by the party applying for maintenance "to the realization of the career potential" of the other party, and "the effect on his or her earning capacity of the responsibilities assumed during cohabitation". The court is directed to take into account "the measures available for the dependent to become financially independent and the length of time and cost involved to enable the dependent to take such measures. [24]

8.18 In some Canadian provinces the court may in addition order that a de facto partner (as defined by the particular legislation) be given an exclusive right to occupy the family residence. [25] This provision does not confer any proprietary interest on that partner.

8.19 To summarise, in several Canadian provinces a de facto partner may be liable to pay maintenance when the relationship comes to an end. The factors to be taken into account by the court in deciding whether or not to order maintenance generally concern the needs and resources of the parties, and their past financial and non-financial contributions to the relationship. The legislation also recognises the desirability of the parties becoming financially independent after their relationship comes to an end. Provision is made for one de facto partner to be given exclusive occupancy of the family home.

B. New Zealand

8.20 Since 1968, in New Zealand an unmarried mother who is unable to support herself has been able to obtain maintenance for *herself* from the father of the child, for up to five years from the birth of the child. [26] In 1980 this provision was extended. Under the new legislation the court may make a maintenance order for an unmarried parent (whether a mother or father) for such periods as it thinks fit providing two conditions are satisfied. First, the order must be desirable in the interests of providing, or reimbursing the applicant for having provided, adequate care for the child. Secondly, the order must be reasonable, having regard to the means (including potential earning capacity) of each parent, their needs and any other financial responsibilities they may have. [27] In addition to permitting a maintenance claim by a de facto partner who is currently caring for a child, the legislation permits a parent to apply for reimbursement after the child has left his or her custody.

8.21 The New Zealand legislation differs from the Canadian in two major respects. First it permits maintenance claims by unmarried parents, whether or not they are or have been living in a de facto relationship. Secondly, the legislation only applies to a de facto partner who is a parent This limitation is consistent with the general philosophy of the 1980 legislation which limited the extent of maintenance obligations of married persons after breakdown of the marriage. The Minister for justice described the new maintenance provisions for married couples as “essentially short-term and rehabilitative in nature, designed to offset any consequences flowing from the marriage itself. [28]

IV. PROPOSALS FOR REFORM

A. Two Specific Injustices

8.22 We have concluded that in certain circumstances, the current law is capable of creating injustice by refusing to allow a person to claim maintenance in his or her own right against a former de facto partner. While we think the parties to a de facto relationship should, in general be required to support themselves, we think there are two specific cases in which the current law may cause injustice.

8.23 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 the child care responsibilities. If the non-custodial parent has the resources to support the custodial parent in meeting his or her own needs, we think it maybe 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.

8.24 The second area of injustice is where a persons 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.

B. A Restricted Power to Award Maintenance

1. The Power

8.25 We do not think that the remedy for these injustices is to give the court a power to award maintenance in terms as broad as those conferred by the Family Law Act in relation to married couples. We think that the power to award maintenance should be very much more restricted, for two reasons. First, the trend under the Family Law Act has been towards an increasingly narrow view of the court s power to award maintenance. This reflects, in part, the more restrictive criteria embodied in that Act, compared with the approach taken under the earlier Matrimonial Causes Act. It also reflects a more restrictive interpretation of those criteria, as the courts have emphasised the rehabilitative function of maintenance and the importance of each party accepting responsibility, to the maximum extent practicable, for his or her own support. We think that this trend should be acknowledged and encouraged in the context of claims between de facto partners. Accordingly, the circumstances in which the court should be empowered to award maintenance to a de facto partner should be carefully and narrowly defined.

8.26 Secondly, we think that a clear distinction should be drawn between the power of the court in proceedings between married couples and those between de facto partners. We accept the view that marriage involves a public commitment that is not a necessary part of a de facto relationship. That commitment may justify a continuing obligation on a married person to support his or her spouse, where the spouse is unable to earn an income. In particular, that obligation may arise even where the need for support is created by circumstances, such as chronic illness, which are not necessarily connected with the relationship. We think that any 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. This ensures that the basis on which maintenance can be awarded between de facto partners is significantly more restrictive than the basis on which maintenance can be awarded between married persons.

8.27 For these reasons **we recommend that**

> **the general principle governing maintenance between de facto partners should be that each partner is liable to support himself or herself, and that neither should be entitled to claim maintenance from the other,**
>
> **notwithstanding the general principle, the court should have power, in proceedings between de facto partners, to award maintenance to the applicant if, and only if,**
>
> > **(a) the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of the relationship under the age of 12 years (or, in the case of a physically or mentally handicapped child, under the age of 16 years) at the date proceedings are instituted: and/or**
> >
> > **(b) the applicant is unable to support himself or herself adequately because his or her earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court, first, an order for maintenance would increase the applicant's earning capacity by enabling him or her to undertake a course or program of training or education and, secondly, having regard to all the circumstances of the case it is reasonable to make the order.**

We refer to a claim by a party for the court to exercise its power to award maintenance as an application for maintenance.

8.28 We have used the term "child of the relationship" in the preceding paragraph In this case we mean a child of both parties (including one born by artificial insemination with the consent of the male partner and a child adopted by both parties), as well as a child of the non-

custodial parent who is in the care and control of the custodial parent, that is, the applicant for maintenance. The reason for including a child of the non-custodial parent is that we consider the fact that the applicant is caring for the child of his or her de facto partner should have the same consequence, as far as assessment of maintenance is concerned, as if he or she were caring for a child of both parties. However, the fact that the applicant is caring for his or her own child by, say, a previous relationship should not of itself give the court power to award maintenance against the applicants de facto partner. [29]

2. Maximum Duration of Orders

8.29 We have recommended that the court should have power to award maintenance to a de facto partner who is unable to support himself or herself adequately because of responsibilities for the care of a child under the age of 12 years. This age was regarded as a reasonable upper limit, because it is the age at which a child usually enters secondary school. At that time the impact of child-care responsibilities on the custodial parent's opportunities for paid employment should be significantly reduced, although we acknowledge that the impact will not be eliminated altogether. In times of economic hardship a parent who has been out of the workforce for a period may not find it easy to re-enter, even though the burden of child care has been eased. In this sense there may continue to be a need for support indirectly attributable to the relationship which endures beyond the child's entry into secondary education. However, we think that a balance must be struck between public and private responsibility for the maintenance of an adult. We have argued that the private responsibility of a person to maintain a former de facto partner should be more limited than that of a married person and that the criteria for maintenance should be strictly based on needs directly attributable to the relationship. It seems to us reasonable to expect the community to accept responsibility for the support of a person whose inability to find employment is no longer directly attributable to day-to-day child care responsibility arising out of a de facto relationship.

8.30 There is a question as to whether any further limitation should be placed on the duration of a child care maintenance order. One member of the Division (Mr Gressier) .contends that the maximum duration of a childcare maintenance order be three years, or the attainment of school age by the youngest child in the applicant s care, whichever is longer. According to this view, if the youngest child of the partners is say, eight years old, an order could be made to extend until this child reached the age of 11. If, however, the youngest child is 11 years old at the time of the order, the order could have a maximum duration of one year only, because of the overall cut-off point at the age of 12 years. On this view, such a time limit would

- recognise that the financial needs of a custodial parent are greatest during the period following separation or until the youngest child reaches school age;

- provide financial support to the custodial parent during a period of adjustment and rehabilitation and possible return to the workforce;

- give practical recognition to the high rate of default under periodic maintenance orders made under the Family Law Act, a rate likely to be as high if not higher in the case of orders made after breakdown of a de facto relationship;

- recognise that a continuing obligation to pay maintenance over a long period may increase the likelihood of acrimony and disputation between former partners, which is not in the interests of the custodial parent or children; and

- recognise that the custodial parent s entitlement to social security benefits may be adversely affected by a maintenance order over a long period, even though the payment of maintenance may be irregular and provide an insecure source of support.

Where, however, maintenance is awarded to the custodial parent of a handicapped child, Mr Gressier considers that it should be possible for the order to continue until the child reaches 16, because of the difficulties the custodial parent may encounter in entering the workforce.

8.31 The majority of the Division (the Chairman, Mrs Cass and Mr Justice Nygh) accept the force of these arguments. They agree that, in general a child care maintenance order should not last beyond the period suggested. However, they also consider that there may be circumstances in which the order should continue for a longer period. One illustration recognised in the argument of Mr Gressier, is where the custodial parent has the care of a handicapped child and the additional responsibilities curtail employment opportunities. But the majority consider that there could be other cases justifying an extended order. For example, even when all the children have reached school age, the child care responsibilities and the financial consequences of the breakdown of the de facto relationship may effectively prevent the custodial parent moving to a new area where employment is available. Similarly, children may have special needs requiring additional attention even when they cannot be regarded as handicapped; meeting such needs may prevent the custodial parent seeking or accepting employment. For this reason the majority do not favour the imposition of a maximum period on the duration of child care maintenance orders, other than the overall limit relating to the child attaining 12, or in the case of a handicapped child, 16 years. They would emphasise, however, that in general they regard it as desirable for the court to limit the operation of child care maintenance orders. They take the view that normally an order should be made for a short period, for example, three years, and that the applicant should return to the court if circumstances make it necessary that the operation of the order should be extended.

8.32 **We therefore recommend (by a majority) that the legislation should not impose a maximum duration on child care maintenance orders, other than the limitation in paragraph 8.27 relating to the maximum age of the child.** On this recommendation it would be permissible for the original order, or any extension of the original order, to operate until the youngest child in the applicant s care attains 12 years, or 16 years in the case of a handicapped child. [30]

8.33 Where a periodic maintenance order is made solely on ground (b) in paragraph 8.27 (rehabilitative maintenance) **we recommend that the duration of the order should be limited to a maximum period of three years from the date of the order or four years from the termination of the de facto relationship, whichever period is shorter.** We make this recommendation because, in our view, rehabilitative maintenance should be awarded for a strictly limited period and every incentive should be provided for the applicant to become self-supporting as soon as possible.

C. Criteria for the Assessment of Maintenance

1. General Criteria

8.34 The recommendations in paragraph 8.27 empower, but do not oblige, the court to award maintenance to an applicant who satisfies the specified conditions. In determining whether to make an order the court should, in our view, take into account a number of matters. These include the income, earning capacity and financial resources of each party, as well as their financial needs and obligations, including responsibilities to support any other person. The court should also consider the effect of any order or proposed order for the transfer of property between the parties. While a property order is to be made in recognition of contributions, it may have a substantial effect on the needs of the applicant and on the capacity of the respondent to pay maintenance. In addition, an applicant who has the care and control of children of the relationship may be entitled to receive maintenance for the children under a court order or an agreement between the parties. Maintenance payments in respect of the children may cover some of the living expenses of the applicant and should therefore be considered by the court in assessing the applicant s need for maintenance (whether based on child care responsibilities or the need for economic rehabilitation).

8.35 **Accordingly we recommend that, in proceedings between de facto partners, the court should take into account the following matters in determining whether to make an order for maintenance and in assessing the amount of any such order:**

the income, property and financial resources of each party and his or her physical and mental capacity for gainful employment;

the financial needs and obligations of each party, including the responsibilities of either party to support another person;

the terms of any order made or proposed to be made in relation to the property of the parties; and

payments made, whether pursuant to an order for child maintenance or otherwise, in respect of the maintenance of children in the care and control of the applicant.

8.36 A claim for maintenance could be based on a combination of grounds (a) and (b) specified in paragraph 8.27. For example, a woman with young children in her care may commence a part-time course which is designed to qualify her for employment or to increase her earning capacity. She may seek an award that covers not only her living expenses while caring for the children, but also the additional expenses necessarily incurred in undertaking the course of training. In a case of this kind there should, however, be no double compensation in respect of the claimants needs, although we do not think that specific legislation to this effect is necessary.

2. Eligibility for Social Security

8.37 We have given careful consideration to whether the court in determining an application for maintenance, should take into account the eligibility of the applicant for social security payments, such as the supporting parents' benefit or unemployment benefit. The basic question is whether an application for maintenance should be decided without reference to the applicant s eligibility for social security (so that the obligation to support falls principally on the other de facto partner), or whether the court should strive to make an order which preserves the applicant s eligibility for social security (thus placing the primary burden of support on the social security system).

8.38 This question has arisen under the Family Law Act which in section 75(2)(f) directs the court to take into account in determining an application for maintenance

> "the eligibility of either party for a pension, allowance or benefit under any law of the Commonwealth or of a State or Territory ... or the rate of any such pension allowance or benefit being paid to either party".

The terms of section 75(2)(o are not easy to reconcile with the compulsory maintenance requirement imposed by the Social Security Acton applicants for the widows' pension and the supporting parents' benefit. [31] The difficulty has been reflected in the approach of the Family Court, where different views have been expressed as to the interpretation of the sub-section. The majority view appears to be that the entitlement of the applicant to social security should be taken into account only where the respondent s means are limited and it would cause him or her hardship to pay maintenance to the applicant. [32] The rationale for this approach is that the primary burden of support should fall on the former spouse, provided the order is not unrealistically high rather than on the community at large. The alternative view is that the language of section 75 (2) (f) is sufficiently clear to require that the amount of any order for maintenance should be calculated to preserve the applicants eligibility for social security and thereby maximise the resources of the parties. [33] The justification for this approach is that, unless the parties are well off, the available resources are usually insufficient to maintain two families. Consequently, a substantial order is an exercise in futility which can have no significant effect on the overall burden carried by taxpayers. In 1982 the then Commonwealth Attorney-General announced that legislation would be introduced to resolve the controversy by making it clear that the court is to calculate maintenance without regard to social security entitlement. [34] However, the Family Law Amendment Bill 1983, although effecting some

drafting changes to section 75(2)(f) makes no change to the subsection relevant to the controversy.

8.39 Whatever view is taken with respect to the Family Law Act, we think that legislation governing the maintenance of de facto partners should require the court to take into account the eligibility of either party for social security, and that any order should, so far as practicable, preserve the applicant s entitlement to a pension or benefit. We reach this conclusion for two reasons.

> First, the existing law imposes no obligation on a person to support his or her former de facto partner. Consequently, the community now shoulders the full burden of supporting a former partner who is unable to support himself or herself. Our recommendations depart from the existing law, but the grounds on which we suggest maintenance should be awarded are very much more restricted than those available under the Family Law Act The basis of our recommendations is not that the burden of support should be shifted generally from public to private sources, but that support should be available in special circumstances to avoid injustice and as a supplement to social security.
>
> Secondly, we have already said that we would be reluctant to extend a right to maintenance, even on a limited basis, if the effect were to reduce the economic security of former de facto partners by substituting an uncertain source of income for a reliable, if modest, source. In our view the first source of support should continue to be social security, and maintenance for a former de facto partner under State law should be limited to supplementing social security payments. [35]

Thus we recommend that in proceedings between de facto partners with respect to maintenance the court should, in addition to other matters, take into account the eligibility of either party for a pension, allowance or benefit, or the rate of any such pension, allowance or benefit being paid to either party; and any order made in the proceedings should preserve, as far as practicable, the entitlement of the applicant to a pension, allowance or benefit.

8.40 Mr Justice Nygh does not agree with this recommendation. In his view the court should take into account the eligibility of either party for social security only if it appears that the respondent has insufficient means to pay maintenance. In his view, the purpose of social security is to support those who do not have sufficient resources to support themselves. Where there is an obligation on an individual to support another, and his or her funds are ample for the purpose, the rationale for social security does not exist. However, he agrees that the difference is largely theoretical since in most cases the respondent does not have sufficient means out of which full support for his or her former de facto partner and children can be paid.

V. SUMMARY

8.41 Existing law makes no provision for a maintenance award in favour of one de facto partner (in his or her own right), against the other. In our view this causes injustice where one partner has needs arising from and attributable to the relationship and the other partner has the means to meet at least part of those needs. To remedy this injustice we think that a de facto partner should be able to claim maintenance in certain limited circumstances. The circumstances should be more restrictively defined than those which justify a maintenance award under the Family Law Act. Thus the court should have power to award maintenance if, and only if, the applicant is unable to support himself or herself adequately because

> he or she has the care of young children of the relationship (as defined in paragraph 8.28); or
>
> his or her earning capacity has been adversely affected by the relationship and some retraining is required.

The maximum duration of a maintenance order should be limited to a specified period. [36] We do not think that maintenance should supplant social security as the primary source of support for a former de facto partner who is in needy circumstances.

FOOTNOTES

1. An exception is that the Maintenance Act, 1964 permits the mother of an ex-nuptial child to claim “preliminary expenses” from the father, including her own maintenance for a period of two months before and three months after the birth: ss.7(1), 17.

2. Maintenance Act, 1964, s.15, para.15.21.

3. Paras.4.16, 4.20.

4. Maintenance Act 1967 (Tas.), s.16.

5. Tasmanian Law Reform Commission, *Report on Obligations Arising from De Facto Relationships* (1977), p.6.

6. See, for example, Women Lawyers’ Association of NSW, Submission No.4; Anglican Home Mission Society, Submission No.6; New South Wales Women’s Advisory Council, Submission No. 10; Australian Council of Social Service, Submission No.26; Uniting Church, NSW Synod Board for Social Responsibility, Submission No.30; Women’s Co-ordination Unit, Submission No.35; New South Wales Catholic Social Welfare Committee, Submission No.36.

7. NSW Catholic Social Welfare Committee, Submission No.36, p.25.

8. Australian Council of Social Service, Submission No.26, pp.5-6.

9. NSW Women’s Advisory Council, Submission No.10, p.4.

10. Anglican Home Mission Society, Submission No.6, p.2; see also Australian Catholic Social Welfare Commission, Submission No.27, p.2-3.

11. Women’s Action Alliance, Submission No.37, p.2.

12. Anglican Diocese of Sydney, Social Issues Committee, (majority response), Submission No.34(a), p.6.

13. Feminist Legal Action Group, Submission No.32, p.4.

14. Social Security Act 1947 (Cth), ss.62(3); 83AAD.

15. S.83AAD provides that a

“benefit shall not be granted to a person who is a supporting parent unless the Director-General considers that it is reasonable that the supporting parent should have taken action to obtain maintenance from the ... father or... mother... of the child or children in relation to whom the... person is the supporting parent and that that person has taken such action to obtain maintenance as the Director-General considers reasonable”.

It is not clear whether S.83AAD is confined to requiring the supporting parent to take maintenance action on behalf of the child or children, or whether it extends to maintenance for the supporting parent in his or her own right.

16. Australian Government Commission of Inquiry into Poverty, *Law and Poverty in* Australia (Second Main Report, 1975), pp.183-189.

17. See eg. Anglican Parish of St. Mark's, Avalon, Submission No.18.

18. Commission of Inquiry into Poverty, note 16 above, pp.186-187.

19. Ontario Law Reform Commission, *Report on Family Law - Part IV* (1974), p. 185.

20. Family Maintenance Act 1980 (Nova Scotia), SNS 1980 cap.6, ss.2, 3; Family Relations Act 1979 (British Columbia), RSBC c 121, ss.1 (definition of spouse), 57; Family Law Reform Act 1980 (Ontario), RSO c 152, s.14.

21. Child and Family Services and Family Relations Act 1980 (New Brunswick), SNB chap. C-2,1, s.112(3).

22. Family Maintenance Act 1978 (Manitoba), SM c 25/F20, s.11.(1).

23. Family Law Reform Act 1978 (Ontario), RSO c 152, ss.14, 15: Child and Family Services and Family Relations Act 1980 (New Brunswick), SNB chap. C-2,1, s.112(3).

24. Family Law Reform Act 1978 (Ontario), RSO c 152, ss.14, 15, 18(5).

25. Family Relations Act 1979 (British Columbia), RSBC c 121, ss.1, 77, 78; Family Maintenance Act 1978 (Manitoba), SM c 25/F20, ss.10, 11(2); Family Maintenance Act 1980 (Nova Scotia), SNS cap.6, s&2, 7.

26. Domestic Proceedings Act 1968 (NZ), s.53.

27. Family Proceedings Act 1980 (NZ), ss.79-81.

28. NZ Parl. Deb., 1980, vol.435, pp.5105-5106 (Hon J McLay, MP).

29. Compare the wider meaning of "child of the relationship" for the purpose of recognising contributions to the welfare of the family in the context of property disputes, para.7.45.

30. We consider later the termination of orders on grounds such as the death or remarriage of one party. para.10.25 ff.

31. Social Security Act 1947 (Cth), ss.62(3), 83AAD. On the interaction see joint Select Committee on the Family Law Act, *Family Law in Australia* (1980), vol.1, paras.5.30-5.32.

32. See eg. *Kajewski and Kajewski* [1978] FLC 90-472, *F and F.* [1982] FLC 91-214.

33. *Brady and Brady* [1978] FLC. 90-513.

34. Press release by the then Attorney-General, Senator Peter Durack, QC, and the then Minister for Social Security, Senator Fred Chaney, 21 January 1983.

35. See Royal Commission on Human Relationships, *Final Report* (1977), vol.4, para.91.

36. There is disagreement within the Division on the maximum duration of orders made in respect of child care responsibilities (para.8.32).

9. The New Financial Adjustment Jurisdiction

9.1 We have recommended that in proceedings between de facto partners, the court should have power

to adjust the property rights of the partners, taking into account a broad range of contributions to the acquisition and improvement of property and to the welfare of the other partner and the family generally; and

to award maintenance in limited circumstances in respect of child care responsibilities and for rehabilitative purposes.

In this Chapter we examine some important aspects of the new financial adjustment jurisdiction in which these powers can be exercised.

9.2 The major issues are the following:

the criteria which an applicant should have to satisfy in order to be eligible to apply for an order for financial adjustment;

the steps a court should take to finalise the relationship between the parties;

the powers that should be conferred on the court;

the interaction between applications for adjustment of property and for maintenance; and

the approach that should be taken where there are competing claims between a spouse and a de facto partner.

I. INVOKING THE NEW JURISDICTION

A. The Basic Requirements

1. The Criteria

9.3 We consider first the basic requirements that an applicant ought to satisfy in order to be able to institute proceedings for financial adjustment against his or her (former) de facto partner. There are two main options. The first is to allow an application for financial adjustment to be made by any person who has lived in a de facto relationship, regardless of the duration of the relationship. The second is to require an applicant to demonstrate that the de facto relationship had some degree of stability. The necessary stability could be demonstrated by proof that the relationship had continued for a minimum period specified by statute.

9.4 The first option has the advantage of flexibility. It would allow a claimant to gain access to a court simply by proving that the parties had lived in a de facto relationship. The court would then have power to make such order as the circumstances warrant This approach would also allow the court to have regard to all contributions made by the claimant. On the other hand, if the claimant had to prove that the relationship had continued for, say, three years, and it had continued for only two years, the claimant could not obtain an order for financial adjustment on the basis of contributions. Proponents of the first option contend that since there is no automatic right to an order for financial adjustment, the court can safely be entrusted with the task of distinguishing between good and bad claims. Further, it can be argued that unfounded claims could be discouraged by an award of costs against a party whose claim for financial adjustment was unsuccessful. [1]

9.5 We think that the danger of trivial or unmeritorious claims by persons whose de facto relationships have lasted for only a short time is a significant one. We also think that this danger is not entirely met by the sanction of an award of costs should the claim prove unsuccessful. A number of commentators expressed their concern that a new regime applying to de facto partners may produce a spate of trivial claims based, for example, on minor domestic contributions over a short period. We think the law should firmly discourage such claims. Moreover, we do not think that 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. The concept of rehabilitative maintenance, for example, may be appropriate where the parties have lived together for a significant period or have had children. It is inappropriate where the parties have lived together briefly and have no children. We think that legislation should make it clear that such a claim cannot be brought, and not simply leave it to the courts to resolve. For these reasons we think that, in general, an applicant should be able to invoke the powers of the court to adjust property rights or award maintenance only where the applicant and the respondent have lived together in a de facto relationship for a specific period.

9.6 The requirement of a specific period of cohabitation will guard against the possibility of a substantial number of unmeritorious claims reaching the courts. However, to avoid injustice, we think that special provision should be made for three cases. First, where the parties have cohabited and have a child (whether as the result of sexual relations, artificial insemination or adoption), the courts should have jurisdiction to entertain and application for a financial adjustment order, even though the parties have lived together for less than the specific period. In such circumstances, injustice might be caused if the court does not have power to compensate contributions made, for example, as a homemaker or parent, or to provide maintenance in respect of the child care responsibilities. Secondly, the requirement of a applicant has made substantial contributions to the relationship in its early stages. If these contributions are not recognised under the existing law, the contributor would be without a remedy if they could not be taken into account in a claim for the adjustment of property. Thirdly, the requirement of a minimum period of cohabitation may cause hardship in the unusual cases where the applicant retains care and control of his or her partner's child after the de facto relationship ends. We think that the courts should have power to hear the application in each of these cases, if the applicant can show that a failure to do so may lead to serious injustice.

9.7 **We therefore recommend that in proceedings between de facto partners the court should have power to make an order for an adjustment of property or for maintenance only where the parties have lived together in a de facto relationship**

> **(a) for not less than a specified period;**
>
> **(b) for a shorter period than that specified, but have had a child (whether as a result of sexual relations, artificial insemination or adoption); or**
>
> **(c) for a shorter period than that specified, but the court is satisfied that the applicant**
>
> > **(i) has made substantial contributions (of the kind referred to in paragraph 7.44) for which the applicant would otherwise not be adequately compensated; or**
> >
> > **(ii) has the care and control of a child of the respondent,**
>
> **and failure to entertain the application may lead to serious injustice.**

2. The Specified Period

9.8 We refer in the previous paragraph to a “specified period”. The question arises as to what that period should be. Two members of the Division (the Chairman and Ms Cass) consider that this period should be two years. They contend that this period is sufficient to demonstrate that the relationship has been substantially more than transitory or casual. They see the major purpose of this basic requirement as being to avoid the danger of trivial or unmeritorious claims coming before the court, and consider that this purpose will be achieved by a requirement of two years cohabitation. In their view, a longer period increases the likelihood that meritorious claims will not reach the court. They also have in mind that 60 per cent of current de facto relationships have continued for at least two years (Table 3. 10). Case studies suggest that de facto relationships of this duration involve substantial intermingling of finances, joint purchases of property and other assets, and non-financial contributions in the form of housework and improvements to household property. While the recommended jurisdictional requirements do not require a minimum period of cohabitation where serious injustice might be caused by a failure to recognise contributions, the need to demonstrate that injustice may discourage some meritorious claims. Unlike Mr Gressier and Mr Justice Nygh they see little need for uniformity between the definition of “widow’ for the purposes of the Social Security Act and the jurisdictional requirements in proceedings between de facto partners under State law.

9.9 While conceding that much can be said in favour of a two year period Mr Gressier and Mr Justice Nygh favour a three year period for four reasons. In the first place, whether the period is two years or three years, cases of serious hardship will be avoided by the provision allowing a partner who has made substantial contributions, or who will suffer serious injustice if an order is not made, to apply notwithstanding that the relevant period has not expired. Secondly, a three year period will serve to limit access to the courts to those members if the de facto population (approximately one-half who have clearly demonstrated that theirs is not a transient relationship. Thirdly, a three year period will highlight to a greater degree than a two year period, that the law is concerned to maintain a real difference between marriage and de facto relationships. And, finally, a three year period is the period now used in Commonwealth legislation such as the Social Security Act 1947, and uniformity is not lightly to be discarded.

9.10 Since there is an equal division of opinion within the Commission on the prescribed period, **we recommend only that the prescribed period, referred to in paragraph 9.7 should be either two or three years.**

3. The Definition of a De Facto Relationship

9.11 In paragraph 9.7 we refer to the parties “living together in a de facto relationship”. We discuss in Chapter 17 the precise statutory language that should be employed and some questions of interpretation that arise (paragraphs 17.4-17.12). We do not duplicate that discussion here.

4. A Separation Requirement?

9.12 We refer in paragraph 9.7 to proceedings between parties to a de facto relationship. In the ordinary course of events, proceedings will be instituted after the parties have separated, or at least are no longer living together on a “*bona fide* domestic basis”. However, we do not think it is necessary to require in the legislation that the parties should be living separately and apart before proceedings can be instituted. There may be occasions when a party to a continuing relationship wishes to apply for an adjustment of property. We do not see that this will lead to special procedural or other difficulties. In paragraph 9.23 we deal with the case where the parties have separated, and we recommend a time period after the separation within which proceedings must be instituted.

5. A Broader Issue

9.13 We note here one consequence of our recommendations. The powers of the court to make financial adjustment orders are confined to proceedings between de facto partners.

Thus a maintenance award in favour of an unmarried custodial parent in his or her own right can be made only where they have lived together in a de facto relationship. In New Zealand an unmarried custodial parent may claim maintenance in his or her own right against the other parent, regardless of whether they have ever lived in a de facto relationship (paragraph 8.20). The New Zealand provision is outside the scope of this Report. Nonetheless we see good reasons for confining the powers of the court to cases where the parties have lived together in a de facto relationship and the child has formed part of their household. In such cases there is likely to be considerable interdependence between the parties and there may well be other issues to be resolved between them such as the recognition of contributions through an order for transfer of property. In determining whether to award maintenance to the custodial parent, the court will no doubt consider the nature of the child care responsibilities assumed by the applicant during the relationship, since these will usually have been accepted as the result of a joint decision between the parties. The New Zealand approach implies that the mere fact that the respondent is a parent of a child may justify a continuing award of maintenance in favour of the custodial parent. This is not an entirely new concept as has been seer New South Wales law allows the mother of an ex- nuptial child to claim “preliminary expenses” from the father, including the expenses of her own maintenance for a period of two months before and three months after the birth (paragraph 8.1). Nonetheless, the New Zealand approach would require further investigation before we could recommend its adoption.

B. Connection with New South Wales

1. The Issue

9.14 In speaking of the powers of the court to order an adjustment of property or award maintenance, we have so far used general words which if taken literally, would apply to de facto relationships anywhere in the world. It is, of course, our intention that this adjustive jurisdiction should be confined within proper territorial limits. As to what these limits are, the general law provides guidance. It starts with the presumption that in the Australian federal structure all New South Wales legislation is *prima facie* restricted in its operation to the territorial limits of New South Wales. It recognises however, that New South Wales legislation can operate outside the territorial limits of New South Wales in some circumstances. The test is now said to be that the legislation “is valid if it is connected, not too remotely with [New South Wales], or, in other words, if it operates on some circumstance which really appertains to” the State. [2] Nevertheless, it appears from the decided cases that there is no “relevant territorial connection” if the connection with the territory of New South Wales is too slight. In other words, there is an element of degree involved. The significance of this is that every aspect of some de facto relationships will be connected with New South Wales, but some de facto relationships will have connections not only with New South Wales but also with other places. To what extent should a law of New South Wales govern de facto relationships of the latter kind?

9.15 For present purposes, the nature of the problem is best illustrated by some hypothetical facts and questions. Suppose that A and B enter into a de facto relationship in New South Wales in 1984; that they live together in New South Wales until 1988 and then move to Queensland where they continue to live together until their relationship ends in 1992; and that in 1992, our recommendations have become part of the law of New South Wales but not part of the law of Queensland. Should, for example, A or B, or both of them be entitled to invoke the law of New South Wales at the time proceedings are instituted, neither of them is domiciled, resident or present in New South Wales.) Or, should A or B, or both of them be entitled to invoke the law merely because they lived together in New South Wales from 1984 to 1988? Should some other territorial connection with New South Wales be required before a New South Wales court can determine the matter?

2. The Solution

9.16 We think that legislation should specify the connection required between the parties to the proceedings and New South Wales, and that the connection required should be

reasonably substantial. If, for example, it is enough that one party is resident in New South Wales at the time proceedings are instituted, people who never lived in New South Wales or had any dealings in the State while their de facto relationship continued might be able to invoke the powers of the court simply by moving to the State after the relationship ended. We think that in addition to a residence requirement an applicant should demonstrate either that the de facto partners were resident in New South Wales for a significant period, or that substantial contributions of the kind that can be recognised in proceedings for the adjustment of property were made in New South Wales. Accordingly, where an applicant seeks an order for adjustment of property or for maintenance **we recommend that the court should have power to deal with the application only where it is shown that**

> **(a) either the applicant or the respondent was resident in New South Wales on the date proceedings were instituted; and**
>
> **(b) (i) both parties had been resident in New South Wales for a substantial proportion of their relationship, or**
>
> **(ii) the applicant had made substantial contributions, of a kind referred to in paragraph 7.44, in New South Wales.**

We think that the legislation should provide that the parties shall be deemed to have been resident in New South Wales for a “substantial proportion” of their relationship if they lived together in this State for a period equivalent to at least one third of the duration of their relationship.

9.17 We stress that our recommendation is concerned only with conditions which must be satisfied by a person seeking to obtain an order for financial adjustment in New South Wales. We are not concerned here with any procedural aspects of the proceedings, such as the application of the provisions of the Service and Execution of Process Act 1901 (Cth) or the Supreme Court Rules, 1970, dealing with the service of process outside the State. Nor do we deal with the enforcement of a judgment given or order made in the proceedings. Where relevant, principles of conflict of laws will determine issues of this kind.

9.18 One incidental matter remains to be mentioned. In proceedings involving parties who have territorial connections with jurisdictions other than New South Wales, it may sometimes be desirable to produce evidence as to facts and circumstances which took place in one or more of these jurisdictions. These facts and circumstances could, for example, have some bearing on aspects of the parties’ relationship in New South Wales. Accordingly, and following the precedent of section 53 of the Family Law Act 1975, **we recommend that in proceedings f or adjustment of property or f or maintenance the court be empowered to have regard to a fact or circumstance notwithstanding that it took place outside New South Wales.**

C. A Transitional Problem

9.19 An important question is whether our recommendations should apply to all de facto relationships, past, present and future, or to a more limited category. We do not think that the recommendations should apply, in effect, retrospectively to relationships which have ended before the suggested legislation takes effect. On the other hand, to confine the recommendations to de facto relationships which commence after that legislation takes effect would be too restrictive and continue hardship and injustice long into the future. **We therefore recommend that the legislation should apply to all persons living in de facto relationships on the date the legislation takes effect.**

II. FINALISING THE RELATIONSHIP

A. The “Clean Break” Principle

9.20 The Family Law Act accepts the philosophy that it is desirable to terminate the financial relationship between the parties when the marriage is dissolved and ancillary orders made. Section 81 of the Act directs the Family Court so far as practicable, to make such orders as will finally determine the financial relationship between the parties to a marriage and avoid further proceedings between them. The principle of finality is based on the view that it is desirable for the parties to make a "clean break" after their marriage is over. Such a break is designed to assist the parties to avoid bitterness and recriminations by settling their financial problems and allowing each of them to begin an independent new life. [3] In addition, since one or both parties may remarry or establish new relationships, the second relationship should not be imperilled by continuing financial obligations owed to a former spouse.

9.21 We think these arguments apply with at least the same force where the parties have never married but have lived together in a de facto relationship. We are also influenced by the practical difficulties a de facto partner may have in enforcing an obligation imposed on the other partner to make periodic payments. Consequently, **we recommend that, in proceedings between de facto partners for adjustment of property or for maintenance the court should, so far as practicable, make orders which finally determine the financial relationship between the parties and avoid further proceedings between them.**

9.22 Our recommendations concerning the recognition of contributions through orders for the transfer of property are consistent with the clean break philosophy, since such orders create no continuing obligations between the parties. Our recommendations concerning maintenance contemplate that a court may order maintenance in respect of certain categories of needs, albeit for a limited time. We considered restricting maintenance payments to lump sum orders, but rejected this approach as unrealistic. In many cases a party will have no capital from which a lump sum can be paid, yet he or she may have sufficient income to justify an order for periodic payments. In this case, we think it would be unfair if the applicants needs could not be met simply because the parties had not accumulated assets during their relationship. Moreover, even where sufficient assets are available to satisfy a lump sum maintenance order, the court may prefer to make a periodic order where the circumstances of each party are likely to change in the near future and thus require a variation of the order. The recommendation in paragraph 9.21 would, however, require the court to consider whether there was another means of satisfying the applicants claim for maintenance, such as the payment of a lump sum or an order for transfer of property, which would finally determine the financial relationship. We return to this question later (paragraph 9.3 1). At this stage, we note that any lump sum order representing the capitalisation of a claim to periodic maintenance would need to take into account the statutory limits on the duration of periodic orders (paragraphs 8.29-8.33).

B. A Time Limit

9.23 Section 44(3) of the Family Law Act provides that where a decree *nisi* of dissolution of marriage has been made, proceedings with respect to maintenance or property (other than for variation or discharge of a maintenance order) shall not be instituted more than twelve months from the date of the decree, except by leave of the court. Leave is not to be granted unless hardship would otherwise result Precisely the same approach cannot of course, be adopted with respect to proceedings between de facto partners, since there is no equivalent to a decree *nisi* of dissolution of marriage. Nonetheless, we accept the general policy implicit in section 44(3). Financial questions between the parties should be finalised within a reasonable period after the breakdown of the relationship. [4] We think therefore that a time limit should be placed on the institution of proceedings for financial adjustment **We recommend that proceedings should be instituted not later than two years from the date on which the parties' de facto relationship ended.** The relevant date is the date on which they ceased "to live together as husband and wife on a *bona fide* domestic basis". If allowance is made for the one year's separation which must precede an application for divorce, the period of two years corresponds broadly with the period prescribed by the Family Law Act. **We also recommend that the court should have power to grant leave to institute proceedings out of time**

where the court is satisfied that greater hardship would be caused to the applicant if leave were not granted, than would be caused to the respondent if leave were granted. This provision for the extension of time on the basis of hardship is based on the interpretation of section 44(3) of the Family Law Act adopted by the Family Court. [5] **This recommendation does not extend to cases where an applicant seeks maintenance solely for the purposes of rehabilitation.**

9.24 Unlike section 44(3) of the Family Law Act, this recommendation does not speak of hardship caused to a child as a ground on which the court may grant leave to institute proceedings out of time. The omission is intentional Our recommendations relating to the court s powers of financial adjustment are designed to deal only with the rights of de facto partners between themselves, and not to provide for the needs of the children of the partners. A de facto partner s right to apply for maintenance on behalf of any child of the relationship is, of course, unaffected by our suggested time limit for commencing proceedings for financial adjustment.

III. POWERS OF THE COURT

A. General Powers

9.25 On an application for adjustment of property or for maintenance, the court should have the flexibility to fashion orders to take account of the circumstances of each case. For example, where the respondent to an application for adjustment of property owns several properties, the court may think it appropriate to recognise the applicant s contributions by ordering the transfer of one of those properties. Where the only asset of the parties is their home, the court may prefer to order that the property be sold and the proceeds divided between the parties in proportions determined by the court. If the respondent has realisable assets, an order for payment of a lump sum may be the most satisfactory way of recognising the applicants contributions. If the assets can be realised only over a period, it may be appropriate to require the respondent to pay the lump sum by instalments and perhaps to provide security for future payments. Where the applicant makes out a case for maintenance, based on the specific criteria discussed in paragraph 8.27, the court may have no alternative but to order payment of a periodic sum because the respondent has a reasonable earning capacity, but no assets. However, if the respondent does have assets, the “clean break” principle may dictate payment of a lump sum rather than an order for periodic payments. Again, it maybe appropriate in special circumstances for the applicant s claim for maintenance to be satisfied by a transfer of property, although the value of the property to be transferred should not exceed the amount necessary to provide for the limited needs in respect of which maintenance may be ordered.

9.26 Section 80 of the Family Law Act confers a wide range of general powers on the Family Court. It can be used as a model with some variations, for specifying the powers a court should have in proceedings between de facto partners for financial adjustment. Thus **we recommend that, in proceedings between de facto partners for adjustment of property or for maintenance, the court should be able to do all or any of the following:**

> **order the transfer of property;**
>
> **order the sale of property and the distribution of the proceeds in such proportions as the court thinks appropriate;**
>
> **order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;**
>
> **order payment of a lump sum, whether in one amount or by instalments;**

appoint an officer of the court to execute a deed or instrument in the name of a party and to do such things as may be necessary to make the deed or instrument operative;

order payments of weekly, monthly, yearly or other periodic sums;

order that the payment of any sums ordered to be paid be wholly or partly secured in such manner as the court directs;

make orders removing or appointing trustees;

impose terms and conditions on any order;

make an order by consent;

make interim maintenance orders;

make any other order (whether or not of the same nature as mentioned above) which it thinks necessary to do justice.

These powers should not affect either the existing powers of the court or the other powers that we recommend elsewhere should be conferred on the court.

B. Injunctions

9.27 In addition to the powers listed in paragraph 9.26, the court should have specific power to make orders restraining one party from particular conduct or directing a party to act in a particular way. For convenience, we refer to such orders as injunctions. In some cases, the court may wish to issue injunctions against third parties. This presents particular difficulties which are discussed elsewhere (paragraphs 10.1-10.8).

9.28 There are two particular instances where the court should have explicit power to issue injunctions. The first is where, before the hearing of a claim for financial adjustment, a party seeks an order to preserve the status quo pending determination of the claim. The order may be sought to prevent one party disposing of or damaging property which is the subject matter of the dispute or which otherwise may be relevant to the proceedings. Alternatively, the order may be sought to prevent one party from exercising his or her rights so as to prejudice the claims of the other party. This might occur, for example, where the owner of the home attempts to evict the other party before the claim of the other party to the home, based on contributions to the welfare of the family, can be determined. The second instance where an injunction may be required is where the court has made an order for financial adjustment and consequential orders are required to give effect to the main order. It may be necessary, for example, to order one party to vacate premises that are the subject of an order for sale and division of proceeds.

9.29 It would seem that the powers of the Supreme Court are sufficient to allow such injunctions to be granted without additional specific statutory authority. Local Courts, however, do not have these powers. [6] Later in this Report we discuss the allocation of the new jurisdiction to different levels of courts (paragraph 10.39). Here, we make the general point that express powers should be conferred on courts to issue injunctions in appropriate circumstances in proceedings for financial adjustment. Accordingly, **we recommend that the courts should have power to make such orders or grant such injunctions as they think proper with respect to any matter to which proceedings for financial adjustment relate, either unconditionally or upon such terms and conditions as they think appropriate, including (but without affecting any general powers of any court)**

(a) an order or injunction for the protection of, or in relation to, property or financial resources of a party to the proceedings; and

(b) an order or injunction to aid the enforcement of any **other order made in the proceedings.**

This recommendation adapts some of the provisions contained in section 114 of the Family Law Act. [7]

9.30 Two matters arising out of the recommendation made in paragraph 9.29 call for comment The reference in sub-paragraph (a) to "financial resources" is intended, in part, to cover the case where the person against whom an order is sought has effective management and control of assets, without necessarily having any legal or equitable interest in them. The provision is intended, for example, to enable an order to be made against a de facto partner who has a controlling interest in a family company. The order might be made for the purpose of restraining that partner from exercising voting powers in order to dispose of assets held by the company. Sub-paragraph (b) is intended to be broad enough to enable the court to order that one de facto partner should be permitted to occupy premises owned by the other partner. However, orders of this kind should be made only within the limits of the court's powers to order adjustment of property on the basis of contributions, or the payment of maintenance on the basis of the limited categories of needs referred to earlier. For example, a woman with the care of young children of the relationship might be held entitled to an order, in her own right against her former de facto partner for maintenance of $60 per week for a period of three years. It should be open to the court to determine that this entitlement will be satisfied by an order permitting the woman to occupy premises owned by the man (having a rental value equivalent to $60 per week) for that period. To give effect to this determination, the man could be ordered to vacate the premises and to refrain from disposing of them or interfering with the woman's possession during the three year period. As we note in paragraph 9.32, we think the court should be encouraged, where practicable, to specify the extent to which an order for financial adjustment is designed to recognise contributions or to satisfy needs.

IV. INTERACTION BETWEEN APPLICATIONS FOR ADJUSTMENT OF PROPERTY AND FOR MAINTENANCE

9.31 In Chapter 6 we discussed the relationship between property and maintenance claims under the Family Law Act (paragraphs 6.22-6.25). Analogous questions arise under our proposals, but they are not identical. We have already touched upon these questions in earlier parts of this Report, but we return to them here because, in our view, they are especially important. We repeat that we contemplate a clear distinction between the grounds on which an order for adjustment of property may be made and those on which an order for maintenance may be made. Subject to what is said below, contributions should be recognised through an order for adjustment of property, while needs (to the extent they can be considered at all should be recognised through a maintenance order. Our approach therefore, differs from the theoretical position under the Family Law Act. Under that Act contributions and needs may be taken into account by the court in determining both claims for adjustment of property and claims for maintenance. In practice, however, contributions are not normally taken into account in determining maintenance claims.

9.32 Despite what is said in the previous paragraph, we do not think that the only means of giving effect to an application for adjustment of property should be through an order for the transfer of specific property. Nor do we think that the only means of satisfying an application for maintenance should be through an order for periodic payments. The court should be able to fashion relief according to the circumstances of each case. We envisage that where applications for adjustment of property and applications for maintenance are made in the same proceedings, the court will deal with the applications as follows (although we propose no statutory requirement that this procedure be followed):

First, the court should determine whether an order for adjustment of property, which can only be based on contributions, is justified.

Secondly, having determined that an order is justified, the court should decide whether it should be satisfied by an order for the transfer of specific property, or by some other order. It may be appropriate to satisfy the claim by a lump sum order, perhaps payable by instalments. We doubt that an order for *periodic payments,* as such, will ever be the appropriate means of satisfying an order for the adjustment of property.

Thirdly, the court should determine whether an order for the payment of maintenance, which can only be based on the existence of any one of the limited categories of needs referred to earlier, is justified.

Fourthly, having determined that a maintenance order is justified, the court should decide how it should be satisfied. The only practicable means may be through an order for periodic payments. However, in view of the "clean break" principle, it may be appropriate to capitalise the payment by means of a lump sum order or an order for the transfer of specific property. When this is done, the capitalisation will need to take into account the statutory limits on the duration of periodic orders.

9.33 It follows that orders for the transfer of specific property or for the payment of a lump sum may have both a "property" and a "maintenance" component. In other words, the order may constitute, in part, the means of satisfying a claim for adjustment of property based on contributions and, in part, the means of satisfying a claim for maintenance based on needs. Where this occurs we think it is desirable that the court should, wherever possible, specify the extent to which an order relates to adjustment of property and the extent to which it relates to maintenance. In the case, for example, given in paragraph 9.30, the order relating to the occupation of premises should state that it is the means by which the order for maintenance, based on needs arising from child care, is to be satisfied. We do not think it practicable to impose a statutory requirement to this effect.

V. COMPETING CLAIMS: SPOUSE AND DE FACTO PARTNER

9.34 Some commentators have suggested that any power in a court to make financial adjustment between de facto partners should not prejudice a claim to property or maintenance by the spouse of one of the partners. It is of course impossible to ensure that the establishment of a de facto relationship does not cause financial prejudice to the spouse of one of the parties to that relationship. Indeed, as we have seen, the Family Law Act recognises that a person may have financial responsibilities to a de facto partner which take precedence over his or her responsibilities to a spouse (paragraph 4.24). Nonetheless, we accept the principle that our suggested financial adjustment jurisdiction should not, so far as practicable, preclude a claim that might otherwise be open to a spouse. The issue takes on added significance where conflicting claims arise in different courts, or in different divisions of the one court.

9.35 Suppose, for the purposes of illustration that H and W are married, but separated and that H lives with F in a de facto relationship, but that relationship also ends in separation. In the ordinary course of events one would expect any financial dispute between H and W to be resolved before any like dispute between H and F. However, it is possible that the issues between H and W will arise at the same time as those between H and F. H and W may be parties to proceedings in the Family Court in which W claims a transfer of property or asserts that she has a beneficial interest in property, and at the same time, H and F may be parties to proceedings in the Supreme Court in which F claims an interest in or the transfer of the same property.

9.36 Difficulties may arise if the separate proceedings proceed concurrently. The Family Court could, for example, make. an order with respect to property which conflicts with an order of say, the Supreme Court with respect to the same property. These problems are not novel. In some cases relief has been sought in the Supreme Court by a married person under section 66G of the Conveyancing Act 1919 (which concerns disputes between co-owners) and other relief has been sought in the Family Court by the other party to the marriage. **To resolve this**

conflict, we recommend that the Supreme Court should be empowered to adjourn proceedings for adjustment of property between de facto partners if, before final judgment or order, proceedings with respect to the property of one of the parties are instituted in the Family Court. This recommendation accords with our general view that the new adjustive jurisdiction should not preclude the determination of a claim by a spouse. If, however, proceedings in the Family Court are delayed excessively, particularly where delay is caused by neglect or collusion the de facto partner should be at liberty to apply to the Supreme Court for an order that the proceedings in that Court be continued. [8]

9.37 An adjournment may also be appropriate in other circumstances. In proceedings between de facto partners in the Supreme Court it may become clear, for example, that the financial resources of one party will be affected by the outcome of proceedings pending in the Family Court, even though the proceedings do not relate to the same property. In such cases, the most convenient course of action may be to adjourn the Supreme Court proceedings, pending determination of the Family Court proceedings. This will be a matter for the discretion of the court.

VI. SUMMARY

9.38 In this Chapter we have considered some aspects of the new adjustive jurisdiction we have recommended. Our recommendations include the following:

> In general the courts' powers should be exercisable only where the parties have lived together in a de facto relationship for a specified period (either two or three years). The only exceptions should be where the parties have had a child, or where strict compliance with the qualifying period would, for particular reasons, cause serious injustice.
>
> An applicant should also be required to demonstrate that there was a substantial connection between the de facto relationship and the State of New South Wales.
>
> The court should make orders which so far as practicable, finally settle the financial relationship between the parties. Proceedings should be instituted within two years of the breakdown of the relationship.
>
> The court should have a wide range of ancillary powers, including the power to issue injunctions in appropriate circumstances.
>
> Special care should be taken in cases involving applications both for adjustment of property and for maintenance. Each application will call for separate consideration especially to ensure that only the criteria appropriate to the application in question are taken into account.
>
> Where competing claims are made by a spouse and a de facto partner, procedures should be available which will allow, in appropriate circumstances, the claim by the spouse under the Family Law Act to be determined first.

FOOTNOTES

1. See generally Joint Select Committee on the Family Law Act, *Family Law in Australia* (1980). Vol.1, paras. 11.35-11.52.

2. *Pearce v Florenca* (1976) 50 ALJ R. 670. at p.673, per Gibbs J.

3. Cf. *Minton v Minton* [1979] AC 593, at p.608: The Law Commission, *Family Law: The Financial Consequences of Divorce: The Basic Policy* (Discussion Paper, Law Com. No. 103. 1980), p.48.

4. *Whitford and Whitford* [1979] FLC 90-612, at p.78, 146.

5. See, in addition, *Hall and Hall* [1979] FLC 90-679 at p.78.627. *Frost and Nicholson* [1981] FLC 91-051. at p.76,422.

6. Local Courts have power to grant injunctions under the Family Law Act 1975: ss.4, 39, 114.

7. It is not necessary to follow the structure of that section, which has been drafted with constitutional difficulties in mind.

8. Competing claims might also be resolved by the intervention of third parties in current proceedings. See para.10.3.

10. Consequential Matters

I. INTRODUCTION

10.1 In this Chapter we deal with matters arising out of our earlier recommendations concerning property and maintenance. By designating them as “consequential” we do not mean to imply that they are unimportant. On the contrary, they are significant issues, and often raise difficult technical questions. We examine a number of matters:

> claims by and against third parties in proceedings for adjustment of property or for maintenance;
>
> the means of dealing with a prospective entitlement to property or financial resources;
>
> the procedures for ascertaining existing property rights in accordance with general principles of law;
>
> the variation setting aside and termination of orders for financial adjustment;
>
> the effect of the death of a party on proceedings;
>
> the setting aside of transactions designed to defeat claims;
>
> stamp duty on the transfer of property; and
>
> the allocation of the financial adjustment jurisdiction to courts in New South Wales.

II. CLAIMS BY AND AGAINST THIRD PARTIES

A. Claims By Third Parties

10.2 We have referred to the possibility of conflicting claims under our proposed legislation and the Family Law Act (paragraphs 9.34-9.37). There is a broader question as to how to protect people who are not the primary parties to proceedings for financial adjustment but who have an interest in the proceedings. A parent of a de facto partner may, for example, claim a proprietary interest in property in dispute by reason of contributions to the acquisition of the property. The parent could institute independent proceedings asserting this claim but the most convenient course of action may be for the parent's claim to be determine in the context of the proceedings between the de facto partners.

10.3 We have considered whether it is necessary to provide specifically for the intervention of third parties in proceedings between de facto partners. Section 92 of the Family Law Act, for example, empowers the court to make an order entitling a third party to intervene in the proceedings. The intervener is deemed to be a party to the proceedings, with all the rights, duties and liabilities of a party. However, at this stage we think it is unnecessary to introduce equivalent legislation since existing powers to add third parties to proceedings appear to be sufficient. Under our proposals for the allocation of the adjustive jurisdiction most claims relating to property would be heard in the Supreme Court (paragraph 10.40). Part 8, rule 8 of the Supreme Court Rules, 1970, allows a person to be added as a party to proceedings if this

> “ is necessary to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon”. [1]

The addition of a party may be made on the application of the person concerned, or on the application of a party to the proceedings. Alternatively, the court may act of its own motion. If we are proved wrong in thinking that existing powers are adequate, legislation can be introduced later to overcome any deficiencies.

B. Claims Against Third Parties

10.4 A second problem which has given rise to some difficulties under the Family Law Act is the extent to which a court should be able to make orders binding third parties. The issue can arise, for example, where assets such as the partners' home are held by a family company under the control of one party and the claimant seeks an order binding the company. The scope of the courts powers under the Family Law Act is complicated by the constitutional limitations referred to in Chapter 2 and by the terms of the Act particularly section 114 which is concerned with injunctions. Experience under the Family Law Act provides some guidance as to the issues that are likely to arise in practice.

10.5 In the leading case of *Ascot Investments Pty. Ltd v. Harper*, [2] the High Court held, as a matter of interpretation that the Family Court did not have jurisdiction to order a company and its directors (other than the husband) to register a transfer to the wife of the husbands shareholding in the company, notwithstanding the husband's refusal to abide by other orders of the court. Despite this decision there are some circumstances in which an order can be made against a third party, or at least affect the interests of a third party. The law is in a state of flux, [3] but the following are illustrations of the circumstances in which orders of this kind have been made in proceedings under the Family Law Act.

> An order was made against an insurance company restraining it from paying money due under a fire policy to any person other than the wife. [4] This has been justified on the basis that the company s substantive rights were not prejudiced. It was not required by the order to pay out money but was simply restrained from paying to any person other than the wife. [5]
>
> Interlocutory injunctions have been granted against family companies to prevent property dealings by them. These orders have been justified as necessary to preserve the ability of the court to make orders for transfer of property or for maintenance. [6] In general interlocutory injunctions of this kind will only be made where one of the parties to the marriage has effective control of the company, but orders have been made (more contentiously) where control rests with other family members, for example, the mother of one of the parties. [7]
>
> An interlocutory injunction has been granted to restrain the husband's mother (who had intervened in the Family Court proceedings) from continuing proceedings in a State Supreme Court in which she claimed that the matrimonial home was held in trust for her. The injunction was granted pending determination of the property proceedings between husband and wife. [8]

10.6 If we make no specific recommendations concerning orders against third parties, the extent to which a court determining a dispute between de facto partners can make such orders will depend on an interpretation of its general powers to issue injunctions and to make other orders (paragraphs 9.27-9.30). Unlike the Family Court, there is no constitutional barrier to a State court making orders against third parties, if such orders are authorised by the relevant legislation or the inherent powers of the court. For this reason, the experience of the Family Court cannot be applied without qualification to the new jurisdiction that we have recommended should be created. Nonetheless, the circumstances in which the Family Court has made orders against third parties may provide some guidance as to the circumstances in which a State court would be likely to make orders binding third parties. We refer to the following situations as examples:

We have pointed out in paragraph 10.3 that procedures are available under Part 8, rule 8, of the Supreme Court Rules to add third parties to proceedings in order to ensure that all matters are effectually and completely determined. Thus, for example, a third party who claims property also claimed by a de facto partner, could be added to the proceedings. The court would have power to make an order in favour of or against the third party in relation to the claim.

The general power of the court to issue injunctions where it considers it proper to do so would permit a court to make a temporary order against the third party. This could be done to preserve the status quo until the claims between the de facto partners are determined. For example, we consider that where a de facto couple have been living in a house owned by a family company or a relative of one of the parties, the court would have power to make a temporary order against the company or the relative, restraining any sale of the house until further order. Whether the power was exercised in a particular case would depend upon a variety of circumstances, including the relationship between the third party and the de facto partners.

Orders could be made against third parties where the commercial or property interests of those parties are not substantially affected. If, for example, a dividend has been declared by a family company but not yet paid, the company could be restrained from paying the dividend except to one of the de facto partners. Similarly, if one of the partners has an immediate entitlement to payment from a superannuation fund, an order could be made against the trustees restraining them from paying out moneys except pursuant to a direction from the court.

10.7 How much further a State court would go in making orders against third parties could be determined on a case by case basis. We think it likely that a State court would take a more generous view than the Family Court of its powers to make orders against third parties, particularly where these are necessary to give effect to orders for the adjustment of property or the payment of maintenance. For example, we think that the narrow interpretation of the Family Law Act adopted in *Ascot Investments Pty. Ltd. v. Harper* would not necessarily be applied to a State Act in similar terms, given that there is no constitutional impediment to the State court requiring a company to register a transfer of shares from one party to another. Again, whether the order would be made in the particular case would depend upon the circumstances, including the need to protect the interests of *bona fide* third parties.

10.8 We have given consideration to granting specific powers to the court in proceedings between de facto partners, to make orders against third parties. There are, however, great difficulties in attempting to define in statutory form the circumstances in which an order should be made against third parties. For the limited number of cases in which third parties are involved, we think it is enough for the court to proceed on a case by case basis, utilising its general powers and the procedures available under rules of court. The experience of the Family Court is likely to prove valuable, but will not determine the issue in any given case since State courts will not be bound by the same constitutional shackles.

III. PROSPECTIVE ENTITLEMENTS

A. The Problems

10.9 If the experience of the Family Court is any guide, courts dealing with financial disputes between de facto partners may find that the resources available to the parties do not take the form of property in the strict sense of that term. The resources may include, for example, interests or contingent interests in, or benefits derived from, superannuation funds, discretionary trusts or family companies. We have recommended earlier that contributions to the “financial resources” of the parties should be taken into account in determining an application for adjustment of property. Accordingly, contributions by one partner which have enabled the other to build up resources that are not strictly property, may nevertheless be taken into account in determining an application (paragraph 7.44). This does not, however,

resolve all problems where superannuation, discretionary trusts or family companies are involved. We now refer briefly to some of the difficulties.

1. Valuation of Superannuation Entitlements

10.10 One common problem is how a prospective entitlement to superannuation benefits is to be valued for the purpose of determining the resources of the parties. The Family Court has adopted a number of strategies, but a consistent approach is yet to emerge. The strategies include the following:

> Treat the future entitlement as one factor to be taken into account in adjusting property, without attempting to quantify the present value of the entitlement. [9]
>
> Divide the accrued superannuation entitlement as at the date of separation or divorce. [10] This can be done by calculating actual contributions plus accrued interest or by calculating a pay out figure on the basis of a notional resignation at the relevant date. One difficulty is that pay out figures vary considerably, depending on the terms of the fund, while actual contributions may bear little relationship to ultimate entitlement.
>
> Calculate a percentage of the ultimate pay out figure by reference to the period of cohabitation during which payments were made, as a proportion of the total period of contributions, and then discount that sum in accordance with accepted practice to take into account the accelerated “entitlement”. [11] This has the disadvantage of complexity and often involves speculative calculations.

10.11 We have considered whether to propose a formula for valuing a prospective superannuation entitlement We have concluded that because superannuation arrangements vary so widely, it is not practicable to design a suitable formula to cover all cases. [12] For this reason, we p refer to leave questions of valuation to be dealt with by the court according to the particular circumstances of the case.

2. Adjustment of Prospective Entitlements

10.12 Our earlier recommendation that contributions to financial resources generally be taken into account in property adjustment will assist a claimant whose partner has property in addition to, say, a prospective superannuation entitlement or the possibility of future benefits from a discretionary trust or family company. If there is no such property available for immediate distribution or it is of little value, the court will be unable to make an order for the transfer of property. A lump sum order may also be inappropriate or unlikely to be enforceable. There are two principal techniques available to a court to deal with the case where the only substantial “asset" is a prospective entitlement or the possibility of a future benefit. We describe these techniques in the following paragraphs.

B. Solutions

1. Adjournment

10.13 First, where the respondent is likely to be eligible to receive benefits within a relatively short time after the breakdown of the relationship, the court could adjourn the proceedings for adjustment of property rights until the time when the benefits are likely to vest or accrue. In the context of marriage, this solution was favoured by the Family Law Council in a paper on *Superannuation and Family Law* and by the Joint Select Committee on the Family Law Act. [13] It has been adopted in the Family Law Amendment Bill 1983 which specifically empowers the court to adjourn proceedings with respect to the property of the parties for a specified period if it is of opinion

> "(a) that there is likely to be a significant change in the financial circumstances of the parties to the marriage or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and
>
> (b) that an order that the court could make with respect to the property of the parties to the marriage or either of them if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the marriage than an order that the court could make immediately with respect to the property of the parties to the marriage or either of them". [14]

10.14 An adjournment of proceedings for property adjustment, in our view, may be a satisfactory solution where, for example, the respondent is likely to receive substantial superannuation payments or allocations from a discretionary trust within a relatively short period. Since an adjournment inevitably will delay termination of the parties' financial relationship, the power of adjournment should be exercised cautiously. **We recommend that the court should have power to adjourn proceedings for adjustment of property similar to the power conferred by the proposed amendments to the Family Law Act.**

10.15 We note here a difficulty that may arise where proceedings for -the adjustment of property are adjourned. If, for example, the respondent is a member of a superannuation fund and dies while the proceedings are adjourned, payments from the fund will usually be made to the dependents nominated by statute or by the member, or designated in the superannuation trust deed. The payments therefore will not become part of the respondent s estate. However, in this case, the Family Provision Act 1982 enables a surviving de facto partner to apply for family provision. Under section 22 of the Act the court may, in some circumstances, and subject to a number of stringent conditions, follow superannuation payments into the hands of a third party in order to satisfy a family provision claim. Thus, the death of one de facto partner after the institution of proceedings does not necessarily prevent the other partner from obtaining all or some of the proceeds of superannuation (paragraph 10.31).

2. Deferment of Order

10.16 The second technique, which has been used under the Family Law Act, [15] is for the court to order the respondent to pay a lump sum, but to defer the operation of the order until the prospective entitlement matures (for example, where the respondent receives superannuation payments on retirement). Again, this procedure is likely to be suitable only where the entitlement can be expected to arise within a short time. However, **we recommend that the court have power to defer the operation of an order where an entitlement is likely to arise within a short time.** We note that the court would also have power to order the respondent and the trustees of the superannuation fund to notify the applicant of the respondents intended date of retirement.

IV. RIGHTS UNDER THE GENERAL LAW

10.17 We have recommended that the court in proceedings between de facto partners, should have power to adjust their property rights having regard to their respective contributions. However, in some cases it will be necessary to determine the existing property rights of the parties under general principles of law, without recourse to the power to adjust those rights. These cases include the following:

> where neither party wishes to invoke the jurisdiction of the court to adjust property rights;
>
> where neither party is able to invoke the jurisdiction because the basic requirement of cohabitation for a specified time has not been satisfied, or proceedings have not been instituted within the required time;

where existing rights are uncertain and must be ascertained before an order for adjustment can be made;

where a third party claims an interest in disputed property.

Of course, even without a specific power to issue such a declaration the Family Court would be empowered to ascertain the existing rights of the parties as a prelude to making an order for settlement of property. The Supreme Court already has power to ascertain the rights of the parties in accordance with the ordinary principles of contract and property law. The court also has power, where appropriate, to issue a declaration as to the parties' rights. Nonetheless, we think that the court s power to issue a declaration should be expressly included in any legislation dealing with the financial relationship between de facto partners. Accordingly, **we recommend that legislation should specifically provide that in proceedings between de facto partners with respect to the existing title or rights to property the court may issue a declaration specifying the rights of the partners or either of them.** The court could issue such a declaration in the course of proceedings for financial adjustment It could also issue such a declaration in proceedings between the parties where the court lacks power to adjust their property rights (as where neither party can invoke the adjustive jurisdiction). In other words, the power to issue a declaration would not be dependent on the parties being able to satisfy the jurisdictional requirements in paragraph 9.7.

10.18 Where the court is called on to exercise its power to ascertain and declare existing interests in property it will apply general principles of law, including the law of trusts. We have previously pointed out that general principles state that where one de facto partner purchases property in the name of the other, the presumption of resulting trust and not the presumption of advancement applies (paragraph 7.3). The law does not presume an intention to make a gift even where the partners have been living together for many years. We have considered whether we should change this principle, but we have decided to recommend no change. Of course the presumptions will play no role in determining how the court should exercise its powers to adjust property rights, except that the court, before exercising those powers, may wish to ascertain the existing rights of the parties.

10.19 We emphasise that the express recognition of the jurisdiction to issue a declaration as to the rights of the parties is not intended to affect the adjustive powers of the court. In particular, we do not intend that where an order for adjustment of property is sought, the court must first issue a declaration as to existing rights or determine whether the applicant is entitled to other relief based on general principles of law. In short, it should not be a condition precedent to the exercise of the adjustive jurisdiction that a specific prior determination be made in respect of the parties' rights under the general law. **We therefore recommend that the court's powers of adjustment should not be dependent upon a prior determination of the parties' rights under the general law.**

10.20 A situation might arise where one de facto partner seeks an order for the adjustment of property and the other partner seeks different relief relying on the general law. It may be appropriate, where each of the proceedings is commenced, in the Supreme Court to consolidate them under Part 31, rule 7 of the Supreme Court Rules. Alternatively, it may be necessary to adjourn one of the proceedings pending determination of the other, particularly where there is a jurisdictional question to resolve. The possibilities are endless and we make no recommendation except to say that experience will tell whether new rules are necessary to cope with new problems.

V. VARIATION, SETTING ASIDE AND TERMINATION OF ORDERS

A. Variation and Discharge

1. Periodic Maintenance

10.21 Section 83 of the Family Law Act confers power on the court to discharge (terminate), suspend, vary or revive maintenance orders. The power to vary an order is not to be exercised unless, since the order was last made or varied, certain specified events have occurred. These include a change in

> the circumstances of the person for whose benefit the order was made;
>
> the circumstances of the person liable to make payments under the order; or
>
> the cost of living;

sufficient to justify a variation. The section permits the court to discharge an order if there is just cause for doing so.

10.22 We have adopted a restrictive approach to maintenance, and this may limit the scope for applications to vary or discharge maintenance orders. For example, there may be little room for variation of an order based on the need for economic rehabilitation since the maximum life of such an order is only three years. Nonetheless, some circumstances may justify variation of an order. An example would be where a custodial parent receiving modest support loses part-time employment opportunities because of the long-term illness of a child in his or her care. [16] Even an order based on a need for rehabilitation may require modification if the circumstances change significantly. Discharge of the order may be appropriate if the need no longer exists. **We recommend that the court should have powers to vary, discharge, suspend or revive orders for periodic maintenance similar to those powers specified in section 83 of the Family Law Act.** [17]

2. Orders for Transfer of Property and Lump Sum Payments

10.23 Orders for the transfer of property or for payment of a lump sum differ from orders for periodic payments, in that they are designed to end the financial relationship between the parties and usually require compliance within a short time (although lump sum orders may be payable by instalments). Where such orders are made in recognition of past contributions, we think it clear that the grounds for variation should be limited and should not include the broad grounds justifying a variation of periodic orders. Where the orders are made in recognition of future needs (that is, in substitution for an order for periodic payments), there is a stronger case for a wider power of variation. It can be argued, for example, that a lump sum order which has not been fully complied with, or even one that has, should be capable of variation simply because of changed circumstances. [18] Our view, however, is that the goal of achieving finality should take precedence. **We recommend that, subject to what we say about the setting aside of orders (paragraph 10.24), orders for the transfer of property and the payment of lump sums should not be capable of variation.** Where an applicant seeks a substantial lump sum payment on the basis of needs which may change within a very short period, the absence of any power of variation can be expected to influence the outcome of the application.

B. Setting Aside Orders

10.24 The Supreme Court has power to set aside decisions (otherwise than on appeal) on certain limited grounds which include fraud." Section 79A of the Family Law Act specifically empowers the court to set aside an order for transfer of property where it

> "is satisfied that there has been a miscarriage of justice by reason of fraud, [19] duress, suppression of evidence, the giving of false evidence or any other circumstance...."

One of the proposed amendments to the Family Law Act would extend the courts power to set aside a property order to cases where it is satisfied that

> "(b) in the circumstances that have arisen since the order was made it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out [or]
>
> (c) a person has defaulted in carrying out an obligation imposed on him 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 .... " [20]

We recommend that powers equivalent to those specified in section 79A of the Family Law Act (including those specified in the proposed amendments to that section) should be conferred on a court exercising jurisdiction in proceedings between de facto partners. These powers should be available in respect of any order which a court is empowered to make, and not merely in respect of orders for the transfer of property. The court, before setting aside an order, should be required to have regard to the interests of any third party who might be affected by such action.

C. Termination of Periodic Maintenance Orders

10.25 We have recommended that an order for periodic maintenance in favour of a de facto partner should be subject to time limits. An order made on the basis of the applicant s child care responsibilities would end, at the latest when the youngest child attained the age of 12 years (or, in the case of a physically or mentally handicapped child, 16 years) (paragraph 8.32). An order based on the need for economic rehabilitation would terminate no later than three years from the date the order was made (paragraph 8.33). In addition to these limits on the duration of an order, **we recommend that an order for periodic maintenance should cease to have effect on**

> **the death of the party for whose benefit the order is made;**
>
> **the death of the person liable to make payments under the order; or**
>
> **the marriage or remarriage of the person for whose benefit the order is made.** [21]

10.26 Two members of the Division (the Chairman and Mr Gressier) propose that an order for periodic maintenance should also automatically cease to have effect when the person for whose benefit the order is made enters into a de facto relationship. In their view it would be inappropriate for a former de facto partner to remain under any obligation to maintain his or her partner, after that partner has entered into a new relationship. They argue that it would be anomalous if the legislation provided for automatic termination if the party receiving maintenance married, but not if that party entered into a de facto relationship. If this view is accepted it will be necessary for the legislation to provide that when the person for whose benefit the order is made, marries or enters into a de facto relationship, he or she should be under a duty to advise the other party without delay. [22] The termination of an order should not, however, affect the recovery of arrears due under an order at the time when the order ceased to have effect. [23]

10.27 The other members of the Division (Ms Cass and Mr Justice Nygh) do not agree that entry into a de facto relationship should automatically terminate an obligation to make periodic payments. They point out that under our recommendations, a person who has lived in a de facto relationship may obtain maintenance from the other partner only in very limited circumstances. If a person receiving maintenance from a former partner enters into a new de facto relationship, he or she will not acquire any automatic right to obtain maintenance from the new partner. This may be contrasted with the consequence of a marriage by a person receiving maintenance from a former de facto partner. Under section 72 of the Family Law Act the new spouse will have an obligation to maintain his or her husband and wife, to the extent that the spouse is unable to support himself or herself. These members of the Division are not concerned that their view differentiates between a de facto partner receiving maintenance

who marries, and a de facto partner who enters into a new de facto relationship. On their analysis, this is simply a corollary to the proposition that entry into a de facto relationship does not confer a legal status on the partners. If this view were accepted a person paying maintenance to a former de facto partner would, of course, be able to apply for a variation or discharge of the order if the former de facto partner entered into a now de facto relationship, under our recommendations relating to discharge and variation (paragraph 10.22).

10.28 Where it is the partners' intention that periodic maintenance should continue beyond the periods specified in paragraph 10.25, they can achieve this result by entering into a cohabitation or separation agreement, as outlined in Chapter 11. For example, the partners may specifically agree that an obligation to pay periodic maintenance shall be enforceable against the estate of the partner undertaking that obligation. Under our proposals such an agreement if embodied in a cohabitation or separation agreement, will be effective. The same agreement could not, however, be effectively embodied in a court order by consent, that is one putting into effect an agreement between the partners, because of the limits on the duration of periodic orders referred to in paragraph 10.25.

VI. EFFECT OF A PARTY S DEATH

A. Introduction

10.29 Section 2 of the Law Reform (Miscellaneous Provisions) Act 1944, expresses the general rule that all causes of action subsisting against or vested in a person on his or her death survive against, or, as the case may be, for the benefit of his or her estate. There are some exceptions to this rule but, for present purposes, they are irrelevant. Part 8, rule 10 of the Supreme Court Rules, 1970, is also concerned with the impact of death on causes of action. The rule says that where a party to proceedings dies "but a cause of action in the proceedings survives", the proceedings shall not "abate" (terminate) by reason of the death. We now discuss the effect of this rule or first proceedings for adjustment of property, and secondly, proceedings for maintenance.

B. Applications for Adjustment of Property

10.30 It is arguable whether proceedings for adjustment of property are proceedings with respect to "a cause of action" within the meaning of the 1944 Act. The Full Court of the Family Court of Australia has held that a claim for alteration of property interests under section 79 of the Family Law Act is not "a cause of action" for the purposes of the equivalent. Western Australian legislation [24] and therefore does not survive against or for the benefit of the estate of a deceased person. However, the decision turned on the structure and terms of the Family Law Act rather than on general principles of law. For present purposes, we assume that proceedings for adjustment of property are proceedings with respect to "a cause of action", which would survive against or for the benefit of the estate of a deceased person. Even if this assumption is incorrect, our recommendations will clarify the position.

1. Death of (Potential) Respondent

10.31 Where a person dies and at the date of death was living with a de facto partner, the surviving partner is an eligible applicant for the purposes of the Family Provision Act, 1982, and may claim provision from the estate of the deceased partner (paragraph 4.41). If no claim for adjustment of property had been made at the date of death (as one would expect where the partners were living together at that time), the appropriate course of action for a surviving de facto partner who has been inadequately provided for is to institute proceedings under the Family Provision Act. Even if the partners had separated at the date of death the survivor is still an eligible applicant under the Family Provision Act, provided he or she can show sometime dependence on the deceased (paragraph 4.42). In this case (that is, where the parties separated before death) we consider it appropriate that the surviving partner should be left to his or her remedies under the Family Provision Act **We therefore recommend that, where a de facto partner dies and the survivor has not at that time instituted**

proceedings for the adjustment of property, the survivor should be left to such remedies as are available under the Family Provision Act, 1982. On the assumption that a claim for adjustment of property constitutes proceedings with respect to a "cause of action", this recommendation will require an amendment to the Law Reform (Miscellaneous Provisions) Act, 1944, to ensure that the cause of action does not survive against the estate of the deceased.

10.32 The recommendation made in the previous paragraph leaves a possible gap between the proposed jurisdiction of the court to order the adjustment of property and the jurisdiction conferred by the Family Provision Act. This gap may occur in at the date of death, the de facto couple had separated and the survivor had not applied for an order for the adjustment of property. A survivor who cannot establish sometime dependence on the deceased (whether whole or partial) is not eligible to apply for an order under the Family Provision Act and is therefore left to his or her general law remedies, if any, against the estate. This result is a consequence of the scheme of the Family Provision Act and we do not think it appropriate to attempt to overcome it in this Report.

10.33 If, however, a de facto partner applies for adjustment of property and the respondent dies after the application is made, we do not think the proceedings should thereby terminate (abate). We are influenced by the policy to this effect embodied in the Family Law Amendment Bill 1983 [25] and reflected in the Supreme Court Rules. Moreover, since a claim for an interest in property is based on contributions, it is appropriate that the claim once instituted, should proceed notwithstanding the respondents death. Accordingly, **we recommend that where the respondent to an application for adjustment of property dies, the proceedings should continue against his or her estate.**

2. Death of (Potential) Applicant

10.34 **We recommend that, if a de facto partner dies without having instituted proceedings for adjustment of property, the cause of action (assuming it is one) should not survive for the benefit of his or her estate. However, if the applicant dies after proceedings are instituted, we recommend that the proceedings should not abate and should be able to be continued by the applicant's personal representatives.**

C. Applications for Maintenance

1. Death of Respondent

10.35 **We recommend that where an application for maintenance is instituted, the proceedings should abate on the death of the respondent, and the applicant should be restricted to a claim under the Family Provision Act, 1982. A fortiori, if proceedings have not been instituted at the date of the (potential) respondent's death, we recommend that the surviving de facto partner should also be restricted to a claim under the Family Provision Act, 1982.** These recommendations are consistent with our view that an order for periodic maintenance should cease to have effect on the death of the person liable to make payments under the order. The recommendations will not, however, prevent an order for the payment of a lump sum (or an order for the transfer of specific property), which has been made on an application for maintenance being enforced against the estate of a respondent who dies after, the order, but before payment. Nor will they prevent the enforcement of a cohabitation or separation agreement which provides that periodic maintenance shall be paid from the estate of one of the partners.

2. Death of Applicant

10.36 **Where an applicant for maintenance dies after the institution of proceedings, we recommend that the proceedings should abate.**

VII. TRANSACTIONS TO DEFEAT CLAIMS

10.37 Parties to intra-family disputes are often tempted to enter into transactions with other people involving sales, gifts, and the like which are intended to defeat or will have the effect of defeating, the just claims of another party. For the purposes of its proposed powers to make property or maintenance orders, we consider that the court should be given extensive powers to set aside or restrain transactions of this kind. Section 85 of the Family Law Act is in point:

> "(1) ... the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in ... proceedings for costs, maintenance or the declaration or alteration of any interests in property or which irrespective of intention is likely to defeat any such order.
>
> (2) The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs or maintenance as the court directs, or that the proceeds of a sale shall be paid into court to abide its order.
>
> (3) The 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."

We recommend that a provision similar to section 85 be adopted in relation to claims by de facto partners for adjustment of property or for maintenance.

VIII. STAMP DUTY ON TRANSFER OF PROPERTY

10.38 Section 74CB of the Stamp Duties Act, 1920, has the effect that a document is exempt from duty to the extent that it makes provision for, or with respect to, the conveyance to the parties to a marriage, or to either of them of matrimonial property. The exemption is conditional upon, among other things, the dissolution of the marriage and the document having been executed for the purposes of or in accordance with an approved settlement or an order of the Family Court. This exemption was added to the Stamp Duties Act in 1982 . In some instances, stamp duty is payable upon the execution of the document but the person paying it becomes entitled to a refund at a later date. **We recommend that consideration be given to the granting of a similar exemption with respect to documents executed for the purposes of, or in accordance with, an order of h court made in proceedings between parties to a de facto relationship with respect to the adjustment of property.**

IX. COURTS

A. Allocation of Jurisdiction

10.39 To this point we have spoken generally of "courts" and "orders". We now recommend a framework to be followed in determining which courts should exercise the powers referred to in this Part.

10.40 In our view, both the Supreme Court and Local Courts should be able to exercise the recommended powers to adjust property and to award maintenance. (Local Courts are soon to be established under the Local Courts Act 1982, and, when established, will take the place of Courts of Petty Sessions). The basic jurisdiction should be entrusted to the Supreme Court, partly because the powers we propose are novel and important, and partly because they relate to a jurisdiction to determine property disputes already exercised by the Supreme Court. It will clearly be convenient for that Court to have power to decide all aspects of a dispute between the parties to proceedings. However, we think it is also appropriate that Local Courts should have power to determine claims within their usual jurisdictional limits. This will increase access to the courts, minimise costs and relieve the burden that would otherwise fall on the Supreme Court.

10.41 We think that the allocation of work between the courts could follow the lines suggested by the Family Law Act, which specifies the respective powers of the Family Court of Australia and State courts of summary jurisdiction. **We recommend that the allocation of work between the courts should take the following form:**

> **The Supreme Court should have jurisdiction to exercise all the powers relating to the adjustment of property and the award of maintenance which we have recommended in this Report.** Presumably the powers would be exercised by the Equity Division of the Supreme Court.
>
> **Local Courts should have concurrent jurisdiction to make any order open to the Supreme Court, subject to an appropriate jurisdictional limit. That limit should be the maximum amount or value specified for civil claims (currently $5,000).** [27]
>
> **Where proceedings are instituted in a Local Court with respect to property of a value greater than the limit or claiming a lump sum greater than the limit, the court should, unless the parties agree to the matter continuing, transfer the proceedings to the Supreme Court.** [28]
>
> **The Local Court should have power of its own motion, notwithstanding any agreement between the parties, to transfer proceedings to the Supreme Court.**
>
> **The Supreme Court should have power of its own motion, to transfer proceedings f or the adjustment of property or the award of maintenance to a Local Court where, in the opinion of the Supreme Court, it is appropriate to do so and the claim is within the jurisdiction of the Local Court.**

10.42 We consider that, under this framework, few claims within the jurisdictional limit of Local Courts will be determined by the Supreme Court The cost of proceedings in that court will deter minor claims and, in any event, the court would have power to transfer proceedings to a Local Court Similarly, we envisage that few, if any, claims for periodic maintenance will be dealt with by the Supreme Court unless claims are made concurrently with other claims for substantial financial adjustment.

B. Enforcement of Orders

10.43 In general, the Rules of the Supreme Court relating to the enforcement of its ordinary judgments and orders will cover the enforcement of judgments given, or orders made, pursuant to the powers we have recommended. To this general statement there is at least one exception. We see a need for the enforcement of orders for the payment of periodic maintenance made by the Supreme Court to be governed by the procedures of the Local Courts rather than by those of the Supreme Court. We therefore suggest that consideration be given to the creation of a system under which orders of this kind would be registered as orders of the Local Court and be enforceable accordingly. [29]

10.44 The enforcement of judgments given, or orders made, by Local Courts in the exercise of the powers we recommend calls for brief comment. In our view, a judgment or order for the payment of money could, for the purposes of Division 6 of Part IV and Part V of the Local Courts (Civil Claims) Act, 1970, be deemed to be a judgment. In this way, the enforcement procedures of that Act including, for example, all the provisions relating to the attachment of debts and execution against goods and chattels would attach to orders for, say, the payment of lump sum maintenance. In the case of orders for the payment of periodic maintenance, the enforcement procedure prescribed by the regulations made under the Maintenance Act, 1964, could also serve as a model. For the purposes of the draft Bill attached to this Report, we have adopted the enforcement procedures of the Local Courts (Civil Claims) Act, 1970.

10.45 Where, in the exercise of its adjustive jurisdiction a judgment is given or an order is made by a Local Court which requires a person to do an act or to refrain from doing an act, (that is, other than the payment of money), the position is a little more complicated. We are concerned, for example, with cases where a court may direct a person to deliver a household appliance such as a refrigerator or a washing machine to another person or to refrain from attempting to remove such an appliance from the possession of the other person. There should be means of securing compliance with such orders.

10.46 There are broadly two approaches that can be taken to this problem. Breaches of orders could be dealt with by proceedings for contempt. The Supreme Court has power to punish for contempt and this power extends to cases where a person is guilty of contempt of some other court. [30] The Supreme Court will of course retain its contempt powers, but proceedings for contempt before that court should not be a regular method of enforcing orders of the Local Court. The second approach is to create a specific offence for a wilful breach of or refusal to comply with an order of the court. Such an approach has been taken under the Family Law Act [31] and has also been taken in relation to orders made to prevent apprehended violence. [32] We think that a provision of this kind would provide an appropriate means of securing enforcement of an order of a Local Court other than for the payment of money. **We recommend accordingly.**

X. SUMMARY

10.47 In this Chapter we discuss a number of consequential matters arising from our earlier recommendations concerning financial adjustment. Our principal conclusions are as follows:

State courts have adequate powers in proceedings between de facto partners to deal with claims by and against third parties.

Courts exercising the adjustive jurisdiction should have power to adjourn proceedings or make a deferred order. These powers are designed to deal with the case where one party to property or maintenance proceedings has a prospective entitlement to property or other financial resources.

The court should have a power to adjust the property rights of the partners without making a prior determination of their rights under the general law.

The court should have power to discharge, vary, suspend, or revive periodic maintenance orders. We recommend automatic termination of such orders on the death of either party, or on remarriage by the party for whose benefit the order has been made. We are equally divided as to the effect on periodic maintenance orders of entry into a de facto relationship by the party for whose benefit the order has been made. Provision is also made for the setting aside of orders in cases of fraud, duress or similar circumstances, or where it is impracticable for the order to be carried out.

We make detailed recommendations dealing with the effect of death of a party, whether or not the proceedings have been instituted before the party dies.

Provision is made for the setting aside of transactions designed to defeat claims.

We recommend that both the Supreme Court and Local Courts should be able to adjust the property rights of the parties and award maintenance. In the case of Local Courts, this should be subject to the relevant jurisdictional limit.

Generally, orders should be enforced under existing rules of court. However, provision is made for the creation of a specific offence for wilful breach of, or refusal to comply with an order of the court.

FOOTNOTES

1. There is some doubt about the precise scope of this rule. See *Re Great Eastern Cleaning Services Pty. Ltd. and the Companies Act* [1978] 2 NSWLR 278.

2. (1981) 55 ALJR 233; 33 ALR 631.

3. D. Kovacs, “The Jurisdiction of the Family Court With Respect to Family Companiea” (1982) 8 *Adelaide Law Review* 163; J H Wade, *Property Division Upon Divorce* (1982) pp.63-81.

4. *Sanders v. Sanders* (1967) 116 CLR 366.

5. *Ascot Investments Pty.Ltd. v. Harper* (1981) 55 ALJR 233, at p.238; 33 ALR 631, at p.641.

6. *Smith and Saywell* [1980] FLC 90-856.

7. *Harris and Harris; Re Banaco Pty. Ltd.* (No.2) [1981] FLC 91-100.

8. *Gillies and Gillies* [1981] FLC 91-054.

9. *Crapp and Crapp* [1979] FLC 90-615.

10. *Woolley* and Woolley (No.2) [1981] FLC 91-011.

11. *Thomas and Thomas* [1981] FLC 91-018.

12. A similar approach has been taken by the Scottish Law Commission in relation to the rights of married spouses under pension schemes. See Scottish Law Commission. Family Law, *Report on Aliment and Family Provision* (Scot. Law Com. No.67, 1981), p.97.

13. Joint Select Committee on the Family Law Act, *Family Law in Australia* (1981), vol.1, pp.95-96. The technique has been used by the Family Court *Makin and Makin* [1980] FLC 90-818.

14. Family Law Amendment Bill 1983, cl.31, inserting a new s.79(5) into the Family Law Act 1975.

15. *Crosthwaite and Crosthwaite* [1981] FLC 91-082.

16. If the view of two members of the Division on cessation of orders is accepted (see para.10.26) another example would be the case where the custodial parent enters into a de facto relationship. In these circumstances, the partner making the payments could apply to the court for a discharge or variation of the order on the ground of changed circumstances.

17. We exclude the provision relating to withholding of material evidence from the court (Family Law Act 1975, s.83(2)(c)), as the provisions we recommend for setting aside orders on the basis of miscarriage of justice give sufficient protection.

18. Cf. *Anast and Anastopoulos* [1982] FLC 91-201, where the Full Court of the Family Court assumed that a lump sum order was capable of variation under s.83 of the Family Law Act 1975.

19. See generally *Halsbury’s Laws of England* (4th ed. 1979), vol.26, para.560, Supreme Court Rules, Part 40, r.9.

20. Family Law Amendment Bill 1983, cl.32.

21. Cf. Family Law Act 1975, s.82.

22. *Id*., s.82(6).

23. *Id*., s.82(8).

24. *Sims and Sims* [1981] FLC 91-072. Many of the relevant, but somewhat inconsistent authorities are reviewed in *King v King* [1974] Qd. R. 253.

25. A proposed amendment of the Family Law Act 1975 will provide for the continuation of property proceedings where either party to the proceedings dies before they are completed: see clause 31 of the Bill and the proposed section 79(8).

26. Stamp Duties Amendment Act 1982.

27. Courts of Petty Sessions (Civil Claims) Act. 1970. s.12.

28. Cf. Family Law Act 1975, s.46(1).

29. The Supreme Court currently has power to make periodic maintenance orders under the Infants Custody and Settlements Act 1899, s.5(3). As to enforcement see s.10A(3).

30. Supreme Court Rules, Part 55, Div.3. As to contempt under the Family Law Act 1975. see paras.14.17, 14.36.

31. Family Law Act 1975, s.114(4).

32. See paras.14.10, 14.38.

11. Cohabitation Agreement

I. INTRODUCTION

11.1 People who live together in a de facto relationship may wish to enter into agreements regulating their financial affairs. An agreement of this kind may be made before the couple begin to live together, or during the course of their relationship. We call such an agreement a "cohabitation agreement". Alternatively, a couple who have lived together and separated, or who are estranged and contemplating separation may wish to enter into an agreement for the division of property or the payment of maintenance after separation. We call an agreement of this kind a "separation agreement". Most cohabitation and separation agreements are likely to deal with financial matters: for example, the respective interests of the parties in their home, furniture, car, and other household assets, and their respective responsibilities in relation to household and other debts. Some cohabitation agreements might also contain provisions about the division of labour within the household, the education of children and, generally, the partners' expectations of their relationship.

11.2 In this Chapter we are concerned to clarify the legal status of cohabitation and separation agreements. We take as our starting point the widely expressed view that such agreements between de facto partners should be encouraged. It is desirable, it is said, that people who have chosen not to marry should be free to regulate their own financial affairs if they wish to do so (see paragraphs 5.51-5.54). Under the current law, however, there are doubts about the validity of cohabitation and separation agreements. The doubts arise because some agreements might be held by the courts to be "contrary to public policy", and therefore void, on the ground that they promote immorality. In the next section we outline the arguments for and against the proposition that cohabitation and separation agreements (assuming they comply with other legal requirements) should be regarded as invalid on public policy grounds. We reject the proposition and recommend that cohabitation and separation agreements should not be open to challenge on the round that they promote immorality. This conclusion does not, however, solve all problems, since there is a tension between two policies. On the one hand, respect for principles of freedom of choice and autonomy leads us to favour regulation of financial affairs by private agreement. On the other hand, we have recommended that the court should have power to adjust the financial affairs of de facto partners in order to avoid injustice. Which policy, freedom of choice or court intervention should prevail when the terms of an agreement may produce unfair results? The remainder of the Chapter outlines an approach which we see as achieving a fair balance between these two policies. Our general argument is that cohabitation and separation agreements should be given full effect, to the exclusion of the court s financial adjustment jurisdiction if, and only if the parties have adhered to certain safeguards designed to ensure that they have given sufficient thought to their agreement. An agreement which does not comply with our suggested safeguards should be enforceable as an ordinary contract, but should not prevent either party from invoking the powers of the court in proceedings for financial adjustment to vary the terms of the agreement.

II. APPLICATION OF THE "PUBLIC POLICY" DOCTRINE

A. The Present Law

11.3 In broad terms, neither a cohabitation agreement nor a separation agreement is enforceable under the general law unless, first it satisfies the formal requirements of the law of contracts and, secondly, it is not contrary to public policy. We are not concerned here with the formal requirements of the law of contracts, but we are concerned with public policy.

11.4 In 1938, in *Fender v. St. John Mildmay,* [1] Lord Wright relied on authorities dating back to at least 1853 to propound the following common law rule:

> "The law will not enforce an immoral promise such as a promise between a man and a woman to live together without being married, or to pay a sum of money or give some other consideration in return for immoral consideration". [2]

The decision in Fender v. St. John Mildmay did not extend to a contract entered into by a de facto partner after the relationship had ended, and which provided for the future support of the other spouse. Contracts of this kind do not encourage the continuation of "immoral" cohabitation. [3]

11.5 In 1973, in *Andrews v. Parker*, [4] Mr Justice Stable of the Supreme Court of Queensland had to consider an agreement between de facto partners in which the man transferred his house to the woman on condition that if she returned to live with her husband she would retransfer the house to him. His Honour held that the agreement was not contrary to public policy. The parties were already living together and the agreement was not intended to bring about extra-marital cohabitation. In any case he thought community standards had changed. In his words:

> "...notoriously the social judgments of today upon matters of immorality are as different from those of last century as is the bikini from a bustle. So, on this aspect, I hold that if the agreement between the parties was based on an immoral consideration ... then the immorality was not such according to modern standards as to deprive the plaintiff of the right to enforce it". [5]

11.6 The matter was considered more recently by the Court of Appeal in New South Wales in *Seidler v. Schallhofer*, [6] a case to which we have already referred (paragraphs 4.4-4.9). The Court held that an agreement made between a man and a woman who were already cohabiting, and which contemplated that they would live together for a further six months and then either marry or separate, was not contrary to public policy. The majority decision was confined to the facts of the case and did not involve a ruling that a cohabitation agreement entered into by de facto partners who intended to live together indefinitely would not be contrary to public policy. However, Mr Justice Hutley suggested that the principle of public policy invalidating contracts entered into by de facto partners could no longer be regarded as having any operation. He referred to Commonwealth and State legislation which recognised de facto relationships and commented, in a passage we have already cited, that judicial condemnations of such contracts as immoral so that they are unenforceable, must now be disregarded. [7] (See paragraph 4.7).

11.7 In 1981, Mr Justice Powell of the Supreme Court of New South Wales commented on the increasing frequency of proceedings between de facto partners in terms which led him

> "devoutly to wish that parties who choose to enter into social relationships which are less than conventional - particularly if the entry into such a relationship is, or is intended to be, attended by the acquisition of property - would, in their own interests, as well as for the assistance of the courts which may later be required to adjudicate upon them record in a clear and legally binding form what are, or are intended to be, their respective rights with respect to any property they held, or later acquired." [8]

11.8 In short, there are strong judicial indications that the law is moving in the direction of recognising cohabitation and separation agreements and not regarding them as contravening doctrines of public policy, but that this process is by no means complete. The question arises whether we should recommend that Parliament take the next step and formally declare that notwithstanding any principle of public policy to the contrary, such agreements are enforceable under the general law. There are a number of points to be made on each side of the argument. [9]

B. The Arguments

1. Arguments for Enforceability

Avoidance of Litigation

11.9 If de facto partners are able to enter into enforceable cohabitation and separation agreements which regulate their financial relationship, disputes and litigation between them may be avoided. Their agreement will govern their relationship and, provided they have expressed their intention clearly, the financial readjustment on any breakdown of that relationship (should it occur) will be determined by the agreement without the necessity for legal proceedings. The private and public advantages of such a result need no elaboration.

Certainty

11.10 A corollary of the "avoidance of litigation" argument is that an enforceable cohabitation or separation agreement will enable the parties to plan their future financial affairs according to their own rules, and with a consequent degree of certainty. If the parties separate, the agreement should facilitate a "clean break" with all the advantages to which we have referred in an earlier Chapter. [10]

Freedom of Choice

11.11 Some people enter into de facto relationships for the express purpose of avoiding the financial rights and obligations imposed by law on those who marry. We have proposed that certain financial rights and obligations should be imposed upon people who do not marry but who live together in a de facto relationship. Provision for cohabitation and separation agreements would enable a couple to make an effective choice to opt out of the protection provided by the court s adjustive jurisdiction and to choose a regime quite different from that which currently applies to married persons.

11.12 We referred in Chapter 5 to the significance of freedom of choice and autonomy and to the emphasis placed in submissions on the need for a distinction to be drawn between the law governing marriage and that governing de facto relationships. The Women Lawyers' Association of New South Wales, for example, regarded cohabitation agreements as the means by which de facto partners could maintain their freedom to regulate their own relationship. [11] The Association argued that provision for cohabitation agreements would "put the onus on those wishing to opt out of the provisions [for financial adjustment] to enter into a written agreement or cohabitation contract with their partner". The majority submission of the Social Issues Committee of the Anglican Diocese of Sydney regarded it as desirable for parties to a de facto relationship to "be encouraged to make their own conscious arrangements with regard to property". [12] The Committee recommended that the present law should be amended to "remove uncertainty as to the status and validity of cohabitation contracts".

11.13 Of course, if this argument is accepted, it may be necessary to qualify de facto partners' freedom to enter into cohabitation and separation agreements. A warning was sounded recently by Mr Justice Hutley:

> "[E]xtra-marital agreements are not for the amateur lawyer. There being no conventional framework as in marriage, foresight as to it falls, which only professional training or many bitter experiences can supply, is required. There is no authority which has power to alter the contract to adjust it to unforeseen contingencies. Care should be given to anticipating them". [13]

The sentence “There is no authority which has power to alter the contract to adjust it to unforeseen contingencies” draws attention to a particular problem to which we return later in this Chapter (paragraph 11.48).

2. Arguments Against Enforceability

Discouragement of Marriage

11.14 The traditional argument against the enforceability of cohabitation agreements is that these agreements promote sexual relationships outside marriage and may tend to discourage people from marrying. As we have noted in Chapter 4, a major difficulty with this argument is that the law no longer adopts a consistent policy of penalizing people who live together outside marriage. In any event, as was recognised in *Seidler v. Schallhofer,* the argument has little force where a couple are already living together at the time the contract is made, and the contract is designed to regulate aspects of their relationship.

Inappropriateness of Cohabitation Agreements

11.15 It may be argued that it is inappropriate for the law to allow close family relationships to be regulated by formal contracts. Contracts of this kind may indicate an undesirable lack of trust in people who intend to cohabit or who are cohabiting, and may imperil the success of the relationship. But for some couples entry into a cohabitation agreement may have valuable psychological advantages. The process of discussing and settling the terms of the agreement may enable the parties to clarify their expectations, and the certainty provided by the agreement may help to improve their relationship. Judging from written submissions and other information available to us, for example, oral comments, and our case studies, there are many who think that cohabitation agreements constitute all entirely sensible means of regulating the parties’ affairs.

Children

11.16 A cohabitation or separation agreement may contain provisions which are inconsistent with the welfare of the children of the relationship. One partner, for example, may agree not to take proceedings for the recovery of child maintenance or may agree to custody arrangements which are detrimental to the children. We accept that no cohabitation or separation agreement should affect the powers of a court to make maintenance and custody orders which are in the best interests of children. This does not, however, provide a ground for denying enforceability to an agreement which regulates the parties’ financial relationship.

Interaction with Social Security

11.17 A de facto partner may undertake in a cohabitation or separation agreement not to apply for maintenance or financial adjustment One effect of such an agreement may be that the burden of supporting that de facto partner will fall upon the community. It may be argued therefore that de facto partners should not be permitted to enter into agreements which have this effect. On the other hand, Our recommendations in relation to maintenance would confer only limited rights on a de facto partner, and expressly preserve the primary role of the social security system in providing support for a person who is unable to earn his or her own living. Thus, any provision in an agreement which presented a party from applying for maintenance would have a negligible effect on public revenue. And it must be remembered that at present a de facto partner has no right to claim maintenance in his or her own right.

Hardship and Oppression

11.18 A major argument against the enforceability of cohabitation and separation agreements is that their enforcement may lead to hardship and injustice. Where the agreement is made between a couple before they live together, or while they are living together harmoniously, hardship may occur because one partner is able to persuade the other to enter into an unfair

or oppressive agreement. The intimacy of the relationship may well make it difficult for one partner to express doubts about the proposed arrangements. And an expression of doubt may offend the other partner or be regarded by that partner as indicating lack of trust. In some cases, a partner may place too much trust in the judgment and honesty of the other partner and the terms agreed upon may ultimately prove to be unfair or oppressive.

11.19 Where an agreement is entered into by a couple after their relationship has ended excessive trust is less likely to be a problem. On the other hand, a de facto partner who considers himself or herself responsible for the breakdown of the relationship may be so influenced by guilt or remorse as to enter into an unfair agreement. [14] Alternatively, one partner may influence the other partner by threats or intimidation, for example, by suggesting that children will be removed by stealth or that lengthy custody litigation will be commenced.

11.20 Several submissions to us expressed concern about the enforceability of agreements made between de facto partners. A Committee of the Legal Aid Commission of Victoria, for example, suggested that de facto partners should not be permitted to exclude a courts power to adjust the parties' property rights. The Committee said:

> "[C]ontracting out would provide the opportunity to perpetuate the injustices seen in the present position .... The opportunity for one party to take advantage of another would still be present at the time the contract was being discussed or negotiated." [15]

11.21 There is still another instance where the enforcement of an agreement entered into by a de facto partner may lead to hardship or exploitation. Where a cohabitation agreement was entered into before the parties lived together, or during their time together, their circumstances may later change unexpectedly. De facto partners may agree, for example, not to make claims against each other s property if their relationship ends. But if they live together for many years, have several children, and one party makes substantial contributions to family resources to which the agreement does not extend, it might be grossly unfair to enforce that agreement. Normal contractual rules would seldom prevent the enforcement of an agreement on this ground alone. For this reason, it may be necessary for legislation relating to cohabitation agreements to contain special provisions dealing with changed circumstances. Hardship due to changed circumstances is, however, less likely to be significant in the case of separation agreements. Separated or separating de facto partners can be expected to ensure that their agreement specifically provides for the changed circumstances resulting from the breakdown of their relationship.

11.22 The potential problems of hardship and oppression suggest that de facto partners who enter into cohabitation or separation agreements may require special protection. Nonetheless, we think it is possible to provide safeguards against ill-advised agreements or unforeseen ma or changes in circumstances and at the same time to give effect to a policy of permitting and encouraging cohabitation and separation agreements.

C. The Position Elsewhere: Canada

11.23 Although much has been said and written about cohabitation agreements in many common law jurisdictions, we refer, for comparative purposes, only to the position in Canada. In that country there has been considerable legislative activity.

11.24 In Canada, the Provinces of Ontario, Newfoundland, Prince Edward Island, New Brunswick and the Yukon Territory have enacted legislation specifically allowing cohabitation agreements. [16] The Ontario Family Law Reform Act 1978, provides the model for this legislation. The major provisions of the Act relating to "domestic contracts" are as follows:

> "52(1) A man and a woman who are cohabiting and not married to one another may enter into an agreement in which they agree to their respective rights and obligations during cohabitation or upon ceasing to cohabit, or death including,

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and

(d) any other matter in the settlement of their affairs...

54(1) A domestic contract and any agreement to amend or rescind a domestic contract are void unless made in writing and signed by the parties to be bound and witnessed.

55(1) In the determination of any matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child."

11.25 For a cohabitation agreement (domestic contract) to be enforceable it must be made by a man and a woman "who are cohabiting", it cannot be made prior to the commencement of cohabitation. The reason for this restriction is not apparent. Any agreement which is not written, signed by those to be bound and witnessed, is not merely unenforceable but void. These requirements are significant and are apparently designed to impress upon the parties that they are creating a legally binding arrangement. Support provisions in cohabitation agreements may be set aside in certain circumstances, including where the provision "results in circumstances that are unconscionable" and where one party has defaulted in the payment of support. The Act does not enable the court to set aside the provisions of an agreement relating to division of property.

D. Recommendation

11.26 We consider that the advantages of cohabitation and separation agreements considerably outweigh the disadvantages, provided that steps are taken to minimise the risk that they may cause hardship to one of the parties. We are particularly influenced by the desirability of providing a means by which de facto partners may regulate their own affairs and avoid a regime that they do not wish to apply to them **We therefore recommend that cohabitation and separation agreements between de facto partners with respect to financial matters arising out of their relationship should be enforceable under the general law, notwithstanding any principles of public policy invalidating such agreements.** This recommendation is intended to apply whether or not either of the parties is married, and whether or not the agreement contemplates cohabitation for a limited or indefinite period. The court should, however, always have power to override or disregard the agreement insofar as it relates to the custody, guardianship and maintenance of children. Later in this Chapter we consider other circumstances in which the court should have power to override or vary other terms of the agreement.

11.27 This recommendation is unlikely to represent a major change in the law. The courts are already moving in the direction of removing public policy barriers to cohabitation and separation agreements. Indeed, in the case of separation agreements the recommendation almost certainly reaffirms the existing law. Nonetheless, we think the law should be placed beyond doubt.

11.28 Our recommendation extends to agreements made both before and after the commencement of cohabitation. We acknowledge that some people argue that cohabitation agreements made before the commencement of cohabitation should not be enforceable because this would encourage people to enter into de facto relationships. We disagree. As Chapter 3 shows, people enter de facto relationships for a variety of reasons. They are hardly likely to be deterred simply because the law denies enforceability to their pre-cohabitation

agreement. Moreover, where the parties begin living together on 1 January, we see little point to giving effect to an agreement made on 3 January, but not one made on 30 December.

11.29 The effect of our recommendation is that the general law of contracts would apply to cohabitation and separation agreements and to their enforcement. In this context, the general law of contracts includes both common law and statutory rules. Thus, for example, remedies would be available in the event of fraud, misrepresentation , duress and undue influence. Likewise, the provisions of Acts such as the Minors (Property and Contracts) Act, 1970, and the Contracts Review Act, 1980, should also apply to cohabitation and separation agreements. The former act will be relevant where a person under the age of 18 years wishes to enter into a cohabitation or separation agreement. The latter act enables a court to refuse to enforce all or any of the provisions of a contract which are unjust (provisions, for example, which are unconscionable, harsh or oppressive " in the circumstances relating to the contract at the time it was made"). [17] The factors which the court may take into account in exercising this power include whether or not the parties had equal bargaining power, whether or not they obtained independent legal advice and whether unfair pressure was applied to the person seeking to be released from the contract. [18] It is clearly desirable that de facto partners entering into cohabitation and separation agreements should have the protection of the Contracts Review Act 1980. To avoid any doubt, **we recommend the enactment of a specific provision affirming that the Contracts Review Act, 1980 applies to cohabitation and separation agreements.**

III. COHABITATION AND SEPARATION AGREEMENTS AND PROCEEDINGS FOR FINANCIAL ADJUSTMENT

A. Two Competing Policies

11.30 Earlier in this Chapter we spoke of a tension between freedom of choice and court intervention Respect for freedom of choice has led us to recommend that cohabitation and separation agreements should be enforceable, and that the principles of public policy invoked against them in the past should be discarded. On the other hand, a concern for fairness and justice has led us to recommend that the courts should have a discretion to adjust the financial affairs of de facto partners. We now come to consider what should be the effect of the terms of a cohabitation or separation agreement on the power of a court to adjust the partners' financial affairs. In short, where the parties have previously entered a cohabitation or separation agreement, under what, if any, circumstances should a court exercise its adjustive jurisdiction so as to vary or overturn that agreements. We examine this question in later parts of this Chapter. In some places, the examination is detailed and somewhat technical. For convenience, we outline in paragraphs 11.31 and 11.32 the substance of the conclusions to which the examination leads us.

11.31 We think that the general principle should be that the parties' intention to regulate their affairs ought to be respected, but only if they have been properly advised before entering the agreement. An agreement entered into after proper advice should govern the parties' financial relationship and should not be liable to be overturned or disregarded by a court exercising the powers of adjustment discussed earlier in this Report. In this section we examine the safeguards that should be adhered to if each party is to be regarded as having received proper advice. It follows from our statement of general principle, that if either party has not received proper advice before entering a cohabitation or separation agreement, the court should be able to use its powers of adjustment to vary or overturn the agreement. Later in this Chapter we illustrate the effect, on the courts adujustive jurisdiction, of agreements which have been entered into after proper advice and of those which have not.

11.32 There is one particular situation where we think that our general principle should not apply. Where a cohabitation agreement (but not a separation agreement) has been entered into after the partners have received proper advice, but circumstances later change so that it would cause serious injustice to enforce the agreement, the court should be able to exercise

its powers of adjustment so as to vary or overturn that agreement. In other words the principle of freedom of choice and autonomy gives way when a change of circumstances would result in that principle causing serious injustice, even though the parties were properly advised before entering the agreement.

11.33 In the following paragraphs, we are concerned mainly with the powers which we recommend a court should have in its adjustive jurisdiction. For the purposes of discussion, we assume that a de facto partner who wishes to invoke the adjustive jurisdiction is entitled to do so. In other words, we assume that he or she is able to satisfy the basic criteria laid down in paragraph 9.7, in that for example, the partners have lived together for longer than the prescribed period or have had a child.

B. The Making of the Agreement

1. Safeguards

11.34 We have already referred to the general principle that the parties' intention to regulate their own affairs should be respected, provided that they have been properly advised before entering the agreement. The assumption underlying that general principle is that de facto partners entering into such an agreement are particularly vulnerable to exploitation or oppression and need special safeguards to protect them.

11.35 One safeguard would be to require court approval of agreements which purport to affect the rights of the partners with respect to financial adjustment. This is the approach adopted in section 87 of the Family Law Act, which enables the parties to a marriage to enter into an agreement in substitution for their rights under the Act. The agreement must relate to financial matters (whether or not it also makes provision for other matters), must be in writing or evidenced by writing, and must be approved by the court. [19] If these requirements are satisfied, the approval of the court may only be set aside upon proof of fraud or undue influence, or where the parties desire revocation. [20] The Family Provision Act, 1982, adopts a somewhat similar approach to agreements under which a person surrenders his or her rights to claim family provision. An agreement of this kind is binding only if approved by the court. The court may revoke its approval if the agreement was obtained by fraud or undue influence, or if the approval itself was obtained by fraud. [21]

11.36 In our view, de facto partners who wish to make their own financial arrangements are likely to find the requirement of court approval particularly cumbersome. The cost of an application for approval may be disproportionate to the value of the assets covered by the agreement. Consequently, a requirement of this kind would discourage the use of cohabitation and separation agreements, particularly the former.

11.37 We prefer less onerous safeguards, but ones which will ensure that the partners understand the significance of the agreement they are making and receive independent legal advice before committing themselves. We think that the dual requirements of written agreement and independent legal advice strike a reasonable balance between allowing the partners to enter into agreements freely and providing protection against ill-advised or unfair agreements. **We therefore recommend that, subject to the recommendations in paragraphs 11.49 and 11.54, in proceedings between de facto partners for the adjustment of property or for maintenance, the court must give effect to the financial terms of a cohabitation agreement or separation agreement, if,**

> **the agreement is in writing and signed by the partner against whom it is to be enforced;** [22] **and**
>
> **each of the partners received separate and independent legal advice before entering into the agreement.** [23]

Proof that the latter requirement has been satisfied should be provided by certificates in a prescribed form furnished by the solicitor for each of the partners. Such certificates should accompany the agreement or be endorsed upon it.

11.38 We recognise that in some cases a legal adviser may be under pressure to give the necessary certificate as a matter of formality. We also recognise that some advisers may not give a detailed explanation of the precise effect of the agreement on a potential claim for financial adjustment. This may be a particular problem until practitioners become familiar with the terms of the relevant legislation. For these reasons, **we recommend that the prescribed form of certificate should specifically state that the solicitor gave advice to the partner concerned in relation to the following four matters:**

> **the effect of the agreement on the rights of that partner to seek an alteration of property rights or to claim maintenance;**
>
> **whether or not, at the time the agreement was made, it was to the advantage, financially or otherwise, of that partner to enter into the agreement;**
>
> **whether or not, at that time, it was prudent for that party to enter into the agreement; and**
>
> **whether or not, at that time, and in the light of such circumstances as were at that time reasonably foreseeable, the provisions of the agreement were fair and reasonable.** [24]

11.39 The provisions which we have recommended, together with the provisions of the Contracts Review Act, 1980, should provide substantial protection for de facto partners against unfair or unconscionable agreements. In addition to this protection common law doctrines enable a court to set aside a cohabitation or separation agreement if satisfied that the agreement was obtained by fraud, misrepresentation duress or undue influence.

2. A Duty of Disclosure?

11.40 As between de facto partners should there also be a duty to disclose material facts? Under the general law, non-disclosure does not amount to fraud unless the relationship between the parties is such that a duty of disclosure arises in equity. Under the general law there is no obligation on the parties to a marriage to disclose financial matters when a separation agreement is made. [25] Presumably the same rule would apply to de facto partners who enter into cohabitation or separation agreements. However, under the Family Law Act, it has been held that there is a statutory obligation on the parties to a marriage to disclose assets and income in relation to a separation agreement. Failure to disclose assets amounts to fraud, enabling the court to revoke its approval to an agreement under section 87 of the Act. [26]

11.41 We do not recommend that a statutory duty be imposed on de facto partners to disclose their assets or financial position when a cohabitation or separation agreement is being negotiated. While such a duty may be appropriate where an agreement requires approval by the court, we do not think that it should apply to an agreement which does not require such approval and which may deal only with particular aspects of the partners' financial relationship. The circumstances in which cohabitation agreements are entered into are so varied that it may be quite reasonable for a partner not to divulge any more information concerning his or her financial position than is required by the general law. [27] If the non-disclosure relates to a serious matter and, as a consequence, the other partner is induced to enter a harsh or unconscionable agreement, the Contracts Review Act 1980, is likely to provide a remedy. The provisions of this Act together with the requirements of the general law, in our view provide sufficient protection to the partners.

C. The Effect of an Agreement

1. A Certified Agreement

11.42 The practical effect of our recommendations is that, in proceedings for financial adjustment, courts will give effect to the financial arrangements of de facto partners embodied in a written cohabitation or separation agreement in respect of which each of the partners has received independent legal advice and which is appropriately certified. If the area of the dispute is not covered by the agreement them of course, the jurisdiction of the court in question will be unfettered. This means that there will be cases where a court will need to determine whether the area of the dispute is, in fact, covered by the agreement. Here the court will be required to interpret the scope of the agreement before giving effect to it or, alternatively, determining that it is irrelevant to the point in issue. Thus, for example, an agreement which deals only with the division of personal property, such as household goods, will not prevent the court, in proceedings for the adjustment of property, making an order affecting the home owned by one or both partners. If, however, the agreement does cover the matter in dispute the court will be bound, subject to our later recommendations concerning a change in circumstances, to give effect to the terms of the agreement. In other words, the court will not be able to exercise its powers to adjust property or award maintenance if the agreement covers the subject matter of the claim. In those cases the role of the court will be limited to enforcing the agreement.

2. A Non-Certified Agreement

11.43 If a cohabitation or separation agreement does not satisfy either of the conditions of being in writing, and having been made upon independent legal advice, a court will not be required to give effect to it in *proceedings for financial adjustment.* That is, the court will be able to exercise its powers to adjust property or award maintenance regardless of the terms of the agreement. This is not to say that a non- certified agreement will be totally disregarded in financial adjustment proceedings. It may, for example, be of assistance to the court in determining what the partners' intentions were at a particular time, or in assessing the nature and extent of the contributions each was to make to the relationship. If, notwithstanding the absence of certification, the court considers that the provisions fairly recognise each partners contributions, it may decide not to depart from the terms of the agreement even though it has power to do so. In addition, as we have previously observed, a non-certified agreement, if it otherwise complies with the law of contract will be enforceable *as a contract.* Thus, if neither partner invokes the adjustive. Jurisdiction of the court, the agreement will still have full effect according to the general law.

11.44 A non-certified agreement may sometimes contain a provision which purports to exclude the adjustive jurisdiction. Because it is a non-certified agreement this clause will not be given effect in proceedings for adjustive relief. The question arises whether the clause should have any bearing on the enforceability of the other provisions of the agreement. The presence of such a clause may sometimes give rise to the argument that its unenforceability makes the whole agreement unenforceable. [28] That is, it may be argued that both partners only consented to the other terms of the non-certified agreement under the mistaken belief that the exclusion clause would effectively exclude the adjustive jurisdiction. We do not intend that this argument should succeed. **We therefore recommend that a provision in a non-certified agreement purporting to exclude the power of the court to adjust property or award maintenance shall not affect the enforceability of other provisions in the agreement.**

3. Illustrations

11.45 The effect of our recommendations can be illustrated by examples. We deal first with de facto partners, A and B, who enter into an agreement before they begin to live together. In this case, the agreement may make provision only for the property owned by the partners at that time including say, a house owned by A. For example, the agreement may provide that if the

couple separate the house will be sold, and the proceeds divided evenly between them. The effect of this agreement will depend on a number of factors.

> The partners may separate before either of them is entitled to invoke the powers of the court to adjust property or award maintenance (for example, they may separate before having lived together for the period necessary to invoke the court s powers). Here the agreement is enforceable in the same way as any other contract, assuming it satisfies the requirements of the general law. There is, on the basis of our earlier recommendations, no public policy barrier to enforceability. Since the adjustive jurisdiction of the court cannot be invoked, our recommendations do not require the agreement to be in writing nor that the parties have obtained independent advice before entering the agreement.
>
> The partners live together for three years, and B seeks to enforce the agreement after they separate. A seeks an order for adjustment of property. I f the only property in dispute is the house owned by A, the court in the exercise of its adjustive jurisdiction will give effect to the terms of the agreement provided that it is certified (subject only to the rules relating to changed circumstances which we discuss later). if the agreement is not certified, the court will not be required to give effect to it.

It may, however, wish to take it into account in exercising its powers to adjust property (for example, in assessing the nature of the contributions made by each partner, or in deciding the appropriate way in which those contributions might be recognised).

11.46 The second illustration is where A and B acquire property during the course of their relationship which is not expressly covered by the terms of the agreement In this situation the court can exercise its powers of adjustment over property failing outside the terms of the agreement Because of this possibility, however, the agreement made by A and B may contain a clause which expressly excludes the court s adjustive jurisdiction, or the agreement may comprehensively regulate the partners' financial rights and obligations on separation. For example, the agreement may provide that all property held at the date of separation shall be divided equally between the partners, and that neither partner shall have any right to claim maintenance. Where this is the case, in financial adjustment proceedings the court will simply give effect to the terms of the agreement, provided that it is certified. (This, too, is subject to the rules relating to changed circumstances.) In some cases, even in the absence of a clause explicitly excluding the court's adjustive jurisdiction the court may take the view that the agreement was impliedly intended to state the full extent of the partners' rights and obligations. If the court adopts this interpretation it will give effect to the terms of the agreement, provided that is certified, and no other financial adjustment order will be made.

11.47 Where A and B enter into an agreement in contemplation of separation or after separation, it is likely that the agreement will deal with all the property owned by the partners, and will purport to regulate comprehensively their financial relationship. Such an agreement, if professionally drafted, is also likely to contain a clause designed to prevent the court exercising its powers of financial adjustment. In these circumstances the court will simply give effect to the terms of the agreement, provided it is certified.

D. Change of Circumstances after the Making of the Agreement

11.48 We have recommended that cohabitation and separation agreements should be enforceable, and should not be struck down on the grounds that they may infringe any principle of public policy (paragraph 11.26). Further, we have recommended that-provided the partners have received advice on appropriate matters, the terms of that agreement should prevail over the power of the court to order financial adjustment. We have recommended a form of certification of an agreement which should be required to put this principle into effect. These recommendations are designed to encourage the greatest degree of freedom of choice and autonomy in financial arrangements between de facto partners which is consistent with the minimisation of injustice and the avoidance of hardship. We now consider the effect of a change in the circumstances of the partners after the making of the agreement. Should a

change of circumstances permit the court to exercise its powers of financial adjustment to vary or override the terms of an agreement entered into after appropriate advice? In other words, should “changed circumstances” be an exception to the general rule that the terms of the partners’ agreement override the court s powers to order financial adjustment?

1. Cohabitation Agreements

11.49 We wish to alleviate injustice which may occur as a result of a change in the circumstances of the de facto partners after a cohabitation agreement is made. Even an agreement which seems perfectly fair at the time when they entered into it, may later become unfair or oppressive in its effects. A couple, at the outset of their relationship, may agree, for example, that neither shall seek an alteration of property rights. At a later stage one partner, at the request of the other, may make a substantial non-financial contribution to the property of the other partner. If this contribution cannot be recognised and compensated, serious injustice may be caused to the contributing partner. Alternatively, at a time when each partner is financially independent, they may agree that they will have no responsibility to maintain each other, the assumption being that they will not have children. Later they may have children and the woman may leave the workforce to assume child care responsibilities. It may cause serious injustice if her needs cannot be recognised in proceedings for financial adjustment **We therefore recommend that, in proceedings for adjustment of property or for maintenance, the court should have power to override the terms of a cohabitation agreement, where the circumstances of the partners have so changed since the agreement was entered into that it would lead to serious injustice to enforce the agreement according to its terms.** Under this recommendation the intention of the partners, expressed in a written agreement, with the benefit of independent legal advice, will normally be binding upon them. However, this principle will give way where serious injustice can be demonstrated. In our view, this recommendation strikes an acceptable balance between on the one hand, the desirability of de facto partners having the freedom to settle their financial affairs and to preclude the court exercising its powers of financial adjustment, and on the other hand, the need to prevent cohabitation agreements being enforced in circumstances which are oppressive to one partner.

11.50 We have already referred to the importance of finalising the financial relationship of the partners after the relationship comes to an end. It follows that there should be some time limit for setting aside a cohabitation agreement on the ground of changed circumstances. Under our recommendation in Chapter 9, proceedings for financial adjustment must be commenced within 2 years of the breakdown of the relationship, except where the court gives leave to commence proceedings out of time on the ground of hardship. **We recommend that a similar time limit should apply to a de facto partner who seeks to resist, on the ground of changed circumstances, the enforcement of a cohabitation agreement.**

2. Separation Agreements

Changed Circumstances

11.51 There is a clear distinction between cohabitation and separation agreements. Cohabitation agreements are entered into by partners who intend to continue to live together, often for an indefinite period. At the beginning of their relationship it may be difficult for them to anticipate and provide for all the changes which may occur in the course of the relationship. Changes such as dependence, the birth of children, and an alteration in the financial position of the family may lead to serious injustice if the agreement is enforced. By contrast, in the case of separation agreements, the partners are aware that their relationship has ended, or will end very soon. In this situation the “clean break” principle means that the partners should have the certainty that their financial disputes have been resolved and that the agreement will be binding whatever happens in the future. The comments made by a British Columbian judge are relevant in this context.

> "It is of great importance not only to the parties but to the community as a whole that contracts of this kind should not be lightly disturbed. Lawyers must be able to advise their clients in respect of their future rights and obligations with some degree of certainty. Clients must be able to rely on these agreements and know with some degree of assurance that once a separation agreement is executed their affairs have been settled on a permanent basis. The courts must encourage parties to settle their differences without recourse to litigation. The modern approach in family law is to mediate and conciliate so as to enable the parties to make a fresh start in life on a secure basis. If separation agreements can be varied at will it will become much more difficult to persuade the parties to enter into such agreements". [29]

For this reason we recommend that the court should have no power to override the terms of a separation agreement on the ground of changed circumstances.

Definition of Separation Agreement

11.52 The fact that cohabitation agreements, but not separation agreements, may be set aside on the ground of changed circumstances leading to serious injustice, makes it necessary to differentiate between them. Our approach is that all agreements should be treated as if they are cohabitation agreements, unless they are expressed to be separation agreements.

11.53 In order to exclude the court s power to set aside the agreement on the ground of changed circumstances leading to serious injustice, some legal practitioners may advise a client to designate an agreement as 'a separation agreement rather than a cohabitation agreement. To prevent this, **we recommend that an agreement should not be accorded the status of a separation agreement, unless it was made either after the partners ceased to live together in a de facto relationship or, in the case of an agreement made in contemplation of imminent separation, unless the partners ceased to live together in a de facto relationship within three months from the making of the agreement.** If separation does not occur within the three months, the agreement will be treated as a cohabitation agreement.

3. Revocation of Agreement

11.54 **We also recommend that the court should have power to make an order for adjustment of property or for maintenance where the partners have, either by words or conduct, consented to the revocation of a certified cohabitation or separation agreement that would otherwise prevent the court exercising its powers.**

4. Subsequent Marriage

11.55 Where de facto partners enter into a cohabitation or separation agreement and later marry, their agreement would not be binding under the Family Law Act if the marriage subsequently breaks down. This is because the proposed State legislation could not affect the powers of the Family Court in proceedings between married persons. Nevertheless it is likely that judges of the Family Court would take the terms of such an agreement into account in proceedings for alteration of property interests under section 79 of the Family Law Act.

IV. ENFORCEMENT OF COHABITATION AND SEPARATION AGREEMENTS

11.56 As we have noted, normal contractual remedies will be available in proceedings for the enforcement of cohabitation and separation agreements. Thus, if one partner wishes to enforce such an agreement, whether certified or non-certified, he or she may do so, relying on the same remedies as are available in relation to other contracts. Of course, a non-certified agreement is liable to be overridden by a court exercising the financial adjustment jurisdiction. This is also the case with a certified cohabitation agreement, where circumstances have changed since the date of the agreement and serious injustice would be caused if its terms

were to be enforced. But if the agreement is not overridden (for example, because the agreement is certified and neither partner considers that a case of serious injustice through changed circumstances could be established), it can be enforced in accordance with usual procedures.

11.57 Enforcement of an agreement involves a decision that it complies with the requirements of contract law. Thus, a court may rule that an agreement whether certified or not, is void or should be set aside because of common law principles or statutory provisions (such as the Contracts Review Act 1980). Where this occurs the agreement will not be enforceable. In some circumstances, a court hearing proceedings for financial adjustment will be asked to declare void or set aside a cohabitation or separation agreement on these grounds. We note that the Supreme Court Rules, Part 40, rule 1, allow the court to direct the entry of such judgment or make such order as the nature of the case requires, notwithstanding that the applicant does not make a claim for relief extending to that judgment or order. If the agreement is declared void or set aside the court will then be able to exercise its powers to adjust the property rights of the partners or to order maintenance.

11.58 One special problem might arise in the context of breaches of cohabitation or separation agreements. One partner may commit a serious breach of the agreement, for example, by refusing to pay money due or failing to transfer property he or she has agreed to transfer to the other partner. The innocent partner may elect to enforce the agreement by instituting proceedings for enforcement. Alternatively the innocent partner may, in accordance with general contractual principles, accept the breach as a repudiation of the agreement thus bringing the contract to an end. Suppose, for example, that A and B enter into a written cohabitation agreement and each of them receives a certificate of independent legal advice. In proceedings between them for financial adjustment the court would normally give effect to the agreement But suppose further that A has committed a serious breach of the agreement and B indicates that she regards that breach as terminating the agreement. What effect should be given to the terms of the agreements. We think that, where the agreement has been brought to an end in this way, any term of the agreement which precludes the court exercising its powers of financial adjustment should also be regarded as having ended. Thus, there would no longer be a barrier to the court exercising those powers. In order to avoid doubt we think the position should be made quite clear. **Accordingly, we recommend that in proceedings for adjustment of property or for maintenance, where a cohabitation or separation agreement to which a court would ordinarily be required to give effect is brought to an end by reason of a breach and the acceptance of that breach as a repudiation of the agreement, the court should not be required to give effect to it or to any of its terms.**

V. ENFORCEMENT IN THE EVENT OF DEATH

11.59 Should the provisions of cohabitation or separation agreements be capable of enforcement by or against the estate of a deceased de facto partner? This problem is most likely to arise if the cohabitation or separation agreement requires the payment of a lump sum or periodic maintenance, or transfer of property on the separation of the partners. If the partners separate, and one partner dies before the terms of the agreement are complied with the question arises whether the terms of the agreement should be enforceable by or against the estate of the deceased partner. Less commonly, the problem may arise where the partners enter into an agreement which specifically provides for payments to be made, or property to be transferred, on or after death of one of them. If these provisions are regarded as testamentary dispositions, they will have to be embodied in a will executed in proper form. If they are not testamentary dispositions, the same question arises as to whether the terms of the agreement can be enforced by or against the estate of the deceased partner. It is necessary to distinguish between provisions relating to property (or lump sums) and periodic maintenance, and between proceedings by and proceedings against the estate of a deceased de facto partner.

A. Proceedings by the Personal Representative of a Deceased De Facto Partner

1. Periodic Maintenance

11.60 A provision in a cohabitation or separation agreement relating to the payment of periodic maintenance is intended to provide for the future needs of a dependent partner. In the case of an agreement providing for payment of maintenance on separation the terms of the agreement will usually make clear that the obligation to pay maintenance is extinguished by the death of the dependent partner. Nevertheless, whatever the agreement may say, **we recommend that a provision in an agreement for the payment of periodic maintenance should not be enforceable by the personal representative of the deceased de facto partner.** Where, however, maintenance payable under an agreement is in arrears at the time of the death of the deceased partner, the arrears should be recoverable as a debt by the personal representative of the deceased de facto partner.

2. Transfer of Property or Payment of a Lump Sum

11.61 An agreement may provide for the transfer of property, or the payment of a lump sum to a de facto partner who has died. We think that this obligation should be enforceable by the personal representative of the deceased de facto partner, in the absence of any express provision to the contrary in the agreement. This is consistent with the normal principles regulating the enforcement of contractual obligations after death. **We recommend that provisions of this kind should be enforceable by the personal representative of the deceased de facto partner.**

B. Proceedings Against the Estate of a Deceased De Facto Partner

1. Periodic Maintenance

11.62 We think that it should be open to the parties to a cohabitation or separation agreement specifically to agree that the obligation to pay periodic maintenance should bind the estate of the person liable to make payments. However, in the absence of a specific agreement to this effect, it should be assumed that any such obligation will terminate on the death of the person liable to make the payment. **Thus, we recommend that a cohabitation or separation agreement should be able to provide expressly for periodic maintenance to continue beyond the death of the person liable to make the payments, but that it should be assumed, in the absence of contrary provision, that the obligation will cease on death.** Arrears of maintenance accrued at the date of death should be recoverable from the estate of the person liable to make payments.

2. Transfer of Property or Payment of a Lump Sum

11.63 At first glance, there would seem to be no difficulty with applying the general rule that contractual obligations incurred during a person's lifetime are enforceable against his or her estate after death. However, one effect of applying this rule to cohabitation or separation agreements will be to reduce the value of the estate for the purposes of the Family Provision Act 1982. Thus, a de facto partner may be able effectively to defeat the operation of the family provision legislation and prevent a spouse from obtaining an order, by entering into a cohabitation or separation agreement with his or her de facto partner for the transfer of property after death. This problem is not confined to cohabitation or separation agreements, nor to de facto partners, but may arise when an agreement is made with any person for the payment of money or the transfer of property by will or after death.

11.64 The recommendation made by this Commission in the 1977 *Report on the Testator's Family Maintenance and Guardianship of Infants Act* 1916, dealt with this general problem. We recommended there that in family provision proceedings, the court should have power to make provision out of property subject to a contract made by the deceased person, where the contract provided for the transfer of property or the payment of money after his or her death. The Family Provision Act 1982, does not however, contain a section in the form recommended by this Commission. [30] Thus, it may still be possible for a person to defeat the

operation of the family provision legislation by entering into a contract including a cohabitation or separation agreement to dispose of property by will or to transfer property after death to some other person. We regard the possibility that a person can defeat the operation of the family provision legislation in this way as a problem raising implications extending beyond cohabitation and separation agreements entered into by de facto partners. For this reason, we do not think it justifiable to suggest the enactment of a general provision precluding the enforcement of separation and cohabitation agreements against the personal representative of a deceased de facto partner, simply because in a few cases such agreements may reduce the effectiveness of the family provision legislation. **Thus, we recommend that the provisions of cohabitation or separation agreements relating to property or the payment of lump sums should be capable of enforcement against the personal representative of a deceased de facto partner who is a party to the agreement, in the absence of any provision to the contrary.**

11.65 It should be noted that a cohabitation or separation agreement cannot waive the right of a de facto partner to apply for family provision, unless the agreement satisfies the requirements of section 31 of the Family Provision Act, 1982. That section requires court approval of a release by a person of his or her right to make an application for family provision.

VI. SUMMARY

11.66 There is a widely held view that de facto partners should be able to regulate their own financial affairs- by means of enforceable cohabitation and separation agreements. We agree with this view because it accords with the principle of respecting the freedom of choice and autonomy of de facto partners. Therefore we recommend that the law should be clarified to ensure that such agreements are not held to be invalid as contrary to public policy. Under this recommendation cohabitation and separation agreements would be enforceable between the partners as ordinary contracts.

11.67 Further, we think that the terms of a cohabitation or separation agreement should override the court s powers to order financial adjustment, provided that certain safeguards have been complied with by the partners. These safeguards require that the agreement should be in writing and that each partner should receive independent legal advice. They are designed to ensure that the partners receive advice on appropriate matters and are aware of the consequence of the agreement. If a cohabitation or separation agreement is entered into after the partners have received appropriate advice, it should not be capable of being varied or overturned by a court exercising its powers of financial adjustment.

11.68 To this general rule there should be one exception. We have recommended that the court should have power to override the terms of a cohabitation agreement (but not a separation agreement) entered into between the partners after each has received proper advice, where the circumstances of the partners have so changed that it would lead to serious injustice to give effect to the terms of the agreement.

11.69 We also make recommendations dealing with the effect of breach of an agreement and the effect of the death of one partner on obligations which remain to be fulfilled under the terms of an agreement.

FOOTNOTES

1. [1938] AC 1.

2. [1938] AC 1, at p.42. See also *Pearce v. Brooks* (1866) LR. 1 Ex 213; *Upfill v. Wright* [1911] 1 KB. 506; G. Treitel, *The Law of Contract* (5th ed. 1979), pp.329-331.

3. *Beaumont v. Reeve* (1846) 8 Q.B. 483.

4. [1973] QCLR. 93.

5. *Id*., at p.104. Cf. *Zapletal v. Wright* [1957] Tas.SR 211.

6. [1982] 2 NSWLR 80.

7. *Id*., at p.101. In *Fischer v. Hall,* 3 February 1983, Supreme Court of New South Wales, Powell J doubted the correctness of the views expressed by Hutley JA, Transcript of judgment, p.22.

8. *Jardany v. Brown* 1 July 1981, Supreme Court of New South Wales (Powell J.): Transcript of judgment pp.2-3.

9. For a discussion of some of these arguments see, for example, K Fleischmann, “Marriage by Contract Defining the Terms of the Relationship”(1974) 8 *Family Law Quarterly* 27, at p.29; LJ Weitzmam “Legal Regulation of Marriage: Tradition and Change” (1974) 62 *California Law Review* 1169; D. Mendes Da Costa, “Domestic Contracts in Ontario” (1978) *Canadian Joumal of Family Law* 232; AT Honore, *Sex Law* (1978), pp.42-46; S. Poulter. “Cohabitation Contracts and Public Police” [1974] 124 *New Law Journal* 999 and 1034; LJ Weitzman *The Marriage Contract* (1982).

10. Paras.9.20-9.22.

11. Women Lawyers’ Association, Submission No.4. para.7.1.

12. Social Issues Committee, Anglican Diocese of Sydney (majority response) Submission No.34a, p.5.

13. [1982] 2 NSWLR 80, at pp.103-104.

14. It is generally accepted that a spouse experiencing the loss of a partner will go through stages of shock, denial anger and despair, before reaching resolution. See RS Weiss, *Marital Separation* (1973); See also *Backhouse v. Backhouse* [1978] 1 WLR 243; *Webley and McMullen* [1979] FLC 90-619.

15. Law Reform Committee, Legal Aid Commission of Victoria, Submission No.50, pp.9-10. Subsequently the Legal Aid Commission, adopting the Committee’s views with some modifications, took a different view on contracting out. See Legal Aid Commission of Victoria, Submission No.50a, pp.9-10. See also Australian Council of Social Service, Submission No.26. A similar view was expressed by the Royal Commission On Human Relationships, Final Report, (1980) vol.4, p.73.

16. Ontario: Family Law Reform Act 1978, RSO 1980, c.125, s.52, Newfoundland: The Matrimonial Property Act, S.Nfld. 1979, c.32, s.32, Prince Edward Island: Family Law Reform Act, SPEI 1978, c.6, s.52; New Brunswick: Marital Property Act 1980, 2nd Session, 49th Legislature, Bill 49, s.35; Yukon: Matrimonial Property Ordinance, OYT 1979 (2nd), c.11, s.36. See N Bala, “Consequences of Separation for unmarried Couples: Canadian Development” (1980) 6 *Queens Law Journal* 72.

17. Contracts Review Act, 1980, s.7.

18. *Id*., s.9(2).

19. Family Law Act 1975 (Cth), ss.4(1),87(2),(4). As to the matters which the court should take into account in approving maintenance agreements, see eg. *Lind and Lind* [1980] FLC 90-858. *Wright and Wright* [1977] FLC 90-221; *Sabbagh and Sabbagh* [1982] FLC 91-224.

20. Family Law Act 1975 (Cth), s.87(6).

21. Family Provision Act, 1982 (NSW), s.31(8).

22. In the case of agreements relating to land, the agreement must, in any case be in writing and signed by the party to be charged: Conveyancing Act, 1919, s.54A. Our recommendation takes the place of any requirement of form contained in other legislation.

23. Provisions requiring independent legal advice can be found in Land Sales Act, 1964, s. I C (5)(c); Minors (Property and Contracts) Act 1970, s.29; Landlord and Tenant (Amendment) Act, 1948, ss,5A(1)(C), 17A(6) (b).

24. Compare Family Provision Act 1982 (NSW), s.31. See also *Wright and Wright* [1977] FLC 90-221, at p.76,166, per Watson SJ, concerning the duties of the legal profession and the court when approval of a maintenance agreement is sought under the Family Law Act 1975 (Cth), s.87.

25. Apparently, the principle that family settlements are contracts requiring disclosure of all material facts known to the parties is not applicable to separation agreements. See *Wales v. Wadham* [1977] 1 WLR 199. See also *Green and Kwiatek* [1982] FLC 91-259, at p.77,456.

26. *Fryda and Johnson (No.2)* [1981] FLC 91-058, at p.76,468; *Green and Kwiatek* [1982] FLC 91-259, at p.77,457.

27. Note that the Canadian and American courts have developed the doctrine of unconscionability in this area. See N Bala, note 16 above; MG Picher, “The Separation Agreement as an Unconscionable Transaction: A Study in Equitable Fraud” (1972) 4 *Queens Law Journal* 441.

28. *Brooks v. Burns Philp Trustee Co.Ltd.* (1969) 121 CLR 432; *O’Loughlin v. O’Loughlin* [1958] VR 649.

29. *Dal Santo v. Dal Santo* (1976) 21 RFL 117, at p.120, per Anderson J.

30. See, however, Family Provision Act 1982, s.22(1), (7). Query whether such a contract could amount to a prescribed transaction.

12. Succession on Death

I. INTRODUCTION

12.1 When a person living in a de facto relationship dies his or her property is distributed in accordance with general legal rules which apply to the distribution of the property of every deceased person. These rules provide for the distribution of the property in three ways.

12.2 First, the deceased person may leave a will which disposes of the property to named beneficiaries. In New South Wales it seems that most people who die leave wills, although precise records of how many do so are not kept. [1] It is therefore likely that many people living in de facto relationships provide for their surviving partners by will.

12.3 Secondly a person, may die without leaving a valid will ("wholly intestate"), or leaving a will which fails to dispose of the whole of his or her property ("partially intestate"). In this case the property is distributed to the surviving spouse, children and relatives according to a scheme contained in the Wills, Probate and Administration Act, 1898. This scheme does not give the surviving de facto partner of a person who dies intestate any share in the estate of that person.

12.4 Thirdly, the terms of the deceased person's will or the statutory provisions that apply on intestacy, may be altered by a court order made under the Family Provision Act 1982, which will soon come into force, replacing those parts of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, concerned with family provision. [2] The legislation enables the court to order provision out of the estate of a deceased person when that person's will or the operation of the intestacy legislation fails to make adequate provision for the proper "maintenance, education or advancement in life" of certain family members. Family provision applications in New South Wales appear to be relatively uncommon. [3]

II. DISTRIBUTION ON INTESTACY

A. The Purpose of the Intestacy Rules

12.5 Where a person dies without leaving a will the existence of statutory "intestacy rules" governing the distribution of the estate serves several purposes.

> First by providing that the estate is to be divided in fixed shares between specified family members, the rules have the virtue of certainty. This prevents disputes, and enables property to be distributed without delay.
>
> Secondly, the rules protect members of the deceased person's immediate family by ensuring that they are entitled to a share in the estate in preference to more remote relatives.
>
> Thirdly, the rules are intended to reflect community views as to the way in which a deceased person's property should be distributed. [4] For example, in 1977 the Wills, Probate and Administration Act, 1898, was amended to give the surviving spouse of a person dying intestate a greater share in his or her estate. In the second reading speech on the amending legislation the comment was made that the Bill
>
> > "introduces into the law the widely held and practical view that the intestate's main obligation is to make adequate provision for the welfare of his or her spouse". [5]

Fourthly, the rules are designed to carry out the assumed wishes of a deceased person In other words, the rules are “the laws answer to the question how would the deceased have distributed his property if he had made a will.” [6]

B. The Intestacy Rules

12.6 Where a person dies wholly or partially intestate, the Wills, Probate and Administration Act provides that the following rules apply to the distribution of his or her estate.

If the estate of the deceased person is worth less than $100,000, [7] and that person had a surviving spouse and children [8] the spouse takes the whole estate. The majority of intestate estates in New South Wales fall into this category.

If the estate exceeds $100,000 and the deceased person had a surviving spouse and children, the spouse is entitled to

(a) the deceased person’s household goods (for example, furniture and domestic appliances);

(b) $100,000 together with interest from the date of death(the “statutory legacy”);

(c) one-half of the remainder of the estate, the other half going to the children of the deceased. [9]

If the deceased person left children but no husband or wife, the property passes to the children.

No distinction is made between children born in or out of marriage. [10] Thus the children of de facto partners may be entitled to a share of the estate of either of their parents, if the parent dies intestate.

Where there is no surviving spouse or children, the estate is divided between the parents of the deceased. If there is only one parent that parent takes the whole of the estate. [11]

Where the deceased person is not survived by a spouse, children, or parents, the property passes to brothers and sisters (and in certain cases nephews and nieces of the deceased). Next in line are grandparents, and then uncles and aunts. [12]

In the absence of any relatives entitled to claim on intestacy, the estate passes to the Crown (that is, the State Government) as *“bona vacantia”* (things without any apparent owner). [13]

12.7 In addition the 1977 amendments to the Wills, Probate and Administration Act (paragraph 12.5) gave the surviving spouse certain rights in relation to the matrimonial home. Where the deceased person

is survived by a spouse and “issue” (children or grandchildren); and

at the time of death had an interest in a dwelling house which was occupied by the spouses together or the surviving spouse alone, as the principal residence; and

the value of the estate exceeded $100,000,

the surviving spouse may elect to take the deceased person's interest in the matrimonial home. [14] If the value of this interest exceeds the surviving spouse's share on intestacy, they share of the children is reduced by the excess amount. [15]

De Facto Partners

2.8 The de facto partner of a person dying intestate is not now entitled to share in that person's estate. Thus, where a deceased person is survived by a de facto partner and by children of the relationship, the estate passes to the children to the exclusion of the de facto partner. Similarly, where the survivors are the de facto partner and other relatives of the deceased, the estate passes to any of those relatives (for example, parents) who are entitled to take on an intestacy, to the exclusion of the de facto partner.

12.9 Where the deceased person has a de facto partner but no relatives entitled to claim on intestacy, the property passes to the Crown as *bona vacantia.* The Crown however, may make provision out of the estate for dependents

> "whether kindred or not, of the intestate and any other persons for whom the intestate might reasonably have been expected to make provision". [16]

This could include a surviving de facto partner of the deceased. When property passes byway of *bona vacantia,* people not entitled to the intestate estate may petition the Crown requesting it to waive its rights in the property.

12.10 One disadvantage of the *bona vacantia* procedure is that there may be considerable relays in establishing that the deceased person had no relatives entitled to take on intestacy. A de facto partner's petition cannot be granted by the Crown until exhaustive searches have been made for surviving relatives. Our inquiries indicate that these searches, which are conducted by the Public Trustee, may take up to 10 years to complete.

12.11 A power to petition the Crown for a share in *bona vacantia* is of no assistance to a person whose de facto partner has died leaving children, parents, or other relatives entitled to make on an intestacy. Since it is rare for a person to die without leaving any such relatives, there ire few *bona vacantia* estates in New South Wales. We are told that there are only about 20 such estates each year. [17]

D. Intestacy Rules in Other Australian States

12.12 The intestacy rules of other States, like those in New South Wales, give preference to the claims of the deceased person's spouse and children. [18] South Australia is the only State where a person may become entitled to a share in the intestate estate of his or her deceased de facto partner. We have spoken already of the provisions of the Family Relationships Act 1975 of that State which enable a de facto partner to obtain a declaration that he or she was the "putative spouse" of another person. [19] If a person acquires the status of putative spouse, he or she may claim under the relevant intestacy rules in the same way as a lawful spouse, and may also apply for additional provision under family provision legislation.

12.13 The intestacy legislation in South Australia also contains provisions designed to deal with a conflict between the claims of a lawful and a putative spouse. Where the deceased is survived by both the general rule is that the share of the lawful spouse is divided between them. [20] The putative spouse or the lawful spouse, or both of them may apply to the court for provision under the family provision legislation if the statutory scheme fails to make adequate provision for their maintenance. [21]

III. FAMILY PROVISION

A. New South Wales

12.14 As we have mentioned the distribution of a persons estate may be affected by an order of a court made under family provision legislation. This applies whether or not the person left a valid will. A major purpose of family provision legislation is to protect the family of the deceased by

> "providing for the proper maintenance, education or advancement of members of the family who would otherwise be left without adequate provision and might, in many cases, become a charge on the community". [22]

12.15 The Family Provision Act, 1982, which is expected to come into force later in 1983, enables a person living with the deceased at his or her death on a *bona fide* domestic basis to apply for family provision. [23] A former de facto partner of the deceased, who separated from the deceased prior to his or her death may also apply for family provision if he or she can establish some-time dependency (whether whole or partial on the deceased, and some time membership of the household of the deceased. [24] A de facto partner had no entitlement under the superseded legislation.

12.16 In contrast with the rigid intestacy rules contained in the Wills, Probate and Administration Act, the Family Provision Act enables the court to make an order which takes into account the particular circumstances of the deceased person and the applicant (the "eligible person"). Under the Act the court is specifically empowered to take into consideration the character and conduct of the eligible persons, the circumstances existing before and after the death of the deceased person, and any other matter which it considers relevant in the circumstances. [25] The Act also allows the court to take into account

> "any contribution by the eligible person, whether of a financial nature or not and whether by way of providing services of any kind or in any other manner, being a contribution directly or indirectly to -
>
> > (i) the acquisition conservation or improvement of property of the deceased person, or
> >
> > (ii) the welfare of the deceased person including a contribution as a homemaker". [26]

The philosophy underlying this provision is consistent with our recommendations relating to the determination of property disputes during the lifetime of the partners. [27]

12.17 The courts have formulated principles governing the exercise of their discretion under family provision legislation. [28] Traditionally, at least three different factors have been important. First, the court takes into account the applicants needs. Here the applicants age, health financial situation and earning capacity are relevant. Secondly, the court considers whether the applicant is "deserving". In this context, the court takes into account the closeness of the relationship between the applicant and the deceased, and whether the applicant was a dutiful spouse or child. Services which the applicant has performed, in particular, services which have helped to build up the estate, have been regarded as important. This line of authority has now been reinforced by the section in the Family Provision Act referred to earlier concerning contributions made by the applicant. Finally, the court considers the size of the estate, and weighs the claims of the applicant against the claims of other people for whom the deceased person was under a moral obligation to provide. In the case of a claim by a de facto partner under the new legislation it would be necessary for the court to weigh the needs of the applicant against the needs of any spouse or children of the deceased.

B. Other Jurisdictions

12.18 The extension in New South Wales of the family provision legislation to de facto partners is consistent with the trend in other States, although the criteria for eligibility in New

South Wales contain fewer restrictions than those applying in other jurisdictions. In Queensland, [29] South Australia, [30] and the Northern Territory, [31] a de facto partner of the deceased person may apply for family provision if certain conditions are satisfied. In Western Australia [32] a de facto widow, but not a de facto widower may apply. In these States, with the exception of South Australia, where the concept of the "putative spouse" is used, it is necessary for a de facto partner to show that he or she was being maintained by the deceased person immediately prior to death. In 1977 the Tasmanian Law Reform Commission recommended that a de facto partner who was dependent on the deceased should be able to make a claim for family provision. This recommendation has not yet been implemented. [33]

IV. POLICY ISSUES: INTESTACY

12.19 The changes which have been effected by the Family Provision Act, 1982, are consistent with the approach we would have taken to family provision had the legislation not been enacted in the course of our reference. Accordingly, in this Chapter we concentrate on the policy issues relating to the entitlement of de facto partners to claim on intestacy. The major question is whether or not a de facto partner should be entitled to share in the intestate estate of his or her deceased partner. We discuss below a number of considerations relevant to this issue.

A. The Argument

1. Freedom of Choice

12.20 We have discussed freedom of choice in other contexts. [34] Some people argue that legal consequences associated with marriage should not be imposed upon people who have chosen to live together without marrying. A person who wishes to benefit his or her de facto partner on death may make a will having this effect. It can be argued that failure to make a will reflects a deliberate decision not to benefit the surviving partner.

12.21 We do not, however, find this a convincing reason for excluding a person from a share in the intestate estate of his or her deceased partner. People who live together are often unaware of the precise legal consequences of their relationship, [35] and may fail to provide for their partner by will simply as a result of misunderstanding, ignorance of the law or procrastination In several recent cases, for example, a de facto partner died intestate having told his partner, or some other person that he had provided for that partner on death (paragraph 12.24).

2. Claims of a Spouse

12.22 If a person is entitled to share on the intestacy of his or her deceased partner, the entitlement will automatically reduce the share of any surviving spouse, children or other relatives of the deceased. Some of the organizations which made submissions to us were concerned that the rights of a spouse would be affected if a de facto partner had an automatic share on intestacy. [36] We, too, share this concern although we do not regard it as a compelling argument against giving any rights to de facto partners. In some cases the deceased person may not have had a spouse. In other cases the spouse may have had no justifiable claim on the deceased person's estate. A solicitor provided us with an example of a case where the deceased, who had died intestate, left a wife whom he had not seen for 25 years. The wife succeeded to the estate, to the exclusion of the de facto partner of 15 years who had borne him four children. [37] Our later recommendations make special provision for the spouse and any children of the deceased, but we have not taken the view that the claims of the spouse should always be preferred to those of a de facto partner.

3. Protection of the Family

12.23 In our view the strongest argument in favour of giving a de facto partner an automatic share in some cases of intestacy lies in the purposes of the intestacy rules. We have said that the rules are designed to protect the family of the deceased, and to give effect to community standards on the appropriate provision to be made for surviving family members. De facto partners often see themselves, and are seen by others, as members of a family unit In the words of an English judge, it can certainly be said

> "that the parties to such a union provided it had the appropriate degree of apparent permanence and stability, were members of a single family whether they had children or not." [38]

4. Injustice

12.24 We are also concerned that injustice occurs under the present law. In *Blanchfield v.Public Trustee,* [39] a woman who had lived with a man for 20 years could not establish that she had acquired a beneficial interest in his estate, and was not entitled to any share on intestacy. Since no other relatives had made a claim on the intestate estate, it was anticipated that the deceased man's property would pass to the Crown as *bona vacantia* and that the woman would have to seek a favourable exercise of the Crown's discretion (paragraph 12.9). Similarly, in *Feeney v. Feeney,* [40] a woman who had lived with a man for eight years and worked hard to help him build up his assets had no claim on his intestate estate. Thus the property passed to the man's adult children, and his de facto partner received no share in the estate, despite her substantial contributions of money and labour.

5. The Effect of Family Provision Legislation

12.25 Some submissions suggested that family provision legislation is sufficient to protect a person whose de facto partner dies intestate. [41] They say that that person's claim could best be weighed by a court which, under that legislation is able to take into account matters such as the length and closeness of the relationship, the needs of the applicant and the claims of the other relatives. By contrast, they suggest to give all de facto partners an automatic right to claim on intestacy could lead to injustice, since it could enable unmeritorious de facto partners to benefit to the exclusion of close relatives. Since these submissions were made, the class of persons eligible to apply for family provision has been extended by the Family Provision Act, 1982, to include de facto partners. Thus, a de facto partner in the position of those in *Blanchfield v. Public Trustee and Feeney v. Feeney* (paragraph 12.24) would now be eligible to apply for family provision, and would be likely to receive a share of the deceased person's estate.

12.26 We do not think that this new eligibility will solve all problems. An application for family provision is not a practical solution in the majority of cases. The legislation requires a de facto partner who wishes to claim an interest in the estate to take court proceedings, and to rely on the favourable exercise of the courts discretion. The cost and unpredictability of such proceedings may deter many people from making an application particularly when the estate is a small one. [42] Costs are normally borne by the estate, but the effect of proceedings may be simply to reduce the value of the estate to a negligible amount. By contrast an alteration to the intestacy rules would give a de facto partner a fixed share in the intestate estate without the necessity for court proceedings. Moreover, in our view, family provision legislation is designed to operate as a safety net when the provisions of the testator's will or the operation of the intestacy rules, fall to make adequate provision for the surviving family. We do not think that this safety net should take the place of rules designed to ensure that the majority of intestate estates are distributed fairly.

V. PROPOSALS

12.27 For the reasons we have given we think that in *general* a person should, on the death intestate of his or her de facto partner, be entitled to share in the estate of that partner. In reaching this conclusion we distinguish between two types of cases.

> The first category of case is where the deceased is survived by a de facto partner and by a spouse or children of the marriage or of a former relationship. He or she may also have had children with the de facto partner.
>
> The second category is where the deceased is survived by a de facto partner (and possibly children of the de facto relationship) but has neither a spouse nor children of any other relationship.

A. The Deceased is Survived by a De Facto Partner and a Spouse and/or Children of Another Relationship

12.28 In this situation any extension of the intestacy rules to enable the de facto partner to share in the intestate estate will correspondingly diminish the rights of the spouse or the children of another relationship, or of both. The question to be determined is in what circumstances this is justifiable.

12.29 We must first consider the case where a deceased person is survived by a spouse. One solution would be to exclude the de facto partner from any share on intestacy, leaving that partner to make a claim for family provision. While this approach would have the advantage of enabling the court to weigh the needs, deserts, and contributions of both the surviving spouse and de facto partner, it would be of little practical assistance to a de facto partner where the estate was too small to justify an application to the court. This could lead to injustice, it for example, the deceased had been separated from his or her spouse for many years and the de facto partner has a strong moral claim to the estate. We do not favour this Solution.

12.30 A second solution is adopted in South Australia. This provides for an equal division of the intestate estate between the spouse and the “putative spouse”. [43] Again, we do not favour this approach. Since most estates are fairly small equal division is unlikely to provide adequately for the needs of either spouse and smacks of arbitrariness. The South Australian legislation seems to increase the likelihood that either or both parties will find it necessary to apply for family provision.

12.31 It is necessary in our view, to balance a number of factors.

> First, the right of a spouse to claim on intestacy should not be defeated by an unmeritorious claim made by a de facto partner who has lived with the deceased for only a short time prior to death.
>
> Secondly, where the deceased was living with the de facto partner for a substantial period prior to death, the deceased may well have intended the partner to share in the estate in preference to his or her spouse.
>
> Thirdly, it is likely that many people enter into a de facto relationship gradually, without a clearly stated decision that they have become de facto partners. During the early stages of the relationship, the parties are not likely to direct attention to the legal significance of their living together and, in particular, may not direct their minds to the legal consequences of one of them dying. This suggests to us that at least where the de facto partner is survived by a spouse, legal consequences should not automatically follow immediately the parties begin living together.
>
> Fourthly, where the deceased and his or her spouse have been separated for a substantial period, the spouse usually has had an opportunity of applying for dissolution of the marriage and a property order under section 79 of the Family Law Act 1975. [44] In

these circumstances, there is little justification for the spouse taking an automatic share on intestacy of the deceased. The spouse will of course, be entitled to apply for family provision and whether or not any order is made will depend, in part on what order, if any, was made in proceedings under the Family Law Act.

12.32 These considerations have led us to conclude that where the deceased is survived by a spouse as well as a de facto partner, the de facto partner should be entitled to the spouse's share on intestacy if the cohabitation with the spouse has come to an end and the de facto relationship has demonstrated some degree of stability and permanence. While we recognize that the adoption of a fixed period of cohabitation may sometimes lead to arbitrary results, we think that the imposition of such a period is justifiable in this case. Opinions may differ as to the time period which should be selected. However, we think that where the de facto partners have been living together for at least two years prior to the death of the intestate, a sufficient degree of permanence and stability in the relationship has been demonstrated to warrant the onus being placed on the spouse to seek a share by instituting family provision proceedings, rather than receiving an automatic share under the intestacy rules.

12.33 In some instances the deceased may have cohabited with a de facto partner for at least two years and, during this period, may also have lived intermittently with his or her spouse. Elsewhere we have taken the view that a couple in this position may be regarded as living in a de facto relationship. [45] This approach is appropriate for certain purposes, such as determining whether one de facto partner should be eligible to claim financial adjustment from the other. We do not think that it is suitable for the purposes of determining eligibility to claim on intestacy if the effect is to exclude the spouse, with whom the deceased also lived, albeit intermittently, from claiming a share of the estate. Consequently, we take the view that where the deceased is survived by a spouse and a de facto partner, the latter having lived with the deceased for a period of two years prior to death it will be necessary for the de facto partner to show that the deceased did not, during this requisite two year period live with his or her spouse.

12.34 Accordingly, **we recommend that the Wills Probate and Administration Act, 1898 be amended to provide that, where a person dies intestate and is survived by both a spouse and a de facto partner, the de facto partner should be entitled to the spouse's share on intestacy to the exclusion of the spouse if the de facto partner lived with the deceased for a period of at least two years before his or her death. However, even where this condition is fulfilled, the de facto partner should not be entitled to take the spouse's share if the court is satisfied that the deceased lived with his or her spouse during any part of that two year period.** Where a de facto partner becomes entitled to a spouse's share on intestacy the spouse, will of course, be eligible to make a family provision claim Where the de facto relationship lasted for less than two years prior to the death or where the deceased was sometimes cohabiting with his or her spouse at the same time as living in the de facto relationship, the de facto partner will not be entitled to an automatic share on intestacy, but will be eligible to make a family provision claim. Similarly, where the de facto relationship ended prior to the death the de facto partner will not be entitled to an automatic share, but may be eligible to make a family provision claim (paragraph 12.15).

12.35 We have considered also the situation where the deceased person was survived by a de facto partner, and children of another relationship, but not by a spouse. If the de facto partner automatically receives a share on the intestacy, the share of the children will be reduced and they will be left to claim family provision. This may lead to hardship and, particularly where the children are young and the de facto couple had been living together for only a short time, it may be contrary to the wishes of the deceased. Again, we think it would be justifiable for the de facto partner to share on the intestacy only if the deceased and his or her de facto partner had been living together for at least two years prior to the death.

12.36 Thus, **we recommend that, where the deceased is survived by a de facto partner and children cif another relationship, the de facto partner should be entitled to the**

spouse's share on intestacy if he or she had lived with the deceased for a period of at least two years before the death.

12.37 The effect of this recommendation is that where an estate is worth less than $l00,000, a de facto partner who satisfies the qualifying period will take the whole estate to the exclusion of the children of the deceased, including any children of another relationship. Where the value of an estate exceeds this amount, the de facto partner will be entitled to receive the statutory legacy of $100,000, together with one-half of the remainder, while all the children of the deceased will share the remaining one-half between them. The children will also be eligible to apply for family provision. Where part of the estate includes a home, lived in by the deceased and his or her de facto partner immediately before death special difficulties arise. These are discussed in more detail later (paragraph 12.45).

B. The Deceased is Survived by a De Facto Partner but Leaves Neither a Spouse non Children of Another Relationship

12.38 **We recommend that where a person dies intestate leaving a de facto partner but neither a spouse nor children of another relationship, the Wills Probate and Administration Act, 1898, should be amended to provide that the de facto partner of the deceased, if living with the deceased at the time of his or her death, should be entitled to take the spouse's share on intestacy.**

12.39 In this instance, because there is neither a spouse nor children of another relationship, the recommendation does not require the de facto partner to establish a minimum period of cohabitation. It is therefore less onerous than the South Australian legislation which broadly speaking, requires cohabitation for five years, or the birth of a child to the parties before a de facto partner can become entitled to a share on intestacy. [46] The consequences of our recommendation can be illustrated by three examples.

12.40 First, if the person dying intestate is survived by a de facto partner but not by a spouse, children, grandchildren or any other relatives entitled to claim on his or her intestacy, the estate will pass to the surviving de facto partner, instead of to the Crown as bona *vacantia. We* think that this result is likely to accord with the wishes of the deceased person, even where the couple have lived together for only a relatively short period prior to death. In our view, in this instance there is no justification for imposing a minimum period of cohabitation as a condition of the surviving de facto partner's eligibility to claim on the intestacy.

12.41 Secondly, under the present law, if a person dying intestate is survived by a de facto partner and children of their relationship, the estate passes to the children to the exclusion of the surviving de facto partner. In this instance the effect of our recommendation is that the surviving de facto partner will be entitled to the whole of the estate if it is worth less than $100,000. Where it exceeds this value, the surviving partner will be entitled to the statutory legacy of $100,000, together with one-half of the remainder. The other one-half will be distributed among the children of the de facto relationship. We think that this recommendation is likely to accord with the wishes of most de facto partners, and that, in these circumstances, there is no basis for requiring a minimum period of cohabitation. A similar result is reached in South Australia by different means. Under the Family Relationships Act 1975 a de facto partner who has had a child of the relationship is entitled to the spouse's share on intestacy without satisfying the cohabitation period of five years which the Act specifies for other purposes. [47]

12.42 The third example is where a person dies intestate and is survived only by a de facto partner and the relatives entitled to claim on the intestacy under the present law. Under our recommendations, the estate will pass to the de facto partner to the exclusion of the other relatives. It could be argued that this is unjust where the de facto partner lived with the deceased for only a short time before his or her death. However, where the competition is between a de facto partner and relatives of the deceased, other than a spouse or children, we

do not think a minimum period of cohabitation should be required. The imposition of such a period could lead to harsh results where one of the partners dies shortly before the required period has passed. This potential injustice must be balanced against the need to prevent unmeritorious claims. In our view, the balance favours the de facto partner, and not for example, the parents or brothers and sisters. It is therefore justifiable to place the burden of applying for family provision on those relatives of the deceased who are eligible to apply rather than on the de facto partner.

12.43 One statutory provision requires specific mention. Under section 61C of the Wills, Probate and Administration Act, where a child of a intestate dies before the intestate, the issue of that child (such as the grandchildren of the intestate) are entitled to the share which the deceased child would have taken if he or she had survived. Our recommendations relating to the share of a de facto partner do not make any change to this rule as such. However, we consider that where the deceased is survived only by a de facto partner and grandchildren but has no living children the de facto partner should be entitled to the spouse's share on intestacy, without having to satisfy the two year cohabitation period. Thus, if the estate is worth less than $100,000 the de facto partner will take to the exclusion of the grandchildren. But, in these circumstances, the grandchildren are eligible to apply for family provision.

C. Conclusion

12.44 The effect of our recommendations is that to claim on intestacy a de facto partner of the deceased will have to satisfy a two year cohabitation period except where

the deceased had no surviving spouse or children; or

the deceased's only surviving children were children of the de facto relationship.

Where either of these exceptions applies, the surviving partner need only show that at the time of death he or she was living with the deceased in a de facto relationship.

D. Right to Elect to Take a Share of the "Matrimonial" Home

12.45 We have referred to a spouse's right to elect to take a share in the matrimonial home in whole or partial substitution for his or her share on the intestacy. Under the present law this right of election arises where the deceased is survived by a spouse and "issue" such as children or grandchildren. We think that where, under our earlier recommendations, a de facto partner is entitled to a share in the estate, he or she should be entitled to exercise a similar election. This right would, of course, apply only with respect to a dwelling house occupied by the deceased and the de facto partner as their principal residence at the date of the deceased s death. We note that under the present law the effect of the exercise of the election by a spouse may be to deprive the issue of the deceased of their share in the estate. For example, if the estate consists solely of a dwelling house worth $150,000, the spouse may take the house and has no obligation to reimburse the estate to the extent that the value of the estate exceeds his or her share on the intestacy. [48] We see no reason why the position of a surviving de facto partner should be different. Accordingly, **we recommend that the Wills, Probate and Administration Act, 1898, should be amended to provide that, where the deceased is survived both by a de facto partner entitled to succeed on the intestacy and "issue", the de facto partner should be able to elect to take the deceased's interest in the parties' home in substitution for his or her interest arising on the intestacy.**

E. Consequential Matters

1. Right to Obtain Administration

12.46 Section 63 of the Wills, Probate and Administration Act enables the court to grant administration of an intestate estate to the husband or wife of the deceased person, one or more of the next of kin, or the spouse jointly with the next of kin. **We recommend that the**

Act should be amended to permit the court to grant administration of the estate to a de facto partner who was living with the deceased at the time of death.

2. Valuation of Real Estate

12.47 Section 53 of the Wills, Probate and Administration Act provides that a husband or wife of an intestate who is entitled to share in real estate (other than real estate in respect of which the right to elect has been exercised)

> "shall be bound to accept the value of that real estate instead of partition if all other persons entitled to that real estate with him or her so desire".

We recommend that this section should be extended to include a de facto partner of the intestate who is entitled to share in the real estate.

3. Interested Witnesses

12.48 Section 13 of the Wills, Probate and Administration Act provides that where a gift is made by will to a person who witnesses the execution of the will or to the spouse of a witness, the gift in the will is invalid, although the other provisions of the will will take effect. The section is designed to remove any motive for fraud from a person who might be tempted to testify falsely about matters relating to the validity of the will. [49] The rationale for the application of the section to a gift to the spouse of a witness is presumably that the witness could derive an indirect benefit if the will were effective to pass the benefit to the spouse and that spouse later died intestate. Since we recommend that a de facto partner of a person who has died intestate should be able to claim on the intestacy, and since the Family Provision Act 1982, applies to de facto partners, the question arises whether section 13 should be extended to cover the case where a gift is made to the de facto partner of an interested witness. If the section remains in force without amendment it can be argued that such an extension should be made. However, section 13 has often been criticised, and its equivalents have been substantially modified elsewhere in Australia. [50] We think that the operation of section 13 raises general issues relating to the execution of wills which require consideration. At this stage, therefore, we do not recommend an amendment of section 13 to cover the position of the de facto partner of a witness.

4. Multiple De Facto Partners

12.49 We define a de facto relationship in Chapter 17 in terms that do not exclude the possibility that a person might be found to have more than one de facto partner at a particular time. We regard this as very unlikely. In practice, we would expect that if two people each claim to be the de facto partner of the same person, the court would generally find that neither, or no more than one, of them satisfies the relevant criteria. Nonetheless, the possibility exists. It does not present undue difficulties in areas such as proceedings for financial adjustment between de facto partners or for family provision where the court has a discretion and can take relevant circumstances into account. In the case of an intestacy it could lead to difficulties if more than one de facto partner of the deceased could claim an automatic share. **We therefore recommend that in the unlikely event of a person dying intestate leaving more than one de facto partner, neither should be entitled to claim on the intestacy.** In this event both would be left to seek remedies under the Family Provision Act 1982.

VI. SUMMARY

12.50 At present in New South Wales, the surviving de facto partner of a person who dies intestate is not entitled to an automatic share in the deceased person's estate, although when the Family Provision Act, 1982, comes into force, the survivor will be eligible to apply for family provision. We have recommended that in general the survivor should be entitled to

share in the intestate estate of his or her deceased partner. 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 recommendation 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.

FOOTNOTES

1. See New South Wales Law Reform Commission, *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act,* 1916, (1974), para. 18.3. The Registrar of Probate has recently estimated that only 8-9 percent of estates passing through the Probate Division of the Supreme Court are intestate estates.

No information is available on the substantial number of intestate estates which do not pass through the Division. These would comprise very small estates, distributed informally.

2. Assent to the Family Provision Act 1982 was given on 24 December 1982. The major provisions of the act do not commence until a date, not earlier than six months after the date of assent to the Act appointed by the Governor s.2.

3. See New South Wales Law Reform Commission, note 1 above, Appendix B.

4. See, for example, Report of the Committee on the Law of Intestate Succession (195 1) Cmnd.83 10, p.3.

5. NSW Parliamentary Debates (third series), vol.136, p.10323, Legislative Council (The Hon DP Landa).

6. Ontario Law Reform Commission, *Report on Family Law: Part IV Family Property Law* (1974), p.163. In England, for example, the scheme of intestate succession introduced by the Administration of Estates Act 1925 was based on an investigation of a large number of wills: J.G. Miller, *The Machinery of Succession* (1977), pp.17, 92.

7. Wills, Probate and Administration Act, 1898, s.61B(3).

8. If the deceased person had a child who died before the deceased, his or her children (ie, the grand children of the deceased) are entitled to the share of the deceased child: Wills, Probate and Administration Act, 1898, s.61C.

9. As to a child predeceasing the deceased in this case see Wills, Probate and Administration Act, 1898, s.61B(3).

10. Children (Equality of Status) Act, 1976, s.9.

11. Wills, Probate and Administration Act, 1898, s.61B(5).

12. *Id*., s.61B(6), and see also s.61C.

13. *Id*., s.61B(7), (8).

14. *Id*., s.61 D. See also the Fourth Schedule which sets out the machinery for such an election.

15. *Id*., s.61(B)(13)(a). For the purpose of this subsection the value of household chattels is not taken into account.

16. *Id*., s.61(B)(8).

17. Information on these matters was provided to us by Mr J Bowring, Senior Legal Officer, Crown Solicitor's Office.

18. Eg. Administration and Probate Act 1958 (Vic), s.50(1), (2): Succession Act 1867-1977 (Qld.), Schedule, Part 1, items 1, 2.

19. See para.5.38: Family Relationships Act 1975 (SA), s.11(2).

20. See generally Administration and Probate Act 1919-1980 (SA), ss.72K 72L

21. Inheritance (Family Provision) Act 1972-1975 (SA), ss.4, 6.

22. *Lieberman v. Morris* (1944) 69 CLR 69, at p.85, per Rich J.

23. Family Provision Act, 1982, s.6(l) - definition of "eligible person" (a) (ii), (iii).

24. *Id*., s.6(1)(d).

25. *Id*., s.9(3).

26. *Id*., s.9(3) (a).

27. See paras.7.42-7.46.

28. I. Hardingham, MA Neave and HAJ Ford, *The Law of Wills* (1977), pp.268-269. See *Bosch v. Perpetual Trustee Co. Ltd.* [1938] AC 463; *Coates v. National Trustees Executors and Agency Co. Ltd.* (1956) 95 CLR 494; *Pontifical Society for the Propagation of the Faith v. Scales* (1962) 107 CLR 9; *Re Sinnott* [1948] VLR 279; *Welsh v. Mulcock* [1924] NZLR 673.

29. In Queensland, both de facto widows and widowers may apply, provided the" connubial relationships' has continued for at least five years. The applicant must show that he or she was wholly or substantially maintained or supported by the deceased person at the time of death: Succession Act 1981 (Qld), ss.40-41.

30. Family Relationships Act 1975 (SA): Inheritance (Family Provision) Act 1972-1975 (SA), s.4. A person coming within the definition of "putative spouse" is an eligible applicant. See paras.5.38, 12.13.

31. In the Northern Territory, a de facto widow or widower may apply for family provision. It is necessary to show that the applicant was maintained by the deceased person immediately before his or her death. Family Provision Act 1970 (NT), ss.4, 7(2).

32. In Western Australia, a de facto widow may apply for testator's family maintenance if she was wholly or partly maintained by the deceased at the time of death was ordinarily a member of his household, and was a person for whom the deceased had some special responsibility to make provision: Inheritance (Family and Dependants Provision) Act 1972 (WA), s.7(1) (f). This provision differed from the recommendation of the Western Australian Law Reform Committee in its *Report on the Protection to be given to the Family and Dependants of a Deceased Person* (1970). The Committee's draft Bill allowed any person satisfying the criteria to make a claim on the estate.

33. Tasmanian Law Reform Commission, *Report on Obligations Arising from De Facto Relationships* (1977). The Report recommended that, except in special circumstances, the partners should have lived together for 12 months prior to death.

34. See paras.5.51-5.54, and 11.11-11.13.

35. See the comments made by the Law Reform Committee of Legal Aid Commission of Victoria, Submission No.50.

36. See eg. Australian Federation of Festival of Light, Submission No.38, p.8; Anglican Diocese of Sydney, Social Issues Committee (majority response). Submission No.34a, pp.3-4; Anglican Parish of St Mary's, Avalon, Submission No. 18.

37. Ms K Loder, Submission No.3.

38. *Dyson Holdings Ltd., v. Fox* [1975] 3 All ER 1030, at p.1036, per Bridge LJ.

39. 10 April 1981, Supreme Court of New South Wales, Wootten J. See also *Biro v. Union-Fidelity Trustee Co. of Australia Ltd.* 13 December 1982, Supreme Court of New South Wales, Needham J.

40. 3 May 1979, Supreme Court of New South Wales, Powell J.

41. Eg. Trustee Companies Association of Australia and New Zealand, Submission No.33, and oral submission 17 August 1982.

42. According to the *1981 New South Wales Year Book,* p.590, 86.9 per cent of all estates assessed for duty in 1979 were valued at less than $50,000.

43. Administration and Probate Act 1919-1975 (SA), s.72ff.

44. Under the 1983 Bill, an application for a property order can be made even before an application for dissolution of marriage, and, once instituted, will survive against the estate of a deceased spouse: Family Law Amendment Bill 1983, cl.31.

45. See paras.17.14-17.17.

46. Family Relationships Act 1975 (SA), s.11(1).

47. *Id.,* s.11(1). The Act reaches a different solution where the deceased also has a spouse.

48. See Wills, Probate and Administration Act, 1898, ss.61 B(13), 61D.

49. This rationale was offered in 1970 by the Victorian Chief Justice's Law Reform Committee in a *Report* on *Section 13 of Wills* Act 1958. The provision dates back to the time when persons with any interest in a matter were incompetent as witnesses in relation to that matter. A will witnessed by a beneficiary was for that reason wholly void. The provision was therefore designed to ensure that the will would be valid, by making a gift to an interested witness or his spouse ineffective and thereby removing his interest.

50. The rule was abolished in South Australia in 1972. See now Wills Act 1936-1975 (SA), s.17. In 1969 the South Australian Law Reform Committee said of the rule: "[i]t serves no useful purpose and is only a trap for the unwary"; South Australian Law Reform Committee, Report *on s.17 Wills Act 1936-1966* (1969). In Victoria the rule was modified so that where the interested witness or spouse would have been entitled to a share of the estate on an intestacy of the testator, that person may take under the will to the extent of his share on intestacy. See now Wills Act 1958 (Vic), s.13, as amended in 1977.

13. Fatal Accidents

I. INTRODUCTION

13.1 When injuries result in the death of a person, civil claims for compensation can be made in limited circumstances. These circumstances are prescribed by

the Workers' Compensation Act 1926;

the Compensation to Relatives Act 1897 (commonly described as fatal accidents legislation); and

the Law Reform (Miscellaneous Provisions) Act 1944.

13.2 In Chapter 4 we explained the basis on which the surviving de facto partner of a deceased worker, whose death resulted from a work- related accident may claim compensation under the Workers' Compensation Act, 1926, in respect of that death (paragraphs 4.37 and 4.38). In brief, the surviving de facto partner is entitled to compensation calculated in accordance with the Act, if he or she was wholly or partly dependent for support on the worker at the time of the worker's death It has not been suggested to us in submissions or comments that the entitlement of a de facto partner under the Workers' Compensation Act should be changed. The criterion of "dependence" in the Workers' Compensation Act is not confined to de facto partners, and it would not be appropriate for us in this Report to suggest any change in the general criterion. Therefore, we regard the entitlement of de facto partners as consistent' with the general approach to de facto relationships taken in this Report and we recommend no change. [1]

13.3 The Compensation to Relatives Act 1897, allows certain relatives of a deceased person to recover damages for their loss of a reasonable expectation of future pecuniary benefits. In contrast to the position under the Workers' Compensation Act eligible relatives may be awarded compensation for their loss, regardless of whether they were dependent, in the sense of being reliant on the deceased for continuing support. So, for example, a husband may receive compensation for the loss of his deceased wife's domestic services, or for the loss of her financial contribution to household expenses. [2] The Law Reform (Miscellaneous Provisions) Act, 1944, provides, among other things, that a person who negligently causes the death of another person may be liable in damages for mental or nervous shock sustained by certain members of the deceased's family. Neither of these Acts provides for surviving de facto partners and in this Chapter we examine the legislation for the purpose of determining whether such provision should be made. We do so in the context of the existing law of accident compensation In the course of our reference on Accident Compensation we may recommend more far-reaching changes.

II. THE COMPENSATION TO RELATIVES ACT, 1897

A. Actions for the Benefit of a De Facto Partner

1. The Present Position

13.4 An action lies under the Compensation to Relatives Act 1897, where the death of a relative is caused

> "... by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof....." [3]

For the purposes of the Act, a relative of the deceased is his or her wife, husband, brother, sister, half-brother, half-sister, parents (including father and mother, grandfather and grandmother, step father and step mother, and any person standing in *loco parentis* to another), and child (including son and daughter, grandson and granddaughter, step son and step daughter, and any person to whom the deceased stands in *loco parentis)*. [4] The effect of section 6 of the Children (Equality of Status) Act 1976, is to add ex-nuptial children to this list of relatives, although previously an ex-nuptial child who was a member of the deceased's household at the time of death was covered by virtue of the "in *loco parentis"* relationship. [5]

13.5 For the purposes of the Act a de facto partner of the deceased is not a husband or wife, and hence he or she cannot obtain compensation under the Act. There are, however, circumstances in which the former financial dependence of such a person on a deceased person may be taken into account in assessing the amount of damage payable to relatives who do have an action. Thus, in *Johnson v. Ryan*, [6] the Supreme Court held that the children of parents who had been living in a de facto relationship when the father was killed were entitled to an award of damages which took into account the pecuniary loss they would suffer through the loss of the care of a mother supported by their father. That is, her loss of support was a detriment to her children, for which they could be compensated under the Act.

2. The Position Elsewhere

13.6 In South Australia, the Australian Capital Territory and the Northern Territory of Australia, the respective counterparts of the Compensation to Relatives Act allow actions for the benefit of de facto partners. In South Australia, for the purposes of the Wrongs Act 1936-1975, "spouse" includes "a putative spouse", which means a de facto partner who has lived with the deceased for five years, or with whom the deceased had a child (paragraph 5.38). [7] In the Australian Capital Territory and the Northern Territory, the relevant definition is as follows:

> "a person who, although not legally married to the deceased person was, immediately before the death of the deceased person living with the deceased person as wife or husband, as the case may be, on a permanent and *bona fide* domestic basis." [8]

In Victoria, the position is somewhat different Until 1982, section 17 of that State's Wrongs Act 1958 said that actions arising out of the wrongful death of a person were to be brought for the benefit of "the wife, husband, parent and child of the person..." Since the enactment of the Wrongs (Dependants) Act 1982, section 17 speaks only of "dependants". Presumably, a dependent de facto partner of the deceased person is now a person for whom an action maybe brought.

13.7 In 1978, the Law Reform Commission of Western Australia published a report on that State's counterpart of the Compensation to Relatives Act, namely, the Fatal Accidents Act 1959. Among other things, the Commission recommended that a de facto partner should be able to claim damages under the Fatal Accidents Act 1959, if he or she:

> "(a) was immediately before the death of the deceased living with the deceased as wife or husband, as the case may be, on a permanent and bona fide domestic basis, if the deceased leaves a child who is the child of the union between the deceased and that persor or
>
> (b) had lived with the deceased on a permanent and bona fide domestic basis continuously for a period of at least five years immediately preceding the death of the deceased, if the deceased does not leave any such child." [9]

In 1980, the Law Reform Commission of Tasmania made a similar recommendation. [10] As yet, neither recommendation has been implemented.

13.8 The question of extending fatal accidents legislation to de facto partners has been considered by the Law Commissions in England and Scotland and by the English Royal Commission on Civil Liability and Compensation for Personal Injury. The Law Commissions declined to make any recommendations, on the ground that the question should be considered in the wider context of the reform of family law. [11] The Royal Commission also declined to make any recommendation. Its basic recommendation was that the system of liability in tort should be coordinated with the English and Scottish social security systems. Since de factowidows are not entitled to widows' benefits underthe National InsuranceActs, it felt unable to make any recommendations in relation to the fatal accidents legislation. [12]

3. Recommendation

13.9 We consider that a surviving de facto partner should be entitled to claim compensation under section 3 of the Compensation to Relatives Act, in respect of the death of his or her partner. Our reasons for this conclusion are substantially the same as those expressed by the Western Australian Law Reform Commission. In short, the basic purpose of the Act is to provide protection for the family unit. It enables, in particular circumstances, members of a family to obtain compensation from a wrongdoer (in practice, in most cases, the wrongdoer's insurer) for the loss of support of a breadwinner or homemaker due to his or her death. A surviving de facto partner is liable to suffer the same financial loss as a surviving spouse. We think it is unjust that there should be no right to compensation even where the surviving de facto partner has suffered serious financial loss. As we see it, all family units, whether constituted by a marital or de facto relationship, need the protection afforded by the Act against loss of financial support. This view is consistent with the policy of the Workers' Compensation Act, 1926, which allows a dependent de facto partner compensation for the loss of a breadwinner in a work-related accident. However, as we have seem (paragraph 13.3) the Compensation to Relatives Act does not require dependence on the deceased as a prerequisite for an award of compensation.

13.10 As noted in paragraphs 13.4 and 13.5, the children of de facto partners can claim under the Act in respect of the death of either of their parents. The children are, broadly speaking, entitled to compensation at a level sufficient to enable them to enjoy the same material standard of life as they would have enjoyed if their father or mother had continued to support, them. If a de facto partner of the deceased is permitted to claim under the Compensation to Relatives Act some of the compensation which would have otherwise been paid to children will be included in the compensation paid to the de facto partner on the basis that he or she is under a legal duty to provide reasonable maintenance for the children. The result, at least in the case where there are surviving childrer would be that the de facto partner would be compensated directly, instead of indirectly through damages recovered for the benefit of the children.

13.11 We note that the events which give rise to liability under the Act usually occur on the roads or at work. In both cases, insurance is compulsory (except for bodies permitted to act as self insurers). The cost of adding de facto partners to the list of possible claimants under the Act would therefore be borne by the general body of policy holders. We would not regard the fact that there are some cases where a defendant in proceedings under the Compensation to Relatives Act is not insured as being a good ground for denying the protection of the Act to de facto partners.

13.12 **We therefore recommend that the class of persons for whose benefit an action may be brought under the Compensation to Relatives Act, 1897 should be extended to include a surviving de facto partner of the deceased and that section 4 of the Act should be amended accordingly.** This recommendation raises some incidental issues to which we now turn.

B. Incidental Issues

13.13 By way of background information we mention here some procedural provisions of the Compensation to Relatives Act Similar provisions are contained in the fatal accidents legislation of most Australian jurisdictions. First, only one action lies in respect oC in the words of the Act, “the same subject matter of complaint”. [13] Secondly, the action is brought by the executor or administrator of the deceased person on behalf of all eligible claimants. [14] Where there is no executor or administrator, or where the executor or administrator does not bring the action within six months after the deatk an eligible claimant may bring it. [15] Thirdly, the person bringing the action must give the defendant full particulars of all the persons on whose behalf the action is brought. [16] And, fourthly, any amount recovered must be divided among the claimants in such shares as the judge, or, where there is a jury, the jury directs. [17]

1. Conflicts of Interest

The Issue

13.14 The case of *McIntosh v. Williams* [18] illustrates the nature of the problem to which we now refer. The widow of a deceased person brought an action under the Act on behalf of herself and the two children of her marriage with the deceased. Later, a claim was made on behalf of a third child who was alleged to be the child of the deceased and another woman. It was held that the rule that the person who brings an action under the Act must do so on behalf of all claimants applied in this case, even though the widow, as the person bringing the claim wished to dispute that her late husband was the father of the third child. If an action under the Act may be brought for the benefit of both a surviving spouse and a surviving de facto partner, and the executor or administrator of the deceased person is either the spouse or the de facto partner, the likelihood of conflicts of interest are obvious.

The Position Elsewhere

13.15 In the relevant legislation of South Australia the Australian Capital Territory and the Northern Territory, express provision is made for potential conflicts of interest. In South Australia, the effect of the provision is that where a deceased person is survived by a spouse and, in the terms used in the SouthAustralianAct a putative spouse, the action is brought for the benefit of both. However, where the court considers it appropriate that any person should present an independent claim, it maypermit or *require* that person to be treated as if he or she were a separate party to the proceedings. [19] In the Australian Capital Territory and the Northern Territory, the court is empowered, on the application of a person whose name is not included in the names of the persons for whose benefit the action is stated to have been brought, to order the action to proceed as if the name of that person had been so included. In additiom the court may order that any one or more of the persons in question be separately represented by counsel or solicitor, or both. [20] The Law Reform Commission of Western Australia has recommended provisions broadly similar to those contained in the legislation of the Australian Capital Territory and the Northern Territory. [21]

Recommendation

13.16 **We recommend that the Act should provide that where a deceased person is survived by a spouse and a de facto partner, any action under the Act should be brought for the benefit of both. We also recommend that the Act should provide that the spouse and the de facto partner shall be separate parties to the action.** This latter recommendation accords with comments made in *McIntosh v. Williams*. [22] There, the court recommended that the child whose paternity was in dispute should have been added as a party to the proceedings pursuant to rules of court. [23] Not only would this have ensured that the child’s interests were protected during the hearing, but also it would have given the child rights in relation to any proceedings by way of appeal. In our view, the same considerations

are relevant to any action under the Act involving a spouse and a de facto partner, or a de facto partner and any eligible child or children.

2. Duration

13.17 We say, in Chapter 17, that we do not propose a uniform definition of a de facto relationship for the purposes of specifying eligibility for benefits under our proposed legislation. Our approach is to examine each area to determine whether, for example, a minimum period of cohabitation should be required as a condition of eligibility. The question here is whether a surviving de facto partner should be entitled to claim under the Compensation to Relatives Act only where the relationship had lasted for a specified period.

The Position Elsewhere

13.18 The South Australian legislation, in its definition of “putative spouse”, speaks of a period of five years’ cohabitation or the birth of a child. The recommendations of the Western Australian Law Reform Commissiom and, it seems, those of the Tasmanian Law Reform Commission are in similar terms. On the other hand, the legislation of the Australian Capital Territory and the Northern Territory are free of such limitations (see paragraphs 13.6, 13.7).

Recommendation

13.19 **We recommend that no minimum period of cohabitation be prescribed for the purposes of determining the eligibility of a surviving de facto partner to claim under the Compensation to Relatives Act, 1897.** We believe that in this context such a prescription is neither necessary nor desirable. The Act functions in what is essentially a judicial environment. Once a claimant establishes that he or she was the de facto partner of the deceased at the date of deatk we would leave to the court the task of deciding whether the evidence justifies an award and, if so, the approp riate amount of that award. Elegibility to apply under the Act does not guarantee that a claim will be successful. We should make it clear that we intend that a surviving de facto partner should establish that he or she was living with the deceased on a bona fide domestic basis at the date of death. This has effect of excluding a separated de facto partner from the application of the Act. This exclusion accords with our view that the basic purpose of the Act is to protect family units, not members of a former family unit.

3. Apportionment of Damages

13.20 As noted in paragraph 13.13, any damages recovered in an action under the Act are divided among the claimants in such shares as the judge, or jury, directs. The question arises whether, in the event of a de facto partner becoming an eligible claimant special provision should be made for the case where both a spouse and a de facto partner are claimants. Our short answer is that no special provision should be made. In our view, it would be a futile exercise to att empt to draft a provision which would adequately cover the almost limitless possibilities involved. And, so far as we are aware, the exercise has not been attempted in any place where a de facto partner is an eligible claimant. The case by case approach of the courtis, we believe, much more likely to be effective than any legislative approach. The court is well able, for example, to distinguish between on the one hand, the claim of a de facto partnerwho at the date of his or her partner’s death had been living with that party for only a short time and who was only partly dependent on the deceased; and, on the other hand, the claim of a totally dependent spouse of long standing.

13.21 This recommendation, that no legislative action be taker is consistent with the approach of the Family Provision Act 1982, in that competing claims may be made by a surviving spouse and a surviving de facto partner. In both instances the court can make an allocation between the claimants in accordance with the evidence in a particular case.

4. “Remarriage”

13.22 In an action under the Act the court must take into account, for the purpose of reducing the damages which would otherwise be awarded, the possibility that the bereaved spouse will remarry and be supported financially by another person. The Act does not specifically refer to the possibility of remarriage, but the courts have interpreted the legislation as requiring the possibility to be taken into account. The rule has been severely criticised but it remains in force and it would be inappropriate in this context for us to recommend its repeal. [24] For present purposes, it is relevant onlyto the extent of its application to a de facto partner who has never married and for whom therefore the word " remarriage" is inapt. Should the Act in the context of a de facto claimant, speak specifically of the possibility of "marriage" or of the possibility of the claimant entering into a new de facto relationship?

We doubt that it is necessary to do so. In a case under the relevant Northern Territory legislation Bennett v. *Liddy,* [25] Mr Justice Muirhead said:

> "I act on the basis that with a person who lived in a *de facto* arrangement... the word 'remarriage' should be extended to cover marriage also. Any other interpretation would be nonsensical." [26]

It should be noted that the case was concerned, in part, with a legislative provision that in assessing damages no reduction should be made on account of the remarriage or prospects of remarriage of the surviving spouse.

C. The Law Refonn (Miscellaneous Provisions) Act, 1944

13.23 Recent developments have highlighted the need to amend the Compensation to Relatives Act These developments arise out of the judicial interpretation of section 2 of the Law Reform (Miscellaneous Provisions) Act, 1944, which provides that, on the death of a persor all causes of action subsisting against or vested in him or her survive against, or, as the case may be, for the benefit of, his or her estate. It was held by the High Court in 1982 that under this sectiom the estate of a deceased person could recover damages in respect of the deceased's lost earning capacity during the "lost year" that is, the period between the date of death and the date he or she might have been expected to cease working. [27] Legislation has been passed in New South Wales to overcome the effect of the decision. This legislation the Law Reform (Miscellaneous Provisions) Amendment Act, 1982, provides that the damages recoverable forthe benefitof the estate of a deceased person shall not include damages for lost earning capacity or earnings during the "lost years".

13.24 The effect of this amendment on the position of de facto partners can be shown by an illustration. Suppose that A, a man aged 28, and B, a woman aged 27, are de facto partners, that A is earning a substantial income, that B is financially dependent upon A, that A is killed in consequence of a wrongful act by A and that B is the sole executrix and beneficiary named in A's will Under current law, B is not an eligible claimant under the Compensation to Relatives Act but, in her capacity as executrix, she may bring an action against X by virtue of section 2 of the Law Reform (Miscellaneous Provisions) Act 1944. If she had brought, and completed, such an action before the enactment of the Law Reform (Miscellaneous Provisions) Amendment Act 1982, she may have received, in her capacity as A's sole beneficiary, a substantial sum of money. This is so because the damages recoverable in the action would have included damages for the loss of A's probable earnings during the remainder of his working life (subject to deductions for the probable living expenses of A during that time). But since the enactment of the 1982 Act, the damages recoverable do not include damages for the loss of A's future probable earnings and hence B, in the final analysis, will suffer a considerable financial disadvantage. By contrast, the 1982 Act does not disadvantage a married partner in a similar situation, because he or she may claim under the Compensation to Relatives Act.

13.25 The illustration just given is not exaggerated or unrealistic. A firm of solicitors has already drawn our attention to a case presenting a comparable set of facts and argued for a

change in the law. [28] In our view, the Law Reform (Miscellaneous Provisions) Act 1944, as it now stands, adds a compelling reason for extending the application of the Compensation to Relatives Act to de facto partners.

III. NERVOUS SHOCK AND LOSS OF CONSORTIUM

A. Nervous Shock

13.26 At this point it is convenient to consider section 4 of the Law Reform (Miscellaneous Provisions) Act 1944, even though the operation of the section is not confined to claims arising out of the death of a person. The section provides as follows:

> "(1) The liability of any person in respect of injury caused ... by an act neglect or default by which any other person is killed, injured or put in peril shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by -
>
> > (a) a parentorthe husband orwife of the person so killed, injuredorput in peril; or
> >
> > (b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family."

13.27 In the case of a fatal accident the parent, husband or wife of the person killed may bring an action in respect of nervous shock, whether or not the accident took place within the sight or hearing of the claimant. The rationale for this rule has been said to be that

> "injury by nervous or mental shock to a parent husband or wife is not an unlikely consequence where a child, wife or husband has been killed injured or put in peril". [29]

Other members of the family may claim compensation in respect of nervous shock, but only if the accident occurs within their sight or hearing. The de facto partner of a person killed or injured in an accident is not included within the terms " husband" or "wife", nor is that partner within the category of "member of the family" of the victim. [30]

13.28 The de facto partner of a person who has been injured or killed in an accident is likely to suffer mental or nervous shock and, in our view, the law should permit an action where such shock occurs. We can see no good reason for distinguishing between the entitlement of a spouse and that of a de facto partner, bearing in mind that the Act provides for compensation only where mental or nervous shock actually occurs. This conclusion accords with a submission of the New SouthWales Women's Advisory Council. The Council argued that the Compensation to Relatives Act should be extended to de facto partners and that "remedies in the case of nervous shock would also then have to be logically extended". [31] **We recommend that the terms "husband" and "wife" in section 4 of the Law Reform (Miscellaneous Provisions) Act, 1944, should include the de facto partner of the person "killed, injured or put in peril".** Since the duration of the de facto relationship is unlikely to be relevant to the question whether or not nervous or mental shock is suffered, the de facto partner should not be required to satisfy any minimum period of cohabitation.

B. Loss of Consortium

13.29 At common law, a husband has a right to bring an action for. damages for loss of the conjugal suppom assistance and services of his wife, against a person who negligently injured her. [32] No similar action is available to a wife whose husband is injured. [33] We have taken the view that a husband's right to bring an action for lost "consortium" (as it is called) should not be extended to a man whose de facto partner is injured. The action for loss of consortium has come under considerable attack, and a number of bodies have recommended its abolition while suggesting other ways of preserving the limited benefits theoretically provided by the

action. [34] In these circumstances we think it would be anomalous to extend the action to a de facto partner. Our approach is consistent with the view of the New South Wales Women's Advisory Council submission. [35] The Council commented that the action for loss of consortium was "sexist and anachronistic" and recommended its abolition.

IV. SUMMARY

13.30 In this Chapter we have considered the right of a de facto partner to claim compensation for the wrongful death or injury of his or her partner. Our recommendations include the following:

> Where a person dies as a result of a wrongful act his or her de facto partner should be eligible to claim compensation under section 3 of the Compensation to Relatives Act 1897. Where the deceased person is survived by a spouse as well as a de facto partner, the Act should provide that the spouse and de facto partner should be separate parties to the action.
>
> Where a de facto partner suffers nervous shock as a result of death or injury of his or her partner, he or she should be able to bring an action for damages under section 4(1) of the Law Reform (Miscellaneous) Provisions) Act, 1944. This places a de facto partner in the same position as a parent husband or wife who suffers nervous shock as the result of the death or injury of a child or spouse.

FOOTNOTES

1. However, in para.17.5, note 6, we point out that there is a slight anomaly in the drafting of the definition of "dependents" in the Workers' Compensation Act 1926. At an appropriate time this anomaly should be corrected, although it is of no practical significance.

2. See eg. *Rowe v. Scanlan* [1969] 1 NSWR 43. Foran analysis of the principles on which compensation is basecl see H. Luntz, *Assessment of Damages for Personal Injury and Death* (2nd ed. 1983), at pp.402-426.

3. Compensation to Relatives Act. 1897, ss.3, 4, 7.

4. *Id*., ss.4, 7.

5. *Johnson v. Ryan* [1977] 1 NSWLR 294.

6. [1977] 1 NSWLR 294.

7. Wrongs Act 1936-1975 (SA), ss.3a. 20.

8. Compensation (Fatal Injuries) Ordinance 1968 (A.C.T.), s.4(2)(h); Compensation (Fatal Injuries) Act 1974 (N.T.), s.4(3)(c).

9. Law Reform Commission of Western Australia, Report on Fatal Accidents (1978, Project No.66), para.3.32.

10. Law Reform Commission of Tasmania, *Working Paper on Compensation for Personal Injuries Arisingout of Tort* (1980), p.23.

11. The words of the Law Commission in England were "... there may be a case for examining the legal position of a common law wife in all its aspects": Law Commission, *Report on Personal Injury Litigation - Assessment of Damages* (1973, Law Com. 56), para.258. See also

Scottish Law Commission, *Report on the Law Relating to Damages for Injuries Causing Death* (1973, Scot. Law Com. No.31), paras.82-83.

12. Royal Commission on Civil Liability and Compensation for Personal Injury, Report (1978, Cmnd 7054-I), vol.1, para.405.

13. Compensation to Relatives Act, 1897, s.5.

14. *Id*., s.4.

15. *Id*., s.6B.

16. *Id*., s.6.

17. *Id*., ss.4, 6D. The Court of Appeal has said that there are two acceptable methods of assessing and apportioning the loss. Either the court considers the loss of each claimant separately, then aggregates; or, preferably, the court assesses the extent of the loss to the whole family without attempting to determine, as against the defendant the extent of the loss of individuals. The latter method avoids problems of duplicating losses which are common to all the claimants. However, the court recognised that in complex cases there may be no alternative to an examination of the loss suffered by each individual *Gullifer v. Pohto* [1978] 2 NSWLR 353, at p.363.

18. [1979] 2 NSWLR 543.

19. Wrongs Act 1936-1975 (SA). s.20(4)-(7).

20. Compensation (Fatal Injuries) Ordinance 1968 (A.C.T.), s.15; Compensation (Fatal Injuries) Act 1974 (NT), s.15.

21. The Law Reform Commission of Western Australia, note 9 above, paras.3.50 and 3.52.

22. [1979] 2 NSWLR 543.

23. *Id*., at pp.560-562.

24. See, for example, this Commission's Working Paper on among other things, *The Relevance of Remarriage or Prospects of Remarriage in An Action under Lord Campbell's Act* (1969), pp.72-77.

25. (1979) 25 ALR 340.

26. *Id*., at p.352.

27. See *Fitch v. Hyde-Cates* (1982) 56 ALJR 270.

28. Hardings, Solicitors, Submission No.55.

29. *Scala v. Mammolitti* (1965) 114 CLR 153, at pp.159-160. The leg islation extends the common law, by making it unnecessary for the parent, husband or wife to show that the shock suffered was reasonably foreseeable.

30. Law Reform (Miscellaneous Provisions) Act, 1944, s.4(5). The de facto partner may, however have a claim under liberalised common law rules: cf. *McLaughlin* v. *O'Brian* [1982] 2 WLR 982.

31. NSW Women's Advisory Council, Submission No.10, p.4.

32. J.G. Fleming, *The Law of Torts* (6th ed 1983), pp.619 ff. For a recent example *see State Rail Authority of New South Wales v. Sharp* [1981] 1 NSWLR 240.

33. *Best v. Fox* [1952] AC 716. Cf. the situation in South Australia, where the action for loss of consortium has been extended to a wife: Wrongs Act 1936-1975 (SA), s.33.

34. Law Comission, note 11 above, para.121: Royal Commission, note 12 above, para.447. In the United Kingdom legislation to abolish the action of consortium has now been enacted: Administration of Justice Act 1982, s.2.

35. NSW Women's Advisory Council, Submission No.10, p.4.

14. Domestic Violence and Harassment

I. INTRODUCTION

14.1 Violence within families is a special social problem. Inquiries in Australia, the United Kingdom and elsewhere have documented its extent and proposed new legal procedures to deal with it.[1] New South Wales is no exception. A Task Force on Domestic Violence reported to the Premier in July 1981.[2] The Task Force was not specifically concerned with violence within de facto families, but it recommended that its proposed Domestic Violence Act should extend to persons living in de facto relationships.[3]

14.2 The Crimes (Domestic Violence) Amendment Act, 1982, was enacted in December 1982, and itsoperative provisions commenced in April 1983. The Act implements many of the recommendations made by the Task Force. It is clear that the Act will significantly improve the remedies available to a victim of violence within a de facto relationship. Nonetheless the protection accorded to such a victim will not be as complete as that provided to a victim of violence within a married relationship. Because we think that the law should provide full protection to victims (or potential victims) of domestic violence we pay particular attention in this Chapter to the differences in the respective legal remedies available to married people and de facto partners, and make recommendations for further change.

II. REMEDIES AVAILABLE TO MARRIED PERSONS AND DE FACTO PARTNERS IN RESPECT OF DOMESTIC VIOLENCE

14.3 In this section we refer to:

prosecutions for assault;

apprehended violence orders under section 547 of the Crimes Act, 1900;

the Crimes (Domestic Violence) Amendment Act, 1982;

injunctive relief from the Supreme Court; and

injunctions under the Family Law Act 1975 (Cth).

A. Prosecutions for Assault

14.4 Any person who has been assaulted may cause the assailant to be prosecuted for a criminal offence. For a conviction to be obtained, the assault, or other offence, must be proved beyond reasonable doubt. In many cases of domestic assault there is no witness other than the victim and consequently the standard of proof may not be easily satisfied. In any event, whether the victim (usually a woman) is married to or a de facto partner of the assailant, she is often reluctant to prosecute the man with whom she is living in a continuing relationship and upon whom she may be financially dependent. Also, a prosecution does not of itself provide any protection against further assaults. Indeed, it may provoke them. In short, the criminal prosecution is a crude defence against domestic violence. Its utility, or lack of it does not, however, vary as between married persons and de facto partners.

B. Apprehended Violence Orders Under Section 547 of the Crimes Act, 1900

14.5 Section 547 of the Crimes Act, 1900, provides, in effect that in all cases of apprehended violence, a justice of the peace (usually a court officlao may, on the complaint of the person

apprehending the violence, issue a summons or warrant, and another Justice of the peace (usually a magistrate) may examine the complainant, the defendant, and their witnesses. If it appears that the apprehension alleged is reasonable, the second justice of the peace may require the defendant to enter into a bond to keep the peace for a term not exceeding six months. If the bond is not entered into, the defendant may be imprisoned for three months. The penalty for breach of the bond, by, for example, repetition of the threatening conduct, is forfeiture of the money value of the bond.

14.6 Section 547 is frequently invoked by both married women and women living in de facto relationships. The section has its own special advantages and disadvantages but in its application to apprehended domestic violence, it is likely to fall into disuse now that the Crimes (Domestic Violence) Amendment Act, 1982, has come into force. For this reasor we do not comment in detail on the provisions or operation of the section.

C. The Crimes (Domestic Violence) Amendment Act, 1982

14.7 The expressed object of this Act is to facilitate efforts to reduce the incidence of domestic violence. [4] The Act itself is concerned with "domestic violence offence". This term includes specified offences, such as assault or sexual assault (whether committed or attempted), where the assailant and the victim are married to each other or living in a de facto relationship. [5] The object of the Act is achieved by amending the Crimes Act so as

> to make the spouse or de facto partner of the accused person a witness who may be compelled to give evidence in domestic violence proceedings, unless excused by the court; [6]
>
> to clarify and define the power of a member of the police force to enter and remain in a dwelling-house for the purpose of investigating or preventing domestic violence where he or she is invited to do so by a person residing there (for example, the victim of the violence, or a child of the persons engaged in the domestic violence); [7]
>
> to empower magistrates and other persons appointed by the Attorney General to issue warrants to members of the police force by telephone in urgent cases, authorising them subject to certain limitations, to enter dwelling-houses to investigate or to take action to prevent domestic violence; [8] and
>
> to empower Local Courts to impose restrictions or prohibitions on the behaviour of persons from whom domestic violence is apprehended, and to make failure to comply with such an order an offence. [9]

The last-mentioned provisions are contained in the new section 547AA of the Crimes Act to which we now refer in more detail.

14.8 Under section 547AA, a complaint may be made to a Local Court by the "aggrieved spouse" of the defendant (including a person with whom the defendant has been living on a *bona fide* domestic basis), or by a police officer. Where a complaint of apprehended domestic violence is made, a justice may issue a summons for the appearance of the defendant or a warrant for his or her arrest. [10]

14.9 If the court is satisfied, on the civil standard of the balance of probabilities, that the "aggrieved spouse" reasonably apprehends that the defendant will commit a domestic violence offence, [11] the court may prohibit or restrict, for a period of up to six months:

> approaches by the defendant to the aggrieved spouse;
>
> access by the defendant to premises occupied or frequented by the aggrieved spouse, whether or not the defendant owns those premises;

behaviour by the defendant “which might affect” the aggrieved spouse. [12]

An order may be made in the absence of the defendant. The court has power, on application to vary or revoke an order.

14.10 Where an order has been made and served personally on the defendant, he or she is guilty of an offence, and liable to imprisonment for up to six months, if he or she knowingly fails to comply with a restriction or prohibition specified in the order. [13] A police officer may, without a warrant, arrest a person who is reasonably suspected of having committed such an offence, and in such a case bail may be granted under the provisions of the Bail Act, 1978.

14.11 The procedure under section 547AA has similarities to legislation enacted in South Australia in 1982. [14] It is a hybrid measure, having elements of both a civil remedy and a criminal offence. The remedy can be invoked by establishing a reasonable apprehension of a domestic violence offence on the civil standard of prooe rather than the more stringent criminal standard required by section 547 (paragraph 14.5). The order which may be made under the section has similarities to the injunction which a civil court may issue. In additiom a court acting under section 547AA may impose conditions on an order to provide effective protection according to the nature of the threatened behaviour and the circumstances of the complainant. Orders may be made without the defendant having been served with a summons or otherwise having notice of the proceedings, if the court is satisfied that it is appropriate to proceed in this manner.

14.12 On the other hand, section 547AA has been placed within the Crimes Act and has many of the trappings associated with a provision creating a criminal offence. After a complaint is made, the defendant may be subject to arrest Proceedings may be instituted by a police officer, and the complaint must relate to the threat of commission of one of a number of specified criminal offences. Breach of the order constitutes an independent criminal offence and the orderitself is regarded as a “punishment” for the purposes of the appeal provisions of the Justices Act, 1902. [15]

D. Supreme Court Injunctions

14.13 There is uncertainty about the jurisdiction of the Supreme Court to issue injunctions in relation to threatened assaults or seriously annoying behaviour. Some authorities suggest at least in relation to threatened assault that the court has such a jurisdiction but there are decisions to the contrary. [16] And, even if the court has this jurisdiction there is also uncertainty about the circumstances in which the court would grant an injunction. It seems reasonably clear, however, that an injunction would be granted only in exceptional circumstances. [17] Given the new power in courts of summary jurisdiction conferred by section 547AA of the Crimes Act to make orders imposing restrictions or prohibitions on persons by whom domestic violence is apprehended, we doubt that many married persons or de facto partners will seek to invoke this jurisdiction of the Supreme Court. Apart from the uncertain nature of the jurisdiction itself, the fact that proceedings in the Supreme Court are likely to be much more expensive than those in a Local Court is a telling consideration.

E. Injunctions Under the Family Law Act 1975

14.14 The Family Law Act 1975 provides remedies for a party to a marriage and for the children of a marriage. For reasons discussed in Chapter 2, it does not provide remedies for de facto partners or their children. An important remedy is conferred by section 114(1) of the Act. That section allows a court, among other things, to grant an injunction for the personal protection of a party to a marriage or of a child of the marriage. A wife, for example, who fears violence from her husband may seek an injunction for her personal protection and she may do so even without instituting proceedings for divorce or for any other relief under the Act.[18] In urgent cases, a court may issue an injunction on herex parte application that is, an application of which the husband has no notice whatsoever.

14.15 In practice, section 114(1) has been construed liberally in the sense that it has beer used to protect a party not only from abuse or threatened physical or mental harm but also tc prevent undue interference by one party with the other, or the children. [19] In short, the concept of “personal protection under section 114(1) extends to the prevention of non-violent molestation harassment or persistent annoyance. The subsection also authorises the making of orders relating to the use or occupancy of the matrimonial home. An order of this kind may have the effect of excluding a violent spouse from the home indefinitely. [20]

14.16 Injunctions under section 114(1) may be issued by the Family Court of Australia or by a State court of summary jurisdiction. [21] In practice, magistrates in New South Wales frequently issue these injunctions. There are, however, proposals to the effect that, except for maintenance matters, the Family Court should have exclusive jurisdiction in respect of all matters arising under the Family Law Act, including applications under section 114(1), in those metropolitan areas where the court is permanently established. [22] The Family Law Amendment Bill 1983, introduced into Parliament on 1 June 1983, would allow the Government to terminate the jurisdiction of Local Courts in New South Wales with respect to specified classes of proceedings. [23]

14.17 Section 114 also provides for the enforcement of orders which have been made for the personal protection of a party. Where a person has knowingly and without reasonable cause contravened or failed to comply with an order, the court may impose a fine, require the person to enter a bond or punish that person for contempt (which may result in imprisonment). In addition, where the breach of an order constitutes an offence under any other law, the offender may be punished, but not so as to be punished twice for the same offence.

14.18 If provisions of the kind contained in the Family Law Amendment Bill 1983 are enacted, the courtwill be specificallyempowered tograntinjunctions restraining a party from entering or remaining in the matrimonial home and any other premises in which the other party is living or working. [24] In additiom the court will be empowered to attack for a period not exceeding six months, a power of arrest to a personal protection order. The court will have this power where it is satisfied that the respondent has caused or threatened to cause bodily harm to his or her spouse, or to a child of the marriage, and that that person is likely to cause bodily harm to those persons. Once a power of arrest is attached to an order, a police officer will be able, if he or she believes on reasonable grounds that the person in question has breached the in’unctior to arrest that person without warrant. The Bill also contains detailed provisions dealing with the bringing of the arrested person before the court to be dealt with for breach of the injunction. [25] These provisions are outside the scope of this discussion except to the extent that they have the effect of creating a “24 hour truce” between the parties.

F. Summary of Legal Position

14.19 Both married persons and de facto partners have the following remedies in respect of domestic violence:

prosecutions for assault;

apprehended violence orders under section 547 of the Crimes Act;

apprehended domestic violence orders under section 547AA of the Crimes Act; and

possibly, injunctions by the Supreme Court.

On the other hand, a married persom but not a de facto partner, also has the remedies provided by the Family Law Act.

14.20 One complicating factor should be noted although it need not be resolved by us. Under the Constitutiom where there is an inconsistency between a valid Commonwealth law and a

State law, the former prevails and, to the extent of the inconsistency, the latter is invalid. [26] There would seem to be no inconsistency between the availability of injunctive relief under section 114 of the Commonwealth Act and the quasi-criminal apprehended violence procedure under section 547 of the State Act. The position is, however, less clear in considering whether there is any inconsistency between section 114 and the new apprehended domestic violence procedure under section 547AA, particularly if the Family Law Act is amended to allow a power of arrest for breach to be attached to an injunction. It may be, for example, that the procedure under section 547AA is sufficiently "criminal" in character to warrant the conclusion that the subject matter of the Commonwealth and State Acts are different and that they are therefore not inconsistent. The matter could be put beyond doubt by the passage of the Family Law Amendment Bill 1983, which proposes, in clause 58, to insert a new section 114AB(1), saving the operation of "a prescribed lawof a State... that is capable of operating concurrently with" sections 114 and 114AA. The proposed section 114AB(2) provides that where a remedy has been sought by a married person under, say, section 547AA of the Crimes Act (assuming it is a "prescribed law"), that person should not be entitled to institute proceedings under section 114 or section 114AA.

III. ASSESSMENT OF THE LAW

A. The Submissions (Before the 1982 Act)

14.21 Several thoughtful submissions commented on the legal problems presented by violence within de facto relationships. [27] The preparation of the submissions, and discussions held with the authors, preceded the enactment in 1982 of section 547AA of the Crimes Act. They therefore concentrated on the effectiveness of the apprehended violence procedure under section 547 of that Act, and compared that procedure with the provisions governing injunctions under section 114 of the Family Law Act Some of the criticisms in submissions have been met by the 1982 legislation but other points of substance remain for consideration.

14.22 The submissions of chamber magistrates in New South Wales suggested that it is very common for women living in de facto relationships to seek orders protecting them against domestic violence. The oral evidence given on behalf of a women's refuge indicated that the centre encountered a large number of domestic violence cases involving de facto partners, often in conjunction with custody disputes. [28] Our surveys of legal practitioners and welfare workers supported this evidence by showing that both groups were regularly consulted on such matters, [29] although it seems to be more usual for a woman in need of protection to go directly to a chamber magistrate rather than to a solicitor.

14.23 Those with experience in advising women who are living in de facto relationships of the remedies available to them generally reported dissatisfaction with the state of the law. One commentator, a chamber magistrate, observed that many women who were (or had been) cohabiting were "indignant" when told that they did not have the same remedies available to them as married women and, in particular, could not obtain a restraining order under the Family Law Act. [30] The chamber magistrates who made submissions to us generally considered that the remedies available to married women under the Family Law Act were more effective than apprehended violence orders under section 547 of the Crimes Act. The Family Law Act was regarded as having four main advantages:

> It provides a civil remedy and thereby avoids the stigma of criminal conviction that is associated with an apprehended violence order.
>
> The court can grant injunctions without delay, if necessary on an *ex parte* basis.
>
> The standard of proof is the civil standard (the balance of probabilities) and this can be met more readily than the criminal standard required for apprehended violence orders.

> The powers of the Family Court extend, and are applied in practice, to a wide range of conduct including harassment or persistent annoyance failing short of violence. By contrast, apprehended violence orders are obtainable only where actual violence is reasonably apprehended.

There are no reliable statistics to indicate precisely the extent to which magistrates exercise their powers under the Family Law Act to grant injunctions for personal protection. A general indication can be gained from the fact that one suburban Court of Petty Sessions reported that 166 injunctions were granted under the Family Law Act in 1981, and that the "vast majority" were for the personal protection of a party to a marriage. [31]

B. Remaining Issues

14.24 There is no doubt that the enactment of section 547AA and the other reforms in the Crimes (Domestic Violence) Amendment Act 1982, has done much to overcome criticisms of the law in New SouthWales. A personwho fears a domestic violence offence need only satisfy the statutory requirements on the civil standard of proof. A complaint may be made by the person apprehending the offence, or by the police. Orders maybe obtained on an *ex parte* basis and may prohibit or restrict, not merely the repetition of violent behaviour, but a wide range of conduct by the defendant that might adversely affect the person apprehending an offence. A defendant who knowingly breaches an order commits an offence and is liable to arrest. Clearly the new provisions will constitute the principal remedy for persons fearing domestic violence, and can be expected to work smoothly once arrangements are made with the police and other agencies to ensure that they utilise the new procedures. Nonetheless, some important issues remain for consideration.

1. A Civil Jurisdiction

14.25 The first issue arises from the fact that no court in New South Wales has a specific statutory jurisdiction to provide, in *civil proceedings,* a remedy in the nature of a restraining order or injunction where de facto partners or former de facto partners are involved. Such a jurisdiction exists, in relation to married persons, under section 114 of the Family Law Act. The procedure under section 547AA of the Crimes Act has certain features characteristic of civil proceedings, but as we have noted it also retains some of the trappings of criminal proceedings. It therefore does not provide a civil remedy in the same way as the procedure under the Family Law Act A person threatened by violence from a de facto partner may possibly obtain an injunction from the Supreme Court. But, as has been seer the precise scope of this jurisdiction, assuming it exists, is unclear and may be subject to significant restrictions. In additiom it appears to have been invoked relatively rarely in New South Wales.

14.26 We have been told frequently that some women threatened with violence are reluctant to institute proceedings of a criminal or quasi-criminal character, preferring to take no action rather than to invoke the criminal law or procedures that are associated with the police or the arrest of the defendant. If no civil remedy were available, women holding this view would be effectively denied a legal remedy. For this reason (among others) it was suggested that women living in de facto relationships should have the same opportunity as married women to obtain civil remedies in respect of domestic violence. [32]

14.27 We think that this is a powerful argument. The objective of the law should be to minimise the incidence of abusive conduct. The availability of civil remedies, as an alternative to the initiation of criminal or quasi-criminal procedures, contributes to the attainment of that goal. We see no reasom in the context of the principles stated in Chapter 5, to with hold civil remedies from a woman on the ground that her assailant is her de facto partner rather than her husband. On the contrary, the effective denial of civil remedies is an injustice to which the law should respond.

14.28 We recognise that the new apprehended domestic violence procedure under section 547AA is significantly different from the old procedure established by section 547 and that the new remedy, as it becomes known and its effectiveness understood, will be widely accepted. Nonetheless, it is not difficult to envisage circumstances in which a person fearing domestic violence may prefer not to utilise the protection afforded by section 547AA, but to rely on a civil remedy. For example, we have recommended elsewhere that the Supreme Court should have jurisdiction to make orders adjusting the financial relationship of de facto partners and, in certain circumstances, to decide custody disputes between them. Where threats are made by one party, perhaps prompted by passions related to the pending proceedings, the aggrieved person may consider it inappropriate to invoke the quasi-criminal procedure in a Local Coum yet be most anxious to obtain a restraining order from the Supreme Court (and believe that such an order would be obeyed). Such a course of action might also be more convenient than initiating fresh proceedings in a separate court.

2. Molestation and Harassment

14.29 The second problem is that the powers of the court under section 547AA of the Crimes Act arise only on proof of apprehension of a domestic violence offence. Molestation and harassment not constituting an offence cannot be the subject of an order under the section. This is despite the fact that the court, once a reasonable apprehension of a domestic violence offence is proved, may make wide ranging orders including restraining the defendant from "specified behaviour ... which might affect the aggrieved spouse". [33]

14.30 As we have noted, the Family Law Act has been interpreted in practice as authorising orders restraining molestation and harassment (including persistent annoyance) falling short of violence. Orders of this kind are regularly made in favour of married persons by judges of the Family Court and by magistrates. In our view there are good reasons for giving courts powers of this kind, since harassment or persistent annoyance may be as distressing or intimidating as the threats of violence. A failed or stormy de facto relationship is as likely as a failed or stormy marriage to produce this kind of conduct and the law should be capable of providing a swift and effective response.

14.31 This view has been adopted in the United Kingdom where the Domestic Violence and Matrimonial Proceedings Act 1976 allows the court to grant injunctions restraining the defendant from "molesting the applicant". This power may be exercised where the parties have been living together in a de facto relationship. The term "molesting" has a wide meaning and is not confined to violence or threats of violence, but

> "applies to any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court". [34]

Accordingly, the Act extends to behaviour such as the sending of abusive letters, intercepting the applicant on the way to work and similar conduct "which makes life extremely difficult". [35]

3. Conclusions

14.32 For these reasons, we have concluded that despite the recent enactment of the Crimes (Domestic Violence) Amendment Act, the law should provide the parties to a de facto relationship with further protection against domestic violence. The guiding principle is that, as far as practicable, de facto partners should have essentially the same range of remedies in respect of domestic violence and harassment, and protection against the same range of conduct as is available to married persons. This means that in New South Wales

> an aggrieved de facto partner should be able to seek a civil remedy in the nature of an injunction in respect of domestic violence in appropriate cases;

courts should have power to intervene where the conduct of the defendant consists of harassment or molestation falling short of actual or threatened violence.

14.33 We think that our specific recommendations should take careful account of the provisions of the Family Law Act, since it is desirable, where possible, to promote consistency between Commonwealth and State legislation dealing with similar subject matter. Our recommendations should also take account of section 547AA of the Crimes Act, and work within the framework of that sectiorl as it is essential to avoid complications by creating overlapping jurisdictions to deal with the same problems. We now turn to the specific recommendations required to implement our policy conclusions.

IV. RECOMMENDATIONS

A. The Supreme Court

1. Orders for Personal Protection

14.34 For the reasons given in paragraphs 14.25-14.28, we recommend that the Supreme Court should be given express statutory power, in proceedings between the parties to a de facto relationship (includingthe parties to a relationship which has recently ended), to make orders for the personal protection of the applicant or the children of the parties [36] against violence, molestation and other forms of harassment. The legislation should broadly follow the form proposed for section 114 of the Family Law Act 1975, with necessary adaptations. [37] Accordingly, the powers of the Supreme Court should include a power to make an order

restraining the defendant from entering the premises occupied by the applicant (including the home occupied by the parties) or entering a specified area on which those premises are located;

restraining the defendant from entering the place of work of either the applicant or a child of the parties; or

relating to the use or occupancy of the home occupied by the parties.

These powers should be in addition to the inherent jurisdiction of the Supreme Court to issue injunctions or make orders restraining conduct which threatens the applicants legal rights.

14.35 In making this recommendation we neither expect nor suggest that an order of the Supreme Court should become the primary remedy for domestic violence or non-violent harassment. The primary remedy, especially in serious and urgent cases, will be the apprehended domestic violence procedure under section 547AA of the Crimes Act. The Supreme Court will have a discretion to grant or withhold relief and no doubt will exercise thatdiscretion to ensure that orders are notgranted in inappropriate cases. However, in some circumstances (for example, where an application is made on good grounds in conjunction with other proceedings between the parties before the Supreme Court) it will clearly be appropriate for an order to be made. We have considered whether to provide specifically that the Supreme Court's powers to make orders should be ancillary to other proceedings between de facto partners. On balance we have concluded that this is unnecessary, although we again stress our view that the jurisdiction of the Supreme Court should be exercised sparingly.

2. Enforcement

14.36 As we have seen, the Family Law Act expressly provides that if the court is satisfied that a person has knowingly and without cause contravened an order made under section 114, it may impose a fine and take other measures to secure compliance with the order. [38] The Supreme Court, however, has wide powers to enforce its orders by punishing a person in breachforcontempt. The powers include committing a person to prison or imposing a fine. [39]

While the Family Law Act preserves the power of a court to punish for contempt, [40] we think, subject to what is said in the next paragraph, that it is unnecessary in the case of the Supreme Court to confer statutory powers additional to its power to punish for contempt.

14.37 The amendments to the Family Law Act proposed in the Family Law Amendment Bill also contemplate that the court should have power, on application by a party, to authorise the arrest of the respondent without warrant forbreach of an injunction issued under section 114. If the legislation is enacted as drafted the power to authorise arrest will be exercisable only where the respondent has caused or threatened to cause bodily harm to the applicant or a child of the marriage and is likely to cause further bodily harm (paragraph 14. 18). As we have indicated, the primary remedy for serious cases of domestic violence should be the procedure established by section 547AA of the Crimes Act which by its terms, makes a deliberate breach of an order an arrestable offence, rendering the offender liable to imprisonment for up to six months. Nonetheless, there will be some serious cases coming before the Supreme Court in which it may be appropriate to provide for the arrest of the respondent should the order be breached.

14.38 The next question is how this should be done. One approach would be to follow the proposed amendments to the Family Law Act, and establish a special procedure whereby a court may attach a "power of arrest" to an injunction. Such an order would authorise the arrest of the respondent without warrant where a police officer has reasonable grounds for believing that he or she has breached the order. However we think it would be better to adopt a different procedure, in the light of section 547AA of the Crimes Act, which creates an offence of knowingly failing to comply with a restriction or prohibition in an order made under that section. [41] We suggest that it should be an offence for a person knowing y to breach the terms of an order of the Supreme Court for the personal protection of a party to a de facto relationship, or restraining the other party from entering premises. The creation of such an offence would allow a police officer who has reasonable grounds for believing that the respondent has breached the order to arrest and charge him or her with the offence. In practice, this means that breach of an order of the Supreme Court for personal protection of the kind described in paragraph 14.34, will attract the same consequences as a breach of an order made under section 547AA of the Crimes Act. Further proceedings in respect of the breach (unless for punishment for contempt) therefore can be brought before a magistrate rather than before the Supreme Court. Accordingly, we recommend that it should be an offence for a person, who has been served with a copy of an order of the Supreme Court of the kind described in paragraph 14.34, knowingly to fail to comply with the terms of the order.

B. Local Courts

1. Molestation and Harassment

14.39 Local Courts, unlike the Supreme Court, have statutory authority to make orders under section 114 of the Family Law Act on the application of a party to a marriage. They also have power under section 547AA of the Crimes Act to make orders in relation to apprehended domestic violence. For reasons we have explained, we think that Local Courts should also have power to deal with cases of molestation and harassment falling short of violence or apprehended violence between de facto partners. If there had been no recent legislation, there would be an argument in favour of creating a civil jurisdiction analogous to that created by section 114 of the Family Law Act in which the court would have power to make orders restraining such conduct by the de facto partner of the applicant. However, in view of the recent enactment of section 547AA of the Crimes Act we think it could be confusing to confer a further set of distinct powers on Local Courts. We think the best solution is to expand the circumstances in which the court can issue an order under section 547AA. Accordingly, we recommend that section 547AA of the Crimes Act, 1900, should be amended to enable an apprehended domestic violence order to be made in cases where a complainant apprehends the commission by his or her partner of conduct consisting of harassment or molestation

falling short of actual or threatened violence. The order could provide for any of the matters specified in section 547AA(3) (paragraph 14.9).

14.40 Subject to one exception we see no reason why the remaining provisions of section 547AA should not apply to a complaint made in respect of molestation or harassment falling short of a domestic violence offence. The exception is that the making of such a complaint should not render the defendant liable to arrest before a hearing. The appropriate procedure to ensure the defendants attendance should be, at least in the first instance, the issue of a summons. On the other hand, we do not think it inappropriate that a deliberate breach by the defendant of an order made in consequence of apprehended non-violent molestation or harassment should constitute a criminal offence. The nature of the order and the conduct to which it applies will not necessarily differ according to whether the order is made as a result of apprehended domestic violence or apprehended molestation or harassment. Moreover, a breach of an order made in consequence of apprehended molestation or harassment may have very serious consequences for the applicant. We therefore recommend that the provisions of section 547AA should apply to a complaint made in respect of apprehended molestation or harassment falling short of a domestic violence offence, except that such a complaint should not render the defendant liable to arrest before the initial hearing.

2. A Drafting Problem

14.41 Finally, we refer to a drafting matter which may indicate a weakness in section 547AA of the Crimes Act. The definition of a “domestic violence offence”, upon which the courts jurisdiction under the section depends, refers to certain kinds of offences

> “committed upon a person *at a* time when the person who commits the off ence and the person upon whom the of fence is committed are married to each other or, although not married to each other, are living together as husband and wife on a *bona fide* domestic basis”. (Emphasis added). [42]

The difficulty is that an offence committed by, say, a man on his former de facto partner (or his former spouse) will not constitute a domestic violence offence for the purposes of the legislation. Accordingly, if a woman fears violence from her former de facto partner (or former spouse), this probably does not constitute apprehension of a domestic violence offence within section 547AA(1). We think it would be in accordance with the spirit of the amendments to the Crimes Act if the legislation extended to people who, for example, had lived together as de facto partners until a short time before the threatened violence. We recommend that the legislation be amended accordingly. It may be appropriate at the same time to extend the legislation to cover threatened violence between former spouses. If so, it would be appropriate to amend the definition of a domestic violence offence to include specified offences

> “committed in circumstances where the person who commits the offence and the person upon whom the offence is committed are or have been married to each other or, although never having been married to each other, are living together or have lived together as husband and wife on a *bona fide* domestic basis”.

V. SUMMARY

14.42 The legal remedies against domestic violence in New South Wales have recently been extended and improved by the passage of the Crimes (Domestic Violence) Amendment Act, 1982. This Act applies both to married persons and people living in de facto relationships. Despite this legislation de facto partners 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 to provide, in *civil proceedings,* a remedy in the nature of an injunction; and

the powers of Local Courts 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 and accordingly, we suggest 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 harassment falling short of actual violence.

FOOTNOTES

1. Domestic Violence Committee (SA), Report and Recommendations on *Law Reform* (1981); Joint Select Committee on the Family Law Act, *Family Law in Australia* (1980), vol.1. paras.6.17-6.23; *Report from the House of Commons Select Committee on Violence in Marriage* (H.C. Papers (Session 19.74-1975) 553); Scottish Law Commission, Report *on Occupancy Rights in* the Matrimonial Home and *Domestic Violence* (Scot Law Com. No.60,1980); Justices Act Amendment Act (No.2) 1982 (SA) (inserting a new s.99 into the Justices Act 1921-1982 (SA)); Domestic Violence and Matrimonial Proceedings Act 1976 (U.K). See *Davis v. Johnson* [1978] 1 All ER 1132 (HL); H A Finlay, “The Battered Mistress and the Violent Paramour”, (1978) 52 *Australian Law Journal* 613.

2. *Report of New South Wales Task Force on Domestic Violence* (1981).

3. *Id*., paras.3.1, 3.7.

4. See the Explanatory Note relating to the Bill for the Act as introduced into Parliament.

5. Crimes Act, 1900, s.4(l) (definition of “Domestic violence offence’). See para. 14.41.

6. *Id*., s.407AA. The de facto partner was compellable under the pre-existing law, but could not apply to be excused.

7. *Id*., s.357F.

8. *Id*., ss.357G and 357H.

9. *Id*., s.547AA.

10. The provisions of the Bail Act, 1978 apply to a person arrested pursuant to such a warrant CrimesAct 1900, s.547AA(14)(b).

11. See para.14.7 and note 5 above.

12. Crimes Act, 1900, s.547AA(3). Before making an order restricting the defendants access to his place of residence, the court must consider the accommodation needs of all parties and the effect of an order on any children, s.547AA(4).

13. *Id*., s.547AA(7).

14. See note 1 above. The South Australian legislation has significant differences. For example, it is not confined to complaints made by or on behalf of spouses and de facto partners of the defendant. Moreover, it extends to cases where the complainant fears not only personal injury, but also damage to property or behaviour likely to lead to a breach of peace: Justices Act 1921-1982 (SA), s.99(1).

15. Crimes Act, 1900, s.547AA(15).

16. *Egan v. Egan* [1975] 1 Ch 218, *Zimitat v. Douglas* [1979] QCLR 454l; *Parry v. Crooks* (1981) 27 SASR 1. Cf. *Fitzwilliam v. Beckman* [1978] QCLR. 398; *Daley v. Martin* (No.1) [1982] Qd.R. 23.

17. *Parry v. Crooks* (1981) 27 SASR 1, at pp.7-9; *Corvisy v. Corvisy* [1982] 2 NSWLR 557. Depending on the circumstances, the court may be prepared to grant an injunction to restrain a trespass or a nuisance. as opposed to an apprehended assault or molestation.

18. The Family Law Act 1975 (Cth) confers a separate power on the court to issue injunctions in proceedings claiming other relief (such as an orderwith respect to property) “in any case in which it appears to the court to be just or convenient to do so; s.114(3).

19. *Wilmoth and Wilmoth* [1981] FLC 91-030, at p.76,287, per Strauss J; see also P E Nygh, *Guide to the Family Law Act* 1975 (3rd ed 1982), para.1013.

20. See eg. *O’Dea and O’Dea* [1980] F.LC. 90-896: cf. *Healey and Healey* [19791 F.LC. 90-706. Violence need not be established for the court to grant an exclusive occupancy order. but it will clearly be a relevant factor *Rowe and Izowe* [1980] FLC 90-895, applying the principles of *Davis and Davis* [1976] FLC 90-062. Compare the terms of s.547AA(3),(4), para. 14.9 above.

21. Family Law Act 1975 (Cth), s.39(1), (2), (6). As to a State Family Court (currently established only in Western Australia). See s.4l. A court of summary jurisdiction may not continue to exercise jurisdiction with respect to property exceeding $1.000 in value where the respondent appears and seeks an order different from that sought by the applicant: s.46(1).

22. See Family Law Council, *Jurisdiction of Magistrates under the Family Law Act* 1975 (Working Paper No.6, 1980). p.2-5.

23. Family Law Amendment Bill 1983. Cl.14, proposing to insert a new subsection (7) in the Family Law Act 1975 (Cth), s.39.

24. *Id*., cl.57, proposing to insert a new s.114(1) in the Family Law Act 1975 (Cth). Of course the court already has power to grant such injunctions where necessary for the personal protection of a party.

25. *Id*., cl.58, proposing to insert a new s.114AA in the Family Law Act 1975 (Cth).

26. Constitution, s.109. It is presumably with this in mind that the Family Law Act 1975(Cth), s.114(6) provides that the penalties stipulated in the section for a wilful breach of an order do not prevent a prosecution under any other law.

27. Principally Mr G Johnson (Chamber Magistrate and Clerk of Petty Sessions), Submission No.7; Mr. R Grigg (Chamber Magistrate), Submission No.12; Mr. A- Cullen (Chamber Magistrate and Clerk of Petty Sessions), Submission No. 13, Blacktown Community Cottage Women’s Refuge, Submission No.29.

28. Blacktown Community Cottage Women’s Refuge, Submission No.29.

29. 235 respondents who had advised on “de facto problems” in the preceding twelve months reported at least 244 occasions on which they had been consulted in relation to domestic violence.

30. Mr G Johnson (Chamber Magistrate and Clerk of Petty Sessions), Submission No.7, p.3.

31. Mr A Cullen (Chamber Magistrate and Clerk of Petty Sessions), letter, 27 July 1982.

32. In addition to other submissions cited, see Australian Legal Workers' Group, Submission No.54.

33. Crimes Act, 1900, s.547AA(3) (c).

34. *Horner v. Horner* [1982] 2 WLR 914, at p.916, per Ormrod LJ.

35. *Ibid.*

36. The children of the parties should include children of either party or children ordinarily residing within the household.

37. See paras.14.14-14.18.

38. Family Law Act 1975 (Cth), s.114(4), para. 14.17, above.

39. Supreme Court Rules, Part 55, Divisions 3, 4.

40. Family Law Act 1975 (Cth), s.114(5).

41. See Crimes Act, 1900, s.547AA(7).

42. Crimes (Domestic Violence) Amendment Act, 1982, Schedule 1(1), inserting the definition in Crimes Act, 1900, s.4(1).

15. Parents and Children

I. CUSTODY, GUARDIANSHIP AND MAINTENANCE OF CHILDREN

A. Introduction

15.1 The law governing the custody, guardianship and maintenance of the children of a de facto relationship is complex and widely regarded as unsatisfactory. The complexity arises from both the constitutional division of legislative powers between the Commonwealth and States and the fragmented nature of the State law on this topic. In this section we examine the existing Commonwealth and State law with a view to identifying its major deficiencies. We refrain, however, from making substantial recommendations since our terms of reference require us to take account of the proposed reference of family law powers to the Commonwealth (paragraphs 1.1, 2.13). As we shall explain the proposed reference, if it proceeds, should overcome the major deficiencies in the existing law and should ensure that questions of custody, guardianship and maintenance are no longer matters of State law. In preparing this Chapter we have assumed that the reference of powers will proceed. If it does not, further consideration will have to be given to the means of overcoming the deficiencies in State law.

15.2 One preliminary point needs to be made if the deficiencies of the existing law are to be fully appreciated. Children living within the household of de facto partners fall into several categories. Without being exhaustive, the following cases may arise in relation to a child whose custody or maintenance is in dispute:

> The child was born to the de facto partners, whether before or after they commenced living together. The information in Chapter 3 suggests that approximately 18 per cent of de facto households contain children born to the partners (paragraph 3.26).
>
> The child was born within a marriage to one of the partners and later formed part of the household of the de facto partners.
>
> The child was born outside marriage to one of the partners and later formed part of the household of the de facto partners.
>
> The child was not the natural child of either party, but formed part of their household Such a child might or might not have been born within a marriage and might or might not continue to have a relationship with the natural parents.

In addition to households of de facto partners Containing children born to the partners, a further 18 per cent of de facto households contain children (paragraph 3.26). In all 36 percent of de facto couples have dependent children living in the family. Some are families with children of the relationship only, some have only children born of a previous marriage or relationship of one or both partners; some have children in both categories. However, for present purposes, the major distinction that needs to be drawn is between children who are born within a marriage and those who are not. This, subject to certain qualifications, determines whether questions of custody, guardianship and maintenance are to be governed by Commonwealth or by State law.

B. Commonwealth and State Jurisdiction

1. Jurisdiction Under the Family Law Act

15.3 The Family Law Act is concerned with custody disputes relating to a “child of the marriage”. The structure of the legislation is, however, rather complex The Family Law Act provides that any “matrimonial cause” must be instituted under the act. A matrimonial cause may be heard only in the Family Court or, in certain cases, in a State court of summary jurisdiction invested with federal jurisdiction under the act. [1] The term “matrimonial cause” includes proceedings between current or former spouses with respect to

> “the custody, guardianship or maintenance of or access to, a child of the marriage”. [2]

It also includes “any other proceedings ... in relation to concurrent, pending or completed proceedings” of a kind referred to specifically in the definition of a matrimonial cause. [3] A “child of the marriage”, for the purposes of custody and maintenance proceedings, refers only to the natural and adopted children of both parties, [4] although important changes have been proposed in the Family Law Amendment Bill 1983 (paragraph 15.37).

15.4 There are therefore clear limitations on the scope of the Family Court’s jurisdiction to deal with disputes relating to the custody and maintenance of children. For example, a child born to de facto partners and residing with them is not a “child of the marriage” and a dispute between the partners relating to the custody of the child can be dealt with only by State courts applying State law. Similarly, under the current definition of a “child of the marriage”, a dispute between spouses over the custody or maintenance of one spouse’s ex- nuptial child (such as a child born during a previous de facto relationship) falls outside the scope of the Act and must be determined under State law. Again, a claim instituted by a third party against a married couple for custody of a child of the marriage (such as a claim by the former de facto partner of one spouse) is nota matrimonial cause since the proceedings are not “between” the spouses. [5]

15.5 Other limitations are not so clear. There has been considerable uncertainty, for example, as to when custody proceedings can be said to be “in relation to” prior custody proceedings between spouses. [6] Thus, doubts have arisen where, after the death of a spouse, a surviving spouse is in dispute with a third party such as a grandparent (a custody order under the Family Law Act having previously been made in proceedings between the spouses); [7] or where a third party wishes to seek a variation of orders made in the original custody proceedings, [8] or to obtain a specific type of order not available in the Family Court, [9] or to dispute an implied finding of paternity reflected in the original order. [10] We return later to some of these questions.

2. State Jurisdiction

15.6 Where a custody dispute does not constitute a “matrimonial cause” within the meaning of the Family Law Act, it will be determined by a State court, in accordance with State law. We consider the relevant State law later in this Chapter (paragraph 15.9).

C. The Law of Custody and Guardianship

1. Commonwealth Law: The Family Law Act

15.7 The general principle stated in the Family Law Act is that each of the parties to a marriage is a guardian of any child of the marriage, and the parties have the joint custody of the child. [11] Of course, this principle may be modified by an order of the court. The Act uses the word “custody” in a broad sense, to include not only the power of physical control over an infant but for example, the power to control education, the choice of religion and the administration of property. [12] The word “guardian” is interpreted more narrowly. In general, it refers to the person having the responsibility to assert the rights of the child against third parties, for example, by undertaking litigation or consenting to medical treatment. In practice the distinction between custody and guardianship is not often of significance for the purposes

of the Family Law Act, although the terms are not always used consistently by legislatures and courts.

15.8 Where proceedings are brought to contest custody or guardianship of, or access to, a child, the court is required to "regard the welfare of the child as the paramount consideration". [13] The court has power to require the parties to attend a conference with a welfare officer or court counsellor and may also obtain a report from a court counsellor for use in the proceedings. [14] The Act specifically permits the court to order that the child be separately represented in those proceedings. [15] Custody disputes involving children of a marriage are therefore generally processed and determined by a specialist court which has wide ranging powers and can call on the services of counsellors and welfare officers in an effort to minimise the disruption inherent in family breakdown. While some parties may still face difficulties because of delays in obtaining a hearing date or the expense of legal representation [16] the Family Law Act nevertheless represents a concerted attempt to resolve custody disputes using procedures which cause the least harm to the child.

2. State Law

Types of Proceedings

15.9 In contrast State law concerning custody and guardianship is complex and confusing, with several courts having power to hear and decide cases. First custody orders (including orders relating to the guardianship of a child) may be made by the Supreme Court in what is variously referred to as its inherent or prerogative or wardship *or parens patriae* jurisdiction. These terms are often used synonomously to describe a wide and unrestricted jurisdiction, derived from the Chancery Court in England, to intervene to protect the welfare and interests of children. [17] Indeed, the Supreme Court may make a custody order which is inconsistent with and which has the effect of superseding an order of a Children's Court. The Supreme Court has said that an order of this kind would be justified only in special circumstances. On the other hand, the court does not require special circumstances to make an order, pursuant to its prerogative jurisdiction, of a kind a Children's Court is not empowered to make, if the purpose of the order is to aid or supplement an order of a Children's Court An example would be an application for an injunction to aid in the enforcement of an access or custody orders. [18] While the court may hear applications from any person with an interest in the childs welfare the jurisdiction apparently does not extend to making maintenance orders. [19] There is also some difference of opinion as to whether the making of a wardship order, whereby the court technically becomes the childs "guardian", is a necessary precondition to the making of other orders, such as those relating to access or care and control. [20]

15.10 Secondly, custody proceedings may be brought under the Infants' Custody and Settlements Act, 1899, the terms of which are derived from English legislation of 1839 and 1891. [21] Section 5 of the act confers jurisdiction on the Supreme Court to determine disputes, but proceedings may be instituted only by the mother or father of the child, or by a relative seeking access on the death of a parent. An order for periodic child maintenance maybe made, but only against the father in conjunction with a custody order in favour of the mother. Section 10A extends this jurisdiction to the District Court and to courts of petty sessions (soon to become Local Courts), sitting as a Children's Court, in each case being the court nearest to the respondents place of residence. The submissions of chamber magistrates show that this latter requirement causes inconvenience and expense to a person seeking custody of a child who has been taken to a remote part of the State. [22] In addition, it is not unknown for simultaneous applications to be made by both parents with respect to the same child in different courts. Magistrates' powers under the Act are further restricted in that any maintenance order made in conjunction with a custody order may not exceed two dollars per week. [23] Magistrates are also not given powers to punish breach of an order as a contempt of court.

15.11 Proceedings under section 5 of the Infants' Custody and Settlements Act, 1899, were originally restricted to those concerning a child born within a marriage. However, the court of Appeal has now held that one effect of the Children (Equality of Status) Act, 1976, is to allow claims concerning ex-nuptial children (such as the children of de facto partners) to be brought under section 5. [24]

15.12 Thirdly, the Testator's Family Maintenance and Guardianship of Infants Act, 1916, provides for the guardianship of minors after the death of either the father or mother. Section 13 states the, general rule that the surviving parent is the guardian of the minor, either alone or jointly with any guardian appointed by the deceased parent. Where there are joint guardians, and they are unable to agree upon a question affecting the welfare of a minor, they may apply to the Supreme Court for directions. The court, by virtue of section 17, has power to make such order as it thinks proper, including, where one of the guardians is the child's mother or father, orders for periodic maintenance, custody and access. Section 21 also allows the court to order access in favour of grandparents if either of the parents has died. Of course, where children of a marriage are concerned, the Act can only apply to disputes which do not amount to a "matrimonial cause" under the Family Law Act.

15.13 Finally section 22 of the Maintenance Act 1964, permits a Children's Court to make a custody order, on application by a married parent of a "child of the family", provided that the applicant has also received an order for maintenance. "Child of the family" includes "any child of either party who has been accepted as one of the family by the other party", that is, step-children. The term "child of the family" therefore may extend to a child born within a previous de facto relationship of one of the spouses.

Status of Children Legislation

15.14 The law concerning the custody and guardianship of ex-nuptial children has been affected in a number of respects by the Children (Equality of Status) Act, 1976 (in addition to that noted in paragraph 15.11). Section 6, the key section of the Act, provides that

> "whenever the relationship of a child with his father or mother, or with either of them falls to be determined by or under the law of New South Wales... that relationship shall be determined irrespective of whether the father and mother of the child are or have ever been married to each other ..."

Before the passage of this legislation the position of a father claiming custody of an ex-nuptial child was not altogether clear, but was generally less advantageous than that of a father of a nuptial child, even where the ex- nuptial child had lived in a stable de facto household. [25] The authorities recognised that the mother of an ex-nuptial child had the right-to custody and guardianship until a contrary court order was made, and although the presumption was weakened in recent times it was still commonly felt that the court should lean in favour of granting custody to the mother. The High Court has now held that the equality of status legislation has the effect of "equating the relationship between an ex-nuptial child and its parents". [26] The Court of Appeal has recently decided, on the basis of this principle, that section 6 of the Children (Equality of Status) Act

> "imports into the relationship between an illegitimate child and its parents so much of section 61(1) of the Family Law Act as affects or regulates the relationship between a legitimate child and its parents.. [Section] 61(1) constitutes the parents of a legitimate child its joint guardians. The effect of section 6 is to constitute both parents of an illegitimate child its joint guardians." [27]

15.15 There is now little doubt that the general principles applicable to a custody dispute between de facto partners in relation to their ex-nuptial child will be very similar, if not identical to those governing a custody dispute between married spouses over a child of the marriage. [28] This is so notwithstanding the antiquated language of parts of the Infants' Custody and

Settlements Act, 1899. Like the Family Law Act, this act refers to the importance of the welfare of the child in determining custody disputes, unlike the Family Law Act, it also contains a number of provisions directing attention to the conduct of the parties, or implying that parental rights should be paramount (especially where a third party may be involved) unless forfeited by neglect or misconduct. [29] However, recent Supreme Court decisions have applied similar principles to those applicable in the Family Court, [30] and thus give support to the recommendation contained in the submission from the Australian Council of Social Service that references to misconduct in the Act should be deleted, with conduct only being taken into account by the court to the extent that it relates to parental capacity. [31]

Summary

15.16 To summarise, custody orders in State courts may be made by several courts pursuant to several enactments, with varying restrictions on the parties who may apply and the form in which orders may be made. Furthermore, as will become clear, while custody orders may be obtained from a variety of courts, not all those courts have power to, make appropriate child maintenance orders. The legislation is clearly out of date and contains much language that reflects principles of law no longer regarded as acceptable. While custody cases between married persons are usually determined by the Family Court, which is a specialist court with counselling facilities and special procedures, these facilities are not available to any of the State courts which have custody jurisdiction Consequently it is fair to say that, in so far as court proceedings can advance the welfare of children, children of de facto relationships in general are at a significant disadvantage compared with children of a marriage. If the reference of powers to the Commonwealth does not proceed, it will clearly be necessary to decide how the State law of custody and guardianship should be changed to accord with modern notions of the welfare of children (see paragraphs 15.49-15.51).

D. Child Maintenance

1. Commonwealth Law - The Family Law Act

15.17 In respect of children of a marriage, section 73 of the Family Law Act provides that both spouses are liable accord in to their respective financial resources, to maintain children of the marriage, under the age of 18 years. In determining whether to make an order for child maintenance, and if so for how long and for what amount, the Family Court is directed to consider a number of matters. [32] These include the financial resources and needs of the child and the manner in which the child is being or is expected to be educated, as well as the needs and financial resources and earning capacity of the parent or parents, and any other orders made under the Act affecting the parties. Claims for child maintenance are usually brought by the custodial parent on behalf of the child, although the Act contemplates that a child of the marriage May also bring maintenance proceedings in his or her own right against one or both of the parties to the marriage. [33] Interim maintenance maybe awarded in a situation of urgency and maintenance orders may take the form of a lump sum, periodic payment, transfer of property by way of security, or other arrangement. [34] A maintenance order may continue to apply to a child over the age of 18 years if it is necessary for the completion of education or if the child is mentally or physically handicapped. [35]

15.18 Maintenance orders for children are often made in the course of adjusting the property interests of the spouses. Indeed, the court s power to order a settlement of property or a lump sum payment may be exercised in a way that takes account of the parties' obligation to maintain their children. For example, in one case, a lump sum payment to a wife was reduced in recognition of the fact that the husband had custody of the children and had accepted responsibility for their support. The reduction in the lump sum payment was said "to liquidate the wife's, maintenance obligation to the children", although the court acknowledged that the order could not rule out altogether the possibility of a future application for maintenance on behalf of the children if circumstances changed. [36] An order settling the parents' property interests may therefore operate, in effect, to discharge one parent's future responsibility to

maintain a child of the marriage, although in recent times the Family Court has been reluctant to make such orders. [37]

15.19 The courts power to order a settlement or transfer of property extends to making an order for the benefit of a child of the marriage. However, the Full Court of the Family Court has made it clear that

> "[t]here is no obligation on a party to contribute to the building up of an asset for the children of the marriage. Children are entitled to be maintained and educated by their parents, but after their full time education is complete, except in unusual cases, they have no further claim on their parents....." [38]

The Full Court noted that, unless there are exceptional circumstances, the creation of a trust by the court for the benefit of children should be restricted to such purposes as securing maintenance where there is a likelihood that a spendthrift parent might dissipate substantial assets. [39]

2. State Law

15.20 Maintenance cases in State courts in New South Wales generally proceed in a fashion and according to principles different from those prescribed by the Family Law Act, Maintenance orders can be made under the Infants' Custody and Settlements Act, 1899, and the Testator's Family Maintenance and Guardianship of Infants Act, 1916, although those Acts do not specify the principles to be applied by the court. Most State maintenance cases, however, are brought under the Maintenance Act, 1964. Under this Act a Children's Court (constituted by a Stipendiary Magistrate) may hear a complaint against a parent on behalf of an ex-nuptial child that the child "has been left without adequate means of support" without "just cause or excuse". [40] It follows that a child born of a de facto union has a right to claim maintenance against each of his or her parents, if the child has been left without adequate means of support and the parent has no "just cause" for so leaving the child. Further, a child whose parent marries and who is accepted by the parents spouse as a "child of the family" may also claim maintenance against that step parent. [41] However, where a child's parent enters a de facto relationship, the child has no claim for maintenance against the "de facto step parent".

15.21 In determining whether a child has been left without adequate means of support, the court is directed to take account of the "accustomed condition in life" of the child. [42] In deciding the amount of any order, the court is also to consider the means and earning capacity of the child, and of the parents. [43] Orders for child maintenance are normally made on a periodic basis and cease when the child turns 18, but may be extended for limited periods up to the age of 21 where necessary for education or training. [44] There is no provision for the court to require the transfer of property by way of security for the payment of maintenance. *Ex parte* orders for preliminary maintenance, and interim orders for child maintenance appear to be available only for a child living within a marital household. [45]

15.22 If a question of paternity arises, the issue may be decided by the Supreme Court under the Children (Equality of Status) Act, 1976, or by the Children's Court under the Maintenance Act, 1964. The 1976 Act provides for presumptions as to parenthood, including a presumption in relation to a child born during or after a period of cohabitation between the mother and a man to whom she was not married. The presumption is in the following terms: [46]

> "[w]here a woman gives birth to a child and, at any time during the period of 24 weeks commencing with the beginning of the forty-fourth week before the birth of the child, she cohabited with a man to whom she was not married, the child shalt for all purposes, be presumed to be the child of that woman and that man."

Thus, a child born t o a woman living in a de facto relationship will have the benefit of the presumption of paternity in respect of the woman's partner, if the relationship was in existence during the relevant period. The Act provides also for acknowledgement of paternity, the evidentiary effect of maintenance orders and the use of blood tests to assist in determining paternity or maternity. [47]

Defects

15.23 The State law of child maintenance suffers from the same confusing fragmentation as the law of custody. There is a clear need for rationalisation of the legislation. In addition, there are several differences between the conduct of child maintenance proceedings under State law and maintenance proceedings under the Family Law Act which indicate the need to reconsider the principles embodied in State law. These differences are as follows:

> While the Family Court can deal with a claim for child maintenance in the context of other issues affecting the family, such as custody or property settlement, claims under State law are usually heard in the Children's Court which has no power (or very restricted powers) to deal with other issues affecting the family.
>
> The Family Courts powers to make provision for children are broader and more flexible than those available to State courts.
>
> There are differences between the criteria applied by the Family Court and, for example, by the Children's Court under the Maintenance Act 1964. In particular, the State Act embodies older notions relating to parental fault and misconduct, which characterised Australian family law before the Family Law Act, as a precondition to the award of child maintenance.

As with State laws relating to custody, it will be necessary, if the intended reference of powers does not proceed, to consider how State maintenance law should be rationalised and brought into line with developments in other areas of Australian family law (see paragraphs 15.49-15.51).

E. The Divided Jurisdiction

1. The Problems

15.24 We have referred to the jurisdictional difficulties created by the Constitution and by the terms of the Family Law Act which have, of course, been influenced by the scope of the Commonwealths legislative power. These difficulties have provoked strong judicial criticisms and calls for reform to remedy an unacceptable position. The problems are not confined to disputes relating to the children of persons living in de facto relationships, but they frequently affect such cases. We refer below to some examples.

15.25 In the recent High Court case of *Fountain v. Alexander*, [48] the mother of a child had been awarded custody when she was divorced from the father in 1971. She later entered a de facto relationship, which resulted in the birth of a second child. When the de facto relationship broke up in 1975, both children stayed with the de facto husband. In 1981 the de facto husband, who had since married another woman, commenced proceedings in the Supreme Court of New South Wales asking that both children be made wards of court (that is, be brought under the protection and supervision of the court), and that care and control of the children be given to him and his wife.

15.26 It was clear that the Supreme Court had jurisdiction to determine the custody of the child of the de facto relationship, since there was no basis for holding that child to be a "child of the marriage" within the Family Law Act (but compare paragraph 15.37). However the High Court unanimously held that the Family Court had exclusive jurisdiction to determine the

custody of the other child. The application in respect of that child constituted proceedings "in relation to" the custody proceedings decided ten years previously between the former spouses, and was therefore within the definition of "matrimonial cause" in the Family Law Act (paragraph 15.3). The Chief Justice commented on the unfortunate position of the litigants:

> "This case provides yet another example of the confusion and inconvenience that is caused by the fact that jurisdiction in cases relating to the custody of children is divided between state and federal courts. Not only are the parties left uncertain as to the proper forum thus causing costs to mount and delays to increase, but there is no one court which can determine the custody of the two children in the present case, notwithstanding that they are half-brother and half-sister." [49]

Earlier, in the Supreme Court, the Chief Judge in Equity had used even stronger language, referring to the "disgraceful state" of the law and apologising to the parties for the entirely unsatisfactory situation that had arisen. [50]

15.27 A further source of confusion has arisen in cases where one spouse or a third party disputes paternity of a child. In a recent case, the wife's second husband claimed paternity of a child born during the wife's first marriage and instituted proceedings in the Supreme Court of New South Wales in respect of that child. The first husband invoked the jurisdiction of the Family Court in relation to the children of the first marriage, including the child whose paternity was disputed. The Supreme Court judge held that he had jurisdiction to determine paternity of the child, but made these observations:

> "The fact that all of these proceedings cannot be heard in the one court at the same time is a cause of anguish and hardship to the parties, is detrimental to the interests of the children results in grossly excessive trouble, expense and legal costs for all concerned and is a public scandal because it is capable of being set right. The spate of litigation in the present case speaks for itself without my having to add my voice of protest to those of the judges who have already forcefully drawn attention to the absurdity of having conflicting jurisdictions between State and Federal Courts on family law in an affluent country which claims to have an advanced and civilised legal system." [51]

15.28 Where the Family Court has already made a maintenance or custody order on the basis that a child is a "child of the marriage", a question arises as to whether the implied finding of paternity can be challenged by proceedings in a State court. The High Court by a majority, has recently held that, where the State proceedings are brought for the, purpose of contesting custody of a child who is subject to an order of the Family Court, they come within the definition of "matrimonial cause" because they relate to the earlier Family Court proceedings. [52] Accordingly, the issue cannot be determined by a State court and the proper course is to challenge the custody order in the Family Court itself. The result in the particular case was that the proceedings were found to have been instituted in the wrong court.

15.29 Further examples of difficulties are provided by two cases, *Vitzdamm-Jones v. Vitzdamm-Jones* and *St. Clair v. Nicholson,* decided by the High Court at the same time. [53] In each case a separately constituted majority decided that the proceedings had been commenced in the wrong court. The cases, although not concerned with children of de facto relationships, illustrate the problems confronting professional advisers in determining the court in which proceedings should be commenced.

15.30 It is clear that on any view, the jurisdictional difficulties in cases involving the custody, guardianship and maintenance of children are intolerable. It is bad enough that children of a marriage are generally dealt with under one system and ex-nuptial children, including children born within a de facto relationship, under another. As we have seem the principles and procedures applied in the Family Court are different from those in State courts, which lack the specialised facilities (including counselling and support services) provided under the Family Law Act Consequently, despite the formal abolition of the legal disabilities of ex-nuptial

children the legal system does less to protect their welfare when custody disputes arise than it does to protect the welfare of children of a marriage.

15.31 When it is considered that the jurisdictional division sometimes prevents a single court dealing with all the children within the one household the position becomes, to use the word of the Chief Judge in Equity, “disgraceful”. The uncertainty and confusion that has arisen from the drawing of the line between State and federal jurisdiction has only served to emphasise the urgent need for reform to avoid inconvenience, waste of resources and distress to the parties involved.

2. Solutions

15.32 A number of remedies have been proposed to overcome or alleviate the problems caused by the divided Jurisdiction. The more significant proposals include the following: [54]

amend the Constitution to confer further power on the Commonwealth to legislate with respect to other aspects of family law, including the custody, guardianship and maintenance of children;

establish a State Family Court to take over, in relation to New South Wales, the jurisdiction of the Family Court of Australia;

establish a system of dual commissions for Family Court Judges;

enact State legislation conferring jurisdiction on the Family Court in family matters presently falling within State jurisdiction;

amend the Family Law Act to take advantage of the full extent of Commonwealth powers;

refer the State’s powers over areas of family law (including custody, guardianship and maintenance of children) to the Commonwealth.

We consider each of these possibilities in turn.

Amendment of the Constitution

15.33 The Joint Select Committee on the Family Law Act discounted the possibility of a constitutional amendment, because of the low success rate of referendums held to approve proposals to amend the Australian Constitution. [55] However, a proposal to this effect was considered but not endorsed at the Constitutional Convention held in Adelaide in April 1983. [56] The experience of the Convention shows the difficulties facing attempts to amend the Constitution.

A State Family Court

15.34 When the Family Law Act came into force, each State was invited to set up a State Family Court which could then be given federal jurisdiction under the act. [57] This arrangement not unlike that which occurred under the Matrimonial Causes Act 1959 in relation to State Supreme Courts, has to date been adopted only by Western Australia. [58] In that State, the judges exercise federal jurisdiction under the Family Law Act, in addition to exercising State jurisdiction over ex- nuptial children, adoption and other family law matters governed by State law. This has the advantage that disputes over custody or maintenance of all the children within a single household can be heard in the one court at the same time, even though “children of the marriage” will be covered by the Family Law Act and other children b State law. Difficulties may, of course, still arise because of differences in the relevant provisions of federal and State legislation and in relation to appeals, with different courts hearing appeals from decisions on questions of State and federal law. The Joint Select

Committee concluded that a State Family Court was at best only a partial solution to the jurisdictional problems, given what it saw as the advantages of a uniform federal family law jurisdiction for Australia, and the practical and political difficulties of dismantling the present Family Court. [59] As far as we are aware, there has been no suggestion that New South Wales would view favourably the establishment of a State Family Court. However, one of our submissions included a paper by the Chief justice of New South Wales arguing in favour of such action. [60]

Dual Commissions for Judges

15.35 The Joint Select Committee on the Family Law Act referred to a scheme under which judges of the Family Court would receive dual commissions under Commonwealth and State law. This would enable the judges to exercise powers granted under State law and thus overcome jurisdictional difficulties. The Committee did not consider the scheme in depth since there was no evidence that the States, whose co-operation would be required, were prepared to participate. [61] However, the Committee did publish an opinion that a scheme of this kind would be constitutionally valid. [62] Because of the proposed reference of powers (detailed in Chapter 2), we do not consider the suggestion further in this Report. If that reference does not proceed, the proposal should be reconsidered.

State Legislation Conferring Jurisdiction on the Family Court

15.36 We have considered the possibility of the New South Wales Parliament legislating directly to confer jurisdiction on the Family Court in respect of family law matters within the State's control such as the custody, guardianship and maintenance of ex-nuptial children Such a solution appears not to be constitutionally feasible, since the Commonwealth has exclusive power, under Chapter III of the Constitution to determine the jurisdiction of federal courts. [63]

Amendment of the Family Law Act

15.37 The proposals embodied in the Family Law Amendment Bill 1983 reflect the view that the Commonwealth should exercise its existing constitutional powers to the full. The proposed amendments, if enacted, would have two important consequences in the present context. First, in many cases it would be open to strangers to a marriage, such as a grandparent or the de facto partner of one spouse, to initiate proceedings in relation to a child of that marriage. [64] Secondly, the definition of "child of the marriage" would be extended to include a child born to or adopted by one spouse if the "child was ordinarily a member of the household of the husband and wife". The definition would also include any other child who was "treated by the husband and wife as a child of their family" and at the relevant time, was ordinarily a member of their household. [65]

15.38 These amendments if enacted and found to be constitutionally valid would extend the jurisdiction of the Family Court significantly. This can be seen by referring to the facts of *Fountain v. Alexander* (paragraph 15.25). In that case a child born during a de facto relationship remained in the care of the father. Later the man married a woman other than the child s mother. The child became a member of the household of the man and his new wife. Such a child would come within the extended definition of "child of the marriage" and therefore be subject to the jurisdiction of the Family Court. Nonetheless, the amendments cannot overcome all the difficulties created by the divided jurisdiction. In particular, they do not permit the Family Court to make orders in respect of ex-nuptial children who have never formed part of a marital household.

The Reference of Powers by the State to the Commonwealth

15.39 The final proposal to consider is the reference of powers by the State to the Commonwealth discussed in Chapter 2. The draft agreement under discussion by several

States and the Commonwealth provides that the States concerned will refer to the Commonwealth powers in respect of

> "(a) the maintenance of children and the payment of expenses in relation to children and child bearing; and
>
> (b) the custody and guardianship of children."

As we have noted (paragraphs 2.17-2.20) the reference of powers, if it proceeds, would not, as presently drafted, give the Commonwealth power over all matters relating to children. Under the terms of the agreement, State laws of adoption, wardship, and child welfare would not be affected. Further, certain restrictions are contemplated in relation to those powers which are referred to the Commonwealth. For example, any Commonwealth law made under the referred power to deal with custody, guardianship or maintenance of children is not, "so far as practicable" to differentiate between nuptial and ex-nuptial children. Maintenance obligations are to be imposed only on parents and step-parents of children, and are not to be enforceable (except as to arrears) against a deceased person's estate. The draft agreement also provides that a State court s powers to make a child a ward of court are not to be affected where the order is sought for a purpose "other than ... providing for the maintenance, custody or guardianship of the child". The most important restriction is that the terms of any Commonwealth law proposed to be enacted pursuant to the reference of powers must have the approval of each participating State. Each State would retain the right to revoke the, reference of powers by giving the appropriate notice to that effect.

15.40 Since we have been directed to take into account the proposed reference of powers and since the agreement has reached the stage of an advanced draft we think the most appropriate course is to assume, for the purposes of this Report, that the reference will proceed. It is not possible to identify all the consequences (and potential difficulties) of the reference until the agreement is concluded and the necessary legislation passed. However, the clear purpose of the reference is to expand Commonwealth legislative power so that federal law governs the resolution of disputes relating to the custody, guardianship and maintenance of all children whether or not they were born within a marriage and whether or not they have formed part of a marital household. Accordingly, for the purposes of the Report, we assume that the Commonwealth will enact legislation (probably by way of amendments to the Family Law Act) pursuant to the reference of powers. If enacted, this legislation, no doubt will confer jurisdiction on the Family Court to determine disputes relating to the custody, guardianship and maintenance of children other than the "children of a marriage". The Family Court, under the terms of the draft agreement, will be required to apply the same principles in resolving such disputes as it applies in proceedings relating to the children of a marriage. Moreover, all litigants will have access to the Family Court's counselling and support services.

15.41 One consequence of Commonwealth legislation of the kind referred to in the preceding paragraph is that much State legislation will be displaced. In New South Wales most if not all the operative provisions, relating to custody and maintenance of the Maintenance Act, 1964, the testator's Family Maintenance and guardianship of Infants Act, 1916, and the Infants' Custody and Settlements Act, 1899, will cease to have effect. The impact on other State legislation and on the jurisdiction of State courts will depend on the scope of the reservations of State power embodied in the final agreement. [66]

3. Conclusion

The Assumption

15.42 It is clear that the present divided jurisdiction in relation to the custody, guardianship and maintenance of children is intolerable. The problems must be overcome as a matter of urgency. This should occur if the proposed reference of powers to the Commonwealth takes place, although this is not the only solution For reasons we have explained, we think that this Report should be presented on the assumption that the proposed reference will proceed and

will be followed by Commonwealth legislation. On the subject matter of the reference. Should this assumption prove to be incorrect the problems of the divided jurisdiction will require reconsideration in order to ensure that the present intolerable situation is rectified. We could undertake this task, if necessary, in a supplementary report.

A Problem

15.43 We do, however, wish to refer to one problem which may be created by the reference of powers. If Commonwealth legislation enacted pursuant to the reference of powers, confers exclusive jurisdiction on the Family Court (and Local Courts exercising federal jurisdiction) to determine custody or maintenance disputes relating to ex- nuptial children there may be no single court with power to determine all disputes arising out of the breakdown of a de facto relationship. This is because, on our recommendations, disputes between de facto partners involving claims for the adjustment of property will usually be determined by the Supreme Court. Consequently, the situation may arise whereby disputes between de facto partners relating to custody are determined by one court, and disputes relating to property or other financial adjustment are determined by another court.

15.44 This problem may not be quite as serious as it seems at first glance. Parties may be in conflict over financial matters without being in dispute over the custody or maintenance of children. Similarly, custody disputes may arise between the parties without financial adjustment being in issue. Moreover, the Family Court often decides custody disputes separately from disputes over financial matters (although for obvious reasons the two may be closely connected). Nonetheless we think it would be ironic, and unacceptable, if a proposal designed to overcome jurisdictional difficulties were to create a fresh set of jurisdictional problems capable of inflicting inconvenience and hardship on litigants.

15.45 We think the potential difficulty could be overcome if the Supreme Court were to be granted concurrent jurisdiction with the Family Court (and Local Courts) to determine disputes relating to the custody, guardianship and maintenance of children covered by the reference of powers. To avoid frustrating the major purpose of the reference, which is to allow the Family Court to deal with claims concerning all children, it would be important that the Supreme Court exercise its concurrent jurisdiction only where it is clearly desirable to do so. One case we have in mind is where the court has before it a claim for financial adjustment involving the same parties as the custody dispute and the latter is related to the former. In these circumstances, it is likely to be convenient and in the interests of the children that all matters affecting the family be resolved in the one set of proceedings. In practice this would mean that the Supreme Court would deal with custody claims only where de facto partners are involved and those partners are already contesting financial proceedings.

15.46 In order to achieve this result, we recommend that New South Wales should require the Commonwealth, when enacting legislation pursuant to the reference of powers, to confer jurisdiction on the Supreme Court to determine disputes relating to the custody, guardianship and maintenance of children covered by the reference. This recommendation can be implemented most conveniently by the Commonwealth investing t ie Supreme Court with federal jurisdiction to determine such disputes. [67] The Supreme Court would then be bound to apply the substantive law enacted pursuant to the reference. We would hope that in those circumstances arrangements could be made to allow the Supreme Court to utilise the services of counsellors and welfare officers who assist the Family Court. We note that under the terms of the agreement relating to the reference of powers, the State must approve of proposed legislation by the Commonwealth so that it would be open to New South Wales to require legislation of the kind we recommend. [68]

15.47 Mr Justice Nygh does not join in this recommendation. In his view the investment of the Supreme Court with concurrent jurisdiction will continue the risk of forum shopping which already exists. Since custody and property disputes raise different issues, it is extremely rare for them to be dealt with in the same hearing if they are both disputed. They are often raised

in litigation but usually one of them is not pressed at the hearing. Should a situation occur in which both property and custody matters are actually in issue, the Supreme Court should adjourn the hearing of the property application until the custody dispute has been resolved in the Family Court, subject to a discretion to proceed with the hearing if the custody proceedings are unduly delayed in the Family Court.

15.48 In the majority view, it is not necessary that the investment of jurisdiction in the Supreme Court should be expressly limited to cases where the custody dispute is related to a claim for financial adjustment. To do so may give rise to wasteful technical arguments in borderline cases. However, we intend that the Supreme Court will exercise jurisdiction only in such cases and only when a reference of the matter to the Family Court would cause delay or inconvenience to the parties or impair the welfare of the child. The legislation should, therefore, confer power on the Supreme Court to transfer a custody dispute to the Family Court. The legislation should indicate that in exercising this power the court should take into account whether the custody proceedings relate to other proceedings before the Supreme Court and whether a transfer to the Family Court can be made without causing significant delay or hardship to the parties and without detracting from the welfare of the child. In some cases it will be appropriate for the Supreme Courtto transfer proceedings even though claims for financial adjustment are before the court. To minimise the opportunities for “forum shopping” the Family Court should also be given power to transfer matters to the Supreme Court, taking into account the same criteria.

F. State Law: Summary of Issues for Resolution

15.49 We have referred earlier in this Chapter to the deficiencies in the existing State law concerning custody, guardianship and maintenance of children of de facto relationships. In New South Wales, as we have seer there is no single statute covering all aspects of the legal relationship between parents and children Questions of custody, access, guardianship and maintenance of children are dealt with in different ways in several different Acts. This legislation bears the stamp of several stages of development, reflecting its ancient origins followed by piecemeal uncoordinated amendment. Moreover, the basic principles of the legislation have yet to be reconsidered in the light of modern thinking concerning the role of the law in family disputes and the best means of promoting the welfare of children. The overlapping jurisdiction of the various State courts can lead to inefficient use of judicial resources, as well as confusion expense and delay for litigants in determining the most appropriate court in which to pursue a particular case. [69]

15.50 If the proposed reference of powers proceeds, the deficiencies of State legislation are likely substantially to be overcome by Commonwealth legislation enacted pursuant to the reference. Since we have been directed to take the proposed reference of powers into account, we consider it inappropriate to analyse the measures that could be adopted by New South ‘Wales, acting alone, to remedy the deficiencies identified in this Chapter.

15.51 It is, however, possible that the reference of powers will not proceed, or that Commonwealth legislation will not be enacted pursuant to its terms. We have said that if the reference does not proceed (and the Commonwealth does not acquire power over the field by other means, such as a constitutional amendment), a detailed examination of the State law relating to custody and maintenance would clearly be warranted. A number of issues would reserve attention in any such examination

> The principles of custody, guardianship and maintenance of children should be dealt with in a single Act This Act should rationalise the law and replace the fragmented legislation now operating in the field.
>
> The new Act should restate the general principles of custody, guardianship and maintenance of children in order to ensure that they reflect contemporary attitudes towards parent-child relationships, ex-nuptial children and de facto families. It would be

necessary to remove anachronistic provisions relating to parental fault or misconduct, [70] and to consider whether the principles embodied in the Family Law Act should be incorporated in State legislation.

Consideration should be given to replacing the present system of separate courts exercising overlapping jurisdiction with a new specialist "family" court which would have powers as broad and flexible as those of the Family Court. [71]

An examination should be made of the support services for children and adults in State courts exercising jurisdiction in family law cases. The examination should include the need for counselling and conciliation services and the circumstances in which children should be separately represented. [72]

This task could be undertaken by us in a supplementary report.

II. ADOPTION

A. Adoption by De Facto Partners

15.52 As we have noted, the proposed reference of powers agreement would leave the States with exclusive power to make laws on adoption (paragraphs 2.17-2.20). In the Issues Paper we noted that the Adoption of Children Act, 1965, does not permit de facto partners jointly to adopt a child, even where one partner is the natural parent of the child. [73] Adoption orders may generally only be made in favour of a husband and wife jointly, [74] or in exceptional circumstances, in favour of one person. [75]

15.53 We asked in the Issues Paper whether the State law on adoption should permit joint adoption by de facto partners; and if so, whether this should be permitted generally, or only where there are special circumstances. As an example of special circumstances, we suggested the case where one partner is a parent of the child, and the other partner has accepted the child within the household. Fifteen submissions commented on the question of adoption. Most of these opposed changes to the existing laws, although it was not always clear whether they were concerned with a general provision permitting joint adoption by de facto partners, or whether they would also oppose adoption in the special circumstances already described. [76] Some submissions favoured change to permit de facto partners jointly to adopt a child, particularly where one partner is the child's natural parent. [77]

15.54 The arguments against permitting de facto partners to adopt were expressed in several ways. One argument was that a de facto relationship lacks legal status and it would be incongruous to permit the partners to establish the relationship of parent and child through the adoption laws. [78] Similarly, one submission argued that it is right and proper for State law to prefer married partners to others when "distributing benefits or determining policy connected with the family", giving adoption as a principal example for the application of this principle. [79] Another frequent objection to adoption by de facto partners was that their relationships may lack permanence, or at least a public commitment to permanence, and that adoption would be contrary to the best interests of the child. [80]

15.55 Submissions arguing for a change in the law referred to the special difficulties which may arise where one partner is the child's natural parent, and the partners seek joint adoption. One submission cited the case of a man who had lived with a woman and her child for 18 years but was unable to adopt the child jointly with the mother. In these circumstances, the submission urged, the law should be regarded as defective. [81]

15.56 We do not recommend that de facto partners should generally be eligible to make joint applications for the adoption of children We note that any such recommendation would seem to be so far ahead of current public opinion that it would offend many people. It may also divert attention from the injustices which the other recommendations made in this Report are intended to alleviate. The problem must of course, be seen in proper perspective. It is one of strictly limited scope. We understand that few children become available for adoption and that the married couples already approved as adopting parents are more than sufficient to satisfy the limited number of available placements.

15.57 The question of adoption by de facto partners of a child of one of the partners is, in our view, different Here there is no question of the child being available for adoption generally, [82] and hence no suggestion that the priority listing of approved persons may be disrupted by the inclusion of de facto partners in the category of persons eligible to adopt. A change permitting adoption in these circumstances would have the advantage of enabling the partner of a child's parent to establish a legal relationship with a child who has been living with the couple as a member of the family. An adoption order made in favour of that partner alone, which is possible under the Act, would not achieve this aim. The order would sever the relationship of parent and child between the child and his or her natural parent. The objection could be made that if the partners wish jointly to adopt a child, they should be prepared to marry. However, there may be cases, for example, where de facto partners object to marriage as an institution and wish to maintain their relationship outside the legal constraints applicable to married couples. While we do not think, at this stage, that such partners ought to be able to adopt children on the same basis as married couples, we think they should be permitted jointly to adopt the child of one of them. As noted in paragraph 15.60, an adoption order could be made only if a court is satisfied that the welfare of the child will be promoted by the order.

15.58 It is therefore our view that the inability of de facto partners jointly to adopt children may lead to hardship in some cases. Consequently, the prohibition on joint adoption by de facto partners should be modified in limited circumstances. **We recommend that section 19 of the Adoption of Children Act, 1965, should be amended to provide that the court may make an adoption order in favour of de facto partners jointly, with respect to a child of either of the partners.** It is obviously in the best interests of the child that an adoption order should not be made in favour of de facto partners unless their relationship is relatively stable and permanent. The court will of course, take a number of factors into account in assessing the suitability of the couple as adopting parents, Nevertheless, we think it desirable that the legislation should impose a minimum period of cohabitation before an adoption application may be made. A period of three years is recommended. Elsewhere in this Report we have noted a division of opinion among us on the length of the "specified period" of cohabitation for the purpose of invoking the financial adjustment jurisdiction. Two of us recommend a period of two years, two of us propose three years (paragraphs 9.8-9.9). In the context of adoption applications, we are agreed on the period of three years. The overriding consideration here is the welfare of the child. In the view of all of us this will be best served by requiring the longer period of cohabitation as evidence of the stability of the de facto relationship. **We therefore recommend that de facto partners seeking a joint adoption order of the kind specified should be required to show that, at the time of the application for adoption, they have been living together in a de facto relationship for a period of not less than three years.**

15.59 There is one other special case where it may be desirable to permit de facto partners to adopt a child. This is where a child, who is not the child of either of the partners but is a relative of one of them (for example, a grandchild, niece or nephew), [83] has been living in the same household as the partners over a lengthy period, and the partners wish to adopt the child. As in the case where one of the de facto partners is the parent of the child, there is normally no question of such a child being available for adoption generally. [84] In this instance, we think that the court should also be empowered to make a joint adoption order in favour of the partners. **We therefore recommend that section 19 of the Adoption of Children Act, 1965, should be amended to provide that the court may make an order in favour of de facto partners jointly, with respect to a child who is. a relative of one of the partners**

and who has been brought up, maintained and educated by the partners as their child, where there are special circumstances which justify the making of the order. Again, the recommendation is intended to apply only to partners who have been living together in a de facto relationship for a period of not less than three years.

15.60 It must be stressed that the effect of these changes to the law is limited to removing, in the circumstances described, the present barrier to joint adoption by de facto partners. Before making an adoption order, the court must satisfy itself of the suitability of the prospective adoptive parents, and that the welfare and interests of the child will be promoted by the adoption. [85] The welfare and interests of the child are always to be regarded as the "paramount consideration". [86] The court may take the view that it Is not in the best interests of the child to permit adoption, for example, because the relationship of the de facto partners is not sufficiently stable, or because it is desirable for the child to maintain his or her legal relationship with both natural parents. [87]

15.61 Although of no great persuasive force, one further point should be noted. It may be possible at present for de facto partners jointly to adopt a child in another country where the law permits such an adoption. The Adoption of Children Act, 1965, provides a procedure for the recognition of foreign adoptions, giving them the same effect in New South Wales as an adoption under the Act. [88] Foreign adoptions may be recognised so long as certain requirements, such as local validity and similarity with the legal effect of adoption in New South Wales, are complied with.

B. Consents

15.62 A second issue relating to adoptions was raised in the Issues Paper. Before an adoption order may be made, the consent of relevant persons must be obtained. Unless dispensed with by the court in the case of a child whose parents were not married to each other, the relevant persons are "every person who is the mother or guardian of the child." [89] The Supreme Court has recently held that the father of an ex-nuptial child is not a "guardian" of the child for the purposes of a consent under this section, despite the effect of the Children (Equality of Status) Act 1976, on the legal position of parents of ex-nuptial children generally. [90] For this reason his consent is not required before the child may be adopted.

15.63 Amendments to the 1965 Act passed in 1980 but not yet in force, reproduce the effect of this decision. [91] The 1980 amendments provide that the father of an ex nuptial child who does not have custody of the child under a court order, or who is not the guardian of the child under the laws of the Commonwealth or another State, is not a guardian for the purposes of the Adoption of Children Act. Therefore his consent to the adoption of the child is not required. When the amendments come into force the father will be entitled to be given notice of an application for, or a consent to, the adoption of the child. He will then have 14 days in which to apply to the Adoption Tribunal created by the Act for a "custody, care and guardianship" order. If he is out of time, or is unsuccessful in his application to the Tribunal, his only recourse will be to apply to the tribunal to be joined as a party to oppose the making of the adoption order. [92]

15.64 These provisions will apply to a father of an ex-nuptial child who has never been married to the child's mother, irrespective of whether there has been, or is, any other relationship between the parents. We think that the position of a father who has lived in a de facto relationship with the mother in a household of which the child was part, is clearly distinguishable from that of a father who has had no continuing relationship with either mother or child. We think it is wrong that the relationship which exists between this father and child may be severed by adoption without the consent of the father. Nor are we convinced that his interests will be adequately protected by the procedure which would require him to obtain an order for custody or guardianship before his consent becomes necessary. If for any reason he does not receive notification of the adoption process in time to make application for custody, any rights he may have to oppose the making of an adoption order will depend on the

discretion of the Tribunal. We think that his position can only be secured by a requirement that his consent should be necessary before an order for adoption may be made. Since we are limiting our recommendation to the case of parents who have lived together in a de facto relationship in a household of which the child formed part, we do not think it unreasonable to require that the father's actual consent be sought. There are already provisions in the Act which allow for consents to be dispensed with in certain circumstances (section 32). No doubt these provisions could be extended to dispense with the consent of the father if that would promote the best interests of the child. We have two reasons for not including in the draft Bill attached to this Report any provision relating, to consents. First, our recommendation will require many consequential amendments to be made to the Adoption of Children Act, 1965, and to the 1980 amending Act. Secondly, we are aware that policy in the area of adoption proceedings may be in some state of flux. Nonetheless, we recommend that the position of the father of an ex nuptial child, who has lived with the child's mother in a de facto relationship in a household of which the child formed part, should be protected by requiring that his consent shall be necessary before the court may make an adoption order in respect of that child.

III. SUMMARY

15.65 We have discussed in this Chapter the problems of a divided jurisdiction which arise in cases involving the custody, guardianship and maintenance of children. These problems arise partly from the constitutional division of legislative power between the Commonwealth and the States, and partly from the provisions of the Family Law Act This jurisdictional division sometimes leads to the "disgraceful" result that a single court is unable to deal with all the children living within one household.

15.66 We have discussed the proposed reference of powers by some States to the Commonwealth. Because of our terms of reference, we have taken the view that, for the purposes of this Report, we should assume that the reference of powers will take place. On this assumption we have discussed the difficulties which may arise if the Supreme Court has jurisdiction to deal with financial disputes between de facto partners (as we have recommended in this Report), and the Family Court has jurisdiction to determine disputes concerning their children. To overcome this difficulty, we recommend that the Supreme Court should have a concurrent jurisdiction with the Family Court to determine disputes relating to the custody, guardianship and maintenance of children. Our intention is that the Supreme Court should exercise this jurisdiction only when a reference of the matter to the Family Court for determination would cause delay or inconvenience to the parties, or be detrimental to the welfare of the child.

15.67 If our assumption that the proposed reference of powers will take place proves to be incorrect a further and more detailed examination of State law relating to custody and maintenance of children will be needed. We have indicated in this Chapter some of the principal matters which will need to be examined. These include:

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

removal of anachronistic provisions relating to parental fault and misconduct from a restatement of the general principles of custody, guardianship and maintenance;

replacement of the present system of separate courts with a new specialist "family" court; and

an examination of the support services for children and adults in State courts exercising jurisdiction in family law cases.

15.68 State law on adoption will not be affected by the proposed reference of powers. We have recommended that the prohibition on joint adoption by de facto partners be removed so as to enable the court to permit joint adoption of a child of either of the partners, where the couple have been living together for a minimum period of three years. We further recommend that, in special circumstances, de facto partners should be permitted to adopt a child who is a relative of either partner, and who has lived in their household. We do not recommend that de facto partners should be eligible to adopt children with whom there has been no previous relationship. We also recommend that the consent of the father of an ex-nuptial child who has lived in a de facto relationship with the child s mother should be required before an adoption order may be made with respect to the child.

FOOTNOTES

1. Family Law Act 1975 (Cth), ss.8, 39, 40, 46.

2. *Id.,* s.4 (para.(c)(ii) of the definition of “matrimonial cause”).

3. *Id*., s.4 (para.(f) of the definition of “matrimonial cause”).

4. *Id.,* s. 5.

5. See eg. *Jarman v. Lloyd* (1982) 8 Fam LR 588.

6. It should be noted that the wording of para.(f) of the definition of “matrimonial cause” (see note 3 above), does not require that the subsequent proceedings should be between the spouses.

7. See eg. *Dowal v. Murray* (1978) 143 CLR 410; *St. Clair v. Nicholson* (1981) 55 ALJR 192.

8. See eg. *E. and E.* [1979] FLC 90-645, *Chalker and Chalker* [1981] FLC 91-017.

9. See eg. the discussion in *Fountain v. Alexander* [1982] FLC 91-218, at pp.77,187-77,188, per Gibbs CJ, and p.77,192, per Mason J: cf. *Meyer v. Meyer* [1978] 2 NSWLR 36.

10. See eg. *A v. HM and WM* (1979) 4 Fam LR 776; *Harris v. Harris* [1979] 2 NSWLR 252; *Robinson v. Field* (1982) 7 Fam LR 866.

11. Family Law Act 1975 (Cth), s.61(l).

12. *Newbery and Newbery* [1977] FLC 90-205: cf *Bishop and Bishop* [1981] FLC 90-016. The Family Law Amendment Bill 1983, cl.22. proposes to redefine “guardianship” and “custody”. Broadly speaking. it is intended that a person who is a guardian of a child under the Act will have the responsibility for the long-term welfare of the child together with all other incidents of guardianship under other law. except for the right to possession of the child and the responsibility for the daily care and control of the child. A person granted “custody” will have this right and responsibility. The proposed amendment follows a recommendation of the Family Law Council, Watson Committee Report *(Wardship, Guardianship, Custody, Access, Change of Name)* (1982).

13. Family Law Act 1975 (Cth), s.64(l) (a). Clause 25 of the Family Law Amendment Bill 1983 proposes to amend section 64 by specifying matters which must be taken into account by the court in proceedings with respect to the custody, guardianship or welfare of a child. These include, among other things. the nature of the relationship the child has with each parent or other persons, the effect of separation on the child and the capacity of parents or other persons to care adequately for the child.

14. *Id*., s.62(l), (4)

15. *Id*., s.65.

16. Joint Select Committee on the Family Law Act, Family *Law in Australia* (1980), vol.1. chs,4. 9.

17. See eg. The various judgments in *Fountain v. Alexander* [1982] FLC 91-218; and *Robinson v. Field* (1982) 7 Fam LR 866, at p.874.

18. *Ping v. Van Der Kroft* 3 December 1982, Supreme Court of New South Wales, McLelland J.; *Re J.H. Weir* (1953) 70 WN (NSW) 78.

19. *C v. C* (1981) 8 FamLR 243.

20. See *Robinson v. Field* (1982) 7 Fam LR 866; at pp.873-4, per Holland Cf. The comments of Powell J; In *A v. F*. (1981) 7 Fam LR 14. See also *K v. Minister for Youth and Community Services* [1982] 1 NSWLR 311.

21. See *Gorey v. Griffin* [1978] 1 NSWLR 739, at pp.747 ff.; per Mahoney JA, for a history of the legislation.

22. See eg. G Johnson, Submission No.7; S. Hill, Submission No.46.

23. Infants' Custody and Settlements Act, 1899, s.10A(L) (b) (iii), (4).

24. *Gorey v. Griffin* [1978] 1 NSWLR. 739, at p.744, per Hutley JA; at p.741, per Moffitt P.

25. The principles are discussed at length in *Chignola v. Chignola* (1974) 9 SASR 479.

26. *Douglas v. Longano* (1981) 55 ALJR 352, a case concerned with the Status of Children Act 1974 (Vic), s.3(1).

27. *Youngman v. Lawson* [1981] 1 NSWLR 439, at p.444 per Street C.J.

28. See eg. *Douglas v. Longano* (1981) 55 ALJR 352, per Gibbs CJ; Mason and Murphy JJ; *Holland v. Cobcroft* [1980] 2 NSWLR 483.

29. Infants' Custody and Settlement Act, 1899, ss.5(1), 6, 8, 10.

30. Eg. *Holland v. Cobcroft* [1980] 2 NSWLR 483; *Smith v. Swinfield* (1981) 7 Fam LR 757; *Harrington v. Hynes* (1982) 8 Fam LR 295.

31. Australian Council of Social Service, Submission No.26 (Supplement), p.l.

32. Family Law Act 1975 (Cth), s.76(l).

33. See para.(cb) of the definition of "matrimonial cause" in s.4 of the Act. The question would be put beyond doubt by clause 3 of the Family Law Amendment Bill 1983, which makes it clear that a child of a marriage may bring proceedings for maintenance: see proposed para. (cc) of the definition of "matrimonial cause".

34. *Id*., ss.77, 79, 80.

35. *Id*., s.76(3).

36. *Park and Park* [1978] FLC 90-509.

37. *V. and G.* [1982] FLC 91-207; *Zdravkovic and Zdravkovic* [1982] FLC 91-220.

38. *Koch and Koch* [1977] FLC 90-312, at p.76,662.

39. *Id*., at p.76,663.

40. Maintenance Act 1964, ss.9, 15, 16.

41. *Id*., ss.7(l), (2), 12,13.

42. *Id*., s.7(4).

43. *Id*., s.10.

44. *Id*., ss.26, 27, 27A.

45. *Id*., ss.24, 25.

46. Children (Equality of Status) Act, 1976, s.10(3).

47. *Id*., ss.11, 12, 14, 19, 21.

48. [1982] FLC 91-218.

49. *Id*., at p.77,188.

50. *Fountain v. Alexander*, 16 February 1982, Supreme Court of New South Wales.

51. *Robinson v. Field* (1982) 7 Fam LR 866, at p.868.

52. *DMW v CGW* [1982] FLC 91-274. Cf. *Harris v. Harris* [1979] 2 NSWLR 252.

53. (1981) 55 ALJR 192.

54. All but one of these proposals (the fourth) were considered by the joint Select Committee on the Family Law Act Family *Law in Australia* (1980), vol.1, ch.2.

55. *Id.,* at p.16.

56. As to the agenda for the Convention, see 7 *Commonwealth Record* 1781 (December 1982).

57. Family Law Act 1975 (Cth). s.41.

58. See Family Court Act 1975-1982 (WA).

59. Joint Select Committee, note 54 above, vol.1, p.20.

60. Mr Justice M H McLelland, Submission No.5. The Chief Justice's paper was prepared in September 1975.

61. Joint Select Committee, note 54 above, vol.1, pp.17-19. Cf. the dissenting report of Senator A J Missen; *Id*., pp.205-206.

62. *Id*., vol.2, pp.88-90 (Professor P H Lane). The same view was expressed in an opinion provided for us in December 1982 by Associate Professor M. Coper of the University of New South Wales.

63. This conclusion was reached by Associate Professor Coper in his opinion of December 1982.

64. Family Law Amendment Bill 1983, cl.3, proposing the addition of paras.(cd) and (ce) to the definition of “matrimonial cause”. A stranger can institute proceedings where the party in whose favour a custody order was made has died, or where a party to the marriage is a party to the proceedings.

65. Family Law Amendment Bill 1983, cl.4, proposed in a new s.5(l)(e) and (f).

66. The preservation of the jurisdiction of a State court to make a child a ward of the court for a purpose other than providing for the child’s custody, guardianship or maintenance (para.2.18) may raise particularly difficult issues. It is arguable, for example, that any exercise of court wardship powers involves a question of guardianship, in which case the reservation in the agreement would be meaningless. Cf. Fountain v. Alexander [1982] FLC 91-218, at p.77.187-77,188, per Gibbs CJ; at p.77,193, per Mason J. Other questions which require consideration include the power of the Family Court to order blood tests where the paternity of a child is in issue: Lamb and Lamb [1977] FLC 90-225; Family Law Council; *Annual Report* 1980-81, p.17. See now Family Law Amendment Bill 1983, cl.48, inserting new s.99A. detailing procedures for blood tests and other medical tests in relation to the question of paternity.

67. Pursuant to s.77(iii) of the Constitution.

68. The agreement contemplates that a provision should not differentiate “so far as practicable” between children who are and who are not legitimate. We think that our recommendation is consistent with this requirement.

69. In *Holland v. Cobcroft* [1980] 2 NSWLR 483, for example, the Supreme Court was strongly of the view that custody applications under the Infants’ Custody and Settlements Act 1899 were more appropriately brought in either the District Court or Children’s Court, on grounds of speed. convenience and cost.

70. See eg. Infants’ Custody and Settlements Act. 1899, ss.6, 8. 10.

71. As suggested eg. by the New South Wales Women’s Advisory Council, Submission No. 10; Women’s Co-ordination Unit. Submission No.35.

72. See eg. G Johnson, Submission No.12: P.J. Pascoe, Submission No.14: Australian Council of Social Service, Submission No.26, p.12, Redfern Legal Centre,. Submission No.53.

73. *De Facto Relationships* (1981), para.5.43.

74. Adoption of Children Act 1965, s.19(1).

75. *Id*., s.19(2). (3).

76. Comments on adoption were made by. Mountain Women’s Resource Centre, Submission No.6; Anglican Home Mission Society, Submission No.6; Sutherland Shire Information Service, Submission No.9, New South Wales Women’s Advisory Council, Submission No.10; Anglican Parish of St. Mark’s, Avalon, Submission No.18; E J Merrington, Submission No.22; Australian Catholic Social Welfare Commission, Submission No.27, Council for Civil Liberties, Submission No.31; Anglican Diocese of Sydney, Social Issues Committee(majority response), Submission No.34; New South Wales Catholic Social Welfare Committee, Submission No.36: Australian Federation of Festival of Light, Submission No.38, Catholic Women’s League of NSW, Submission No.39; Anglican Diocese of Newcastle, Submission No.43; Legal Aid Commission of Victoria, Law Reform Committee, Submission No.50; Catholic Women's League of SA Inc., Submission No.52.

77. Comments favouring change in the law were made by Mountain Women’s Resource Centre, Submission No.1, Sutherland Shire Information Service. Submission No.9; New South

Wales Women's Advisory Council, Submission No.10; Council for Civil Liberties, Submission No.31: Legal Aid Commission of Victorian Law Reform Committee, Submission No.50.

78. Catholic Women's League of NSW, Submission No.39; Australian Catholic Social Welfare Commission, Submission No.27.

79. Anglican Diocese of Sydney, Social Issues Committee (majority response), Submission No.34a.

80. Lack of permanence was stressed by, among others, Australian Federation of Festival of Light, Submission No.38, and Anglican Home Mission Society, Submission No.6.

81. Legal Aid Commission of Victoria, Law Reform Committee, Submission No.50, p.2.

82. Adoption of Children Act, 1965, ss.18, 27.

83. *Id*., s.6

84. See note 82.

85. Adoption of Children Act, 1965, s.21. Under amendments to the Act passed in 1980 but not yet in force, the jurisdiction of the Supreme Court will be exercised by the Adoption Tribunal. Adoption of Children (Amendment) Act, 1980, Schedule 1.

86. Adoption of Children Act, 1965, s.17.

87. See the comments on this point in Legal Aid Commission of Victoria, Law Reform Committee. Submission No.50, p.9.

88. Adoption of Children Act, 1965, ss.46, 47.

89. *Id*., s.26(3).

90. *C. v. Director-General of Youth and Community Services* [1982] 1 NSWLR 65; cf. *Youngman v. Lawson* [1981] 1 NSWLR 439, where the Court of Appeal held that the effect of s.6 of the Children (Equality of Status) Act, 1976, was to constitute both parents of an ex-nuptial child its joint guardians.

91. Adoption of Children (Amendment) Act, 1980, Schedule 3(8), inserting s.26(3A).

92. *De Facto Relationships* (1981), paras.4.45-4.46, 5.43.

16. Other Legislation

I. INTRODUCTION

16.1 In this Report we have examined the major issues concerning the legal regulation of de facto relationships in New South Wales. Thus we have examined financial adjustment between de facto partners; succession on death, compensation for fatal accidents; protection against domestic violence; and custody and maintenance of children. We have now however, attempted to analyse every area of law in which the recognition of de facto relationships may prove an issue. The range of possible issues is virtually limitless since we cannot anticipate every area of human activity that might be subject to legal regulation. As legislation (or other forms of rules) are introduced to deal with novel questions, such as the regulation of artificial insemination and other aspects of the new biotechnology, it will often be necessary to consider whether the new measure should extend to de facto relationships and, if so, on what basis. This can and, in our view, should be done in accordance with the principles discussed in this Report.

16.2 While we do not purport to consider all possible legal issues concerning de facto relationships, there are several matters to which we briefly direct attention in this Chapter. These matters were mentioned by the New South Wales Anti-Discrimination Board in its 1978 report on *Discrimination in Legislation*, [1] to which we referred in Chapter 5. In that report the Board identified numerous State enactments which in its view, unjustifiably discriminated on the ground of marital status, a term defined to include the status of “being in cohabitation otherwise than in marriage, with a person of the opposite sex”. [2] As noted in paragraph 5.31, the Board took the view that all State legislation affecting the parties to a marriage should be amended to apply also to the parties to a de facto relationship. On this basis the Board recommended amendments to a large number of Acts, including some that do not raise any questions of general significance. We have given our reasons in Chapter 5 for rejecting the approach of the Board, which seeks to equate marriages and de facto relationships for all legal purposes. However, the Board s report performs a valuable function in identifying issues that may warrant attention either by us or by those responsible for the administration of particular enactments.

16.3 Elsewhere in this Report we have examined some of the legislation criticised by the Anti-Discrimination Board as discriminatory. These included the following.

Adoption of Children Act 1965 (Chapter 15);

Compensation to Relatives Act 1897 (Chapter 13):

Maintenance Act, 1964 (Chapters 8 and 15);

Testators Family Maintenance and Guardianship of Infants Act 1916 (Chapter 12);

Wills, Probate and Administration Act 1898 (Chapter 12).

We also note that two of the Boards recommendations have now been implemented.

In 1981 the definition of “dependents” in the Workers’ Compensation Act, 1926, was amended to include a de facto husband of a deceased female worker and to remove the earlier requirement of three years’ cohabitation (paragraph 4.38). [3]

In 1979 the definition of “spouse” for the purposes of section 124 of the Liquor Act, 1912 (which allows the transfer of licences to members of the licensee’s family where the licensee is convicted of a felony) was amended to include a de facto partner.

We now refer to other legislation which raises questions concerning de facto relationships.

II. PARTICULAR ISSUES

A. Non-Compellability of Witnesses

16.4 Section 407 of the Crimes Act 1900, provides, in effect that in criminal proceedings the spouse of an accused person may not be compelled against his or her will to give evidence. The section does not extend to de facto partners. De facto partners may therefore be compelled by the prosecution to give evidence in a trial involving their partner. The Anti-Discrimination Board recommended extending the protection provided by section 407 to de facto partners so that a person would not be a compellable witness in criminal proceedings against his or her de facto partner. [4]

16.5 In our Issues Paper we raised for discussion the question whether the rule of non-compellability embodied in section 407 should be extended to de facto partners. [5] We also referred to our Discussion Paper on Competence *and* Compellability, which was published in 1980 in the course of our review of the law of evidence. [6] In that Discussion Paper, we tentatively suggested that a spouse of the accused should, in general continue to be a non-compellable witness, but that there should be an exception in cases of domestic violence and the court should have a discretion to require a married person to give evidence against his or her spouse where “the interests of justice outweigh the importance of respecting the bond of marriage”. [7] In the Discussion Paper, doubts were expressed as to the wisdom of extending the principle of non-compellability to de facto partners. [8]

16.6 Since the publication of our Issues Paper there have been two significant developments. First, the Crimes Act, 1900, has been amended by the insertion of section 407AA, which makes a married person a compellable witness for the prosecution where his or her spouse is charged with a domestic violence offence. [9] The definition of “husband” and “wife” for the purposes of the section includes a de facto partner. The section permits a compellable witness to apply to a court to be excused from giving evidence for the prosecution. The court may excuse the witness if it is satisfied that the application is made freely and that having regard to the value of the potential evidence and the seriousness of the charge, among other factors, the witness should be excused. In respect of domestic violence offences, then de facto partners and married persons are equally compellable, and may be excused on the same grounds.

16.7 The second development is that the Australian Law Reform Commission has published a Research Paper on *Competence and Compellability of Witnesses* in the course of its review of the law of evidence. [10] The Paper (which does not purport to express the views of the Commission) puts forward suggestions for reform. The Paper suggests that the general rule should be that all witnesses are competent and compellable. However, where the prosecution seeks to compel the spouse of the accused to give evidence, the court should have a discretion to excuse the witness. In exercising its discretion the Paper suggests that the court should have regard to a number of factors, some relating to the value of the potential evidence, others to the likely effects on the relationship if the witness is compelled to testify. [11] The Paper contends that these principles should apply also to de facto partners and to parents and children of the accused. [12]

16.8 The Paper gives two reasons supporting limits on the principle of compellability of spouses, and the application of those limits to de facto partners. [13] They are:

> "The undesirability that the procedures for enforcing the criminal law should be allowed to disrupt marital and family relationships to a greater extent than the interests of the community really require.
>
> The undesirability that the community should make unduly harsh demands on its members by compelling them where the general interest does not require it, to give evidence that will bring punishments upon those they love, or betray their confidences, or entail economic or social hardships."

On the other hand consideration must be given to the danger that important evidence will not be heard or, less likely, that the parties will enter into a de facto relationship in order to ensure that evidence is not given In addition account must be taken of the uncertainty and delay which would be associated with criminal trials if courts have a wide discretion to excuse particular witnesses from giving evidence. [14]

16.9 We have some sympathy with the tentative conclusions reached in the Australian Law Reform Commission's Research Paper. However, we have two reasons for thinking it inappropriate to make any recommendations in this Report.

> The general principles relating to the compellability of spouses raised by our 1980 Working Paper and the Australian Law Reform Commission's Research Paper have yet to be resolved.
>
> Any change in the position of de facto partners depends, in large measure, on the decisions to be made in relation to the compellability of spouses generally.

In our view, the matter is best left for consideration in the light of the final recommendations on this matter by the Australian Law Reform Commission.

B. Marital Communications

16.10 Under section 11 of the Evidence Act 1898, neither a husband nor a wife can be compelled to disclose communications made between them during marriage, although each is competent (that is, permitted) to give evidence of such communications voluntarily. The reason for this privilege is said to be the desirability of "promoting the utmost candour and confidence in matrimonial relations." [15] The Anti-Discrimination Board recommended that the privilege applying to marital communications should be extended to de facto partners. [16]

16.11 There is now a discernible trend in the common law world to limit or abolish the privilege against disclosure of marital communications. In England, for example, it has been abolished in civil proceedings [17] and its abolition has been proposed for criminal proceedings. [18] The Law Reform Committee, in arguing the case for abolition in civil proceedings, contended that

> "[i]t is unrealistic to suppose that candour of communication between husband and wife is influenced today by [the statutory provisions]....." [19]

In New South Wales, the privilege extends both to communicator and recipient, while in Victoria only the recipient is not compellable to divulge the communication. [20]

16.12 In these circumstances, we think that no recommendation should be made to extend the privilege in respect of marital communications to de facto partners until a decision is made as to the future of the privilege itself. We understand that a recommendation on this matter is likely to be made by the Australian Law Reform Commission in its report on Evidence.

C. Landlord and Tenant Act, 1899

16.13 Section 2B of the Landlord and Tenant Act, 1899, provides that

> "where the tenant of any land ... which includes a dwelling-house, separates from or deserts his wife, leaving the wife in possession of the land"

the provisions of the Act and any other enactment relating to the recovery of possession or the control of rents applicable to the premises shalt during the period of separation or desertion apply as if the wife were the sole tenant. The Anti-Discrimination Board recommended that the section be amended to apply equally to the husband of a female tenant and to the de facto partner of a tenant. [21]

16.14 There are difficulties with this approach It has been held that the section does not apply to a widow or a divorcee, since in neither case is there "an existing relationship of husband and wife and an existing state of desertion or separation." [22] It might be considered strange to extend the benefits of the section to a de facto partner, but not to a widow or divorcee. Moreover, the concept of desertion in relation to husband and wife has been outmoded since the enactment of the Family Law Act and should not be retained if section 2B were to be amended. Again, broadening the coverage of section 2B would have economic consequences, since it would extend the class of persons entitled to take advantage of legislation dealing with rent control and security of tenure. There are therefore a number of issues involved in a review of section 2B in addition to possible extension of the section to de facto partners. These issues should be considered in the context of a general review of the law of landlord and tenant We make no recommendations for amending section 2B. [23]

D. Mental Health Legislation

16.15 The Anti-Discrimination Board drew attention to the terms of section 108(4) of the Mental Health Act 1958, which provides for notice to be given to the nearest relative of a patient before surgical or other treatment can be carried out The phrase "nearest relative" does not specifically include a de facto partner of the patient and the Board recommended that the section should be amended to include such a person. [24] Since the Boards report was published new mental health legislation has been prepared. The Mental Health Bill 1983, has been tabled in Parliament to allow for public comment.

16.16 Part IX of the 1983 Bill relates to the carrying out of medical or therapeutic treatment on a patient It provides that where, for example, surgical treatment is proposed for a patient incapable of consenting to the operation the medical superintendent must do everything that is reasonably practicable to give notice to the patient s "nearest relative" of the intention to seek consent to the operation from an authorised officer or the Mental Health Review Tribunal. [25] The person notified may put forward objections to the proposed surgical treatment but does not necessarily have the right to veto the treatment. The "nearest relative" means the patient s spouse or, where the patient is unmarried or separated from his or her spouse, the patient s parents. If the patient has neither a spouse nor parents, or if their identity or whereabouts cannot be ascertained, the nearest relative is

> "such person, if any, as in the opinion of the medical superintendent, has the care, guardianship or custody of the patient"

prior to his or her admission. [26] It may be that the de facto partner of the patient would receive notification of the proposed treatment as the person "who had the care of" the patient. But this would occur only where the patient had no surviving parents. Consequently, the Bill would not ensure that a de facto partner receives notification of the proposed treatment even assuming the de facto partner had the care of the patient.

16.17 In our view, this aspect of the Mental Health Bill 1983 is capable of working serious injustice' The purpose of the notification provisions is to inform the person who is likely to have the closest relationship with a patient about proposed treatment and to provide an

Opportunity for that person to object to that treatment. The de facto partner of a patient is as likely to be that person and to have the closest interest in the proposed treatment, as is a spouse where the partners are married. Accordingly, such a person should have the same opportunity to be notified and to agree or object to the treatment We appreciate that there may be cases where the authorities do not know of the de facto relationship, but all that is proposed by the Bill is that they must make reasonable efforts to give notice. The inclusion of a de facto partner within the definition of "nearest relative" should not cause any practical difficulties. **We therefore recommend that the term "nearest relative", as defined in Part IX of the Mental Health Bill, 1983, should include the de facto partner of the patient.** [27]

E. Insurance Act, 1902

16.18 Section 8 of the Insurance Act 1902, provides protection for the spouse and children who are named as beneficiaries in a life insurance policy taken out by a married person on his or her life. The effect of the section is to establish a statutory trust in favour of the spouse and children, so that money under the policy does not form part of the estate of the policy holder, and is not available to creditors. The section is substantially identical with section 94 of the Life Insurance Act 1945 (Cth). This Act regulates all life insurance in Australia other than State life insurance within the limits of the State in question. [28] We consider that. the protection accorded by section 8 of the Insurance Act 1902, should be extended to the de facto partner of a policy holder, because the considerations which justify the statutory trust in favour of a spouse also justify a trust in favour of a surviving de facto partner. However, we think that this step should be taken jointly by the Commonwealth and the State, since it is clearly desirable that the legislation regulating life insurance should be uniform as between State insurance and insurance generally. **We therefore recommend that New South Wales raise with the Commonwealth the desirability of amending legislation governing statutory trusts in respect of life insurance, with a view to providing the surviving de facto partner of a deceased policy holder with similar protection to that which is presently provided for spouses.** [29]

F. Superannuation

16.19 Elsewhere in this Report we have referred to the Anti-Discrimination Boards report, *Discrimination in Superannuation* (paragraphs 4.45-4.47). We noted that our terms of reference require us to take this report into account in our own review of the law affecting de facto relationships. We also noted that the Boards recommendations for inclusion of defacto partners as spouse beneficiaries under the State Superannuation Fund have been under consideration for some time by the Superannuation Advisory Committee. The Anti-Discrimination Boards report dealt with the position of de facto partners as part of its general review of discrimination in superannuation As the report recognised, the extension of benefits to any new class of people raises complex issues. Thus, for example, in the area of death benefits (payments made from a superannuation fund on the death of a member, or former member who was in receipt of a pension), the Board considered a number of ways of removing discrimination on the grounds of sex and marital status. These included the automatic payment of benefits to any person in a specified relationship (including a de facto relationship) with the deceased, or alternatively, the payment of benefits to any such person who was, in addition, financially dependent on the deceased. [30]

16.20 We do not think it is appropriate at this stage to attempt our own assessment of the alternatives currently under consideration. Actuarial and administrative considerations are relevant in determining how to avoid injustice, and we think it best that current discussions proceed without our intervention. It may be that the area will be referred to us for consideration at a later stage.

G. Miscellaneous Legislation

16.21 The Anti-Discrimination Board identified a number of other provisions which in its view, discriminated on the ground of marital status and warranted amendment. [31] Some of the provisions identified by the Board have the effect of treating de facto partners more favourably than married persons. These include the following:

> The Housing Indemnities Act 1962, section 84(d) and (f) which prohibits an indemnity being given where the borrower" or the wife or husband of the borrower" already owns a dwelling house or has had an indemnified loan.
>
> The Land Aggregation Tax Management Act, 1971, section 28, which provides that a husband and wife shall be assessed as a sole owner in determining the value of certain land for tax purposes.
>
> The Closer Settlement Act 1904, which provides that land held by a husband and wife shall be considered together to determine whether the permissible maximum area has been exceeded.

16.22 Other legislation referred to by the Anti-Discrimination Board appears to treat de facto partners less favourably than married persons. This legislation includes the following:

> The Metropolitan Water, Sewerage and Drainage Act, 1924, section 100(2), which grants certain rate concessions to an "eligible pensioned" who is in joint occupation of land with his or her spouse. [32]
>
> The Door-to-Door Sales Act, 1967, s.4(1), which allows a purchasers his or her spouse to terminate certain agreements within a specified period.

16.23 None of these provisions, in our view, raises policy issues of substantial importance. The extension of each Act to de facto partners is best considered by those responsible for its administration. We have considered the various provisions, and have formed views which in some cases differ both as to interpretation and conclusions from the approach of the Anti-Discrimination Board. Since no points of general significance are involved we do not set out our views in this Report, but will communicate them separately to the Attorney General.

FOOTNOTES

1. NSW Anti-Discrimination Board, Discrimination in Legislation (1978), prepared pursuant to s.121 of the Anti- Discrimination Act 1977.

2. Anti-Discrimination Act, 1977, s.4.

3. Similar amendments were made to the Workmen's Compensation (Broken Hill) Act, 1920. The Board recommended virtually identical amendments to s.8(2B) of the Workers' Compensation (Dust Diseases) Act, 1942. Curiously enough these have not been enacted. We can see no reason why they should not be adopted.

4. Anti-Discrimination Board, note 1 above, vol.1. p.41.

5. NSW Law Reform Commission, *De Facto Relationships* (Issues Paper, 1981). Paras.4.23, 5.36.

6. NSW Law Reform Commission, *Competence and Compellability* (Discussion Paper, 1980).

7. *Id*., App.A (Draft Bill).

8. *Id*., pp.53-55.

9. Crimes Act, 1900, s.407AA, inserted by the Crimes (Domestic Violence) Amendment Act 1982.

10. Australian Law Reform Commission, Competence *and Compellability of Witnesses* (Research Paper No.5, 1981).

11. *Id*., pp.67, 115.

12. *Id*., pp.88-100.

13. *Id*., p.92.

14. *Id*., pp.93 ff.

15. J.A. Gobbo, D. Byrne & J.D. Heydom Cross *on Evidence* (2nd Aust ed., 1979), pp.272-273.

16. Anti-Discrimination Board, note 1 above, vol.1, p.43.

17. Civil Evidence Act 1968 (Eng.), s.16(3).

18. Criminal Law Revision Committee, *Evidence (General) Eleventh* Report (1972), pp.105-106.

19. Law Reform Committee, Privilege *in Civil Proceedings* (Sixteenth Report, Cmnd. 3472, 1967), p.18.

20. Evidence Act 1958 (Vic), s.27.

21. Anti-Discrimination Board, note 1 above, p.62.

22. *Jeanes v. Drake* (1964) 82 WN (Pt.1) NSW 437, at p.441; *Abigail Pty. Ltd. v. Rudder* (1967) 86 WN (Pt.1) NSW 76.

23. The Anti-Discrimination Board also raised a question concerning the definition of a “protected person” for the purpose of s.99 of the Landlord and Tenant (Amendment) Act-1948. We do not think the section raises any general question of principle warranting review independently of the Act as a whole.

24. Anti-Discrimination Board, note 1 above, vol.1, p.73.

25. Mental Health Bill 1983, cl.161.

26. *Id*., cl.159.

27. The Mental Health Bill 1983 employs the concept of “nearest relative”, “near relative” and “relative” for other purposes. See eg cll.4(1), 75, 76, 103, 133, 139. We have confined our recommendations to Part IX of the Bill but consideration should also be given to defining these terms, when used elsewhere in the legislation to include the de facto partner of a patient.

28. Constitution, s.51 (xiv); Life Insurance Act 1945 (Cth), s.8.

29. See generally, Australian Law Reform Commission, *Insurance Contracts* (ALRC 20, 1982).

30. Anti-Discrimination Board, Discrimination in Superannuation (1978), pp.44-47.

31. Anti-Discrimination Board, note 1 above, vol.1, pp.19, 42, 53, 61.

32. The Anti-Discrimination Board's report actually referred to the Broken Hill Water and Sewerage Amendment Act, 1971, which contains an identical provision: s.87A(1). See also Hunter District Water, Sewerage and Drainage Act, 1938, s.104A(1); Irrigation Area (Reduction of Rents) Act, 1974, s.3(2).

17. The Problem of Definition

I. A UNIFORM DEFINITION?

17.1 Throughout this Report we have used the terms “de facto relationship” and “de facto partners”. In paragraph 1.5 we provided a working definition of a “de facto relationship” and indicated that we would return to the question of a precise statutory definition later. We now do so.

17.2 We have given a number of examples of statutory definitions of de facto relationships that have been designed to cover a wide variety of situations. In some instances, an “all purposes” definition has been adopted. The Anti-Discrimination Act, 1977, for example, defines “marital status” to include “the status or condition of being ... in cohabitation otherwise than in marriage, with a person of the opposite sex”. [1] On the basis of this definition the Anti-Discrimination Board investigated and reported on a wide range of statutory provisions which it saw as discriminating against persons in de facto relationships. [2] In South Australia, the Family Relationships Act 1975, contains a complex definition of “putative spouse”, based on the alternative of a minimum period of cohabitation or cohabitation for any period together with the birth of a child. A person who satisfies the definition is equated with a married person for the purposes of the law relating to, among other things, intestacy, family provision, fatal accidents, death duties, and superannuation. [3]

17.3 Elsewhere in this Report we have explained that our approach has been to examine specific areas of law to determine whether there are injustices or anomalies which ought to be remedied. For reasons we have given in our consideration of each area of the law, we do not think that a uniform definition of a de facto relationship is necessarily appropriate for all legal purposes. Thus, for example, our recommendations on adjustment of property and maintenance require, in general that the parties should have lived together for a specified period before the powers of the court can be invoked (paragraphs 9.7-9. 10). The powers of the court can also be exercised where the parties have lived together and have had a child. Similarly, we recommend that, in certain circumstances, the entitlement of a person to succeed to property on the death intestate of his or her de facto partner should require proof that the relationship had lasted for a minimum period (paragraphs 12.27-12.37). On the other hand, our recommendations on compensation for fatal accidents and protection against domestic violence do not require a de facto partner to show that the relationship had continued for any particular period (paragraphs 13.19 and 14.41). Nonetheless, we think it is appropriate to formulate a basic definition of a “de facto relationship” for legislative purposes. This definition should be capable of modification to incorporate additional eligibility criteria, in particular, a minimum period of cohabitation as the context requires. We now turn to this question.

II. A BASIC DEFINITION

A. The Suggested Definition

17.4 We think the basic statutory definition of a de facto relationship should be as follows:

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

Where it is necessary to include in legislation a requirement that a relationship has continued for a minimum period (as in the case where a de facto partner seeks property adjustment or an order for maintenance), the phrase “on a *bona fide* domestic basis” should be replaced by the phrase “on a permanent and *bona fide* domestic basis”. We do this in conformity with a drafting convention which has developed for Commonwealth legislation We think it is appropriate for State legislation to follow suit.

17.5 We have two reasons for adopting the basic definition. The first is common statutory usage. The definition, with minor variations, is the standard form adopted in Commonwealth legislation, including the Social Security Act 1947. [4] In New South Wales, it appears that the Commonwealth form has now been adopted. Thus the Workers’ Compensation Act, 1926, the Crimes (Domestic Violence) Amendment Act, 1982, and the Family Provision Act, 1982, all use the standard language, [5] again with minor variations. [6]

17.6 The second reason is that decisions of the Administrative Appeals Tribunal and the Federal Court of Australia have clarified the meaning of key words in this definition in the context of Commonwealth legislation, mainly that dealing with social security. [7] Most of these decisions were given in cases where a claimant for a widow’s pension or supporting parents benefit was concerned to show that she was not living in a de facto relationship, so as to avoid being excluded from the pension or benefit by operation of the so-called “cohabitation rule”. Nonetheless, these decisions assist considerably in determining whether or not a particular domestic arrangement amounts to a “de facto relationship” within the meaning of the statutory language we have suggested should be employed. We now refer to some of these decisions.

B. The Interpretation

17.7 In *Re Lambe*, the applicant s supporting parent s benefit had been cancelled on the ground that she was “living with a man as his wife on a *bona fide* domestic basis although not legally married to him”. [8] The applicant unsuccessfully appealed to the Administrative Appeals Tribunal. [9] In the course of its judgment, later upheld by the Federal Court of Australia, [10] the Tribunal made the following observations:

> “We consider ... that in order to determine whether a woman comes within the expression... all facets of the interpersonal relationship of the woman and the man with whom she is allegedly living as his wife need to be taken into account. This will involve consideration of the inter-relationship of the parties and any children in the household; whether that relationship contains any of the indicia of a family unit; and the way in which the parties present their relationship to the outside world ...

[T]he question of financial support provided to a woman will be an important consideration but it is only one of a number of relevant matters which need to be taken into account ....

Before a woman can be said to be living with a man ‘as his wife’, there must in our view, be elements both of permanence and exclusiveness in the relationship, as these elements are of the essence of a marriage relationship .... But within those broad confines, it is surely a notorious fact that marriage, in present day society, allows considerable scope to the parties to develop their relationship as they see fit without damaging the fundamental integrity of that relationship as a marriage.” [11]

17.8 The Administrative Appeals Tribunal has elaborated upon the difficulties of comparing a de facto relationship with “marriage”. In *Re Tang*, the Tribunal noted that

> “[t]he day has long passed (if in fact it ever existed) when one could safely generalise about what constituted a ‘typical marriage’. Certainly today variants on traditional marriage are widespread and numerous. The problem involved in comparing an already

> nebulous concept such as a human relationship with such an imprecise standard [that is, a marital relationship] has been recognised..." [12]

Despite the obvious difficulties, the Tribunal stated its task to be that of analysing the particular relationship "in the light of the indicia of the marriage relationship". The Tribunal was not prepared to place heavy reliance on the subjective opinion of the parties as to the nature of their relationship. While some reference to the subjective element was appropriate,

> "[i]n our view the parties' subjective belief manifests itself in the objective indicia which the relationship exhibits and it is to these that we should primarily look." [13]

17.9 In a similar vein, the Tribunal in *Re R C.*, noted the problem of identifying the distinctive elements which characterize a marriage. The Tribunal considered that the test posed by the legislation

> "looks to a common household to which both the man and the woman both contribute in their own ways." [14]

When referring to the "indicia" of a marriage relationship, the Tribunal cited with approval comments by the Full Court of the Family Court

> "The constituent elements of the marital relationship were referred to [in an earlier case] in these words: 'Marriage involves many elements some or all of which may be present in a particular marriage- elements such as dwelling under the same room, sexual intercourse, mutual society and protection recognition of the existence of the marriage by both spouses in public and private relationships' .To this general statement we wish to add but one phrase, 'the nurture and support of the children of the marriage'." [15]

17.10 The application of the basic definition to the myriad facets of private personal relationships between men and women will inevitably be a matter of degree and proportion. The attributes and circumstances of such relationships differ greatly, ranging from what is little more than a casual liaison to a continuing affectionate companionship, to a long-term merging of lives and resources. Moreover, the nature and quality of a particular relationship may change and develop over time, making it sometimes very difficult to pinpoint a time when the relationship should assume a new legal significance. While criteria such as those outlined in the previous paragraph will be useful as a guide in assessing the nature of a relationship, decisions in borderline cases will necessarily require a close and detailed examination of all aspects of the parties' domestic arrangements.

17.11 A review of the Tribunals decisions in social security cases reveals a large number of matters considered by the Tribunal in deciding whether or not a particular relationship amounted to a de facto relationship: the nature and extent of common residence; the duration of the relationship; whether or not a sexual relationship existed; the degree of financial interdependence and arrangements for support the ownership, use and acquisition of property, procreation of children; care and support of children, performance of household duties; use of a common surname; nature of social activities; degree of mutual commitment and moral support; plans for a common future; reputation and "public" aspects of the relationship; and explanations and interpretations offered by the parties. [16] It is not practicable to attempt an exhaustive list or a precise weighting of all factors, but it is apparent that the Tribunal places particular emphasis on the nature, extent and duration of common residence, and on the presence of a sexual relationship.

17.12 One commentator within the Department of Social Security has observed:

> "Basically, the Department's conception of *de facto* marriage has been the commonsense one that would be accepted also by its clients: *de facto* spouses are people who live together in the same household, and sleep together, and this arrangement is of some

stability. Only it has bound itself normally to infer the existence of the sexual relationship from other features of the association" [17]

C. Some Special Cases

17.13 The case law and guidelines to which we have referred will help to decide whether a particular relationship satisfies our basic definition of a de facto relationship. But, in many, if not most, cases, there will be no doubt whatever that the relationship in question does satisfy the definition. There will however, be some cases where further guidance may be helpful.

1. Concurrent De Facto Relationships

17.14 Is cohabitation with a spouse consistent with concurrent cohabitation with a de facto partner? And, can a person be a party to more than one concurrent de facto relationship? If regard is had to the terms of the basic definition it is conceivable that in some cases affirmative answers would be given to both questions. [18] The issue arises therefore whether the definition should be so qualified as to exclude the possibility of such answers, either for all aspects of the law affecting de facto partners or for only some aspects of that law.

17.15 In general we do not seek to define "de facto relationship" in such a way as to deny rights to the de facto partner of a person who is concurrently married and cohabiting, at least to some extent with his or her spouse. [19] We stress that we say "in general. In Chapter 12, for example, in the context of intestacy law, we recommend that where there is, in effect competition between a spouse and a de facto partner, the latter should be preferred only if the de facto relationship has continued for a prescribed period and the deceased person has not, at any time during that period, cohabited with his or her spouse. Subject to qualifications of this kind in particular contexts, we would leave the courts to determine whether a de facto relationship can exist at the same time if one of the parties continues to live (albeit intermittently) with his or her spouse. In our view, to do otherwise would mean that substantial injustice might occur in some cases.

17.16 Likewise, we do not seek to define "de facto relationship" in such a way as to exclude the possibility that rights may arise out of more than one such concurrent relationship. It would be an exceedingly rare case where a court would be satisfied that a person is living in two or more relationships at the same time, each of which satisfies the conditions of the basic definition. The more likely outcome would be a finding that none of the relationships satisfied these conditions. But, bearing in mind the possibility that the rare case may occur, we would not confine our recommendations to relationships which are, in effect monogamous de facto relationships. If so confined, injustice could sometimes, albeit rarely, arise. In any event, if as stated in the previous paragraph we are prepared to recognise the possibility of concurrent married and de facto relationships, we should also be generally prepared to recognise concurrent de facto relationships.

17.17 In the preceding paragraph we have assumed that the multiple de facto relationships to which we refer would involve separate households. There may be, however, instances where one person may have more than one de facto partner and all parties live together in the same household. In our view none of the relationships would satisfy the basic definition in this situation Among other things there would be no representation to the outside world that the relationship is between one man and one woman and the "indicia of the marriage relationship" would not be present.

2. The Duration and Continuity of the Relationship

17.18 The basic definition of a de facto relationship does not specify any minimum period during which the parties must live together. Where, however, it is desirable to specify such a period, is it also desirable to require that the parties must have lived together "continuously" for that period? The South Australian Family Relationships Act 1975 and the Ontario Family

Law Reform Act 1978 do so, but the Social Security Act 1947 does not, [20] using instead the formula to which we referred in paragraph 17.4. When we specify a minimum duration for the relationship we intend that the parties should have lived together continuously for that period, subject to this qualification: continuity should not be broken merely by reason of separations brought about by outside circumstances, such as business trips or illness, or separations brought about by disagreements where the separation is intended to be temporary only. We believe that the language we have suggested will be interpreted in a manner consistent with our intention. Accordingly, we do not think that the word "continuously" need be used in cases where a minimum period of cohabitation is required.

D. Recommendation

17.19 **We recommend that the basic definition of a de facto relationship, for the purposes of legislation, should be the following:**

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

III. DECLARATIONS

17.20 At this stage it is convenient to deal with another matter closely related to the problem of definition. The question whether a de facto relationship exists or has existed between two persons, may arise in a number of contexts. For example, we have recommended changes to the Wills, Probate and Administration Act 1898, [21] and the Compensation to Relatives Act 1897. [22] If these are implemented and if one de facto partner dies intestate as a result of an accident the surviving partner may wish to claim compensation under both the Workers' Compensation Act, 1926 and the Compensation to Relatives Act, 1897, and may also wish to claim a share of the estate of the deceased partner. All of these claims may be opposed on the ground that it has not been established that the claimant was living in a de facto relationship with the deceased. Clearly it would be convenient if the issue could be resolved once and for all in a single hearing, instead of being litigated in a number of different proceedings.

17.21 Although section 75 of the Supreme Court Act 1970, enables the court to make declaratory judgments or orders, a declaration is binding only on the parties to the proceedings. The procedure could be inappropriate where a person unilaterally seeks to establish that he or she was a de facto partner, or where the question arises in different proceedings involving different parties. This would be the case, for example, where an employer under the Workers' Compensation Act 1926, resists payment of compensation to a person claiming to be the de facto partner of a deceased worker, and a child of the deceased resists the alleged de facto partner's claim to a share in the deceased's intestate estate.

17.22 We think it is desirable to provide a procedure which might be used to avoid multiplicity of proceedings. The procedure should enable a person to obtain a declaration as to whether or not a de facto relationship exists or has existed at a particular date or between particular dates. In reaching this view we have been influenced by the model provided by the Children (Equality of Status) Act 1976. This Act enables an application to be made to the Supreme Court for a declaration of paternity and maternity, and provides that while such a declaration is in force, the person named in the declaration is to be conclusively presumed to be the mother, or father, of the child. [23]

17.23 Thus, **we recommend that, where any person alleges that a de facto relationship exists, or has existed, at a specified date, or for a specified period, between that person and another named person, or between two named persons, he or she should be able to apply to the Supreme Court for a declaration. If it is proved to the satisfaction of the**

Court that such a relationship exists or did exist, the Court should be empowered to make a declaration to that effect. We further recommend that while the declaration remains in force, the persons named in the declaration should, for all purposes, be presumed conclusively to have been living in a de facto relationship at the specified date or for the specified period.

17.24 Unlike a declaration made under section 75 of the Supreme Court Act 1970, a declaration that a de facto relationship exists, or has existed, should be binding upon persons who are not parties to the proceedings. Thus, interested persons should have an opportunity to be heard on the question whether or not the declaration should be made. **We recommend that where any person whose interests would, in the opinion of the court, be affected by the making of the declaration is not present or represented at the hearing, and has not had the opportunity to be present or represented, the court should be empowered, if it thinks that that person ought to be present or represented, to adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.** This recommendation is based on sections 13(2) and 15(2) of the Children (Equality of Status) Act, 1976.

17.25 In some cases a declaration may be made by the Supreme Court and it may later appear that relevant facts or circumstances were not disclosed to the court. The absence of any power to set the declaration aside if new facts are disclosed could give rise to injustice. Accordingly, **we recommend that the court should be empowered to make an order annulling a declaration, where it appears to the court that new facts or circumstances have arisen that have not previously been disclosed to the court. However, any annulment of a declaration should not affect anything done in reliance on the declaration before its annulment.** [24]

17.26 One further point should be noted. In this Report we have rejected the view that a de facto relationship should automatically give rise to specified rights and obligations. [25] The declaration procedure we have recommended is designed simply to provide a de facto partner with a convenient means of avoiding a multiplicity of proceedings. A person who makes a claim on the basis that he or she was living in a de facto relationship should not be *required* to first obtain a declaration. Nor is it our intention that a declaration that a de facto relationship exists or has existed at a particular date should create a status which automatically confers rights on the de facto partner. Our approach may be contrasted with the one adopted in South Australia, where a person who, for example, wishes to make a claim on the estate of a deceased de facto partner must first obtain a declaration from the Supreme Court that he or she was a “putative spouse” of the deceased. [26]

IV. SUMMARY

17.27 In this Chapter we have proposed a basic definition of a de facto relationship for use in legislation. The definition we propose follows language already widely employed in Commonwealth and State legislation. However, as we have explained elsewhere in this Report the same definition should not be applied, without modification to all areas of law. In particular, the period of cohabitation necessary to establish the entitlement of a de facto partner to specified benefits varies according to the context. We also recommend that the Supreme Court should be empowered to declare that a de facto relationship exists or has existed between two persons at a particular time or for a particular period. This additional power will minimise the danger of duplication of Proceedings.

FOOTNOTES

1. Anti-Discrimination Act 1977, s.4. See para.4.34.

2. NSW Anti Discrimination Board, *Discrimination in Legislation* (1978), vol.1. See para.5.42.

3. See para.5.38.

4. See paras.4.11-4.22, 4.30, 4.32-4.33.

5. See paras.4.37-4.38, 4.41, 4.42.

6. The Workers' Compensation Act, 1926, s.6 uses the phrase "permanent and bona fide domestic basis", even though there is now no minimum duration specified in the section. The section initially included such a requirement and the underlined words may have been overlooked (assuming it was intended to follow Commonwealth precedents) when the section was amended in 1981. The definition of "eligible person" in the Family Provision Act, 1982, s.6(a) omits the phrase "although not legally married" to the other partner. It is not clear why this phrase is omitted, although no significant consequences appear to flow from the Omission.

7. The major cases are the following - *Re Waterford* (1980) 49 FLR 98; *Re Lambe* (1981) 1 SSR 5 (AAT), (1981) 38 ALR 405 (Federal Court): *Re Semple* (1981) 1 SSR 6; *Re Tang* (1981) 2 SSR 15; *REPC* (1981) 4 SSR 36; *Re Ferguson* (1982) 5 SSR 55; and *Re Tozer* (1982) 10 SSR 99.

8. See Social Security Act 1947 (Cth), s.83AAA(1).

9. *Re Lambe* (1981) 1 SSR 5 (AAT).

10. *Lambe v. Director-General of Social Services* (1981) 38 ALR 405.

11. *Re Lambe* (1981) 1 SSR 5 (AAT); Transcript of Judgment, pp.21-22.

12. *Re Tang* (1981) 2 SSR 15; Transcript of Judgment, pp.6-7.

13. *Id.,* p.15.

14. *Re RC* (1981) 4 SSR 36; Transcript of Judgment, p.36.

15. *Id.,* pp.37-38, citing *In the Marriage of Pavey* (1976) 10 ALR 259, at p.26 3. See also *Falk and Falk* [1977] FLC 90-247.

16. See cases cited in note 7 above. The guidelines are discussed at length in A. Jordan. *As His Wife - Social Security Law and Policy on de Facto Marriage* (1981).

17. A Jordan, note 16 above, at p.43.

18. Cf. *Furmage v. Social Security Commission* (NZ) (1980) 2 NZAR 75, discussed in J Hughes, "Domestic Purposes Benefit Lessons from the Furmage Case" [1979] *New Zealand Law Journal* 32.

19. Cf. *In re Fagan* (1980) 23 SASR 454.

20. Cf. Superannuation Act 1976 (Cth), s.3. See para.4.30.

21. See paras. 12.27 ff.

22. See para.13.12.

23. Children (Equality of Status) Act, 1976, ss.13, 15.

24. Cf. *Id*., ss.13(6)-(9), 15(6)-(9).

25. See Chapter 5.

26. Family Relationships Act 1975 (SA), s.11(3).

Draft Legislation

- De Facto Relationships Bill, 1983
- Adoption of Children (De Facto Relationships) Amendment Bill, 1983
- Compensation to Relatives (De Facto Relationships) Amendment Bill, 1983
- Crimes (De Facto Relationships) Amendment Bill, 1983
- Law Reform (Miscellaneous Provisions) De Facto Relationships (Amendment) Bill, 1983
- Wills, Probate Administration (De Facto Relationships) Amendment Bill, 1983

De Facto Relationships Bill 1983

DE FACTO RELATIONSHIPS BILL 1983

A BILL FOR

An Act to make provision with respect to de facto partners.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

See also: Adoption of Children (De Facto Relationships)

Amendment Bilt 1983; Compensation to Relatives (De Facto Relationships) Amendment BilL 1983; Crimes (De Facto Relationships) Amendment BilL 1983; Law Reform (Miscellaneous Provisions) De Facto Relationships (Amendment) BilL 1983; Wills, Probate and Administration (De Facto Relationships) Amendment BilL 1983.

PART I - PRELIMINARY.

Short title.

1. This Act may be cited as the “De Facto Relationships Act 1983”.

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) E xcept as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in rspect thereof and as may be notified by proclamation published in the Gazette.

Arrangement.

3. This Act is divided as follows:-

PART I - PRELIMINARY - *ss.* 1-8.

PART II - JURISDICTION - *ss.*9-13.

PART III - PROCEEDINGS FOR FINANCIAL ADJUSTMENT- *ss.*14-43.

DIVISION 1. - *Preliminary* - *ss.*14-19.

DIVISION 2. - *Adjustment of interests with respect to property* - *ss.*20-25.

DIVISION 3. - *Maintenance* - *ss.*26-37.

DIVISION 4. - *General* - *ss.*38-43.

PART IV - COHABITATION AGREEMENTS AND SEPARATION AGREEMENTS - *ss.*44-45.

PART V. - DOMESTIC VIOLENCE AND HARASSMENT - *ss*.53-55.

PART VI. - MISCELLANEOUS - *ss*.56-61.

Report to be an aid to interpretation.

4. It is the intention of the Parliament that this Act and the regulations are to give effect to the recommendations made in the report of the Law Reform Commission concerning De Facto Relationships presented to the Parliament and accordingly, in the interpretation of this Act and the regulations, regard may be had to that report including the draft legislation set out in that report.

Interpretation.

5. (1) In this Act, except in so far as the context or subject matter otherwise indicates or requires -

“applicant” includes a cross-applicant;

“appointed day” means the day appointed and notified under section 2(2);

“de facto partner” means -

(a) inrelationtoamamawomanwhoislivingorhaslivedwiththemanashiswife on a bona fide domestic basis although not married to him; and

(b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her;

“de facto relationship” means the relationship betwee de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other;

“financial resources” in relation to de facto partners or either of them, includes -

(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 whick pursuant to the provisions of a discretionary trust may become vested in or used or applied in or towards the purposes of the de facto partners or either of them;

(c) property, the alienation or disposition of which is wholly or partly under the control of the de facto partners or either of them and which is lawfully capable of being used or applied by or on behalf of the de facto partners or either or them in or towards their or his or her own purposes; and

(d) any other valuable benefit;

“Local Court” means a Local Court established under section 6(1) of the Local Courts Act, 1982;

“property”, in relation to de facto partners or either of them, includes 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 actior and any right with respect to property;

“regulation” means a regulation made under this Act;

“Supreme Court” means the Supreme Court of New South Wales.

(2) Except as provided by section 6, a reference in this Act to a de facto partner includes a reference to a person who has, at any time, been a de facto partner.

(3) A reference in this Act to a child of de facto partners (whether the de facto partners are referred to as the parties to an application for an order under Part III or otherwise) is a reference to -

(a) a child born as a result of sexual relations between the partners;

(b) a child born as a result of the artificial insemination of the woman with the consent of her de facto partner, or

(c) a child adopted by the partners.

(4) A reference in this Act to periodic maintenance is a reference to maintenance paid or payable or to be paid, as the case may require, by means of a weekly, fortnightly, monthly, yearly or other periodic sum.

Application of Act.

6. This Act (except Part V) does not apply to or in respect of -

(a) a de facto relationship which ceased before the appointed day, or

(b) apersoninsofarasheorshewasapartnerinadefactorelationshipreferredto in paragraph (a).

Other rights of de facto partners not affected by this Act.

7. Nothing in this Act derogates from or affects any right of a de facto partner to apply for any remedy or relief under any other Act or any other law.

Declaration of interests in property.

8. (1) Without limiting the generality of section 7, in proceedings between de facto partners with respect to existing title or rights in respect of property, a court may declare the title or rights, if any, that a de facto partner has in respect of the property.

(2) Where a court makes a declaration under subsection (1), it may make consequential orders to give effect to the declaration including -

(a) orders as to possession and

(b) in the case of a Local Court orders of the kind which may be made under section 38(l)(b), (c), (i) and (j).

(3) An order under this section is binding on the de facto partners but not on any other person.

PART II - JURISDICTION.

Courts having jurisdiction under this Act.

9. Subject to this Act, a person may apply to -

(a) the Supreme Court; or

(b) a Local Court

for an order or relief under this Act

Limit of jurisdiction of Local Court.

10. Except as provided by section 12, a Local Court shall not have jurisdiction under this Act -

(a) in relation to property, to declare a title or right or adjust an interest; or

(b) to make an order for maintenance,

of a value or amount in excess of the amount prescribed for the time being by section 12 of the Local Courts (Civil Claims) Act, 1970.

Staying and transfer of proceedings.

11. (1) Where there are pending in a court proceedings that have been instituted under this Act by or in relation to a person and it appears to the court that other proceedings that have been so instituted by or in relation to the same person are pending in another court having jurisdiction under this Act, the first mentioned court -

(a) may stay the proceedings pending before it for such time as it thinks; or

(b) may dismiss the proceedings.

(2) Where there are pending in a court proceedings that have been instituted under this Act and it appears to the court that it is in the interests of justice that the proceedings be dealt with in another court having jurisdiction under this Act, the court may transfer the proceedings to the other court.

Transfer of proceedings from Local Courts in certain cases.

12. (1) Where proceedings are instituted in a Local Court with respect to an interest in property, being an interest of a value or amount in excess of the amount prescribed for the time being by section 12 of the Local Courts (Civil Claims) Act, 1970, the Local Court shalt unless the parties agree to the Court hearing and determining the proceedings, transfer the proceedings to the Supreme Court.

(2) Where proceedings referred to in subsection (1) are before it, the Local Court may transfer the proceedings of its own motion, notwithstanding that the parties would be willing for the Local Court to hear and determine the proceedings.

(3) Before transferring proceedings under subsection (1), the Local Court may make such orders as it considers necessary pending the disposal of the proceedings by the Supreme Court.

(4) Where proceedings are transferred to the Supreme Court under subsection (1), the Supreme Court shall subject to the rules of court, proceed as if the proceedings had been originally instituted in that Court.

(5) Without prejudice to the duty of a Local Court to comply with this section failure by the Local Court so to comply does riot invalidate any order of the Court in the proceedings.

Courts to act in aid of each other.

13. All courts having jurisdiction under this Act shall severally act in aid of and be auxiliary to each other in all matters under this Act.

PART III - PROCEEDINGS FOR FINANCIAL ADJUSTMENT.

DIVISION 1. - *Preliminary*.

Applications for orders under this Part.

14. (1) Subject to this Part, a de facto partner may apply to a court for an order under this Part for the adjustment of interests with respect to the property of the de facto partners or either of them or for the granting of maintenance, or both.

(2) An application referred to in subsection (1) may be made whether or not any other application for any remedy or relief is or may be made under this Act or any other Act or any other law.

Prerequisites for making of order - residence within State, etc.

15. (1) A court shall not make an order under this Part unless it is satisfied -

(a) that the parties to the application or either of them were or was resident within New South Wales on the day on which the application was made, and

(b) that -

(i) both parties were resident within New South Wales for a substantial period of their de facto relationship, or

(ii) substantial contributions as referred to in section 20(1) have been made in New South Wales by the applicant.

(2) For the purposes of subsection (1) (b) (i), the parties to an application shall be taken to have been resident within New South Wales for a substantial period of their de facto relationship if they have lived together in the State for a period equivalent to at least one-third of the duration of their relationship.

Relevant facts and circumstances.

16. Where a court is satisfied as to the matters specified in section 15 (1) (a) and (b), it may make or refuse to make an order under this Part by reason of facts and circumstances notwithstanding that those facts and circumstances, or some of them took place before the appointed day or outside New South Wales.

Prerequisites for making of order - length of relationship, etc.

17. (1) Except as provided by subsection (2), a court shall not make an order under this Part unless it is satisfied that the parties to the application have lived together in a de facto relationship for a period of not less than 2 [3] years.*

* Two members of the Division consider that the period should be 2 years and two members consider that it should be 3 years.

(2) A court may make an order under this Part where it is satisfied -

(a) that there is a child of the parties to the application; or

(b) that the applicant -

(i) has made substantial contributions of the kind referred to in section 20(l) (a) or (b) for which the applicant would otherwise not be adequately compensated if the order were not made; or

(ii) has the care and control of a child of the respondent,

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

Time limit for making applications.

18. (1) Except as provided by subsections (2) and (3), where de facto partners have ceased to live together as husband and wife on a bona fide domestic basis, an application to a court for an order under this Part shall be made before the expiration of the period of 2 years after the day on which they ceased, or last ceased, as the case may require, to so live together.

(2) A court may, at any time after the expiration of the period referred to in subsection (1), grant leave to a de facto partner to apply to the court for an order under this Part (other than an order under section 27(1) made where the court is satisfied as to the matters specified in paragraph (b) of that subsection) where the court is satisfied, having regard to such matters as it considers relevant that greater hardship would be caused to the applicant if that leave were not granted than would be caused to the respondent if that leave were granted.

(3) Where, under subsection (2), a court grants a de facto partner leave to apply to the court for an order under this part, the de facto partner may apply accordingly.

Duty of court to end financial relationships.

19. In proceedings for an order under this part, a court shall so far as is practicable, make such orders as will finally determine the financial relationships between the de facto partners and avoid further proceedings between them

DIVISION 2. - *Adjustment of interests with respect to property*.

Application for adjustment.

20. (1) On an application by a de facto partner for an order under this Part to adjust interests with respect to the property of the de facto partners or either of them, a court may make such order adjusting the interests of the partners 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 de facto partners to the acquisition conservation or improvement of any of the property of the partners or either of them or to the financial resources of the partners or either of them; and

(b) the contributions, including any contributions made in the capacity of homemaker or parent made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following, namely-

(i) a child of the partners;

(ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.

(2) A court may make an order under subsection (1) in respect of property whether or not it has declared the title or rights of a de facto partner in respect of the property.

Adjournment of application - likelihood of significant change in circumstances.

21. (1) Without limiting the power of a court to grant an adjournment in relation to any proceedings before it, where, on an application by a de facto partner for an order under this Part to adjust interests with respect to the property of the de facto partners or either of them or otherwise, the court is of the opinion -

(a) that there is likely to be a significant change in the financial circumstances of the partners or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and

(b) that an order that the court could make with respect to the property of the partners or either of them if that significant change in financial circumstances occurs is more likely to do justice as between the partners than an order that the court could make immediately with respect to the property of the partners or either of them,

the court may, if so requested by either partner, adjourn the application until such time, before the expiration of a period specified by the court as that partner applies for the application to be determined, but nothing in this section requires the court to adjourn any application in any particular circumstances.

(2) Where a court proposes to adjourn an application as provided by subsection (1), the court may, before so adjourning the application make such order or orders (if any) as it considers appropriate with respect to the property of the de facto partners or either of them.

(3) A court may, in forming an opinion for the purposes of subsection (1) as to whether there is likely to be a significant change in the financial circumstances of the de facto partners or either of them have regard to any change in the financial circumstances of a partner that may occur by reason of the vesting in the partners or either of them or the use or application in or towards the purposes of the partners or either of them of a financial resource of the partners or either of them but nothing in this subsection limits the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of the partners or either of them.

Adjournment of application - proceedings in the Family Court of Australia.

22. (1) Without limiting the power of a court to grant an adjournment in relation to any proceedings before it, where, at any time before the court has made a final order under this Part to adjust interests with respect to the property of de facto partners or either of them, proceedings in relation to the property of the partners or either of them are commenced in the Family Court of Australia, the court may adjourn the hearing of the application for the order.

(2) Where the hearing of an application for an order has been adjourned under subsection (1), the applicant for the order may, where the proceedings referred to in that subsection are delayed by neglect or by the unreasonable conduct of a party to those proceedings or by collusion between the parties to those proceedings, apply to the court for the hearing of the application to proceed.

Deferment of order.

23. Where a court is of the opinion that a de facto partner in respect of the property of whom an order is made pursuant to an application under section 20 is likely to become entitled within a short period, to property which may be applied in satisfaction of the order,

the court may defer the operation of the order until such date or the occurrence of such event as is specified in the order.

Effect on application of death of parties.

24. (1) Where, before an application under section 20 is determined, either party to the application dies, the application may be continued by or against as the case may require, the legal personal representative of the deceased party.

(2) Where a court is of the opinion -

(a) that it would have adjusted interests in respect of property if the deceased party had not died; and

(b) that notwithstanding the death of the deceased party, it is still appropriate to adjust those interests,

the court may make an order under this Part in respect of that property.

(3) An order referred to in subsection (2) may be enforced on behalf of or against as the case may require, the estate of the deceased party.

(4) The rules of a court may, for the purposes of subsection (1), provide for the substitution of the legal personal representative as a party to the application.

Effect on order of death of party.

25. Where, after an order is made against a party to an application under section 20, the party dies, the order may be enforced against the estate of the deceased party.

DIVISION 3. - *Maintenance.*

No general right of de facto partner to maintenance.

26. Except as otherwise provided by this Division, a de facto partner is not liable to maintain the other de facto partner and a de facto partner is not entitled to claim maintenance from the other de facto partner.

Order for maintenance.

27. (1) On an application by a de facto partner for an order under this Part for maintenance, a court may make an order for maintenance where the court is satisfied as to either or both of the following:-

(a) that the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of the de facto partners or a child of the respondent, being, in either case, a child who is, on the day on which the application is made -

(i) except in the case of a child referred to in subparagraph (ii)-under the age of 12 years, or

(ii) in the case of a physically handicapped child or mentally handicapped child - under the age of 16 years,

(b) that the applicant is unable to support himself or herself adequately because the applicant s earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court -

(i) an order for maintenance would increase the applicant s earning capacity by enabling the applicant to undertake a course or programme of training or education; and

(ii) it is, having regard to all the circumstances of the case, reasonable to make the order.

(2) In determining whether to make an order under this Part for maintenance and in fixing any amount to be paid pursuant to such an order, a court shall have regard to -

(a) the income, property and financial resources of each de facto partner(including the rate of any pension, allowance or benefit paid to either partner or the eligibility of either partner for a pension allowance or benefit) and the physical and mental capacity of each partner for appropriate gainful employment;

(b) the financial needs and obligations of each de facto partner;

(c) the responsibilities of either de facto partner to support any other person;

(d) the terms of any order made or proposed to be mad ' e under section 20 with respect to the property of the de facto partners; 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.

(3) 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.*

* Clause 27(3) reflects the recommendation of the majority of the Division, Mr Justice Nygh dissents from the recommendation.

Interim maintenance.

28. Where, on an application by a de facto partner for an order under this Part for maintenance, it appears to a court that the applicant is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment by the respondent pending the disposal of the application of such periodic sum or other sums as the court considers reasonable.

Effect of subsequent relationship or marriage.

29. Where de facto partners have ceased to live together as husband and wife on a bona fide domestic basis, an application to a court for an order under this Part for maintenance may not be made by a de facto partner who, at the time at which the application is made, has entered into a subsequent de facto relationship with another person or who, at that time, has married or remarried.

Duration of orders for periodic maintenance.*

30. (1) An order under this Part for periodic maintenance, being an order made where a court is satisfied solely as to the matters specified in section 27(l) (a), may apply for such period as may be determined by the court not exceeding the period expiring when the child to whom section 27(l) (a) applies, or the younger or youngest such child, as the case may require

(a) except in the case of a child referred to in subparagraph (b) - attains the age of 12 years; or

(b) in the case of a physically handicapped child or mentally handicapped child attains the age of 16 years.

(2) An order under this Part for periodic maintenance, being an order made where a court is satisfied solely as to the matters specified in section 27(l)(b), may apply for such period as may be determined by the court not exceeding -

(a) 3 years after the day on which the order is made; or

(b) 4 years after the day on which the de facto partners ceased, or last ceased as the case may require, to live together,

whichever is the shorter.

(3) An order under this Part for periodic maintenance, being an order made where a court is satisfied as to the matters specified in section 27(1) (a) and (b), may apply for such period as may be determined by the court not exceeding the period permissible under subsection (1) or (2), whichever is the longer.

* Clause 30(i) reflects the recommendation of the majority of the Division, Mr Gressier dissents from the recommendation He would impose a statutory maximum of 3 years on the duration of a childcare maintenance order.

(4) Nothing in this section or an order under this Part for periodic maintenance prevents such an order from ceasing to have effect pursuant to section 32 or 33.

Effect on application of death of parties.

31. Where, before an application under section 27 is determined, either party to the application dies, the application shall abate.

Cessation of order - generally.

32. (1) An order under this Part for maintenance shall cease to have effect -

(a) on the death of the person for whose benefit the order was made;

(b) on the death of the person against whom the order was made;

(c) on the marriage or remarriage of the person for whose benefit the order was made;[or

(d) on the entry into a de facto relationship with another person by the person for whose benefit the order was made.]*

(2) Where, in relation to a person for whose benefit an order under this Part for maintenance is made -

(a) a marriage or remarriage referred to in subsection (1) (c) takes place[-, or

(b) the person enters into a de facto relationship,] -

the person shall without delay, notify the person against whom the order was made of the date of the marriage or remarriage, or of the date of entry into the de facto relationship, as the case may require.

(3) Any money paid pursuant to an order under this Part for periodic maintenance, being money paid in respect of a period occurring after the event referred to in subsection (2), may be recovered as a debt in a court of competent jurisdiction by the person who made the payment

* Clauses 3 2 (1) (d) and 3 2 (2) (b) reflect the views of two members of the Division. The other two members would omit both provisions.

Cessation of order - child care responsibilities.

33. Where a court makes an order under this Part for periodic maintenance, being an order made where the court is satisfied solely as to the matters specified in section 27(1) (a), the order shall cease to have effect on the day on which the person for whose benefit the order was made ceases to have the care and control of the child of the relationship, or the children of the relationship, as the case may require, in respect of whom the order was made.

Recovery of arrears.

34. Nothing in section 32 or 33 affects the recovery of arrears due pursuant to an order under this Part for maintenance at the time when the order ceased to have effect.

Variation, etc, of orders for periodic maintenance.

35. (1) On an application by a person in respect of whom an order has been made under this Part for periodic maintenance, a court may -

(a) subject to subsection (2), discharge the order;

(b) suspend the operation of the order wholly or in part and either until further order or until a fixed time or the happening of some future event;

(c) revive wholly or in part an order suspended under paragraph (b); or

(d) subject to subsection (2), vary the order so as to increase or decrease any amount ordered to be paid or in any other manner.

(2) A court shall not make an order discharging, increasing or decreasing an amount ordered to be paid by an order unless it is satisfied -

(a) that, since the order was made, or last varied -

(i) the circumstances of a person for whose benefit the order was made have so changed; or

(ii) the circumstances of the person against whom the order was made have so changed,

as to justify its so doing; or

(b) that, since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing.

(3) In satisfying itself for the purposes of subsection (2) (b), a court shall have regard to any changes that have occurred -

(a) except as provided by paragraph (b), in the Consumer Price Index (All Groups Index) issued by the Australian Statistician, or

(b) where a group of numbers or of amounts, other than those set out in the Index referred to in paragraph (a) (being a group of numbers or of amounts which relate to the price of goods and services, and which is issued by the Australian Statistician) is prescribed for the purposes of this paragraph - in the group ol' numbers or of amounts so prescribed.

(4) A court shall not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made, or last varied having regard to a change in the cost of living.

(5) An order decreasing the amount of a periodic sum payable under an order may be expressed to be retrospective to such date as the court thinks fit.

(6) For the purposes of this section, a court shall have regard to the provisions of section 26 or 27.

Other maintenance orders not to be varied.

36. Except as provided by section 41, an order made under this Part for maintenance, not being an order for periodic maintenance, may not be varied.

Extension of orders for periodic maintenance.

37. (1) Where a court has made an order under this Part for periodic maintenance for a period which is less than the maximum period permissible in accordance with section 30, the de facto partner in whose favour the order is made may, at any time before the expiration of that maximum period, apply to the court for an extension of the period for which the order applies.

(2) A court shall not make an order pursuant to an application under subsection (1) unless it is satisfied that there are circumstances which justify its so doing.

(3) An order extending the period for which an order under this Part for periodic maintenance applies may not be made so as to extend the period beyond the maximum period permissible under section 30 in relation to the second mentioned order.

(4) For the purposes of this section, a court shall have regard to the provisions of sections 26 and 27.

DIVISION 4. - *General.*

Orders, etc, of a court.

38. (1) Without derogating from any other power of a court under this or any other Act or any other law, a court, in exercising its powers under this Part, may do any one or more of the following:-

(a) order the transfer of property;

(b) order the sale of property and the distribution of the proceeds of sale in such proportions as the court thinks fit;

(c) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

(d) order payment of a lump sum whether in one amount or by instalments;

(e) order payment of a weekly, fortnightly, monthly, yearly or other periodic sum;

(f) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;

(g) appoint or remove trustees;

(h) make an order or grant an injunction -

(i) for the protection of or otherwise relating to the property or financial resources of the parties to an application or either of them; or

(ii) to aid enforcement of any other order made in respect of an application, or both;

(i) impose terms and conditions;

(j) make an order by consent;

(k) make any other order or grant any other injunction (whether or not of the same nature as those mentioned in the preceding paragraphs) which it thinks it is necessary to make to do justice.

(2) A court may, in relation to an application under this Part -

(a) make any order or grant any remedy or relief which it is empowered to make or grant under this or any other Act or any other law; and

(b) make any order or grant any remedy or relief under this Part in addition to or in conjunction with making any other order or granting any other remedy or relief which it is empowered to make or grant under this Act or any other Act or any other law.

Execution of instruments by order of a court.

39. (1) Where -

(a) an order under this Part has directed a person to execute a deed or instruments; and

(b) the person has refused or neglected to comply with the direction or, for any other reason a court thinks it necessary to exercise the powers conferred on it under this subsection,

the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person to whom the direction was given and to do all acts and things necessary to give validity and operation to the deed or instrument.

(2) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person directed by the order to execute it.

(3) A court may make such order as it thinks just as to the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.
Ex parte orders.

40. (1) In the case of urgency, a court -

(a) may make an ex parte order pursuant to section 28; or

(b) may make an ex parte order or grant an ex parte injunction for either or both of the purposes specified in section 38(l)(h),

or both-

(2) An application under this section may be made orally or in writing or in such form as the court considers appropriate.

(3) Where an application under this section is not made in writing, the court shall not make an order or grant an injunction under subsection (1) unless by reason of the extreme urgency of the case it considers that it is necessary to do so.

(4) The court may give such directions with respect to the filing of a written application, the service of the application and the further hearing of the application as it thinks fit.

(5) An order made or injunction granted under subsection (1) shall be expressed to operate or apply only until a specified time or the further order of the court.

(6) Where a court makes an order or grants an injunction under subsection (1), it may give directions with respect to -

(a) the service of the order or injunction and such other documents as it thinks fit; and

(b) the hearing of an application for a further order.

Variation and setting aside of orders.

41. Where, on the application of a person in respect of whom an order referred to in section 20 or 27 has been made, a court is satisfied that -

(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;

(b) in the circumstances that have arisen since the order was made, it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or

(c) a person has defaulted in carrying out an obligation imposed on him 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 aside and make another order in substitution for the order,

the court may, in its discretion, vary the order or set the order aside and, if it thinks fit, make another order in accordance with this part in substitution for the order so set aside.

Transactions to defeat claims.

42. (1) In this section, “disposition” includes a sale and a gift.

(2) On an application for an order under this Part a court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of a party, which is made or proposed to be made to defeat an existing or anticipated order relating to the application (being an order adjusting interests with respect to the property of the parties or either of them an order for maintenance or an order for costs) or which irrespective of intention is likely to defeat any such order.

(3) The court may, without limiting section 38, order that any property dealt with by any such instrument or disposition may be taken in execution or used or applied with or

charged with the payment of such sums payable pursuant to an order adjusting interests with respect to the property of the parties or either of them or for maintenance or costs as the court directs, or that the proceeds of a sale shall be paid into court to abide its order.

(4) A party or a person acting in collusion with a party may be ordered to pay the costs of any other party or of a bona fide purchaser or other person interested of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.

Interests of other parties.

43. In the exercise of its powers under this Part 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.

PART IV - COHABITATION AGREEMENTS AND SEPARATION AGREEMENTS.

Interpretation: Pt. IV.

44. (1) In this Part -

“cohabitation agreement” means an agreement between a man and a woman, whether or not there are other parties to the agreement -

(a) which is made (whether before, on or after the appointed day) -

(i) in contemplation of their entering into a de facto relationship, or

(ii) during the existence of a de facto relationship between them, and

(b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,

and includes such an agreement which varies an earlier cohabitation agreements

“financial matters”, in relation to de facto partners, means matters with respect to any one or more of the following-.-

(a) the maintenance of either or both of the partners;

(b) the property of those partners or either of them;

(c) the financial resources of those partners or either of them.

“separation agreement” means an agreement between a man and a woman whether or not there are other parties to the agreement -

(a) which is made (whether before, on or after the appointed day) -

(i) except as provided by subsection (2), in contemplation of the termination of a de facto relationship that exists between them; or

(ii) after the termination of a de facto relationship that existed between them; and

(b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,

and includes such an agreement which varies an earlier cohabitation agreement or separation agreement.

(2) Where in relation to a separation agreement made in contemplation of the termination of a de facto relationship, the relationship is not terminated within 3 months after the day on which the agreement was made, the agreement shall be deemed to be a cohabitation agreement.

Entering into of agreements.

45. (1) Notwithstanding any rule of public policy to the contrary, a man and a woman who are not married to each other may enter into a cohabitation agreement or separation agreement.

(2) Nothing in a cohabitation agreement or separation agreement affects the power of a court to make an order with respect to the right to custody of maintenance of or access to or otherwise in relation to the children of the parties to the agreement.

Agreements subject to law of contract.

46. Except as otherwise provided by this Part a cohabitation agreement or separation agreement shall be subject to and enforceable in accordance with the law of contract, including, without limiting the generality of this section the Contracts Review Act 1980.

Effect of agreements in certain proceedings.

47. (1) Where, on an application by a de facto partner for an order under Part III, a court is satisfied -

(a) that there is a cohabitation agreement or separation agreement between the de facto partners;

(b) that the agreement is in writing;

(c) that the agreement is signed by the partner against whom it is to be enforced;

(d) that each partner was, before the time at which the agreement was signed by him or her, as the case may be, furnished with a certificate in or to the effect of the prescribed form by a solicitor which states that before that time, the solicitor advised that partner, independently of the other partner, as to the following matters:-

(i) the effect of the agreement on the rights of the partners to apply for an order under Part III;

(ii) whether or not at that time, it was to the advantage, financially or otherwise, of that partner to enter into the agreement;

(iii) whether or not at that time, it was prudent for that partner to enter into the agreement;

(iv) whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable, and

(e) that the certificates referred to in paragraph (d) are endorsed on or annexed to or otherwise accompany the agreement,

the court shall not, except as provided by sections 49 and 50, make an order under Part III in so far as the order would be inconsistent with the terms of the agreement.

(2) Where, on an application by a de facto partner for an order under Part III, a court is satisfied that there is a cohabitation agreement or separation agreement between the de facto partners, but the court is not satisfied as to any one or more of the matters referred to in subsection (1) (b), (c), (d) or (e), the court may make such order as it could have made if there were no cohabitation agreement or separation agreement between the partners, but in making its order, the court, in addition to the matters to which it is required to have regard under Part III, may have regard to the terms of the cohabitation agreement or separation agreement.

(3) A court may make an order referred to in subsection (2) notwithstanding that the cohabitation agreement or separation agreement purports to exclude the jurisdiction of the court to make that order.

Effect of certain exclusion provisions in agreements.

48. Where a cohabitation agreement or separation agreement does not satisfy any one or more of the matters referred to in section 47(1)(b), (c), (d) or (e), the provisions of the agreement may, in proceedings other than an application for an order under Part III, be enforced notwithstanding that the agreement purports to exclude the jurisdiction of a court under Part III to make such an order.

Variation of terms of cohabitation agreement.

49. (1) On an application by a de facto partner for an order under Part III, a court may vary or set aside the provisions, or any one or more of the provisions, of a cohabitation agreement (but not a separation agreement) made between the de facto partners, being a cohabitation agreement which satisfies the matters referred to in section 47(1)(b),(c),(d)and(e), where in the opinion of the court, the circumstances of the partners have so changed since the time at which the agreement was entered into that it would lead to serious injustice if the provisions of the agreement, or any one or more of them were, whether on the application for the order under Part III or on any other application for any remedy or relief under any other Act or any other law, to be enforced.

(2) A court may, pursuant to subsection (1), vary or set aside the provisions, or any one or more of the provisions, of a cohabitation agreement notwithstanding any provision of the agreement to the contrary.

Effect of revocation, etc, of agreements.

50. Without limiting or derogating from the provisions of section 46, on an application by a de facto partner for an order under Part III, a court is not required to give effect to the terms of any cohabitation agreement or separation agreement entered into by that partner where the court is of the opinion -

(a) that the de facto partners have, by their words or conduct revoked or consented to the revocation of the agreement; or

(b) that the agreement has otherwise ceased to have effect.

Effect of death of de facto partner - periodic maintenance.

51. (1) The provisions of a cohabitation agreement or separation agreement requiring a de facto partner to pay periodic maintenance to the other de facto partner shalt on the death of the first mentioned de facto partner, except in so far as the cohabitation

agreement or separation agreement otherwise provides, be unenforceable against his or her estate.

(2) The provisions of a cohabitation agreement or separation agreement requiring a de facto partner to pay periodic maintenance to the other de facto partner shalt on the death of the second mentioned partner, be unenforceable by his or her estate.

(3) Nothing in subsection (1) or (2) affects the recovery of arrears of periodic maintenance due and payable under a cohabitation agreement or separation agreement at the date of death of the partner.

Effect of death of de facto partner - transfer of property and lump sum payments.

52. Except in so far as a cohabitation agreement or separation agreement otherwise provides, the provisions of such an agreement entered into by de facto partners relating to property and lump sum payments may, on the death of one of the partners, be enforced on behalf of, or against, as the case may be, the estate of the deceased partner.

PART V - DOMESTIC VIOLENCE AND HARASSMENT

Granting of injunction.

53. The Supreme Court may, on an application made to it by a de facto partner or in any proceedings between de facto partners, whether under Part III or otherwise, grant an injunction -

(a) for the personal protection of a de facto partner or of a child ordinarily residing within the same household as the de facto partners or who at any time ordinarily so resided;

(b) restraining a de facto partner -

(i) from entering the premises in which the other de facto partner resides; or

(ii) from entering a specified area, being an area in which the premises in which the other de facto partner resides are situated,

(c) restraining a de facto partner-

(i) from entering the place of work of the other de facto partner; or

(ii) from entering the place of work of a child referred to in paragraph (a), or

(d) relating to the use or occupancy of the premises in which the de facto partners reside.

Failure to comply with injunction.

54. (1) A person, against whom an injunction under section 53 has been granted and who-

(a) has been served personally, in the prescribed manner, with a copy of the order under section 53 by which an injunction against the person was granted; and

(b) after having been so served, knowingly fails to comply with a restriction or prohibition specified in the order under section 53 so served,

shall be guilty of an offence and liable on conviction before a magistrate to imprisonment for 6 months.

(2) Nothing in subsection (1) affects the power of a court to punish a person for contempt of court

Other powers of courts not affected.

55. Nothing in this Part derogates from or affects any power of a court under any other Act or law with respect to any act, matter or thing to which this Part applies.

PART VI - MISCELLANEOUS.

Declaration as to existence of de facto relationship.

56. (1) A person who alleges that a de facto relationship exists or has existed between the person and another named person or between 2 named persons may apply to the Supreme Court for a declaration as to the existence of a de facto relationship between the persons.

(2) If, on an application under subsection (1), it is proved to the satisfaction of the Court that a de facto relationship exists or has existed, the Court may make a declaration (which shall have effect as a judgment of the Court) that persons named in the declaration have or have had a de facto relationship.

(3) Where the Court makes a declaration under subsection (2), it shall state in its declaration that -

(a) the de facto relationship existed as at a date specified in the declaration; or

(b) the de facto relationship existed between dates specified in the declaration

or both.

(4) Where any person whose interests would, in the opinion of the Court be affected by the making of a declaration under subsection (2) is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of an application made under that subsection the Court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.

(5) A declaration may be made under subsection (2) whether or not the person or either of the persons named by the applicant as a partner or partners to a de facto relationship is alive.

(6) While a declaration made under subsection (2) remains in force, the persons named in the declaration shall for all purposes, be presumed conclusively to have had a de facto relationship as at the date specified in the declaration or between the dates so specified, or both as the case may require.

(7) Where a declaration has been made under subsection (2) and, on the application of any person who applied or could have applied for the making of the declaration or who is affected by the declaration it appears to the Court that new facts or circumstances have arisen that have not previously been disclosed to the Court and could not by the exercise of reasonable diligence have previously been disclosed to the Court, the Court may make an order annulling the declaration and the declaration shall thereupon cease to have effect, but the annulment of the declaration shall not affect anything done in reliance on the declaration before the making of the order of annulment.

(8) Where any person whose interests would, in the opinion of the Court, be affected by the making of an order under subsection (2) is not present or represented and has not been given an opportunity be present or represented, at the hearing of an application made under that subsection the Court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.

(9) Where the Court makes an order under subsection (7) annulling a declaration made under subsection (2), it may, if it thinks that it would be just and equitable to do so, make such ancillary orders (including orders varying rights with respect to property or financial resources) as may be necessary to place as far as practicable any person affected by the annulment of the declaration in the same position as he would have been in if the declaration had not been made.

Enforcement of certain Supreme Court orders by Local Courts.

57. The regulations may make provision for or with respect to the enforcement by a Local Court of an order under this Act of the Supreme Court for the payment of money.

Enforcement of certain orders for payment of money.

58. The provisions of Division 6 of Part IV of the Local Courts (Civil Claims) Act 1970, and of Part V of that Act apply to and in respect of -

(a) an order under this Act of a Local Court for the payment of money; and

(b) an order under this Act of the Supreme Court for the payment of money being an order whick pursuant to the regulations, may be enforced by a Local Court,

in the same way as they apply to and in respect of a judgment of a Local Court under that Act.

Enforcement of other orders, etc.

59. (1) If a court having jurisdiction under this Act is satisfied that a person has knowingly and without reasonable cause contravened or failed to comply with an order made or injunction granted under this Act (not being an order for the payment of money), the court may -

(a) order the person to pay a fine not exceeding $2,000;

(b) require the person to enter into a recognizance, with or without sureties, in such reasonable amount as the court thinks fit, that the person will comply with the order or injunction or order the person to be imprisoned until the person enters into such a recognizance or until the expiration of 3 months, whichever first occurs;

(c) order the person to deliver up to the court such documents as the court thinks fit; and

(d) make such other orders as the court considers necessary to enforce compliance with the order or injunction.

(2) Nothing in subsection (1) affects the power of a court to punish a person for contempt of court.

(3) Where an act or omission referred to in subsection (1) is an offence against any other law, the person committing the offence may be prosecuted and convicted under that law,

but nothing in this section renders any person liable to be punished twice in respect of the same offence.

Rules of court.

60. (1) For the purpose of regulating any proceedings under this Act in or before the Supreme Court, rules of court may be made under the Supreme Court Act, 1970, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Subsection (1) does not limit the rule- making powers conferred by the Supreme Court Act, 1970.

Regulations.

61. (1) The Governor may make regulations, not inconsistent with this Act, or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) A provision of a regulation may -

(a) apply generally or be limited in its application by reference to specified exceptions or factors;

(b) apply differently according to different factors of a specified kind; or

(c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,

or may do any combination of those things.

Adoption of Children (De Facto Relationships) Amendment Bill, 1983

A BILL FOR
An Act to amend section 19 of the Adoption of Children Act 1965, to enable the making, in certain circumstances, of an adoption order in favour of a man and a woman who are living together as husband and wife on a bona fide domestic basis although not married to each other.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

Short title.

1. This Act may be cited as the “Adoption of Children (De Facto Relationships) Amendment Act 1983”.

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on the day appointed and notified under section 2(2) of the De Facto Relationships Act, 1983.

Amendment of Act No.23, 1965.

3. The Adoption of Children Act, 1965, is amended in the manner set forth in Schedule 1.

SCHEDULE 1. (Sec.3.)

AMENDMENTS TO THE ADOPTION OF CHILDREN ACT, 1965.

(1) Section 19(l) -

Omit “ subsectiorf', insert instead “subsections (1A) and”.

(2) Section 19(1A) -

After section 19(1), insert-

(1A) The Court may make an adoption order in favour of a man and a woman who are living together as husband and wife on a bona fide domestic basis although not married to each other if, without derogating from the other provisions of this Divisiom the Court is satisfied -

> (a) that the man and the woman have so lived together for a period of not less than 3 years before the date on which the application for the adoption order is made; and
>
> (b) that -

(i) the child in respect of whom the application for the adoption order is made is the child of the man or the woman; or

(ii) the child in respect of whom the application for the adoption order is made is the relative of the man or the woman and has been brought up, maintained and educated by the applicants as their child.

(3) Section 19(4) -

After “jointly”, insert “or a man and a woman referred to in subsection (1A) jointly”.

Compensation to Relatives (De Facto Relationships) Amendment Bill, 1983

A BILL FOR
An Act to amend the Compensation to Relatives Act of 1897 to enable actions under that Act to be brought for the benefit of de facto partners.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

Short title.

1. This Act may be cited as the “Compensation to Relatives (De Facto Relationships) Amendment Act 1983”.

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on the day appointed and notified under section 2(2) of the De Facto Relationships Act, 1983.

Amendment of Act No. 31, 1897.

3. The Compensation to Relatives Act of 1897 is amended in the manner set forth in Schedule 1.

Application of Act.

4. The amendments made to the Compensation to Relatives Act of 1897 by this Act shall not apply in respect of the death of a person which occurred before the date of assent to this Act.

SCHEDULE 1. (Sec.3.)

AMENDMENTS TO THE COMPENSATION TO RELATIVES ACT OF 1897.

(1) Section 4(2) -

At the end of section 4, insert-

(2) Where there is a wife and a de facto wife or a husband and a de facto husband of the person whose death has been so caused -

> (a) without limiting subsection (1), the action shall be for the benefit of the wife and the de facto wife or the husband and the de facto husband, as the case may require; and
>
> (b) the wife and the de facto wife or the husband and the de facto husband, as the case may require, shall be separate parties to the action.

(2) (a) Section 7(l) -

After “say,”, insert “the word “wife” shall include de facto wife; and the word “husband” shall include de facto husband; and”.

(b) Section 7(1A), (1B) -

After section 7(1), insert-

(1A) In this Act “de facto wife” means a woman who, immediately before the date of death of a man, lived with the man as his wife on a bona fide domestic basis although not married to him.

(1B) In this Act “de facto husband” means a man who, immediately before the date of death of a woman, lived with the woman as her husband on a bona fide domestic basis although not married to her.

Crimes (De Facto Relationships) Amendment Bill, 1983

A BILL FOR
An Act to amend the Crimes Act 1900, with respect to the making of apprehended domestic violence orders by a court.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament ,assembled, and by the authority of the same, as follows:-

Short title.

1. This Act may be cited as the “Crimes (De Facto Relationships) Amendment Act, 1983”.

Commencement.

2. (1) Sections 1 and 2 shall commence on -the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on the day appointed and notified tinder section 2(2) of the De Facto Relationships Act, 1983.

Amendment of Act No.40, 1900.

3. The Crimes Act 1900, is amended in the manner set forth in Schedule 1.

SCHEDULE 1. (Sec. 3.)

AMENDMENTS TO THE CRIMES ACT, 1900.

(1) Section 4(1), definition of *“Domestic violence offence”* -

From paragraph (a), omit “committed upon a person at a time when the person who commits the offence and the person upon whom the offence is committed are married to each other or, although not married to each other, are living together as husband and wife on a bona fide domestic basis; or”, insert instead:-

committed upon -

(i) a person who is or has been married to the person who commits the offence; or

(ii) a person who is living with or has lived with the person who commits the offence as his wife or her husband, as the case may be, on a bona fide domestic basis although not married to him or her, as the case may be; or

(2) (a) Section 547 AA(1) -

Omit “probabilities that the commission by a person of a domestic violence offence upon another person (in this section referred to as the aggrieved spouse of the defendant) is apprehended by the aggrieved spouse of the defendant and that the apprehension is reasonable,” insert instead:-

probabilities -

(a) that -

(i) the commission by a person of a domestic violence offence upon an other person (in this section referred to as the aggrieved spouse of the defendant) is apprehended by the aggrieved spouse of the defendant; or

(ii) the commission by a person of conduct consisting of harassment or molestation falling short of actual or threatened violence, being conduct sufficient, in the opinion of the court, to warrant the making of an order under this section, is apprehended by the aggrieved spouse of the defendants and

(b) that the apprehension is reasonable,

(b) Section 547AA(8) -

After “subsection (7)”, insert “(other than an offence of knowingly failing to comply with a restriction or prohibition specified in an order made under this section relating to the apprehension by a person of conduct referred to in subsection (1) (a) (ii))”.

(c) Section 547AA(14) -

After “section”, insert “(other than a complaint relating to the apprehension by a person of conduct referred to in subsection (1) (a) (ii))”.

Law Reform (Miscellaneous Provisions) De Facto Relationships (Amendment) Bill, 1983

A BILL FOR
An Act to amend the Law Reform (Miscellaneous Provisions) Act 1944, to provide that certain causes of action relating to de facto partners shall not survive after death and to extend liability for injury arising from mental or nervous shock to shock sustained by a de facto partner.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

Short title.

1. This Act may be cited as the “Law Reform (Miscellaneous Provisions) De Facto Relationships (Amendment) Act, 1983”.

Interpretation.

2. In this Act, “appointed day” means the day appointed and notified under section 2(2) of the De Facto Relationships Act, 1983.

Commencement.

3. (1) Sections 1, 2 and 3 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on the appointed day.

Amendment of Act No.28, 1944.

4. The Law Reform (Miscellaneous Provisions) Act, 1944, is amended in the manner set forth in Schedule 1.

Application of Act.

5. The amendment made to the Law Reform (Miscellaneous Provisions) Act 1944, by -

(a) section 4 and Schedule 1(1) - shall apply only in respect of the death of a person which occurred on or after the appointed day, and

(b) section 4 and Schedule 1(2) - shall apply only in respect of an injury sustained by a person on or after the appointed day.

SCHEDULE 1. (Sec. 4.)

AMENDMENTS TO THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1944.

(1) Section 2(1) -

After “adultery”, insert “or to claims under Division 2 of Part III of the De Facto Relationships Act, 1983”.

(2) Section 4(5), definitions of “Husband”, “Wife” -

“Husband” includes a man who lives with a woman as her husband on a bona fide domestic basis although not married to her.

“Wife” includes a woman who lives with a man as his wife on a bona fide domestic basis although not married to him.

Wills, Probate Administration (De Facto Relationships) Amendment Bill, 1983

A BILL FOR
An Act to amend the Wills, Probate and Administration Act 1898, with respect to succession to real and personal property on intestacy.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

Short title.

1. This Act may be cited as the “Wills Probate and Administration (De Facto Relationships) Amendment Act, 1983”.

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on the day appointed and notified under section 2(2) of the De Facto Relationships Act, 1983.

Amendment of Act No.13, 1898.

3. The Wills, Probate and Administration Act, 1898, is amended in the manner set forth in Schedule 1.

Application of Act.

4. The amendments made to the Wills, Probate and Administration Act, 1898, by this Act shall not apply in respect of the estate of a person who died wholly or partially intestate before the date of assent to this Act and any such estate shall be distributed in accordance with the enactments and rules of law in force at the death of that person.

SCHEDULE 1. (Sec 3.)

AMENDMENTS TO THE WILLS, PROBATE AND ADMINISTRATION ACT, 1898.

(1) Section 1 -

Before the matter relating to Division I of Part II insert-

DIVISION IA- - *Preliminary* - s.32G.

(2) Part II, Division 1A -

Before Division 1, insert-

DIVISION 1A- *Preliminary*.

Interpretation: Pt.II.

32G. (1) In this Part, except in so far as the context or subject-matter otherwise indicates or requires -

“de facto husband”, in relation to a woman dying wholly or partially intestate, means a man who, at the time of death of the woman -

(a) was the sole partner in a de facto relationship with the woman, and

(b) was not a partner in any other de facto relationship;

“de facto relationship” means the relationship of a man and a woman living together as husband and wife on a bona fide domestic basis although not married to each other,

“de facto wife”, in relation to a man dying wholly or partially intestate, means a woman who, at the time of death of the man -

(a) was the sole partner in a de facto relationship with the man; and

(b) was not a partner in any other de facto relationship.

(2) In this Part except in so far as the context or subject-matter otherwise indicates or requires, a reference to a husband or wife of an intestate includes a reference to a person who, at the time of death of the intestate, was the de facto husband or de facto wife of the intestate.

(3) Section 61A(2), definitions of “interest”, “matrimonial home” -

After “the surviving husband or wife of the intestate” wherever occurring, insert “for whom part of the estate of the intestate is required to be held in trust under section 6 1B(3), (3A) or (3B)”.

(4) (a) Section 61 B(3) -

Omit “husband and wife”, insert instead “husband or wife”.

(b) Section 61 B(3A), (3B) -

After section 61 B(3), insert-

(3A) Notwithstanding subsections (2) and (3), if the intestate leaves a husband or wife and a de facto husband or de facto wife, the whole or, as the case maybe, such part of the estate of the intestate as is required to be held in trust for the husband or wife of the intestate shall be held in trust for -

(a) where the de facto husband or de facto wife was the de facto husband or de facto wife of the intestate for a continuous period of not less than 2 years prior to the death of the intestate and, the intestate did not during the whole or any part of that period, live with another person to whom he or she was married-the de facto husband or de facto wife; or

(b) in any other case - the husband or wife.

(3B) Notwithstanding subsection (3), if the intestate leaves a de facto husband or de facto wife and also leaves issue but no husband or wife, the whole or, as the case may be, such part of the estate of the intestate as would, if the intestate had left a husband or wife, be required to be held in trust for the husband or wife of the intestate shall be held in trust for -

(a) where the de facto husband or de facto wife was the de facto husband or de facto wife of the intestate for a continuous period of not less than 2 years prior to the death of the intestate - the de facto husband or de facto wife;

(b) in any other case -

(i) except as provided by subparagraph (ii) - the issue as if the intestate left no husband or wife; or

(ii) where the intestate leaves no issue being children of the intestate or where such of the issue as are children of the intestate are issue also of the de facto husband or de facto wife - the de facto husband or de facto wife.

(c) Section 61 B(9)-

Omit “two”, insert instead “separate”.

(d) Section 61B(12)-

Omit “the husband or wife” where firstly occurring, insert instead “a husband or wife”.

(e) Section 61 B(3)-

Omit “the surviving husband or wife”, insert instead “a surviving husband or wife”.

(5) Section 61 D(2)-

At the end of section 61 D, insert-

(2) A reference in subsection (1) to the husband or wife of an intestate is, where the intestate dies leaving a husband or wife and a de facto husband or de facto wife, a reference to the husband or wife or de facto husband or de facto wife for whom part of the estate is required to be held in trust under section 61 B(3), (3A) or (3B).

Appendix I - Submissions

Fifty-five substantial written submissions were received. The original closing date of 31 March 1982 was extended to accommodate several organisations who had notified us of their intention to make submissions. All submissions are filed at the Commission's offices and are available for consultation by members of the public. Identifying numbers represent the date order in which submissions were received.

Name	Submission Number
M T Allan	25
Anglican Home Mission Society	6
Anglican Parish of St Mark's, Avalon	18
Anglican Diocese of Newcastle	43
Anglican Diocese of Sydney,	
Social Issues'Committee: majority submission	34(a)
minority submission	34(b)
supplementary submission	34(c)
Australian Catholic Social Welfare Commission	27
Australian Council of Social Service Inc.	26
Australian Federation of Festival of Light	38
Australian Legal Workers Group	54
A.J. Ayers, Director General Department of Social Security	15
Blacktown Community Cottage Ltd.	29
Catholic Family Welfare Bureau, Archdiocese of Adelaide	24
Catholic Women's League of NSW	39
Catholic Women's League of SA Inc.	52
Catholic Women's League of the Wagga Wagga Diocese	20
Council for Civil Liberties	31

A. Cullen, Chamber Magistrate and Clerk of Petty Sessions, Bankstown	13
Dettman & Dettman, Solicitors, Chatswood	40
Feminist Legal Action Group	32
Mr Justice RW, Gee of the Family Court of Australia, Parramatta	47
G H Griffen	19
R Grigg, Chamber Magistrate, Leeton	12
Hardings, Solicitors, Sydney	55
A Heathwood, Solicitor, Sydney	41
S I Hilt Clerk of Petty Sessions, Wagga Wagga:	46(a)
supplementary submission	46(b)
G Johnson, Chamber Magistrate and Clerk of Petty Sessions, Penrith	7
Kell & Moore, Solicitors, Albury	44
S Kirkham	21
Legal Aid Commission of Victoria, Law Reform Committee:	50
adopted with modifications by the Legal Aid Commission of Victoria	50(a)
Leichhardt Interagency	2
K Loder, Solicitor, Drummoyne	3
Mr Justice M H McLelland of the Supreme Court of N.S.W.	5
Marian Villa - Society of St Vincent de Paul	45
T G D Marshall, Landers & Co., Solicitors, Ashfield	49
E J Merrington	22
C A Mitchelmore	42
L Moloney, Director of Court Counselling, Family Court of Australia, Melbourne Registry	51
Mountain Women's Resource Centre	1
National Marriage Guidance Council of Australia	28
New South Wales Bar Association	23
New South Wales Catholic Social Welfare Committee	36
New South Wales Women's Advisory Council	10
P Pascoe, Swinburne Institute of Technology	14

Presbyterian Women's Association of Australia	8
Redfern Legal Centre	53
Sutherland Shire Information Service	9
Trustee Companies Association of Australia and New Zealand	33
Union of Australian Women	11
Uniting Church in Australia, NSW Synod Board for Social Responsibility	30
J Vile, Solicitor, Maitland	17
LW Williams & Associates, Solicitors and Attorneys	48
Women Lawyers' Association of NSW	4
Women's Action Alliance (NSW)	37
Women's Co-ordination Unit	35
Women's Legal Resources Centre	16

Appendix II - Seminars

1. Members of the Commission participated in the following seminars:
Seminars organised by the Anglican Church, Diocese of Sydney:

> 16 February 1982 at St John's Hall, Parramatta. Chairman: The Right Reverend D.W.B. Robinson, Bishop in Parramatta.
>
> 17 February 1982 at St. Mark's Hall, West Wollongong. Chairman: The Right Reverend K Short, Bishop in Wollongong.
>
> 24 February 1982 at St. Andrew's House, Sydney Square. Chairman: The Right Reverend J.R. Reid, Assistant Bishop, Diocese of Sydney.

Seminars organised by other community organisations:

> 2 March 1982, Women's Electoral Lobby: Chair. Ms J Malcolm.
>
> 5 May 1982, Hillview Community Information Service, held at Hillview Community Health Resource Centre, Turramurra. Chair Ms Y Lee.
>
> 1 June 1982, Uniting Church, held at 139 Castlereagh Street, Sydney. Chair Reverend G H Trickett.

2. A seminar sponsored by the Commission was held on 29 April 1982, at the State Office Block Theatrette, Macquarie Street, Sydney.

Papers presented:

> "Problems of a Divided Jurisdiction" by Mr Justice P E Nygh of the Family Court of Australia.
>
> "Domestic Violence and Custody" by Ms Kaye Loder, Solicitor, Sydney.
>
> "Property Disputes" by Mr P Rose, Barrister, Sydney.
>
> Summary by Dr O Jessep, Senior Lecturer in Law, University of New South Wales.

3. A seminar on the theme"De Factos and the Law: Time fora Change)", jointly sponsored by the Commission and the Law Council of Australia, was held on 21 August 1982, at the Law Institute of Victoria, Melbourne.

Papers presented:

> "De Facto Relationships and Federal-State Jurisdiction" by Mr Justice KJA Asche of the Family Court of Australia.
>
> "De Facto Relationships and the Law: Domestic Violence" by Ms P J Bailey, Senior Lecturer in Law, University of Adelaide.
>
> "De Factos and the Law: Succession on DeatH' by Dr. I.J. Hardingham, Reader in Law, University of Melbourne.

“Property Rights and Financial Relationships” by Mr A Monester, QC, Barrister, Melbourne.

Commentators:

Ms P Harper, National Council for the Single Mother and Her Child.

The Hon Mr Justice M V McInerney, Supreme Court of Victoria.

Ms M Cameron, Solicitor, Melbourne.

Mr J V Kay, Barrister, Melbourne.

Ms M Tehan, Springvale Legal Service.

Mr I Kennedy, Solicitor, Melbourne.

Mr S Fowler, Solicitor, Sydney.

Summary:

Ms J Dwyer, Equal Opportunity Board, Victoria.

Appendix III - Discussions with People and Organisations Making Submissions

In May 1982 the Commission organised meetings with groups and organisations whose submissions had been received by that date. Meetings were held with the following people:

Union of Australian Women, Mrs E Morcom	1 June 1982
Anglican Home Mission Society, Rev A Whitham	1 June 1982
The Honourable Mr Justice M McLelland	1 June 1982
Presbyterian Women's Association, Mrs J Baker and Mrs H Clements	2 June 1982
NSW Women's Advisory Council, Ms M Thorton and Ms E. Atkin	3 June 1982
Mrs J Vile	3 June 1982
Mr A Cullen, Chamber Magistrate and Clerk of Petty Sessions, Bankstown	7 June 1982
Blacktown Community Cottage Ltd, Mrs B Harding	9 June 1982
Mr R Grigg, Chamber Magistrate, Leeton	17 June 1982
Women's Legal Resource Centre, Ms J Stewart and Ms R Reynolds	24 June 1982
Feminist Legal Action Group, Ms F Tito, Ms L Re, Ms L Resuhr	24 June 1982
Australian Council of Social Service, Ms J McClintock, Ms C Petre, Dr O Jessep and Ms H. Kiel	24 June 1982
McClintock, Ms C Petre, Dr O Jessep and Ms H. Kiel	24 June 1982
Catholic Women's League of Victoria and Wagga Wagga, Ms M Naylor, Mrs P Hodge	30 June 1982
Anglican Synod of Sydney Social Issues Committee, the Right Reverend J R Reid, the Very Reverend LR Shilton, Mrs C. Hicks, the Reverend C Harcourt-Norton, Mr J Shellard, Mr G Cooper and Miss M Cook	1 July 1982
Anglican Parish of St Mary's Avalon and St David's, Palm Beach Reverend W Graham and Mr I Tunbridge	2 July 1982
Women's Co-ordination Unit, Ms H L'Orange, Director, and Ms H Boyton	7 July 1982
Trustee Companies Association of Australia and New Zealand, Mr B Hall and Mr P Whiteman	17 August 1982

Appendix IV - Community Attitudes Towards De Facto Relationships

1. Introduction

1. This note summarises the results of public opinion polls conducted in 1971-72, 1973, 1976 and 1977 which sought peoples' attitudes on the issue of "unmarried couples living together". Although there are certain problems with using public opinion polls in probing complex issues, the information from these polls provides material that is not otherwise available about changes in attitudes over this period. We also present the results of an Australia-wide survey of patterns of family formation conducted in 1981 by the Institute of Family Studies.

2. Public Opinion Polls 1971-72 to 1977: Attitudes to "Unmarried Couples Living Together"

2. Two Australian National Opinion Poll Surveys, conducted in November 1971 and March 1972, found that 36 percent of people interviewed expressed approval of "unmarried couples living together", while 51 per cent expressed disapproval and 13 per cent were undecided.[1] Men were more likely to express approval than were women; urban dwellers were more likely to express approval than were rural dwellers; people who had no religious affiliation were more likely to express approval than were people identifying with a religious affiliation.

3. In December 1973, the Victorian newspaper, *The Age* reported on an Age Opinion Poll in which 2,000 people aged 18 years and over were interviewed in all States and in the Australian Capital Territory.[2] The poll attempted to measure peoples' attitudes to "adult relationships outside of marriage" by presenting them with a number of hypothetical situations and asking whether they approved, accepted or disapproved of each situation. The results suggest a high level of approval or acceptance of de facto cohabitation but the level of acceptance varied according to the hypothetical situation described. Approval and acceptance were highest where a couple without dependent children (either childless or with adult children) preferred to live together, while disapproval was most common where a couple with dependent children who were able to marry chose to live together. Approval and acceptance increased where couples (with and without dependent children) lived together because they were 11 prevented for some reason from marrying" (Table 2). The results showed that the age of people interviewed had a marked effect on their attitudes. In every hypothetical situation raised by the poll the younger the person, the more likely he or she was to accept or approve adult cohabitation outside marriage.

4. In 1976, the Age reported on a poll surveying community attitudes to various social issues. The poll which was conducted with a sample of 2,000 people aged 18 years and over in all States and the Australian Capital Territory, sought respondents' views on "unmarried couples living together".[3] Respondents were asked whether they saw "unmarried couples living together" as "right-harmless", "wrong-dangerous" or neither of these. Overall, 42 per cent of respondents saw unmarried cohabitation as "right-harmless"; 34 per cent said that cohabitation was "wrong-dangerous". Acceptance differed according to the sex, age and educational level of respondents. Men were slightly more likely to be accepting than women, the young were much more accepting than older respondents; and those with a longer period of education were more accepting than people who had not completed secondary school.

Table 1: Attitudes Towards "Unmarried Couples Living Together"

1971-1072

	Sex of Respondent			Place of Residence of Respondent		Religion of Respondents		
	Males	Females	Persons	Urban	Rural	Catholic	Anglican	None
	%	%	%	%	%	%	%	%
Approval of "unmarried couples living together"	43	29	36	42	26	30	38	64

Sample size = 1,698 persons, 18 years and over. ANOP Poll.

Table 2: Attitudes Towards Unmarried Cohabitation

	Attitude of Respondents				
	Approve	Accept	Disapprove	Don't know	Total
The situation is:	%	%	%	%	%
A childless couple, able to marry but preferring to live together without marriage	24	31	44	1	100
A childless couple, prevented for some reason from marrying, living together	31	39	28	2	100
A couple with dependent children, able to marry, but preferring to live together with the children without marriage	11	21	66	2	100
A couple with dependent children, prevented from marrying, living together with the children	24	41	32	3	100
A couple with grown-up children, able to marry, but preferring to live together without marriage	21	32	45	2	100
A couple with grown-up children, prevented for some reason from marrying, living together without marriage	27	40	30	2	99

Sample size = 2,000 persons, 18 years and over. Age Poll.

5. Despite the clear moral implications in the wording of the question in the 1976 Age Poll (by reference to notions of “harm” and “danger”) the proportion of respondents expressing acceptance of cohabitation had increased since the poll of 1971/72, from 36 percent to 42 per cent.

6. An Australian Public Opinion Poll conducted in 1977 asked respondents their attitudes to “unmarried couples living together”.[4] Overall, 52 per cent of respondents indicated approval, while a further 9 per cent indicated that “it’s up to [the] couples”. There was virtually no difference between men’s and

women's responses. The age of respondents, however, was significant the younger the person the more likely he or she was to express approval 75 per cent of respondents under 30 years indicated approval and a further 6 per cent said that the issue was "up to couples". Of people aged 30 to 49, 52 per cent indicated approval and a further 11 per cent were neutral-while of people 50 years and over, 28 per cent were approving and a further 10 per cent were neutral.

3. Conclusions from Public Opinion Polls: 1971-72 to 1977

7. There are problems connected with the use of public opinion polls to measure community attitudes on personal issues. The actual answers given by respondents may be affected greatly by the wording of questions and by the range of alternative answers which are provided. In analysing the trend of opinion polls on de facto cohabitation in the period 1971/72 to 1977, the different wording of the questions in different polls presents some problems, but it is still possible to observe certain clear trends. The rate of *disapproval of* unmarried cohabitation provides a useful indication of changing attitudes in this period.

> In the 1971/72 poll 51 per cent of persons interviewed indicated disapproval of "unmarried couples living together".
>
> In the 1976 poll when the answers provided went beyond "disapprove", 34 per cent of persons indicated that they considered "unmarried couples living together" to be "wrong/dangerous".
>
> In the 1977 poll when the possible answers allowed for a category of unconcern ("it's up to couples"), 35 per cent of persons indicated disapproval.

The polls provide strong evidence that disapproval of de facto cohabitation as measured by opinion polls, has decreased in the period 1971/72 to 1977. Expressions of approval have increased for both men and women, but markedly so for women: 29 per cent "approved" in the 1971/72 poll compared with 50 per cent in the 1977 poll In the latter poll almost no difference was discernible in men's and women's attitudes on this issue. The age factor remained significant. In the 1977 poll a very small proportion (16 percent) of people under 30 expressed disapproval of unmarried couples living together, but one-third of people aged 30 to 49 expressed disapproval

Table 3: Attitudes Towards "Unmarried Couples Living Together"

1976

			Sex of Respondents		Age of Respondents		Education of Respondent
	Males	**Females**	**Persons**	**21-24 Years**	**Aged 60 +**	**University Educated**	**Primary Educated**
	N = 998	**N = 1002**	**N = 2000**	**N = 180**	**N = 368**	**N = 184**	**N = 243**
	%	**%**	**%**	**%**	**%**	**%**	**%**
Right - harmless	46	38	42	69	23	69	22
Wrong - dangerous	32	37	34	12	57	19	54
Neither - don't know	23	25	24	18	21	12	24
Total	101	100	100	99	101	100	100

Sample size = 2,000 persons, 18 years and over. Age Poll.

Table 4: Attitudes Towards " Unmarried Couples Living Together"

1977

	Sex of Respondents			Age of Respondents		
	Males	**Females**	**Total**	**16-29 Years**	**30-49 Years**	**50 + Years**
	%	**%**	**%**	**%**	**%**	**%**
Approve	54	50	52	75	52	28
Don't care: it's up to couples	8	10	9	6	11	10
Undecided	4	4	4	3	4	4
Disapprove	34	36	35	16	33	58
Total	100	100	100	100	100	100

Sample size - 1,959, 16 years and over. Australian Public opinion Poll.

4. The Family Formation Project: 1981. Attitudes to Unmarried Cohabitation

The Family Formation Project conducted by the institute of Family Studies in 1981 included a comprehensive set of questions about attitudes towards issues relating to marriage and de facto cohabitation.[5] The sample consisted of 2,548 persons (1,122 men and 1,426 women) aged between 18 and 34 years, living in households in private dwellings in major cities, smaller urban areas, and rural localities throughout Australia. Several questions in the survey related to different aspects of community attitudes to de facto cohabitation Responses to the statement “It’s alright for a couple to live together without planning to get married” show a high level of agreement 78 per cent of respondents indicated their agreement (including 12 per cent who expressed “strong agreement”) (Table 5). 44 per cent of respondents agreed that “if you live together there is a lot of social disapproval” (Table 6), in comparison with the 22 per cent who indicated their own personal disapproval. It would appear that a large majority (78 per cent) of relatively young people (aged 18 to 34 years) personally approve of de facto cohabitation but a smaller majority (55 per cent) consider that cohabitation is free from “social disapproval”.

9. Unmarried cohabitation has sometimes been characterised as “trial marriage”, prior either to a first marriage or to remarriage.[6] On this analysis, cohabitation is seen not as a long term alternative domestic relationship, but as a form of courtship behaviour, leading very often but not always, to formal marriage.[7] Respondents to the survey were presented with the statement: “It is good to have a trial marriage” - a statement which connotes not merely acceptance but positive approval of cohabitation as a trial period before marriage. 56 percent agreed with this proposition (Table 7).

Table 5: Attitudes Towards "It's Alright for a Couple to Live Together Without Planning to get Married"

1981

	Males	Females	Total
	N = 1122	N = 1426	N = 2548
	%	%	%
Strongly agree	13	11	12
Agree	67	64	66
Don't know	1	1	1
Disagree	15	20	18
Strongly disagree	5	4	4
Total	101	100	101

Sample size = 2,548 persons, aged 18 to 34 years. Survey conducted by REARK Research for the Institute of Family Studies, Melbourne

Table 5: Attitudes Towards "If you Live Together There is a Lot of Social Disapproval"

1981

	Males	Females	Total
	N = 1122	N = 1426	N = 2548
	%	%	%
Strongly agree	5	5	5
Agree	35	40	38
Don't know	2	1	2
Disagree	54	49	51
Strongly disagree	5	4	4
Total	101	100	101

Sample size = 2,548 persons aged 18 to 34 years. Survey conducted by REARK research for the Institute of Family Studies, Melbourne

Table 7: Attitudes Towards "It is Good to Have a Trial Marriage"

1981

	Males	Females	Total
	N = 1122	N = 1426	N = 2548
	%	%	%
Strongly agree	12	9	10
Agree	47	45	46
Don't know	2	3	3
Disagree	31	34	33
Strongly disagree	8	10	9
Total	100	101	101

Sample size = 2,548 persons, aged 18 to 34 years. Survey conducted by REARK Research for the Institute of Family Studies, Melbourne

10. The survey indicated that men and women differ very slightly in their attitudes to cohabitation and the differences are consistent A slightly higher proportion of men agreed that “it’s alright for a couple to live together without planning to get married” (80 per cent of men and 75 per cent of women). A slightly higher proportion of men agreed that “it is good to have a trial marriage” (59 per cent of men and 54 per cent of women) and a slightly higher proportion of men disagreed with the proposition that living together incurred “a lot of social disapproval” (59 per cent of men and 53 per cent of women). A comparison of these results with the results of the opinion polls described earlier suggests that in younger age groups there has been increasing acceptance of de facto cohabitation by both men and women. This confirms the trend discernible from the opinion polls themselves.

5. Conclusions

11. Information from public opinion polls conducted in 1971-72 and in 1977 shows a marked decrease in disapproval of “unmarried couples living together”. 51 per cent of persons surveyed in 1971-72 expressed disapproval compared with 35 per cent in 1977. In both polls, the sample included persons in all age groups. The Family Formation Project conducted in 1981 found that only 22 per cent of persons aged 18 to 34 years disagreed with the statement that “it is alright for a couple to live together without planning to get married”. This 1981 figure is very similar to the finding that only 16 per cent of persons under 30 years and 33 per cent of persons between the ages 30 to 49 expressed disapproval of cohabitation in the 1977 poll It is valid to conclude that in the decade 1971-72 to 1981 there has been a clear trend towards increasing acceptance of de facto cohabitation that men’s and women’s attitudes have become increasingly similar, and that younger age groups show the highest level of acceptance.

12. We know that in the period when these changes in attitude were occurring, the numbers of people living together in de facto relationships increased from 34,166 persons in 1971 to 131,876 persons in 1976 and to 337,316 persons in 1982.[8] This represents an almost ten-fold increase. We can conclude that the increases in the numbers of people living together without marriage (or at least their increased willingness to indicate this to official statisticians and the increased interest of statisticians in documenting this pattern of domestic life) has been accompanied by an increased community acceptance of de facto cohabitation.

FOOTNOTES

1. *Australian National Opinion Poll Newsletter*, March 1972.

2. *The Age,* Monday, December 31, 1973.

3. *The Age,* November 11, 1976.

4. *Hobart* Mercury, March 12, 1977.

5. Unpublished Tables supplied to the NSW Law Reform Commission by Dr Don Edgar, Director, Institute of Family Studies.

6. National Population Inquiry, *Supplementary Report: Population and Australia, Recent Demographic Trends and Their Implications* (1978), Chapter 2.

7. P Laslett, “Introduction, comparing illegitimacy over time and between cultures” in P Laslett, K Ooesterveen and R M Smith (eds.), *Bastardy and its Comparative History* (London, 1980), pp.1-65.

8. See Chapter 3 above.

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