NORTHERN TERRITORY LAW REFORM COMMITTEE:

REPORT ON RELATIONSHIPS REGISTERS

Report No.35 – February 2010

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE

The Hon Austin Asche AC QC	Mr Nikolai Christrup
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Ms Carolyn Richards	Mr John Hughes
Mrs Barbara Bradshaw	Mr Glen Dooley

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE RELATIONSHIPS REGISTER SUB-COMMITTEE

The Hon Austin Asche AC QC	Ms Lisa Coffey
Mrs Barbara Bradshaw	Ms Fiona Hussein
Mr Peter Shoyer	Ms Caitlin Perry

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TERMS OF REFERENCE

On 3 June 2009, the Attorney-General the Honourable Delia Lawrie MLA provided the following Terms of Reference to the Northern Territory Law Reform Committee (NTLRC):

"The terms of reference to the inquiry are as follows:

Investigate and report on relationship registration legislation for possible implementation in the Northern Territory. Noting that relationship registration legislation allows de facto couples (including same-sex partners) to obtain a widely recognised form of evidence to prove that a relationship exists. Relationship registration legislation has been enacted in Tasmania, Victoria and the Australian Capital Territory for state-based relationship registration schemes. The Northern Territory has no equivalent relationship registration scheme.

SUBCOMMITTEE

The usual practice of the NTLRC when a reference is given is to appoint a small sub-committee to draft a preliminary report to be submitted to all members of the NTLRC and in the light of comments and submissions received from all members, draft a final report.

The members of the sub-committee are:

- Honourable Austin Asche AC QC, Chair;
- Mrs Barbara Bradshaw, Law Society NT;
- Carolyn Richards, Ombudsman;
- Caitlin Perry, Co-ordinator, Darwin Community Legal Service;
- Lisa Coffey, Acting NT Anti Discrimination Commissioner;
- Fiona Hussein, Co-ordinator Policy and Projects, NT Legal Aid Commission; and
- Peter Shoyer, Registrar General and Director Court Support and Independent Offices NT, Department of Justice.

The NTLRC members record their gratitude for the willing and able assistance given by the above named.

THE DISCUSSION PAPER

THE LAW AND PERSONAL RELATIONSHIPS

Until the latter half of the last century, the law concerned itself very little with the rights and duties of two adult persons living together as partners in a domestic relationship. The only such association recognised by the law was marriage, and while the Ecclesiastical Courts retained control over the situation (which they did until 1857), the words "until death do us part" were significant. The Ecclesiastical Courts did not recognise divorce. They did allow "judicial separation" but that was merely a declaration that one spouse had the right to live apart from the other, and in no sense severed the sacred bond of matrimony. Divorce, in the sense of dissolution of marriage could only be achieved by a private Act of Parliament – a rare and expensive procedure.

No other personal relationships were recognised as creating legal rights and duties between the parties. De facto relationships were just that – de facto but not de jure, that is, a fact without any legal consequences and same-sex relationships were considered abhorrent and (if between males) criminal[1].

In 1857, the first legislation permitting divorce was enacted in England (against the strong opposition of the Bishops in the House of Lords) and the jurisdiction for granting decrees of dissolution of marriage was given to the civil courts (more particularly to the Court of Probate, Divorce and Admiralty (PDA) – a rather strange ragbag of jurisdictions).

[1] Lesbians escaped prosecution because, it is reputed, when Queen Victoria was presented with a Bill making consensual sexual activity between adults criminal, she refused to sign it until it was restricted to men because she refused to believe that any woman could do such a thing.

The English Divorce Act was adopted, with variation by the parliaments of the Australian States and the jurisdiction was given to their Supreme Courts. The original Divorce Acts (usually called Matrimonial Causes Acts) gave the courts jurisdiction over divorce and such other matrimonial causes as nullity and judicial separation. The right to a divorce was based squarely upon fault. One party had to be shown to have committed a "matrimonial offence". The most common and most frequently used categories of matrimonial offences were adultery, desertion and cruelty.

For over a hundred years the courts busied themselves with refining these terms, often with great ingenuity. For instance, if a spouse left the home, that was prima facie "desertion", but if driven out of the home by the conduct of the other, that was "constructive desertion" by the other. The courts also inherited from the Ecclesiastical Courts various strange concepts such as "condonation", "connivance" and "collusion". The last term carried with it a consequence which might seem strange and even quite idiotic these days. Simply put, it meant that, if a husband and wife agreed that they were unsuited, and amicably agreed to separate, that very sensible agreement precluded them from a divorce. That was the logical consequence of "fault" divorce. If you could not or would not paint the picture of an "innocent" and "guilty" party, there was no "fault", and therefore no divorce.

LIMITS TO A DECREE OF DIVORCE

Divorce Courts were concerned only with the question, were the grounds for divorce proved? The consequences of the divorce as affecting custody, maintenance or property were left to other proceedings. Maintenance was determined in the Magistrates Courts, and custody and property by applications to the Supreme Court.

So far as financial matters were concerned, there was no attempt and indeed no power in the courts to order a just and equitable division of property based on concepts such as non-financial contributions, e.g. a wife's contribution to the running of the household or the care of children.

Property disputes were determined in separate applications. The courts commenced these applications with the strong prima facie presumption that the prevailing legal ownership should remain unless it could be displaced by some form of trust, the proof of which depended on strict rules, usually difficult to establish. This was to the considerable disadvantage of the wife since the husband on marriage became the legal owner of any property owned by her[2].

All this was based on the view that apart from changing the status of the parties from husband and wife to single persons, the divorce should not otherwise interfere with the prevailing legal position as to property. At the most a wife, divorced or not, could claim only maintenance for herself provided she could prove she was the "deserted" party. She could also claim maintenance for the children if they were in her care.

MARRIED WOMEN GAIN PROPERTY RIGHTS

The latter half of the nineteenth century saw a slow but growing movement (against much fierce opposition) towards recognition of women as having equal rights with men. A series of Married Womens Property Acts ultimately allowed a wife to acquire property in her own name and in all other respects have the rights of a "feme sole". (As for suffrage, the colonies, particularly NZ and SA, were many years ahead of the UK in granting equal voting rights to women).

[2] A striking example of a husband becoming the owner of any real property owned by his wife occurs in "David Copperfield". David's mother, as a widow, owns in her own name a house. When she marries the repulsive Mr Murdstone she is careless enough to refer to the house as "my house". Mr Murdstone is not pleased, and she corrects herself and says "our house". This is still not correct and finally she gets it right, "Your house".

THE COURTS MOVE TOWARDS ADJUSTING PROPERTY MATTERS

When married women gained the right, even while still married, to own property, there developed rather slowly a view that upon divorce, there should be a general reckoning by the court of claims of both parties to property so that they could both more easily go their separate ways.

Very gradually the principle was recognised that contributions should be assessed not purely on financial contributions or legal ownership (which usually favoured the husband), but include various intangibles such as unpaid assistance in business, contributions by parents or inheritance, careful household management, care of children, social networking, support in sickness or unemployment – and indeed a host of other factors depending on the specific relationship of the parties. These factors became consistently more refined as the concept grew towards attaining the fairest possible distribution.

THE COMMONWEALTH ENTERS THE FIELD

On the institution of the Commonwealth in 1901 the Federal Government was given the power to make laws for "divorce and matrimonial causes". It did not exercise that power until 1961 with the Barwick Act[3] which then superseded State jurisdiction. This was the first occasion on which the courts were given the power to make "such a settlement of property…. as the court considers just and equitable in the circumstances of the case" (section 86).

[3] *Matrimonial Causes Act 1959* which commenced on 1 February 1961.

The court was simply given the wide power to determine what was "just and equitable in the circumstances of the case". This led to a fair amount of judicial consideration. Some early cases restricted the power as only ancillary to the question of maintenance (section 84). Later cases recognised a power of greater breadth. In particular Barwick CJ who, as Attorney-General, had guided the legislation through parliament now, as Chief Justice, pronounced that "in an appropriate case, although one of the parties has no legal or equitable right to property vested in the other or to any greater interest in property than is already wholly or partially vested in him or her, the court hearing the matrimonial cause may make orders settling that property on that one or increasing the beneficial interest in that one in property already wholly or partially vested in him or her as the case may be": *Sanders v Sanders* (1967) 116 CLR 366 at 374-6.

So the courts could now have wider powers into personal relationships – but only with partners previously married.

These observations emphasised that a new and much wider discretion was now granted to the court. Nevertheless, the judges proceeded with caution and in particular, often took "conduct" into account as they were directed to do under section 84. While emphasising that orders should not be made to punish one party for his or her conduct, it remained a factor of importance because the finding in the divorce proceeding was a finding of fact that one party had committed a matrimonial offence.

"FAULT" DIVORCE DISAPPEARS

The concept of divorce based on fault had been eroded by a WA Act[4] which allowed a decree based not on any concept of fault, but purely on the fact of five year separation. This was adopted as a ground under the Barwick Act. But the "fault" grounds remained and continued to be sought, mainly because five years was a long period of time to wait. However, once admitted, the advantages of the non accusatory separation ground were obvious, and the result was the *Family Law Act 1975*. This Act provided that separation of one year was now the sole ground for divorce. This effectively abolished questions of fault and left the courts free to determine financial matters of maintenance and property settlement in a more equitable and detailed way taking into account both financial and non financial contributions.

The history of the *Family Law Act* from 1976 onwards has been one of increasing examination by both legislature and courts into the full financial and non-financial contribution and needs of the parties and therefore, towards an equitable and just decision. Circumstances vary in every case and the courts have been painstaking in examining every relevant detail in the individual case to bring about a result which an impartial observer would regard as fair for both sides.

While no system is perfect and while some parties will always remain dissatisfied, it seems generally accepted that the Act, and the courts acting under it, have achieved basic fairness.

In addition, the court has wide powers over the behaviour of parties vis-a-vis each other and more particularly in relation to custody of, or access to, children.

[4] *Matrimonial Causes and Personal Status Code 1948*

What has gradually crept into general acceptance over the last fifty years is the concept that the financial background between married persons, including non-financial contributions, can be examined and regulated in far greater detail than would have seemed desirable in earlier times

THE LAW MOVES INTO OTHER PERSONAL RELATIONSHIPS

HETEROSEXUAL DE FACTO RELATIONSHIPS

But, if the courts could become involved in the personal relationships of married persons and if, as became increasingly apparent, the courts could adjust these personal rights satisfactorily, why should the courts not be given the same responsibility in other personal relationships? And the most obvious was the de facto relationship.

There is a certain irony in this because many couples formed de facto relationships precisely because they did not wish any court "intrusion" into their lives. There was much good sense in this when divorce was difficult, often degrading and even denied if the parties separated consensually. With the coming of the *Family Law Act* the situation changed and the rational agreement to separate was encouraged rather than proscribed. Meanwhile, as with married couples, many de facto couples fell into disagreement about financial arrangements or ancillary matters and the broad jurisdiction of the Family Court appeared a better prospect of overall resolution than the more limited procedures of the courts of common law and equity. But the Family Court, as a Federal Court constituted under the constitutional power over marriage and divorce, could not act in a jurisdiction which appertained to the States. However the States could "refer" these powers.

The Commonwealth *Family Law (De Facto Financial Matters and Other Measures) Act 2008* gives extensive powers to the Family Court over financial disputes in the de facto relationships over which the court has jurisdiction.

The NT and ACT are "participating jurisdictions" for the purpose of the Act (section 90RA).[5]

The Commonwealth Act makes appropriate amendments to the *Family Law Act* to include a definition of a "de facto relationship" (section 4AA), and then allows similar provisions of the *Family Law Act* to apply in relation to de facto relationships. Section 90SF sets out the matters to be taken into consideration for maintenance and follows closely the matters already set out in section 75(2) of the *Family Law Act* with some differences appertaining to the different nature of de facto relationships. Section 90SM follows closely section 79(4) of the *Family Law Act* as matters to be taken into consideration for property interests – again with some special provisions relating to de facto relationships.

Introducing the Bill to amend the *Family Law Act* in 2008 the Federal Attorney-General Robert McClelland said:

> *"The reforms will also bring all family law issues faced by families on relationship breakdown within the family law regime. The federal family law courts are the specialist courts in Australia with vast experience in relationship breakdown matters. They also have procedures and dispute resolution mechanisms which are more suited to handling family litigation arising on relationship breakdown".*

The result is that in financial disputes between de facto couples, the Family Court can now take the same overriding jurisdiction in detail to arrive at a fair and equitable distribution in property and maintenance matters; but, in the case of the States, only if that jurisdiction is conferred upon it ("referred") by a particular State. Meanwhile, and before any "reference" had occurred, the States had themselves introduced legislation allowing State courts to adjudicate in financial and property disputes between de facto couples.

[5] See also NT – *De Facto Relationships (Northern Territory Request) Act 2008.*

SAME-SEX RELATIONSHIPS

Once the step was taken to allow the courts to adjudicate in de facto heterosexual relationships as well as matrimonial relationships, it is not surprising that the philosophy extended to other personal relationships.

It was inevitable that de facto couples should have in law the same rights and privileges as married couples, and have the advantage of the same close and detailed attention given by the Family Court in matrimonial disputes as to financial matters. Any social ostracism against heterosexual de facto couples has long since disappeared[6].

On the other hand, the social acceptance of same-sex couples is comparatively recent. Sexual practices between consenting males remained illegal, and in fact criminal, in all States up to the first half of the twentieth century. The first step, therefore, was the repeal of such laws and this occurred in all States during the second half of that century.

Social recognition came more slowly but has accelerated in the last decade. This can be shown by the fact that in 2008 when the Commonwealth Government introduced legislation removing all forms of legal discrimination against same-sex couples, the legislation was supported by all parties.

[6] It would be interesting if it could ever be found – and it probably could not – to establish the last time a hotel or guest house refused entry to a couple who were not married. Many years ago "Punch" had a cartoon which depicted a large hotel registry book, tabulated alphabetically. The letter "s" took up the bulk of the book.

THE COMMONWEALTH SAME-SEX LEGISLATION

The Commonwealth legislation came in two separate Acts, but the intention was the same in both – to amend all Commonwealth legislation which in any way discriminated against same-sex couples, and to give these couples and their children the same recognition and the same rights and privileges as heterosexual de facto couples[7].

The first of the Commonwealth Acts was the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*, No. 134, 2008. It was sub-titled "An Act to amend the law in relation to superannuation and for related purposes".

The Act is designed to confer the benefits of various Commonwealth Acts dealing with superannuation and related matters on partners and children of same-sex relationships.

To that end, the Act makes the relevant amendments to various Commonwealth Acts (eg Superannuation Acts).

AMENDMENT OF THE ACTS INTERPRETATIONS ACTS

A significant feature of the Commonwealth Superannuation Act is the amendment of the Commonwealth *Acts Interpretation Act 1901* by the insertion of sections 22A, 22B and 22C.

Section 22C sets out the circumstances in which a de facto relationship can be presumed to exist, and section 22A specifically provides that "a person is the de facto partner of another person (whether of the same-sex or a different sex)" if the person is in a "registered relationship" or a "de facto relationship" with the other person.

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7 Commonwealth Parliamentary Debates – 22/9/08.

By section 22B a “registered relationship” is created by registration “under a prescribed law of a State or Territory as a prescribed kind of relationship”.

By section 22C the incidents by which a de facto relationship can be recognised are set out. As one would expect, there follows a list of factors from which an ordinary citizen would conclude that a de facto relationship existed. Note, however, that the relationship does not exist if the partners are “related by family”, an expression defined in the Act (see section 22(c)(1)(b) & section 22C(6)).

A FURTHER COMMONWEALTH ACT

The second of the Commonwealth Acts is the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* No. 144, 2008. The subtitle is “An Act to address discrimination against same-sex couples and their children in Commonwealth Laws, and for other purposes”.

This Act takes off from the more limited provisions of the earlier Act, which was basically concerned with superannuation and related matters, and takes up all remaining Commonwealth Acts in which discrimination or non-recognition of same-sex relationships previously existed. In all, some 84 Acts are amended by the two statutes.

The amendments to the *Acts Interpretation Act*, already set out, apply generally since the amendments cover all Commonwealth legislation. These two Acts, the Commonwealth *Same-Sex Relationships (Equal Treatment in Commonwealth Laws and Superannuation) Act 2008* and the *Same-Sex Relationship (Equal Treatment in Commonwealth Law – General Law Reform) Act 2008* were assented to in December 2008.

So the Commonwealth commenced the year 2009 with a clean slate from which all legislative discrimination against same-sex couples have been removed[8].

SAME-SEX RELATIONSHIPS EQUATED WITH DE FACTO RELATIONSHIPS

It follows also that, by the amendments of the *Acts Interpretation Act*, already referred to, a same-sex couple being recognised as a de facto relationship, could fall within the ambit of the Family Court under the extensive powers given to that court under the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act* No. 115 of 2008, if a State appropriately referred its powers. The NT and the ACT already come within those provisions.

Without going into unnecessary detail, it is sufficient to state that, once the *Acts Interpretation Act* has been amended to include within the term "de facto partner", the expression "whether of the same-sex or a different sex", the amendments in the other Commonwealth Acts named in the two principal Acts are directed to allowing same-sex partners to have the same benefit and recognition as extended to married partners under the *Family Law Act*. For instance, the expression "marital relationship" now becomes "marital or couple relationship"; the expression "husband or wife" now becomes "husband or wife or partner"; the expression "spouse" becomes "spouse or de facto partner" and so on. The expression "child" is extended to include a child within a de facto relationship and that category may, depending on circumstances, include an adopted child, a stepchild or an ex-nuptial child of a partner.

Thus in all Commonwealth legislation the partner or surviving partner, including a same-sex partner, has the same rights and recognition under those Acts as are possessed by the spouse of a married person.

[8] Some amendments did not come in to force until July 2009.

The rights includes not only the superannuation or pension benefits to which a surviving spouse is entitled, but also all the numerous other benefits or recognition extended to a spouse under the numerous Acts specified and amended by the two principal Commonwealth Acts. The only requisite is that the de facto relationship must be accepted as such by the authority charged with the administration of the various Acts; and the test is that set out in section 22C of the *Acts Interpretation Act* as amended by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*. Presumably if there is any dispute about whether a particular relationship is a "de facto relationship" within the definition, that dispute would go to the particular court or Administrative Review Tribunal to which an appeal would lie pursuant to that specific legislation.

Similarly if a dispute arose between de facto partners as to financial matters, and application made to the Family Court to resolve this dispute, the Court would first need to be satisfied that a de facto relationship existed within the meaning of section 4AA of the *Family Law Act* (and see also section 90RD of that Act).

All States and Territories now have statutes similar to the Commonwealth legislation equating the position of a de facto partner with that of a married partner, and amending numerous earlier statutes to that purpose. See, for instance, the NT *Law Reform (Gender, Sexuality or De Facto Relationships) Act 2003*.

STATE PARTICIPATION

A separate form of recognition of de facto partners is provided by section 22A(a) of the *Act Interpretation Act* (as amended). It provides that a person is "the de facto partner of another person (whether of the same-sex or a different sex) if "the person is in a registered relationship with the other person under section 22B".

Section 22B provides that "for the purposes of paragraph 22A(a), a person is in a registered relationship with another person if the relationship between the persons is registered under a prescribed law of the State or Territory as a prescribed kind of relationship".

This provision seems to allow a State or Territory to set up its own definition of a de facto relationship and if a person is registered under that State or Territory law, he or she could be presumed by the Commonwealth law to be a de facto partner of another named person.

But this interpretation appears to have certain difficulties as hereinafter discussed.

The States of Victoria and Tasmania and the ACT have now passed legislation enabling certain relationships to be registered, if desired, registered under the law of that State or Territory. In each case the legislation varies.

VICTORIA

The *Victorian Relationships Act 2008* sets out the purpose of the Act in section 1:

"(a) to establish a relationship register in Victoria for the registration of domestic relationships;
(a) to provide for relationship agreements;
(b) to provide for adjustment of property interests between domestic partners and the right of domestic partners to maintenance.

By section 5 “registerable relationship” is defined as:

> “a relationship (other than a registered relationship) between two adult persons who are not married to each other but are a couple where one or each of the persons in a relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other irrespective of their genders and whether or not they are living under the same roof, but does not include a relationship in which a person provides domestic support and personal care to the other person –
>
> (a) for fee or reward; or
> (b) on behalf of another person or organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).”

See also section 35, definition of “domestic partner” and “domestic relationship”.

Such a relationship can be registered (sections 6-10) provided the Registrar is satisfied that it comes within the definition (section 18).

A “relationship agreement” can be recognised even it not registered, provided it conforms to the requirements of the definition of “relationship agreement” set out in the definition appearing in section 35.

The Act then provides that a court may determine all property and maintenance proceedings between “domestic partners” to a “domestic relationship” registered or unregistered and gives the court wide powers to do so (section 58). The expression “court” however would, in the context, only be a Victorian court.

The Act then proceeds to amend various pieces of legislation to enable the term "domestic partner" as defined, to be included in such legislation. One significant feature of the Victorian Act is that the definitions of "registerable relationships" and "domestic relationship" seems to be wide enough to include persons related by family. This is expressly excepted in de facto relationships by the *Acts Interpretation Act* as amended (see section 22C(1)(a) and section 22C(b)). Yet section 22A(a) accepts that a person in a "registered relationship" is in a de facto relationship. This will be discussed after examining the Tasmanian and ACT legislation.

TASMANIA

The *Tasmanian Relationships Act 2003* recognises and allows registration of two forms of "personal relationship", namely a "significant relationship" and a "caring relationship" (section 6). A "significant relationship" is defined in section 4 as a relationship between "two adult persons:–

(a) who have a relationship as a couple; and
(b) who are not married to one another or related by family".

Section 4 then sets out the circumstances to determine such relationship (section 4(3), but gives the court a wide discretion in so determining (section 4(4)). The indicia of such a relationship would seem similar to that of a de facto relationship as accepted by the Commonwealth *Family Law Act* (as amended).

A 'caring relationship" is defined by section 5, as "a relationship other than a marriage or significant relationship between two adult persons, whether or not related by family, one or each of whom provides the other with domestic support and personal care".

By section 5(2) for the purposes of subsection (1) a caring relationship is taken not be exist between two persons where "one of them provides the other with domestic support and personal care –

(a) for fee or payment in the nature of wages; or
(b) under an employment relationship between the persons; or
(c) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation)".

Section 7 defines "family relationships".

The Act provides that a "partner" may apply to a court for "an order for adjustment of interests with respect to the property of either or both of the partners, or for the granting of maintenance, or both" (section 36(1)). The detailed powers of the court to do so follow. "Court" here clearly means a Tasmanian court (see definition s 3).

Since "partner" is defined as "a person who is or has been in a 'personal relationship'" it follows that the court has jurisdiction over both "significant relationships" and "caring relationships". Furthermore, although these two relationships are differentiated in the legislation, they are both able to be registered if the partners apply to the Registrar for registration of a deed of relationship (section 11(1)(c)).

A "significant relationship" seems to fit the pattern in the Commonwealth Act for a "de facto relationship" section 22(c), but a "caring relationship" obviously does not since it includes a relationship "whether or not related by family".

ACT

The ACT statute is the *Civil Partnerships Act 2008*.

Section 5(1) states that:

> "This Act provides a way for two adults who are in a relationship as a couple, regardless of their sex, to have their relationship legally recognised by registration as a civil partnership".

Section 6 provides that a "person may enter into a civil partnership unless already married or already in a civil partnership", but prohibits partnerships between relatives as set out in section 6(b). The legislation does not define "civil partnership" other than in the terms of section 5 ("two adults who are in a relationship as a couple regardless of their sex", repeated in section 7(1) as to eligibility for legislation). These terms would clearly include the provisions for de facto relationships set out in section 22C of the Commonwealth Act.

The Act provides for registration of a civil partnership and gives the court power to terminate the partnership if not otherwise terminated by agreement, but does not provide for ACT Supreme or Magistrates Court to determine property or maintenance disputes between the partners. This jurisdiction clearly goes to the Family Court under the Commonwealth *Family Law Amendment (De Facto Financial Matters and Other Matters) Act 2008*.

By a recent amendment (18 December 2009) of the *Civil Partnerships Act* section 6A now provides how a civil partnership is entered into:

> *"*Two adults who are in a relationship as a couple, regardless of their sex, and who meet the eligibility criteria in section 6, may enter into a civil partnership by –
>
> (a) having their relationship registered under section 8; or
>
> (b) unless the couple may marry under the *Marriage Act 1961* (Commonwealth), making a declaration of civil partnership under section 8B (Declaration of civil partnership) and having their relationship registered under section 8BA (Registration of relationship after declaration of civil partnership)."

A "declaration of civil partnership" is a formal act requiring notice to be given to the Registrar-General, and made before the "civil partnership notary" and at least one other witness (section 8B) The formal structure rather suggests some similarity to a civil marriage but the Act is careful not to suggest that it should be thus described. (The earlier Civil Union Act was disallowed by the Commonwealth on this ground). The object is clearly to create a special status for couples who cannot, or do not wish to enter into a "marriage" within the classical definition of "a voluntary union of a man and woman for life to the exclusion of all others (*Hyde & Hyde* 1859 – L.R. 1 P&D 130 & c.f. s 69(2) of the Commonwealth *Marriage Act*); but who wish their relationship to be legally recognised. Although the statute does not specifically say so, the obvious intention is to provide for public recognition of this status of a declared civil partnership as distinct from marriage or a de facto relationship not formally declared. This will be discussed later.

REGISTRATION UNDER THE COMMONWEALTH ACT

If a State referred power, and depending on the terms of such referral, its residents could seek determination of financial matters in the Family Court or Federal Magistrates Court by establishing a de facto relationship within the terms of section 22A(b) and section 22C; but only if they come within the terms of section 22C which prohibits relationship by family (section 22C(1)(b) & (6)). For this, no "registration" is required.

Registration under section 22B of the Commonwealth Act poses a difficult question. The convenience of registration in a State or Territory is that further proof is not needed in the Federal Family Court that a relationship over which it has jurisdiction exists. But does that mean that if a relationship is registered in a State or Territory, which relationship is outside the boundaries of section 22C of the Commonwealth Act, that the Family Court or Federal Magistrates Court thereby has jurisdiction? Such argument would be based on the apparently absolute wording of section 22B.

For the purposes of paragraph 22A(a) a person is in a registered relationship with another person if the relationship is registered "under a prescribed law of a State or Territory as a prescribed kind of relationship".

So the argument would be that the absolute terms of this section mean that if a State or Territory prescribed a kind of relationship outside the boundaries of section 22C, that relationship must nevertheless be accepted as within the meaning of a de facto relationship under section 22A. Thus, the argument would go, each State or Territory could decide what form of relationship it would wish recognised by the Commonwealth and upon registration, that relationship must be recognised by the Commonwealth. Section 22C applies only to one form of de facto relationships and does not apply to section 22B.

Nevertheless, the better view would seem to be that the Commonwealth Act confines itself to de facto relationships within the boundaries of section 22C and section 4AA of the *Family Law Act* (as amended), since the Family Court and the Federal Magistrates Court lacks the jurisdiction to go outside those boundaries.

A careful reading of sections 22A, 22B and 22C does seem to confine their ambit to de facto relationships within the meaning of section 22C. Section 22A commences with the words "For the purposes of a provision of an Act that is a provision in which de facto partner has the meaning given by this Act etc. Section 22B commences with the words "For the purposes of paragraph 22A(a)" etc.

Thus section 23A is still governed by the provisions of section 22A and therefore becomes a convenient method of recognising a de facto relationship recognised by a State or Territory if and only if within the boundaries allowed by the Commonwealth Act.

This is strengthened by the *Family Law Amendment (De Facto Financial and Other Matters) Act 2008*. In that Act the meaning of the term "de facto relationship" appears in section 4AA and is basically in the same terms as section 22C and in particular excludes relationship by family (sections 4AA(1)(b)&(6)). By section 4(1) a "de facto financial cause" is defined as "proceedings between the parties to a de facto relationship".

The Family Court would not therefore appear to have jurisdiction over wider relationships other than those appearing in section 4AA.

Furthermore the Family Court has the power to make declarations as to the existence or otherwise of a de facto relationship (section 60RD).

Simply put, the Family Court and the Federal Magistrates Court can only have a jurisdiction conferred on it by the Commonwealth; and no State legislation can widen this jurisdiction.

Under this argument the ACT registration could be accepted as a sufficiently prescribed kind of relationship, as could a "significant relationship" under the Tasmanian Act if that was differentiated from the "caring relationship" and the Victorian provisions would need to be more specifically defined.

THE COMMONWEALTH REGULATIONS

This interpretation now seems recognised by the Commonwealth Acts Interpretation (Registered Relationships) Regulations 2008. Regulation 3 is as follows:

> "For section 22B of the *Acts Interpretation Act 1901*, the following laws and kinds of relationship are prescribed:
> (a) *Relationships Act 2008* (Vic) – a registered domestic relationship as defined in section 3 of that Act;
> (b) *Relationship Act 2003* (Tas) – a significant relationship as defined in section 4 of that Act;
> (c) *Civil Partnership Act 2008* (ACT) – a relationship as a couple between two adults who meet the eligibility criteria mentioned in section 6 of that Act for entry into a civil partnership."

As previously mentioned, the criteria for a "significant relationship" under the Tasmanian Act, and the criteria under section 6 of the ACT Act seem to correspond with the criteria for recognising a de facto relationship under the *Family Law Act* (as amended). This is emphasised in the Tasmanian legislation by the differentiation between "significant" relationships and "caring" relationships because a "caring" relationship includes relatives and as such is specifically prohibited by section 4AA(1)(b) of the *Family Law Act*. The omission of "caring relationship" from the Commonwealth Regulation 3(b) is therefore a clear recognition that a "prescribed relationship" must comply with the definition in the *Family Law Act*, excluding relationship by family.

Similarly, the ACT Act recognises the principle that "two adults who are in a relationship as a couple, regardless of sex" may have this relationship legally recognised by registration as a civil partnership, but specifically prohibits relatives as set out in section 6(b) of the Act.

Some difficulty, however, might arise under the Victorian Act which does not appear to prohibit relationship by relatives. The broad term used for "registerable relationship" in section 5 of the Victorian Act is:

> "a relationship….. between two adult persons who are not married to each other, but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other…"

These terms would seem to include relationship by family or, at least, such a relationship is not specifically excluded. In this respect the Commonwealth Regulations might run contrary to the intention expressed in the *Family Law Act* section 4AA(1)(b) of excluding such relationships.

JURISDICTIONAL AND TRANSITIONAL PROBLEMS

Dr Dorothy Kovacs in her article, "A federal law of de facto property rights: The dream and the reality"[9], has drawn attention to several possible jurisdictional and transitional problems associated with the *Family Law Act* (as amended). It is to be hoped that, if necessary, these difficulties should be speedily adjusted to enable the full objectives of this comprehensive and important statute to be achieved.

[9] (2009) 23 Australian Journal of Family Law 104.

STATE COURTS

As already noted, both the Victorian and Tasmanian Acts presently provide that the local courts of those States have jurisdiction over persons in the particular relationships defined in those State Acts, and both State Acts provide the machinery for court enquiry and adjudication over disputes arising out of such relationships.

These relationships include what would be recognised as de facto relationships under the Commonwealth Act but go further. This causes a somewhat difficult constitutional question. Both Victoria and Tasmania have "referred" powers relating to de facto relationships to the Commonwealth, but appear to retain a definition of de facto relationship wider than that recognised by the Commonwealth *Family Law Act* (as amended). Insofar as the definition is wider (eg. relationship by family) it would appear that these two States desire to retain jurisdictions over these areas.

So far as the States are concerned, the present position covering a "de facto financial cause" as a "de facto property settlement or maintenance proceedings" as defined in section 4 of the *Family Law Act* (as amended) appears to be:

(a) pursuant to the reference of powers by NSW, Victoria, Queensland and Tasmania, a resident of any of those States and a resident of the NT or ACT as participating jurisdictions, may initiate such proceedings in the Family Court, the Federal Magistrates Court or the NT Supreme Court simply by establishing that he or she is or has been in a de facto relationship as defined by the *Family Law Act* (see section 39A of the *Family Law Act* (as amended)).

(b) Residents of such States and Territories that have provided for registration need not prove the existence of the de facto relationship if such relationship has been accepted for registration and registered under the regulations pursuant to the Act, and in accordance with the Act.

(c) NSW and Queensland partnerships have not provided for "registration. Residents of those States need prove only a de facto relationship within the meaning of the *Family Law Act* (as amended).

(d) Residents of WA & SA (which States have not referred the powers) can proceed only under the relevant State laws.

(e) Residents of the NT & ACT as participating jurisdictions proceed directly under the *Family Law Act* if the de facto relationship is proved.

HOW FAR WILL THE LAW GO IN PERSONAL RELATIONSHIPS?

It is clear, from all the material set out above, that, over the last hundred years, all Australian jurisdictions, Commonwealth, State and Territory, have increasingly and significantly moved into personal relationships to a degree which would have astonished citizens of the nineteenth, or even early twentieth century. This involvement applies over a far wider field than merely financial and custodial disputes between married and de facto partners. Greater protection for children at risk, detailed rules for adoption or wardship, greater protection for partners threatened or stalked by the other partner, and even limitations on a person's right to leave his estate by will if he neglects a person to whom he has a strong moral obligation. All this involves much more detailed examination by third parties into the private lives of individuals than would have been tolerated in the past and is bolstered by an increasing body of anti-discrimination legislation protecting various members of the community who might otherwise be at a disadvantage. An Australian's home may still be his (or her) castle, but authority has far more power than previously to order the drawbridge down.

This is not said in criticism, and indeed, rather than suggesting legislative "intrusion" in its pejorative sense it might be better to use the expression "care". Whatever earlier generations may have thought, it is clear that present day citizens accept that some examination by courts into personal behaviour is justified to prevent instances of serious injustice; and while the various protective statutes cannot be said to have always achieved their objectives, (mainly because of administrative difficulties of proof or enforcement), they have at least alleviated many situations which would otherwise have caused much harm and misery to persons with a limited capacity to protect themselves.

Part of the prevailing philosophy therefore involves recognising, and giving appropriate legal rights and obligations to groups of citizens previously discriminated against, although not themselves causing any threat of criminal conduct against society. Hence the progress from social and legal recognition of married couples to heterosexual de facto couples and then to same-sex de facto couples.

The next step, desired by some but certainly not all of the group which the *Family Law Act* would accept as being in a de facto relationship is formal recognition of that relationship.

Here there are clearly two conflicting points of view. The majority of heterosexual de facto couples would be strongly opposed to some legal recognition of their association carried out by some formal ceremony and legally registered as such. Their argument is that this is just what they do not want, and they have avoided marriage precisely for that reason. The law may resolve their property, financial or custodial disputes, but it is not to put a label on them. Their very freedom is in this lack of solemnities, ceremonials or formalities.

> *"As no formal commitment is required to enter into a de facto relationship, unavoidably the incidents of marriage will be imposed on some people who may well have made the conscious, considered, and very deliberate decision not to marry"* (Dorothy Kovacs)[10].

On the other hand, some heterosexual de facto couples and, apparently most same-sex couples seek legal recognition by way of some formal ceremony accompanied by some legally recognised act such as registration.

The difficulty, as seen by many members of the community and recognised by the Federal parliament in disallowing the ACT Civil Union Act, is that such procedures may be regarded as equivalent to marriage and an attack on the traditional meaning and significance of the word. This is emphasised by the avowed desire of many same-sex couples to call their association precisely that – marriage. The Australian Council for Human Rights Agencies, of which the NT Anti-Discrimination Commission is a member, has plainly advocated that:

> *"A principle of equality therefore required that any formal relationship recognition available under federal law to opposite-sex couples should also be available to same-sex couples. This includes civil marriage."*

In the light of this discussion the NTLRC approaches the question of recognition of same-sex associations.

[10] Ibid p186.

THE NORTHERN TERRITORY

Being a Territory may sometimes have its advantages. This is so in the case of the amendments to the *Family Law Act* because the NT is not bedevilled by the problems which, at least temporarily, appear to confront the States in referring, or not referring, powers in this area to the Commonwealth. The NT is a "participating jurisdiction" under the amended *Family Law Act* (section 90RA(1)(b)) and, as such comes immediately within the purview of that Act. The courts of summary jurisdiction of the NT and the Supreme Court of the NT are given jurisdiction under that Act, together with the Family Court and Federal Magistrates Court (section 29A(1)(c) & (d) and section 39B(1)(c) & (d)); although the Act contemplates that at some future time the jurisdictions of the NT courts may cease (section 39C&D).

Prior to the commencement of the *Family Law Act* (as amended) the NT had recognised de facto relationships by the NT *De Facto Relationships Act* defining the term as "a marriage-like relationship (other than a legal marriage) between two persons" (section 3(1)). This definition was further clarified by the NT *Law Reform (General Sexuality and De Facto Relationships) Act 2004*. By section 3A(1) & (2) of that Act, the indicia of a de facto relationship are set out in terms almost identical with those in section 4AA of the *Family Law Act* (as amended), and, in particular, section 3A(3) provides that in determining whether a de facto relationship exists it is irrelevant that the persons are of different sexes or the same-sex.

The NT *Law Reform (Gender Sexuality and De Facto Relationships) Act 2004* is directed to the same aims as the two Commonwealth Acts, the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*, and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*, that is, to abolish the restrictions which conferred rights under various laws only to spouses and dependants and to grant these rights equally to de facto partners, (including same-sex partners), particularly in such areas as pensions and superannuation.

This is supplemented by the NT *Anti-Discrimination Act* where the objects of that Act are to eliminate discrimination on the grounds, inter alia, of sex, sexuality or marital status. Section 19(1) the definition of "marital status" now includes a "de facto partner".

Legislation now enacted in the Commonwealth, the States and the Territories in effect equates the status of a de facto partner, (including a same-sex partner), with that of a married person. It should however, be noted that the indicia for recognising de facto relationships in the NT the De Facto Relationships Act as amended by the NT *Law Reform (Gender Sexuality & De Facto Relationships) Act* (see section 3A) is sufficiently wide to cover relationships by relatives. Since this is not permitted under the *Family Law Act* (as amended) and since the *Family Law Act* now appears to govern the field in the NT, it must be assumed either that the definition is restricted to that provided by the *Family Law Act* or that disputes relating to relationship by relatives would remain under the NT *De Facto Relationships Act* and would need to be dealt with by the NT Supreme Court[11].

[11] A situation which would, one suspects, cause a certain amount of alarm and despondency amongst their honours of the Supreme Court.

As previously mentioned, a similar situation exists in Tasmania where a "significant relationship" would properly come within the definition of "de facto relationship" in the *Family Law Act* (as amended), but a "caring relationship" insofar as it contemplates a relationship between relatives, would not. Are the Tasmanian courts then left to deal with the latter situation, if financial disputes arise, or do the terms of Tasmania's referral of power to the Commonwealth effectively revoke any such proceedings? We may (thankfully) leave that question to the learned Vandemonian lawyers.

Since the NT is a "participating jurisdiction" within the terms of the *Family Law Act* (as amended), it may be argued that the definition or indicia of "de facto relationship" in the NT *De Facto Relationships Act* is now governed by the definition or indicia in the *Family Law Act* which effectively narrows the definition in the NT Act to exclude persons related by family. On the other hand it might be argued that a separate category of relationship is created by the NT Act which remains and stands outside the provisions of the Commonwealth Act.

This does not mean that a "caring relationship" (in the Tasmanian sense) should not be recognised by the parliament of the NT, but, in view of the obvious policy of a *Family Law Act* (as amended) it should be seen as a category outside the *Family Law Act* and requiring NT statutory recognition separate and apart from the Federal legislation and within the jurisdiction of the NT courts.

In the interests of uniformity it might be wise to amend the NT Act to equate with section 4AA of the *Family Law Act* (as amended) and exclude persons related by family, unless, of course, if the NT parliament intends that these relationships continue within the jurisdiction of the NT Courts.

In light of the above, the NT position is clear. Since de facto relationships are now within the jurisdiction of the Family Court, including the amendments to encompass de facto including same-sex relationships [12], the parliament of the NT, could, if it wishes, take no further action, leaving it to NT residents in de facto relationships to proceed in the Family Court in relation to financial disputes. Registration of such relationships would achieve two objectives"

(a) De facto relationships, including same-sex relationships would be granted specific legislation and recognition; and
(b) if properly drawn to cover registration of all such relationships within the meaning of section 22C of the Commonwealth *Acts Interpretation Act*, it would provide a convenient and absolute proof of that relationship without the parties having otherwise to prove it in various proceedings.

Furthermore, if the legislature wished to do so, it could for the purposes of the law of the NT recognise and allow for registration of, a wider form of relationship such as the Tasmania "caring relationship" provided that it was differentiated from the de facto registration and so worded as to ensure that such registration was not intended to as registration under section 22B of the Commonwealth Act. But any disputes as to property and financial matters would have to come before a Territory court as a separate jurisdiction.

[12] See: *NT De Facto Relationships (Northern Territory Requirement) Act 2003* and s 90BA of the *Family Law Act*.

ALTERNATIVE FORMS OF RECOGNITION OF SAME-SEX RELATIONSHIPS IN THE NORTHERN TERRITORY

As previously noted, the NT parliament has, along with the other Australian parliaments, removed previous legislative preference for married couples, and equated de facto partners (including same-sex partners) with married partners for the purposes of superannuation pensions and many other matters (NT *Law Reform (Gender, Sexuality and De Facto Relationships) Act* 2003). In addition it has enacted anti-discrimination legislation directed (inter alia) against any person on the grounds of sex or sexuality or against anyone associating with any person so discriminated against (sections 19(1) (b), (c) & (r) *NT Anti-Discrimination Act*).

It might therefore be argued that since the law now clearly recognises the rights, protections and lawful existence of same-sex couples, further recognition is unnecessary. Others argue that further legislative recognition is important to enhance and formalise the status of the same-sex relationship.

If the NT parliament wished to consider whether or not further steps should be taken there would appear to be four alternatives.

A. Implied Recognition

As set out above, a same-sex relationship now comes within the category of a de facto relationship under the Commonwealth *Family Law Act* (as amended) and also under various State and Territory legislation, including the NT *De Facto Relationships Act* (section 3A inserted by the NT *Law Reform (Gender Sexuality and De Facto Relationships) Act*). Discrimination against a person on the grounds (inter alia) of sexuality is also prohibited in legislation in all Australian jurisdictions including the *NT Anti-Discrimination Act*. No formal statutory recognition is deemed necessary, such recognition being clearly implied from the legislation.

This is the present position in the NT and apparently also in NSW and Queensland (referring States) and in WA & SA under their own legislation.

B. Registration

In Victoria and Tasmania a de facto relationship may be registered but, if not registered, may still be recognised as "registrable". Registration is a simple administrative process of applying to the Registrar, who must then grant registration if satisfied that the application comes within the requirements of the Act.

This process is therefore available to those couples (heterosexual or same-sex) who wish for a more formal recognition of their relationships than is implied in the legislation.[13]

C. Registration under Prescribed Statutory formalities

This was the path originally chosen by the parliament of the ACT in its Civil Unions Act 2006.

Section 5 of that Act was headed "Civil unions-general" and provided:

> " (1) A civil union is a legally recognised relationship that, subject to this Act, may be entered into by any 2 people regardless of their sex.
>
> (2) A civil union is different to a marriage but is to be treated under Territory law in the same way as a marriage."

Section 9 then provided that:

> "(1) Before 2 people enter into a civil union, they must give notice to a civil union celebrant of their intention to enter into a civil union".

[13] The AG for NSW has recently foreshadowed legislation similar to the VIC or TAS provisions for registration.

(Then follows the requirements of the notice by statutory declaration by each person section 9(2)).

The fact that this procedure looked rather like a civil marriage and that section 5(2) directed that it was "to be treated for all purposes under Territory law in the same way as a marriage" led the Commonwealth to disallow the Act on 13 June 2006.

Recently, the ACT parliament has passed the *Civil Partnership Act 2008*. This is in somewhat similar form to the Civil Unions Act, but with certain alternatives designed to alleviate the concern of the Commonwealth parliament. Section 5 does not contain section 5(2) of the Civil Unions Act so there is no specific reference to marriage.

Section 5 of the *Civil Partnerships Ac*t now refers to a "domestic partnership". Section 5(1) is identified to the original section 5(1) save that the term "civil partnership" is substituted for the term "civil union".

Section 5(1) Civil Partnerships – General provides that:

> "A civil partnership is a legally recognised relationship that, subject to this Act, may be entered into by any 2 adults, regardless of their sex".

Section 5(3) then provides that:

> "two parties to a civil partnership are taken, for all purposes under Territory law, to be in a domestic relationship".

By section 8A persons wishing to enter into a civil partnership must give notice to a "civil partnership notary" and to the Registrar-General. By section 8B if such notices have been given they may then, make a "declaration of civil partnership" before the civil partnership notary and at least one other witness. Providing the formalities have been followed the Registrar-General must register the relationship.

The *Civil Partnership Act*, in this form has only recently been passed by the ACT parliament and it may be too early to determine whether the Commonwealth parliament will disallow it.

D. Marriage

In view of the terms of the Marriage Act and the views of various members of the Commonwealth parliament, it is presently unlikely that a law authorising marriage between same-sex partners would successfully be enacted[14].

THE VIEWS OF THE NT LAW REFORM COMMITTEE

The NTLRC recognises that choice of the four alternatives set out is a policy question for parliament and it would not be proper for this committee to make any specific recommendation. In fact the personal views of members of both the sub-committee and committee differ.

A number of sub-committee members (*including the Acting Anti-Discrimination Commissioner)* are strongly in favour of alternative C; and whilst it is outside the remit of the NT government, support same-sex marriage.

Given the diverging views, and without any member of the committee or sub-committee resiling from his or her personal position, as a practical matter, and allowing for possible later reconsideration, alternative B is the position upon which the entire sub-committee agrees as a minimum. This allows a statutory recognition without any formal ceremony.

We therefore respectfully put forward that general view as a practical resolution, but emphasise again that it is not our prerogative to advise parliament on an important question of policy such as this.

[14] The disallowance of the ACT legislation is already noted and see also Commonwealth Hansard 22/9/08 p 8141 et sequelae.

RECOMMENDATIONS

This may be the first occasion in the history of any law reform body where – for reasons already given – a Report contains no recommendations. If this is regarded as eccentric, unprecedented and outrageous, this committee, as good Territorians, will accept as a compliment.