NORTHERN TERRITORY OF AUSTRALIA

Report on De Facto Relationships

Northern Territory Law Reform Committee

Report No. 13

August, 1988

Northern Territory Law Reform Committee

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TELEPHONE

16 August 1988

The Hon. D. Manzie, M.L.A.,
Attorney-General for the Northern Territory
Chan Building
Mitchell Street
Darwin, N.T. 5790

My dear Attorney,

I have pleasure in forwarding the Committee's report and recommendations on the Reference relating to De Facto Relationships.

The formal recommendations appear throughout the Report and are outlined at p.6. In short, the Committee recommends that legislation be enacted to recognise the existence of de facto relationships only to overcome instances where failure to do so would result in specific injustices.

Yours sincerely,

W.J. Kearney
Chairman

The Northern Territory Law Reform Committee is an independent and permanent non-statutory committee governed by a written constitution.

The Committee receives references from the Attorney-General to examine and report to him on any area of law which he considers may be in need of reform. Such a reference may result from an initiative of the Committee or be prepared in consultation with it. The object of a report is to make recommendations which render more efficient the administration of justice and ensure that the law meets the needs of society.

Members of the Committee as at the date of this Report:

Chairman
Justice Sir William Kearney

Members

Mr Peter Conran, Secretary, Department of Law
Mr Jim Dorling, Parliamentary Counsel
Mr Max Horton, Barrister and Solicitor
Mr Ian Maughan, Barrister and Solicitor, Department of Education
Mr Peter McNab, Principal Legal Officer, Australian Government Solicitor
Mr Tom Pauling QC, Solicitor General
Ms Suzanne Phillip, Lecturer in Law, University College of the Northern Territory
Mr Trevor Riley, Barrister
Mr Ted Rowe, Executive Officer of the Law Society (NT)
Ms Sally Thomas, Chief Magistrate

Executive Officer
Stephen Herne
Michael Chin (acting 1 March 1987 to 31 July 1987)

Sub-Committee on De Facto Relationships:

Chief Justice Asche (Chairman)
Ms Suzanne Phillip
Assisted by the Executive Officer

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TERMS USED IN THIS REPORT

Common Law:

The laws based on the ancient unwritten customs of England and recognised by the courts in jurisdictions which have inherited English law (e.g. Australia, Canada, New Zealand).

ABBREVIATIONS

AC	Appeal cases (House of Lords)
AJFL	Australian Journal of Family Law
ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
Davies	See Select Bibliography
DLR	Dominion Law Reports (Canada)
Fam LR	Family Law Reports (Aust)
J Marr + Fam	Journal of Marriage and Family
NSWLR	New South Wales Law Reports
NZLR	New Zealand Law Reports
QdR	Queensland Reports
RFL	Reports of Family Law (Canada)
SASR	South Australian State Reports
VR	Victorian Reports
WLR	Weekly Law Reports (UK)

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1. INTRODUCTION

(a) Terms of Reference

On 26 October 1982 the then Attorney-General, the Hon P Everingham, MLA, gave the following reference to the Reform Committee:

> "1. To examine legal problems arising out of de fa relationships, but not including an examinatio aboriginal traditional marriages or custody maintenance of children of de facto relationsh in the Northern Territory.
>
> 2. To consider and report on solutions to th problems having regard to case-law and legislat currently in force and reports produced research undertaken in other jurisdictions."

(i) Aboriginal traditional marriages.

In February 1977 the Commonwealth Attorney-Gener referred to the Australian Law Reform Commission question:

Whether it would be desirable to apply, either in wh or in part, Aboriginal customary law to Aborigine either generally or in particular areas, or to tho living in tribal conditions only.

The Commission has issued its report, Aborigina Customary Law, 1986 (ALRC Report 31) 2 Volumes, on t reference. Chapters 12, 13 and 14 deal with the conce and recognition of Aboriginal traditional marriage. Commission concluded that there were situations where was proper to recognise traditional marriage independently of legislation dealing with de fact relationships [paragraphs 242 to 245]. It made a serie of recommendations for reform concerning tradition marriages [paragraphs 258 to 325].

The report was placed on the Standing Committee Attorneys-General ("SCAG") agenda, by the Commonwea Attorney-General at the meeting on 25 September 198 It was considered that SCAG was the appropriate for for consultation to take place on possib implementation of the report by the Commonwealth, th States and the Northern Territory. This report is sti under consideration.

(ii) Custody of Children

By s.63F of the Commonwealth Family Law Act 1975 (adde by the Family Law Amendment Act 1987) each parent of child born inside or outside marriage has joint custo of the child until a court orders otherwise. A perso whose name appears on the birth certificate is presume to be a parent: s.66R.

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(iii) Maintenance of Children

Previously, all jurisdictions in Australia had enacted relatively uniform Maintenance Acts empowering courts to make orders for the maintenance of children. As a result of the amendments made in 1987, the Commonwealth Family Law Act 1975, ss. 66A to 66ZE, now deals with maintenance by parents of their children, regardless of whether the parents are married to each other. In certain situations a step-parent may also be liable to maintain a child (s.66G).

A court may make an order against a parent for the maintenance of her or his child in any circumstances where it considers the "proper needs" (s.66A) or "welfare" (s.60D) of the child require it. The application may be made by any person on behalf of the child.

(b) Outline of Report

After setting out the conduct of the reference (Part 2), the Report places de facto relationships in the social setting, indicating the incidence of such relationships and outlining the legal and administrative background in which they operate (Part 3).

The Report then discusses community attitudes to de facto law reform (Part 4) and reforms elsewhere (Part 5).

The report then considers what policy should be adopted in reforming the law as it affects de facto couples (Part 6) and applies the recommended policy to, firstly, major legal problems that exist under the common law (Part 7) and, secondly, to matters affected by existing Northern Territory legislation (Part 8).

(c) Committee's Conclusions

The Committee is firmly of the view that the law in the Northern Territory 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 (at the 1986 census, 14.5% of all N.T. couples are de facto partners),
- the significant injustices and anomalies in the existing law,
- a general acceptance of the need for some change evident in the legal profession and in the wider community.

The Committee considers that, in accordance with community attitudes and legal constraints, it is not desirable or feasible to equate de facto status with that of marriage, either in a general or limited way.

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The Committee considers that the appropriate solution to legal problems arising out of de facto relationships is recognise the existence of de facto relationships only overcome cases where there are specific injustices in existing law. The Committee considers that such a propo will have widespread support in all sections of community.

The Committee considers that the legal problems most comm experienced by de facto partners concern -

- agreements concerning the financial aspects of parties' continuing relationship, generally call "cohabitation agreements" or "separation agreement

- claims to property and financial adjustment separation, or on the death of one party; and

- protection from domestic violence.

The amendments to the law we recommend to overcome the injustices are contained in Part 7 and embodied in the Dra Bill that is Appendix B.

Additionally the Committee has identified injustices anomalies in existing NT legislation dealing with variou matters. In Part 8 it recommends specific reforms in the areas.

CONDUCT OF THE REFERENCE

(a) Consultation

Soon after receiving the reference the Committee established contact with other bodies involved in reviewing the law relating to de facto relationships, including the New South Wales Law Reform Commission, which had been given a reference on de facto relationships on 13 July 1981, and the Institute of Family Studies.

(b) Research Paper

In July 1983 the then Executive Officer (Mr Maughan) prepared a Research Paper, which extracted references to the words "husband", "wife", "married woman", "spouse" and "de facto" in the Acts of the Northern Territory, to enable the Committee to assess the implications of any changes in the law relating to de facto relationships and to consider the consequential amendments which would be required to the legislation as a result of the implementation of any such changes. An updated summary of that paper appears as Appendix A to this report.

(c) Discussion Paper

On 14 December 1983 the Committee, by notices published in the Northern Territory News, Centralian Advocate, Katherine Advertiser, Tennant and District Times, Gove Gazette and Jabiru Rag, invited written submissions, by 30 March 1984, on the Terms of Reference and a Discussion Paper prepared by the then Executive Officer (Mr Maughan) in August 1983.

Copies of the Discussion Paper were provided, on request, to a number of Northern Territory and Commonwealth Departments and Authorities, community and religious organisations, and over 20 individuals.

The Discussion Paper canvassed the social context of de facto relationships, the existing legislative recognition of de facto relationships, the comparison between marital and de facto relationships, arguments relating to the legislative recognition of de facto relationships, the issues to be considered and the policy options which are available for the reform of the law relating to de facto relationships.

Parts 4 (a) and (b), 5 (a) and (b) and 6 of this report are based on material appearing in the Discussion Paper.

(d) Written Submissions

Written submissions were received from:

- the Office of Women's Affairs in the Department of the Chief Minister (30 March 1984);

- the Secretary, Northern Synod, Uniting Church in Australia (26 April 1984);

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- the YWCA of Australia (10 July 1984);

and 2 individuals. The Committee also received the Pa
Law Council's consultative paper on the NSW Law Re
Commission Report.

(e) Working Paper

In November 1984 the then Executive Officer (Mr Maug
prepared a Working Paper on policy analysis setting out
the need for reform of the existing law and (b) the var
options available.

(f) Deferral of Consideration of the Reference

In 1984 the Committee deferred consideration of the refere
due to the need to accord priority to the preparation of
Rules of Procedure for the Supreme Court. On completio
its work in relation to the new Supreme Court Rules in
1986, the Committee was in a position to resume its work
other references, including the reference on De Fa
Relationships.

(g) Establishment of Sub-Committee

In April 1987, the Committee established a sub-committee
consider the reference comprising Chief Justice K J A Asc
as Chairman, and Ms Suzanne Phillip, with the assistance
the Executive Officer.

The Chief Justice had accepted an invitation to be co-opt
to the Committee for the purposes of the reference. Just
Asche has had vast experience in the field of family l
having been senior Judge of the Family Court of Austra
from 1976 to 1985. His Honour has also been, since 198
Presidential member of the Institute of Family Studies,
was for a number of years a member of the Family Law Counc

The Sub-committee met 8 times to consider the reference a
prepared a draft report which was tabled at the Committ
meeting in April 1988. The draft Report included a dra
Bill prepared by Parliamentary Counsel (Mr. Wells)
accordance with the Sub-committee's instructions. The repo
of the Sub-Committee was adopted, subject to a number
amendments, by the Committee at its meeting on 4 August 19

The Committee meeting in June (attended by the Sub-Committe
was conducted in the form of a telephone conference wi
Professor Marcia Neave, Dean of the Faculty of Law at t
University of Adelaide. Professor Neave had participated
the preparation of the NSW LRC Report on De Fa
Relationships. The Committee was greatly assisted in
deliberations by Professor Neave's comments on the Dra
Report and wishes to record its appreciation of her advic

3. SOCIAL CONTEXT OF DE FACTO RELATIONSHIPS

(a) People

People may decide to cohabit rather than marry for a variety of reasons. In some cases the parties cohabit before marriage, in the form of a trial marriage. In some cases the parties cohabit because one or both are already married to a third party and are perhaps awaiting divorce proceedings. In other situations couples decide to enter a de facto relationship rather than marry because such a relationship accords more closely with their basic philosophy of life.

Such information as is available tends to show that non-marital cohabitation is on the increase.

Information obtained from the Australian Bureau of Statistics indicates that there has been a dramatic increase in the incidence of de facto relationships in Australia between 1971 and 1986. In particular, de facto couples now comprise 14.5% of all Territory couples.

Number of couples in de facto relationships:

	1971	1976	1982	1986
Australia	17,083*	65,938*	168,658*	204,946
NT	n.a.	n.a.	n.a.	4,382

De facto couples as percentage of all couples:

	1971	1976	1982	1986
Australia	0.6*	2.2*	4.7*	5.7
NT	n.a.	n.a.	n.a.	14.5

* These figures are derived from available statistics and represent minimum estimates.

Surveys conducted by the Australian Bureau of Statistics and the Institute of Family Studies in 1982 revealed -

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

- A majority (nearly 59%) of current de facto relationships had continued for at least two years. About 20% had continued for more than five years, and 8% for more than 10 years,

- Over one third of de facto couples (36%) had dependent children in their households (in 1986 this figure was 37%); 18% had the care of children born during their current relationship. Where the female partner was between 25 and 44 years (the period usually associated with family formation), children were present in 51% of families,

- De facto partners could not readily be distingu from married people in terms of education or relig affiliation, but were more likely to have been bor Australia or in another English-speaking country,

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

It is not possible to compare the incidence of de fa co-habitation in Australia, with overseas countries, bec of general paucity of data and an absence of uni definitions. However, the incidence is likely to be simi

Estimates suggest that about 4% of all co-habita heterosexual couples in the United States involve persons married to each other. (P. Glick & G. Spanier, "Married Unmarried Cohabitation in the United States", (1980) J Marr & Fam 19 at 20).

In a study conducted in Alberta it was found that (+/-2%) of urban Albertans were co-habitating outside marriage; this comprised 8.8% (+/-2.5%) of all co-habita couples, and 27.1% of the survey respondents stated that had at one time, past or present, cohabited outside marriage with an unrelated partner of the opposite sex fo period of six months or more: Alberta Institute for Research & Reform, Survey of Adult Living Arrangem (Research Paper No. 15, 1984).

The Alberta survey also revealed -

- less than 30% of all people living in a de fa relationship were over 35,

- 53% of such relationships had continued for over years, 11% for over 10 years,

- 25% of de facto couples had dependant children compa with 60% for married couples,

- de facto partners could not readily be distinguish from married people in terms of education or religio though married people were more likely to reg religion as important, 55% v 26%.

Conclusion

Available statistical information indicates that de fac couples comprise a significant proportion of cohabit couples in Australia and, particularly, the North Territory. This appears to be part of a world-wide tre

(b) Legal Problems

Many laws and administrative practices confer benefits on affect the rights of, persons by virtue of their being spouse of another or by virtue of the person having a spou Such rights or benefits may be -

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- the right to maintenance from the other spouse on separation or end of the marriage,

- the ability to share in matrimonial property on divorce,

- employment benefits such as extra allowances, entitlement to housing, or housing priority,

- pension or superannuation benefits,

- the ability to adopt a child,

- the right to share in the estate of the deceased spouse if he or she dies as the result of a fatal accident, or without making a will.

Some of these rights or benefits may also be conferred on de facto "spouses", and may vary from State to State. Some benefits may be available to a de facto partner after a minimum cohabitation period, such as 2, 3 or 7 years, or if the couple have a child, or no minimum cohabitation period may be required.

Both de facto and married couples tend to show a lack of foresight concerning the legal consequences of their respective relationships. When a relationship is harmonious little thought is given to the legal problems which may arise if the relationship breaks down. Property is usually purchased in the name of one person alone, or bank accounts opened without realising the legal consequences.

Under the Family Law Act 1975 (Commonwealth), the consequences of ending the relationship are spelt out for married couples: counselling and reconciliation, formal dissolution of the relationship, custody of children, maintenance and adjustment of property rights. No such single piece of legislation exists for de facto couples.

The NSW Law Reform Commission conducted a survey in April-June 1982 of a sample of legal practitioners including those who attended the seminar which it conducted on "The Law and De Facto Relationships", all members of the Family Law Practitioners Association and a random selection of members of Regional Law Societies.

The survey revealed that the main legal problems concerning de facto relationships referred to the practitioners were, in order of frequency, property disputes, maintenance including maintenance of children, domestic violence, succession on death of a partner and requests for advice on cohabitation contracts. Eighty per cent of the practitioners who participated in the survey expressed themselves to be dissatisfied with the operation of the law relating to de facto relationships while 14.5% expressed satisfaction with the current law.

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(i) Cohabitation agreements

In Fender v St. John Mildmay, [1938] AC 1, the English ... of Lords relying on cases dating back to at least ... stated the following common law rule:

> "The law will not enforce an immoral promise such ... promise between a man and a woman to live toge... without being married, or to pay a sum of money or ... some other consideration in return for im... consideration." (42).

The decision was followed in Armstrong v Armstrong [196... 542 and Dobersek v Petrizza [1968] NZLR 211.

The decision in Fender v St. John Mildmay did not extend t... contract entered into by a de facto partner after ... relationship had ended, and which provided for the fut... support of the other partner ("separation agreements").

In Andrews v. Parker [1973] QdR 93, the Supreme Court ... Queensland considered an agreement between de facto partn... in which the man transferred his house to the woman ... condition that if she returned to live with her husband ... would retransfer the house to him. The court held that ... agreement was not contrary to public policy. The part... were already living together and the agreement was ... intended to bring about extra-marital cohabitation. In ... case the Judge thought community standards had changed. ... his words:

> "... notoriously the social judgments of today u... matters of immorality are as different from those ... last century as is the bikini from a bustle. So, ... this aspect, I hold that if the agreement between ... parties was based on an immoral consideration ... th... the immortality was not such according to mode... standards as to deprive the plaintiff of the right ... enforce it." (104).

The NSW Court of Appeal held in Seidler v Schallhofer [19... 2 NSWLR 80, 8 Fam LR held that an agreement between a man ... a woman who were already cohabiting, and which contempla... that they would live together for a further six months ... then either marry or separate, was not contrary to pub... policy. The majority decision was confined to the facts ... the case and did not involve a ruling that a cohabitati... agreement entered into by de facto partners who intended ... live together indefinitely would not be contrary to pub... policy. However, one member of the Court (Justice Hutle... suggested that the principle of public policy invalidat... contracts entered into by de facto partners could no long... be regarded as having any operation.

In the Canadian case of Chrispen v Topham (1986) 28 DLR (4t... 754 (Sask QB) affd. 9 RFL (3d) 131 (CA) a cohabitati... agreement was held to be valid and enforceable. Kindred ... held (at p.758): "It cannot be argued that the agreeme... between the plaintiff and the defendant was made for ...

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immoral purpose and, therefore, illegal and unenforceable. Present day social acceptance of common law living counters that argument."

There are strong judicial indications that the law is moving in the direction of recognising cohabitation agreements and not regarding them as contravening doctrines of public policy, but that this process is by no means complete.

(ii) Financial adjustment

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 does not 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.

(iii) Property adjustment

Disputes concerning property arise frequently in the following cases

- where a partner dies (e.g. Horton v Public Trustee [1977] 1 NSWLR 182),

- where property is subject to claim by the creditor or one partner (e.g. In re Sharp [1980] 1 WLR 219),

- when the relationship ends and the division of property cannot be agreed to (e.g. Allen v Snyder [1977] 2 NSWLR 685), or

- when existing title to land is in dispute (e.g. Taddeo v Taddeo (1979) 19 SASR 547).

In Australia, one system of law is applied to determine property disputes between married couples, and another to determine disputes between de facto partners. For married couples the Court must take into account a number of matters set out in the Family Law Act, but it can decide future ownership of property according to what is "just and equitable", irrespective of which party has the formal title to the property.

Disputes between de facto partners relating to property are determined under the common law relating to property, and trusts. This means that the partner with formal legal title is generally entitled to keep the property. Many of the relevant principles turn on the actual intention of the parties at the time the property was acquired, a matter on which evidence is usually ambiguous, and which may not be relevant to a just disposition of property acquired in the

course of lengthy cohabitation. These traditional doctr
are unable to take account of contributions of partners o
non-financial nature such as child care and housewo
Kardynal v Dodek [1978] VR 414.

An idea of the confusion and technical complexity surroun
this area can be gauged from the extract below from Mich
Evans, "De Facto Property Disputes : The Drama Continue
(1987) 1 AJFL 234 -

> "One major source of confusion in this area has been
> plethora of doctrines which have been applied to reso
> these disputes. Apart from express trusts arising fr
> agreement of [sic] common intention, both expressed a
> inferred (Allen v Snyder [1977] 2 NSWLR 685, per Gl
> JA at 692), there has been the old standby of
> presumption of resulting trust: Napier v Public Trus
> (1980) 55 ALJR 1, as well as constructive trusts impos
> for a variety of reasons ranging from proprieta
> estoppel: Jackson v Crosby (No. 2) (1979) 21 SASR 2
> to failure of an express trust: Malsbury v Malsb
> [1982] 1 NSWLR 226, and even unconscientious retenti
> of a benefit conferred outside any agreement or com
> intention: Morris v Morris, [1982] 1 NSWLR 613. It
> submitted that the law governing these disputes was no
> however, determined by some sort of chook [=chicke
> raffle. A staged analysis, discussed below, can
> identified from the leading cases. Now that the Hi
> Court has spoken on these matters, the question aris
> as to whether these principles have been changed,
> even clarified. In Calverley v Green (1984) 56 ALR 48
> 59 ALJR 111, the High Court employed the presumption
> resulting trust without adding to this apparen
> confusion, or relieving it either, for that matter,
> in Muschinski v Dodds (1986) 62 ALR 429 a novel approa
> to the resolution of these disputes was adopted.
> majority overturned the express trust which the Court
> Appeal had found in the intentions of the parties an
> replaced it with a constructive trust based on :
>
> (a) the appellant's right to contribution from th
> respondent as a joint debtor in respect of th
> payment of the purchase price of the property, pe
> Gibbs CJ (437-8), and
>
> (b) the appellant's right to repayment of her greate
> contribution to the purchase price by analogy wi
> the rules applicable upon the failure of
> partnership or joint venture, per Mason (439) an
> Deane JJ (454-5)."

Since this article was written the High Court has furth
developed the concept of the constructive trust in a wa
which may ultimately provide a far-reaching remedy along
lines of the doctrine of unjust enrichment in Canada and

USA: see Baumgartner v Baumgartner (1987) 76 ALR 75. The Court did not require that the parties have a common intention and the constructive trust was used to remedy conduct found unconscionable (a refusal to recognise the existence of an equitable interest in property).

(iv) Domestic violence

Domestic violence tends to be a hidden problem. It is extremely difficult to discover the extent of domestic violence in any community. However, it seems clear that domestic violence is a significant problem in the Territory in its extent and frequency. Obviously, it is a problem that is not confined to de facto relationships. An assault in the home is not a private matter. The resources of the community are called on to deal with the consequences of violence in the home, be they the damaged children, the victim's injuries, the disruption to the neighbourhood, the wrecked lives. It is an area where the law must respond, but the law is not the whole answer.

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4. COMMUNITY ATTITUDES TO DE FACTO LAW REFORM

(a) Community Surveys

An Australian National Opinion Poll Survey conducted in revealed that 36% of people interviewed expressed approva "unmarried couples living together", 51% expre disapproval and the balance were undecided. By 1977 the revealed that approval had risen to 52%, disapproval fallen to 35% and there was virtually no difference in responses from men and women. The Family Formation Pro 1981 conducted by the Institute of Family Studies surv people aged between 18 and 34 years of whom 78% approve de facto relationships.

(b) Submissions to NSW LRC

The Anglican, Catholic and Uniting Churches submitted 1981/1982 that they were generally prepared to accept the current law inflicted injustice in particular areas that the injustices should be remedied but that they w opposed to any attempt to grant de facto relationships e status with marriage on the ground that to do so would be debase the institution of marriage.

The non-church submissions, including the Women Law Association, the Womens Advisory Council and the Austra Council of Social Services, submitted that legal recogniti of de facto relationships should be extended to overc specific injustices but argued against the legal equation de facto relationships and marriage on the basis of th support for the view that the freedom of persons to rem outside the legal institution of marriage should be upheld a pluralist society.

(c) Submissions to NTLRC

The Office of Women's Affairs submitted the law be altered a number of respects. The principal recommendations w that -

(i) legislation should be enacted which recognised de fa relationships to alleviate specific injustices such the possible invalidity of cohabitation and separat agreements (see Part 7),

(ii) a de facto relationship be defined as "a man and wo cohabitating in a personal and domestic relationshi

(iii) new maintenance legislation be enacted which sho

- provide de facto partners with an enforceable ri of support;
- be based on a philosophy of need;
- provide criteria to assess the needs of partne

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- ensure that children are not discriminated against on the basis of the marital status of their parents.

(iv) changes be made in the legislation relating to property to

- empower the courts to look further than direct financial contributions to the acquisition of improvement of property when assessing contributions made;

- guide the courts actions in exercising the proposed adjustive jurisdiction;

- empower the court to take into consideration the future needs of the parties;

- limit to two years after breakdown of the relationship the maximum period that either party can bring a claim;

- enable parties to make legally enforceable agreements relating to the division of property.

(v) legislation be enacted to deal with domestic violence.

(vi) - the Adoption of Children Act be amended to allow a de facto couple to adopt a child.

- de facto partners be included with the statutory beneficiaries who are entitled to succeed automatically on an intestacy under the Administration and Probate Act,

- the definitions of spouse and widow in the Administrator's Pension Act and the Supreme Court (Judges Pension) Act be amended to include de facto partner and de facto widow,

- the Cemeteries Act be amended to give a de facto partner the right to object to cremation of their partner,

- the Aged and Infirm Person's Property Act be amended to give de facto partners the right to apply to the Supreme Court for a protection order.

(vii) a broad based reform in the nature of anti discrimination legislation, to protect parties to a de facto relationship, should be enacted.

The Secretary of the Northern Synod of the Uniting Church in Australia made the following points in his submission -

(i) Marriage involves a public declaration by two people (and maybe their families) that they wish to create a new social unit within society - with all the legal, social and relational implications of such a unit.

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People who enter de facto relationships may be eit unable or unwilling to make such a declaration.

(ii) The de facto relationship is becoming an increasi common form of relationship in our society. relationship form will give rise to issues of the and equitable treatment of partners during relationship (e.g. in the face of domestic violence), at the time of separation or death. As this type relationship becomes more common there will be increasing need for "protective, adjustive supportive" functions of the law to be applied to relationship.

(iii) It would seem that a major reason for enterin de facto relationship is to have time to work thro the questions of rights and obligations in terms of relationship, and not to have these rights obligations automatically thrust upon one by marria Thus not only may it be useful to place a minimum t of six months as a judgement about the relations (alterable for need at a judge's discretion), certain entitlements (e.g. access to the de fa spouse's superannuation) may require a longer t relationship that implies further obligations rights.

(iv) The policy option which recognised de fa relationships in specific areas only "would seem t best option". The following areas were suggested

- Fatal Injuries Compensation
- Testator Family Maintenance
- Human Tissue Transplant
- Superannuation (Govt.)
- Motor Accidents Compensation
- Workers Compensation
- distribution of estate on death
- inter vivos settlement of property - similar provision of family court
- protection from domestic violence - similar provision of family court
- Anti-discrimination Act
- Maintenance

The YWCA advised that its 1984 National Conference, "It Harder for Girls" had made the following recommendations

(i) that cohabitation and separation agreements should b enforceable, and

(ii) all laws and administrative procedures covering de fac relationships should be reformed.

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5. LEGISLATION AND PROPOSALS FOR REFORM ELSEWHERE

Appendix A contains Tables of N.T. Legislation which affect married persons and de facto spouses. Australian legislation has, for many years, recognised the existence of a de facto relationships for various purposes. It can be seen from the Tables that decisions to confer rights on de facto partners, similar to those enjoyed by married persons, have been made on an individual basis, and not as a result of a general policy.

(a) South Australia

A general attempt has been made to give a surviving de facto spouse rights equivalent to those of a surviving de jure spouse. The policy of the Family Relationships Act 1975 was expressed by the Attorney-General to be "that where two people are living together in an established de facto relationship the parties in that relationship should, for certain purposes, be entitled to the same rights and benefits as lawful spouses" (S.A. Parliamentary Debates, House of Assembly, 28 October 1975).

Section 11(1) of the Act provides that a person is a "putative spouse" if on the relevant date he or she is

> "cohabitating with (the other) person as the husband or wife de facto of that other person and
>
> (a) he [or she]
>
> (i) has so cohabitated with that other person continuously for the period of five years immediately preceding that date; or
>
> (ii) has during the period of six years immediately preceding that date so cohabitated with that other person for periods aggregating not less than five years; or
>
> (b) a child, of which he [or she] and that other person are the parents, has been born (whether or not the child is still living at the date referred to above)."

The Act enables a person to apply to the court for a declaration that he or she is a putative spouse but does not equate that status with that of a de jure spouse nor does it specify the consequences which flow from such a declaration.

The consequences are derived by the amendment of other Acts the provisions of which have the effect of giving the surviving putative spouse similar rights to a surviving lawful spouse in certain circumstances eg.

> Administration and Probate Act 1919, s.72h(2) enables a putative spouse of a person dying intestate to participate in the distribution of the estate of the deceased person. If there is no lawful spouse the

putative spouse takes the entire estate. If deceased is survived by both a lawful spouse and putative spouse they share the estate equally.

Criminal Injuries Compensation Act 1978, s.4 defines victim (a person who is entitled to compensation) include spouse or putative spouse.

Inheritance (Family Provision) Act 1972, s.6 enables putative spouse to apply for testators family maintenance in the same way as a lawful spouse.

Succession Duties Act 1929, - s.4(1) enables a putative spouse to enjoy the same exemption from estate duty as lawful spouse.

Superannuation Act 1974, - s.121 enables a putative spouse who survives a contributor to the Government Superannuation Scheme to apply for a spouse's pension and the applicant may be able to take to the exclusion of the legal spouse.

Wrongs Act 1936, ss.19 and 20 enable a putative spouse to bring an action in respect of the death of the deceased spouse where the death is the result of the act, neglect, or default of another person. Where the deceased is survived by both a lawful spouse and a putative spouse, payment of solatium provided by the legislation is apportioned between them in such manner as the court thinks just. Section 23(b) (3) enables a putative spouse of a victim of a criminal assault to share in the compensation awarded for loss caused by the death of the victim.

No provision has been made for living putative spouses to pursue claims for maintenance or property settlements against each other.

The definition of putative spouse in s.11(1) has been criticised in the South Australian Supreme Court on the basis that a childless couple must cohabitate for a period of five years before either can acquire the status of putative spouse whereas a very short and unstable period of cohabitation by a couple who have had a child enables them to qualify as putative spouses: In re Fagan (1980) 23 SASR 454. The birth need not have occurred during the period of co-habitation Lesiw v Commissioner of Succession Duties (1979) 20 SASR 48

(b) Tasmania

(i) Maintenance Act 1967

Section 16 provides that a woman who has cohabitated with a man for a period of at least 12 months may obtain a maintenance order if the man, without just cause or excuse leaves her without adequate means of support, or deserts her or is guilty of such misconduct as to render it unreasonable to expect her to continue to live with him. The maintenance

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proceedings must be bought within 6 months of the end of cohabitation.

The provision dates from 1837 and, prior to the NSW De Facto Relationships Act, there was no similar legislative provision in any other state which enabled a de facto wife to claim maintenance from her de facto husband.

(ii) Law Reform Commission Report on Obligations Arising from De Facto Relationships (1977).

Having analysed the arguments for and against granting rights to de facto spouses, the Law Reform Commission considered it appropriate to legislate to relieve existing hardships and injustices in respect of de facto relationships by the creation of legal rights and obligations to cover persons who have established de facto relationships and survived the partner where one has died. The Commission emphasised that it did not recommend the creation of a new de facto status coextensive with the status of marriage or similar to it. Nor did it recommend that any kind of de facto relationship should ever effect any change of status such as occurs on marriage. The Commission did not recommend that the mere fact that parties have lived together as though they were man and wife for even a long period should itself alone confer either legal rights or impose legal obligations. The Commission felt that rights and obligations in this context should be conferred or imposed <u>on proof of dependency</u> and that this should be for the purpose of <u>relieving hardships and injustices only</u>. The Commission debated whether dependency should be defined by legislation or determined by the courts. The Commission effected a compromise which may be stated in general terms as follows -

- The test to be applied in determining whether or not legal rights and obligations should be created should be proof of dependency.

- Generally, a dependency should only be capable of being proved where the parties have cohabitated for a continuous period of 12 months immediately prior to the cessation of the dependency by death or the happening of an event on which the claim was based.

- Nevertheless, provided the courts which is adjudicating on the claim is satisfied that a dependency does in fact exist, it should be able, on the proof of "special circumstances", to allow the claim even though the parties have not cohabitated for such continuous period of 12 months.

- It should be left to the court to decide what may constitute "special circumstances" but this exception should only apply to enable the court to give relief in cases of hardship (para. 6).

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(c) New South Wales

The De Facto Relationships Act 1984 came into force on 1 1985. It is substantially based on the NSW Law Re Commission's Report on De Facto Relationships (No. 36, 19

(i) Cohabitation and Separation Agreements

The Act provides that cohabitation agreements betwee facto couples are valid. This reflects the common law po qualified approval was given to such agreements in Sei v Schallhofer [1982] 2 NSWLR 80, 8 Fam LR 598. Separa agreements have always been regarded as valid.

The Family Law Act provides for "maintenance agreeme which must be approved by the court. The courts have re to the public interest in deciding whether an agree should be approved.

The NSW Act uses a different approach. It requires a agreements to be certified by a solicitor to have been sig only after each partner had received advice on the effec the agreement, whether it was "prudent", and whether it in the partner's interests.

(ii) Financial Adjustment

Under the Family Law Act, there is a general principle t married partners are obliged to maintain each other. The Act provides that there is no right to maintenance except it provides.

Maintenance is based on the applicant's inability to supp himself or herself adequately, but only if this inability due either to having the care of a child of the partners, to having suffered a reduction in earning capacity due to circumstances of the relationship. The applicant normally have co-habitated with the de facto partner for least 2 years. A maintenance order ceases when the applic ceases to have the care of the child. Orders based reduced earning capacity may only be made if it "reasonable" to make the order, and if the order will ena the applicant to increase his or her earning capacity by course of training or education. Such orders are a limited to a period of 3 years from the date of the order, 4 years from the separation of the partners, whichever is shorter. The Act provides that in making an order maintenance the court shall ensure that the order will so as practicable preserve any entitlement of the applicant to pension, allowance or benefit.

(iii) Property Adjustment

The Act confers a discretionary power to make "such ord adjusting the interests of the partners in the property as it seems just and equitable", having regard to the partie contributions (whether direct or indirect, financial non-financial) to the property, or to their financia resources. The Court should also have regard to

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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 the child of either of them.

(iv) Domestic Violence

The Act includes power for the court to grant injunctions for the personal protection of the partners, and for certain related purposes. Breach of such injunctions constitutes an offence, and the court has in addition its ordinary powers to punish for contempt.

(d) Victoria

The De Facto Relationships Bill 1986 was introduced into the Legislative Council in Victoria on 17 September 1986. The Bill lapsed and was reintroduced on 24 March 1987 as the De Facto Relationships Bill 1987. The Bill was modelled on the New South Wales De Facto Relationships Act 1984. The main provisions

- allowed de facto partners to enter into enforceable cohabitation and separation agreements;

- provided a mechanism for settling property disputes between de facto partners which allow the court to take into account a wide range of contributions to the property of the partners and the welfare of the family;

- provided a limited form of maintenance for former de factor partners who are unable to support themselves either because of child care responsibilities or the effect of the relationship on earning capacity.

It was withdrawn in the Legislative Council on 19 August 1987.

On 12 August 1987 the Property Law (Amendment) Bill was introduced. That Bill contained those parts of the De Facto Relationships Bill that dealt with the adjustment of real property interests only. It was subsequently passed and commenced in June 1988.

(e) Canada

(i) Sub-Committee on Equality Rights.

In February 1985 the Standing Committee on Justice and Legal Affairs of the House of Commons was empowered to examine, enquire into and report on equality rights under the Canadian Charter of Rights and Freedoms, to consider the Discussion Paper on Equality Issues in Federal Law, and to seek the

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views and opinions of Canadians, both individuals organisations, on the subject. The examination and in was carried out by a Sub Committee on Equality Rights.

The recommendations of the Sub-Committee contained in first Report, concerning common law spouses, are

- the Income Tax Act be amended to extend the meanin the words 'spouse' and 'married person' and sim expressions to include a common law spouse, and the 'marriage' to include a common law relationship, so the same tax treatment is afforded taxpayers established common law relationships as now applies taxpayers who are legally married;

- when benefits are conferred or obligations imposed partners in a legal marriage by federal law or polici such benefits and obligations apply in a similar ma to common law spouses;

- a consistent definition of common law relationship incorporated in all federal laws and policies t recognise such relationships, and for this purpose, t the definition require that the parties be of opposite sex, reside continuously with each other for least one year, and represent themselves publicly husband and wife.

(ii) Cohabitation and Separation Agreements

The Family Law Act 1986 (Ontario), Part III, dealing w maintenance obligations, applies to partners who ha cohabited

(a) continuously for a period of not less than three yea or

(b) in a relationship of some permanence, if they are natural or adoptive parents of a child.

By s.53, parties may enter into a cohabitation agreement regulate, during cohabitation or on its cessation,

(a) ownership or division of property,
(b) support (=maintenance) obligations,
(c) the education or moral training of their children not custody/access),
(d) any other matter.

By s.54, parties who have separated may enter into separation agreement dealing with all the matters listed s.53, plus custody of or access to children.

Such contracts must be in writing signed by the parties witnessed (s.55). A court may disregard provisions relat to a child in determining questions of support, educati moral training, custody or access, if, to do so, is in best interests of the child (s.56(4)). It may set aside cohabitation or separation agreement -

(a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;

(b) if a party did not understand the nature or consequences of the domestic contract; or

(c) otherwise in accordance with the law of contract.

Similar legislation exists in British Columbia (Family Relations Act RSBC 1979 c. 121), New Brunswick (Marital Property Act SNB 1980 c. M 1.1), Newfoundland (Matrimonial Property Act SNFld 1979 c.32) Prince Edward Island (Family Law Reform Act RSPEI 1974 c. F 2.1) and the Yukon (Matrimonial Property and Family Support Ordinance OYT 1979 (2d) c. 11.) The legislation in British Columbia is more limited than in the other Provinces as such agreements are readily subject to recision or variation. This is discussed in Davies, pp 80-112.

(iii) Financial Adjustment

It is possible for de facto partners of varying periods of co-habitation to claim support in cases of need in British Columbia (2 years co-habitation), Manitoba (5 years), New Brunswick (3 years or if natural parents of a child), Newfoundland and Nova Scotia (1 year), Ontario (3 years or if natural parents of a child), Yukon (relationship of "some permanence"). All applications must be made within 1 year of separation (except Yukon: 3 months): see Davies, pp. 59-68.

(iv) Property Adjustment

In New Brunswick, Ontario and the Yukon it is possible for a de facto partner of sufficient standing (see (iii)) to obtain an order for any property to be transferred or vested in his or her name, where an application for support has been made. To the extent that a property transfer cannot be based on a need for support in these jurisdictions, and in all the other Provinces, claims for property adjustment are based on common law trust doctrines: Pettkus v Becker (1980) 117 DLR(3d) 257, 19 RFL (2d) 165, Sorochan v Sorochan (1986) 29 DLR (4th) 1, 2 RFL (3d) 225.

Pettkus v Becker involved a couple who had cohabited for 19 years. During cohabitation both contributed towards the acquisition and subsequent development of a beekeeping business. Title to the business and its land was held in the name of Mr Pettkus. The majority of the Supreme Court of Canada held that Miss Becker was entitled to a half interest in the land and in the business. The majority based its decision on the fact that Miss Becker's financial contribution and labor had enabled, or assisted in enabling, Mr. Pettkus to acquire the land and business. To permit Mr. Pettkus to retain these assets would be to countenance his unjust enrichment at the expense of Miss Becker.

The principle established in Pettkus v Becker was extende Sorochan v Sorochan. Here a woman cohabited with a ma 42 years during which time she worked on farmland owne him. Unlike Pettkus v Becker, the claimant's contributed to the preservation, maintenance and improve of the land held in the other partner's name, but not to acquisition. It was found by the Supreme Court of Ca that there had been an unjust enrichment which could remedied by imposing a constructive trust.

(h) New Zealand

The Law Reform Division of the Department of Justice produced a draft study paper entitled "De Facto Marriages the Law". The paper discusses the issues relevant to facto law reform in New Zealand, with particular referenc legislative change. As of 29 July 1988, this issue is be partially considered by a Working Group set up by the Cab Social Equity Committee to review the Matrimonial Prop Act.

(i) Cohabitation and Separation Agreements

By s.40A of the Property Law Act 1952, (added in 1986 facto couples may make cohabitation or separation agreem "with respect to the status, ownership, or division of property owned ... or ... acquired by them or either them". Such agreements are valid. No special procedu governing the making of such agreements are required.

(ii) Financial adjustment

De facto partners have no automatic rights to maintenan Maintenance in favour of a natural parent is conditional o right to custody of a child (Family Proceedings Act 19 s.79).

(iii) Property Adjustment

In the absence of a cohabitation or reparation agreement, common law, primarily the law of trusts, provides for settling of property disputes between de facto partners: Hayward v Giordani [1983] NZLR 140, Oliver v Bradley [19 NZLR 586.

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POLICY OPTIONS FOR REFORM

(a) Equating Marriages and De Facto Relationships for all Purposes

The most sweeping approach would be to equate the legal rights and duties of de facto spouses (as between themselves and in relation to third parties) with those of married couples. In theory, this could be done simply by defining "marriage" to include not only the relationship between persons who have gone through the appropriate ceremony but also that between two persons who have lived together as de facto spouses (perhaps for a specified period).

However, this approach would not be effective for the purposes of laws of the Commonwealth Parliament applying in the Northern Territory. It is not possible for a Territory law, being a subordinate form of law, to alter or otherwise affect the application of Commonwealth laws in the Territory unless the Commonwealth law so provides: R v Kearney; ex parte Japanangka (1983-1984) 158 CLR 395.

In particular, it is not possible for a Territory law to expand the legal concept of a "marriage" as defined in the Commonwealth Marriage Act 1961. The Northern Territory could only validly legislate to equate the legal incidents attaching to de facto arrangements with those already attaching to marriages in matters other than those covered by Commonwealth law. For example, the rules of intestacy applying to a de facto partner's estate.

An alternative to redefining marriage is for the Northern Territory and the States to pass a series of measures designed to provide the same rights and duties for parties to a de facto relationship as apply to married couples. The New South Wales Anti-Discrimination Board, for example, has 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." The Board's report was confined to a consideration of State legislation affecting the parties to marriage.

The implementation of the above amendments to Northern Territory or State legislation would not of themselves equate the legal position of married persons and de facto spouses since much of the law relating to married persons is contained in Commonwealth legislation such as the Family Law Act 1975. However, the Northern Territory and the States could, if thought desirable, enact legislation equivalent to federal legislation governing married persons. They could, for example, pass laws dealing with the property or maintenance rights of de facto spouses in substantially identical terms to the property and maintenance provisions of the Family Law Act 1975. This would not precisely equate the position of married persons and de facto spouses since matrimonial disputes are heard in the Family Court and disputes between de facto spouses are heard in Northern Territory and State Courts.

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The Northern Territory and the States do not have p
without the co-operation of the Commonwealth, to c
jurisdiction on the Family Court to hear matters concer
de facto couples. Accordingly, the complete equival
between the legal position of married couples and de
couples would require co-operation and joint action be
the Commonwealth and the Northern Territory and the Sta
Such a precedent exists. Under s. 51(xxxvii) of
Constitution, a State may refer a matter to the Commonwe
The Commonwealth then becomes empowered to legislate on
matter, for that State, for so long as the refe
continues. In 1986 various States, under indiv
Commonwealth Powers (Family Law - Children) Acts refe
power to legislate with respect to the custody, maintena
and guardianship of children (i.e. all children)
questions of access. The Commonwealth retains plenary p
to legislate on all matters for the Northern Terri
whether or not a request for legislation has been made.

Committee's View

There are considerable legal obstacles to adopting a po
of equating de facto relationships and marriages. Regard
of these difficulties, we reject the policy, on two grou

- marriage has a special status in the community tha
derived from the formal and public commitment underta
by the parties. To adopt a policy equating these
different kinds of relationships would detract from
special significance of marriage as an institut

- a policy equating the relationships would limit
freedom of couples who make a conscious decision no
marry because they wish to avoid the legal rights
obligations of married people.

(b) Equating of Marriage and De Facto Relationships for Limited Purposes

The strategy of equating certain de facto relationships w
marriages, for specific purposes, is employed by the Fa
Relationships Act 1975 (SA). The Act allows a person
conforms to the statutory description of a "putative spou
to apply to the Supreme Court of South Australia for
declaration of his or her status. The definition
"putative spouse" requires a claimant to prove that
parties were cohabitating on the relevant date (usually
death of the partner) and that either the cohabitation
lasted for at least 5 years before that date or the part
have a child.

The definition does not employ the concept of dependence a
therefore, differs from the approach taken from the Tasman
Law Reform Commission. Once the declaration as to the sta
of putative spouse has been made, the putative spouse has
same entitlements as a married person in a number
specified areas each of which is governed by a separate a
The legislation equates the position of a putative spouse
married person only in relation to claims consequential

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the death of a partner. Thus a putative spouse and a married person, in general have the same entitlements under the legislation concerned with such matters as intestate succession, testators family maintenance, compensation for fatal accidents and eligibility under government superannuation schemes. No provision is made for putative spouses to claim maintenance for a settlement of property from a former partner during the partner's lifetime.

The definition of putative spouse is open to criticism that a threshold requirement of 5 years cohabitation for a childless couple may be thought too harsh, particularly where dependence can be proved. The provisions governing the resolution of competing claims between a putative spouse and a lawful spouse are not easy to reconcile, eg. s.72h of the Administration and Probate Act 1919 (SA) provides that where there is both a lawful and a putative spouse, the spouses' share in an intestacy is divided equally between them whereas s.121 of the Superannuation Act 1974 (SA) directs the tribunal to pay death benefits to a putative spouse of 3 years standing to the exclusion of the lawful spouse.

Committee's View

In principle, the Committee considers this may be a possible method of dealing with the legal problems that arise from de facto relationships. The time at which the status of de facto relationships is to be equated with marriage must be fixed at some ascertainable date. In South Australia, this is when one partner of sufficient standing applies to the Supreme Court for a declaration of that status. This requires a conscious decision on the issue, a decision unlikely to be made while both parties are living harmoniously. This decision is most likely to be made on the death of one partner. This is also reflected in the South Australian legislation which provides for equation only in the case of benefits available after death.

The Committee however considers this option inappropriate to deal with the legal problems arising out of de facto relationships. It rejects this approach for two reasons. Firstly, we consider that no one point can be fixed when de facto couples would wish their relationship to be equated with marriage. Requiring a positive act (such as application to a court) to establish this time is unsuitable. Such a decision is unlikely to be made in a continuing harmonious relationship that has rejected the option of marriage. Secondly, we consider the situations in which the two relationships are to be equated cannot be ascertained in general terms, such as all marital benefits accruing after death. We consider, for the reasons outlined in respect of option (e), that this will not necessarily alleviate specific injustices.

(c) Granting De Facto Spouses Rights on proof of Dependence

The Tasmanian Law Reform Commission recommended that further legal recognition should be extended to de facto