



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)

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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) |

1. INTRODUCTION

(a) Terms of Reference

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

"1. To examine legal problems arising out of de facto relationships, but not including an examination of aboriginal traditional marriages or custody and maintenance of children of de facto relationships, in the Northern Territory.

2. To consider and report on solutions to those problems having regard to case-law and legislation currently in force and reports produced and research undertaken in other jurisdictions."

(i) Aboriginal traditional marriages.

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

Whether it would be desirable to apply, either in whole or in part, Aboriginal customary law to Aborigines, either generally or in particular areas, or to those living in tribal conditions only.

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

The report was placed on the Standing Committee of Attorneys-General ("SCAG") agenda, by the Commonwealth Attorney-General at the meeting on 25 September 1986. It was considered that SCAG was the appropriate forum for consultation to take place on possible implementation of the report by the Commonwealth, the States and the Northern Territory. This report is still under consideration.

(ii) Custody of Children

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

(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.

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

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

- agreements concerning the financial aspects of the parties' continuing relationship, generally called "cohabitation agreements" or "separation agreements";
- claims to property and financial adjustment on separation, or on the death of one party; and
- protection from domestic violence.

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

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

2. 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);

- the YWCA of Australia (10 July 1984);

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

(e) Working Paper

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

(f) Deferral of Consideration of the Reference

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

(g) Establishment of Sub-Committee

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

The Chief Justice had accepted an invitation to be co-opted to the Committee for the purposes of the reference. Justice Asche has had vast experience in the field of family law, having been senior Judge of the Family Court of Australia from 1976 to 1985. His Honour has also been, since 1980, a Presidential member of the Institute of Family Studies, and was for a number of years a member of the Family Law Council.

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

The Committee meeting in June (attended by the Sub-Committee) was conducted in the form of a telephone conference with Professor Marcia Neave, Dean of the Faculty of Law at the University of Adelaide. Professor Neave had participated in the preparation of the NSW LRC Report on De Facto Relationships. The Committee was greatly assisted in its deliberations by Professor Neave's comments on the Draft Report and wishes to record its appreciation of her advice.

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 distinguished from married people in terms of education or religious affiliation, but were more likely to have been born in Australia or in another English-speaking country,
- Except that they tended to be younger than married people, de facto partners did not constitute a distinct sub-group of the Australian population.

It is not possible to compare the incidence of de facto co-habitation in Australia, with overseas countries, because of general paucity of data and an absence of uniform definitions. However, the incidence is likely to be similar.

Estimates suggest that about 4% of all co-habiting heterosexual couples in the United States involve persons not married to each other. (P. Glick & G. Spanier, "Married and Unmarried Cohabitation in the United States", (1980) 42 J Marr & Fam 19 at 20).

In a study conducted in Alberta it was found that 6.2% (+/-2%) of urban Albertans were co-habiting outside of marriage; this comprised 8.8% (+/-2.5%) of all co-habiting couples, and 27.1% of the survey respondents stated that they had at one time, past or present, cohabited outside of marriage with an unrelated partner of the opposite sex for a period of six months or more: Alberta Institute for Law Research & Reform, Survey of Adult Living Arrangements (Research Paper No. 15, 1984).

The Alberta survey also revealed -

- less than 30% of all people living in a de facto relationship were over 35,
- 53% of such relationships had continued for over 2 years, 11% for over 10 years,
- 25% of de facto couples had dependant children compared with 60% for married couples,
- de facto partners could not readily be distinguished from married people in terms of education or religion, though married people were more likely to regard religion as important, 55% v 26%.

Conclusion

Available statistical information indicates that de facto couples comprise a significant proportion of cohabiting couples in Australia and, particularly, the Northern Territory. This appears to be part of a world-wide trend.

(b) Legal Problems

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

- 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.

(i) Cohabitation agreements

In Fender v St. John Mildmay, [1938] AC 1, the English House of Lords relying on cases dating back to at least 1853, stated the following common law rule:

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

The decision was followed in Armstrong v Armstrong [1962] VR 542 and Dobersek v Petrizza [1968] NZLR 211.

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

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

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

The NSW Court of Appeal held in Seidler v Schallhofer [1982] 2 NSWLR 80, 8 Fam LR held that an agreement between a man and a woman who were already cohabiting, and which contemplated that they would live together for a further six months and then either marry or separate, was not contrary to public policy. The majority decision was confined to the facts of the case and did not involve a ruling that a cohabitation agreement entered into by de facto partners who intended to live together indefinitely would not be contrary to public policy. However, one member of the Court (Justice Hutley) suggested that the principle of public policy invalidating contracts entered into by de facto partners could no longer be regarded as having any operation.

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

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 doctrines are unable to take account of contributions of partners of a non-financial nature such as child care and housework: Kardynal v Dodek [1978] VR 414.

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

"One major source of confusion in this area has been the plethora of doctrines which have been applied to resolve these disputes. Apart from express trusts arising from agreement of [sic] common intention, both expressed and inferred (Allen v Snyder [1977] 2 NSWLR 685, per Glass JA at 692), there has been the old standby of the presumption of resulting trust: Napier v Public Trustee (1980) 55 ALJR 1, as well as constructive trusts imposed for a variety of reasons ranging from proprietary estoppel: Jackson v Crosby (No. 2) (1979) 21 SASR 280, to failure of an express trust: Malsbury v Malsbury [1982] 1 NSWLR 226, and even unconscientious retention of a benefit conferred outside any agreement or common intention: Morris v Morris, [1982] 1 NSWLR 613. It is submitted that the law governing these disputes was not, however, determined by some sort of chook [=chicken] raffle. A staged analysis, discussed below, can be identified from the leading cases. Now that the High Court has spoken on these matters, the question arises as to whether these principles have been changed, or even clarified. In Calverley v Green (1984) 56 ALR 483; 59 ALJR 111, the High Court employed the presumption of resulting trust without adding to this apparent confusion, or relieving it either, for that matter, but in Muschinski v Dodds (1986) 62 ALR 429 a novel approach to the resolution of these disputes was adopted. The majority overturned the express trust which the Court of Appeal had found in the intentions of the parties and replaced it with a constructive trust based on :

- (a) the appellant's right to contribution from the respondent as a joint debtor in respect of the payment of the purchase price of the property, per Gibbs CJ (437-8), and
- (b) the appellant's right to repayment of her greater contribution to the purchase price by analogy with the rules applicable upon the failure of a partnership or joint venture, per Mason (439) and Deane JJ (454-5)."

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

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.

4. COMMUNITY ATTITUDES TO DE FACTO LAW REFORM

(a) Community Surveys

An Australian National Opinion Poll Survey conducted in 1971 revealed that 36% of people interviewed expressed approval of "unmarried couples living together", 51% expressed disapproval and the balance were undecided. By 1977 the Poll revealed that approval had risen to 52%, disapproval had fallen to 35% and there was virtually no difference in the responses from men and women. The Family Formation Project 1981 conducted by the Institute of Family Studies surveyed people aged between 18 and 34 years of whom 78% approved of de facto relationships.

(b) Submissions to NSW LRC

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

The non-church submissions, including the Women Lawyers Association, the Womens Advisory Council and the Australian Council of Social Services, submitted that legal recognition of de facto relationships should be extended to overcome specific injustices but argued against the legal equation of de facto relationships and marriage on the basis of their support for the view that the freedom of persons to remain outside the legal institution of marriage should be upheld in a pluralist society.

(c) Submissions to NTLRC

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

- (i) legislation should be enacted which recognised de facto relationships to alleviate specific injustices such as the possible invalidity of cohabitation and separation agreements (see Part 7),
- (ii) a de facto relationship be defined as "a man and woman cohabitating in a personal and domestic relationship".
- (iii) new maintenance legislation be enacted which should
 - provide de facto partners with an enforceable right of support;
 - be based on a philosophy of need;
 - provide criteria to assess the needs of partners;

- 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.

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

- (ii) The de facto relationship is becoming an increasingly common form of relationship in our society. This relationship form will give rise to issues of the just and equitable treatment of partners during the relationship (e.g. in the face of domestic violence), or at the time of separation or death. As this type of relationship becomes more common there will be an increasing need for "protective, adjustive and supportive" functions of the law to be applied to the relationship.
- (iii) It would seem that a major reason for entering a de facto relationship is to have time to work through the questions of rights and obligations in terms of the relationship, and not to have these rights and obligations automatically thrust upon one by marriage. Thus not only may it be useful to place a minimum time of six months as a judgement about the relationship (alterable for need at a judge's discretion), but certain entitlements (e.g. access to the de facto spouse's superannuation) may require a longer term relationship that implies further obligations and rights.
- (iv) The policy option which recognised de facto relationships in specific areas only "would seem the 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 to provision of family court
 - protection from domestic violence - similar to provision of family court
 - Anti-discrimination Act
 - Maintenance

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

- (i) that cohabitation and separation agreements should be enforceable, and
- (ii) all laws and administrative procedures covering de facto relationships should be reformed.

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

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

Inheritance (Family Provision) Act 1972, s.6 enables a 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 a 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 the 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 cohabit 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 481.

(b) Tasmania

(i) Maintenance Act 1967

Section 16 provides that a woman who has cohabited 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

proceedings must be brought 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 on proof of dependency and that this should be for the purpose of relieving hardships and injustices only. 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).

(c) New South Wales

The De Facto Relationships Act 1984 came into force on 1 July 1985. It is substantially based on the NSW Law Reform Commission's Report on De Facto Relationships (No. 36, 1983).

(i) Cohabitation and Separation Agreements

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

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

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

(ii) Financial Adjustment

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

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

(iii) Property Adjustment

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

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

- (i) a child of the partners;
- (ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is 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 facto 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

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

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

- the Income Tax Act be amended to extend the meaning of the words 'spouse' and 'married person' and similar expressions to include a common law spouse, and the word 'marriage' to include a common law relationship, so that the same tax treatment is afforded taxpayers in established common law relationships as now applies to taxpayers who are legally married;
- when benefits are conferred or obligations imposed upon partners in a legal marriage by federal law or policies, such benefits and obligations apply in a similar manner to common law spouses;
- a consistent definition of common law relationships be incorporated in all federal laws and policies that recognise such relationships, and for this purpose, that the definition require that the parties be of the opposite sex, reside continuously with each other for at least one year, and represent themselves publicly as husband and wife.

(ii) Cohabitation and Separation Agreements

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

- (a) continuously for a period of not less than three years, or
- (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

By s.53, parties may enter into a cohabitation agreement to 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 (but not custody/access),
- (d) any other matter.

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

Such contracts must be in writing signed by the parties and witnessed (s.55). A court may disregard provisions relating to a child in determining questions of support, education, moral training, custody or access, if, to do so, is in the best interests of the child (s.56(4)). It may set aside a 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 rescission 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 extended in Sorochan v Sorochan. Here a woman cohabited with a man for 42 years during which time she worked on farmland owned by him. Unlike Pettkus v Becker, the claimant's work contributed to the preservation, maintenance and improvement of the land held in the other partner's name, but not to its acquisition. It was found by the Supreme Court of Canada that there had been an unjust enrichment which could be remedied by imposing a constructive trust.

(h) New Zealand

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

(i) Cohabitation and Separation Agreements

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

(ii) Financial adjustment

De facto partners have no automatic rights to maintenance. Maintenance in favour of a natural parent is conditional on a right to custody of a child (Family Proceedings Act 1980, s.79).

(iii) Property Adjustment

In the absence of a cohabitation or reparation agreement, the common law, primarily the law of trusts, provides for the settling of property disputes between de facto partners: see Hayward v Giordani [1983] NZLR 140, Oliver v Bradley [1987] NZLR 586.

6. 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.

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

Committee's View

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

- marriage has a special status in the community that is derived from the formal and public commitment undertaken by the parties. To adopt a policy equating these two different kinds of relationships would detract from the special significance of marriage as an institution.
- a policy equating the relationships would limit the freedom of couples who make a conscious decision not to marry because they wish to avoid the legal rights and obligations of married people.

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

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

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

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

relationships but that such relationships should not be treated automatically as if they were legal marriages. The Commission recommended that recognition should be based on proof of dependency and that, in general, it should be open to a de facto spouse to prove dependence only where the parties have cohabitated for a period of 12 months immediately prior to the cessation of the dependency by death or the happening of the event on which the claim is based provided that the court, if satisfied that the dependency exists, should have a discretion to allow a claim on proof of "special circumstances" even though the parties have not cohabitated continuously for the 12 month period. The Commission further recommended that amendments, in line with the above principles, be made to legislation dealing with estate duty assessment, fatal accidents, motor accidents, testators family maintenance and workers compensation.

The Commission did not attempt to define either "dependency" or the "special circumstances" that would justify a claim before expiration of the qualifying period for cohabitation. These matters are to be determined by the court according to the circumstances of each case. The Commission did not consider the application of the general principles which it had enunciated to property disputes between de facto spouses although such principles would appear to be equally appropriate in such cases. The Commission's approach maintains a clear distinction between the legal effect of marriage and that of a de facto relationship. The former may confer entitlements by virtue of the status of the partners. De facto partners, by contrast, receive entitlements only on proof of dependence and, save in special circumstances, proof of cohabitation for at least 12 months. The Commission's proposal would not permit a non-financially dependent de facto spouse to claim benefits even in circumstances where these are available to a married person without proof of dependence.

It may be argued that a test of financial dependence takes insufficient account of the interdependence of parties to a relationship regardless of their financial arrangements. Relationships may involve not merely economic but emotional interdependence and mutual support concerning such matters as the rearing of children, management of the household and discharge of family and social responsibilities. The interdependence of parties to a relationship may, therefore, be an important consideration in formulating an approach by the law to the recognition of the rights and duties of de facto spouses.

Committee's View

This approach would give de facto partners rights and obligations in certain areas, but only on proof of dependence. We reject this option because dependence does not take into account the interdependence which may exist regardless of the partners' financial arrangements. It may lead to arbitrary results in cases where both parties contribute to the family's resources, so that it is difficult to draw the line between independence and partial dependence.

This option is unlikely to provide a remedy in the vast majority of relationships, and where it does apply, it is likely to disadvantage the male partner.

(d) Leave to the Common Law

Courts are developing the law in the area of de facto relationships. Until recently it was generally assumed that cohabitation agreements were void as being contrary to public policy. The NSW Court of Appeal has recently given qualified approval to such agreements in Seidler's Case. But in other areas there are still problems (see Part 7). It is clear that many rights, enjoyed by people by virtue of their marital status, are only conferred by statute. It is not possible for the common law to develop in the area of statutory rights or benefits.

Committee's View

The Committee considers that the development of the common law is not an appropriate policy option. It cannot be said with any certainty how the law will develop in such areas as property or financial adjustment at the end of a de facto relationship. Further, it is not possible for the common law to alter statutory rights.

(e) Recognition of De Facto Relationships to deal with Specific Injustices

It can be argued that, even if legislative reform is desirable, no attempt should be made to adopt a uniform definition of a de facto relationships designed to confer on de facto spouses the same entitlements as lawful spouses in a variety of fields. Rather, the question of reform should be approached by examining each area of the law in which legislative recognition of de facto relationships is an issue. A judgment should then be made as to whether such relationships should be regulated further and, if so, what form the recognitions should take. The legislation of the Commonwealth, the Territory and the States has tended to develop in this way with the exception of South Australia. Traditionally, de facto relationships have been regulated or acknowledged by legislation in limited areas but not on any systematic basis.

If this approach is to be followed, it will be necessary to examine separately each important area of law in which recognition of de facto relationships is an issue. A decision will be required as to the nature of the change, if any, needed in that area. If further legislative recognition of de facto relationships is warranted, a definition will have to be formulated, although it may not be identical to the definition adopted for other purposes.

Committee's View

This approach has been supported by the large majority of submissions received by the NSW Law Reform Commission and all the submissions received by the NTLRC. It can be applied

without detracting from the special significance of marriage. Equally, it does not penalise de facto partners by forcing them to either accept the full rights and duties of marriage or face various legal injustices or anomalies. In some cases, the Committee has concluded, it is appropriate for the law to distinguish between the two relationships. Conflicting claims against a person may be made by de facto partner and spouse. There is no uniform answer to this kind of problem. It can only be solved on a case by case basis.

Accordingly, we consider this the appropriate policy option.

7. NATURE OF LEGAL PROBLEMS AND RECOMMENDATIONS FOR REFORM

The legal difficulties most commonly experienced by de facto partners concern -

- (a) agreements concerning the financial aspects of the parties' continuing relationship, generally called "cohabitation agreements" or "separation agreements";
- (b) claims to property and financial adjustment on separation, or on the death of one party; and
- (c) protection from domestic violence.

(a) Cohabitation and separation agreements

Submissions from the YWCA, the Uniting Church and the Office of Womens Affairs expressed the view that de facto partners should be able to regulate their own financial affairs by a cohabitation agreement, that is, an agreement between a man and woman made before or after the de facto relationship has begun which makes provision with respect to financial or property aspects of the relationship. Similarly, a separation agreement should be available to the parties.

Co-habitation contracts have, until recently, been considered void at common law, because they were against public policy. In Seidler's Case (1982) the Court of Appeal gave qualified approval to such agreements.

Recommendation

We agree with the view expressed in the submissions, because cohabitation and separation agreements are a means by which de facto partners can regulate their own affairs and avoid both an imposed regime or unnecessary litigation to resolve the issue. Accordingly, we recommend that the law should be clarified to ensure that cohabitation and separation agreements should be enforceable under the general law as an ordinary contract (see clauses 40 to 48 of the Draft Bill).

We consider that the entering into of a cohabitation or separation agreement should be available with certain specified requirements designed to ensure that the partners have received appropriate advice and are aware of the consequences of the agreement. The safeguards should include requirements that the agreement be in writing and that each partner receive independent legal advice before entering the agreement (clause 43). Where the requirements have been satisfied, the agreement should not, in general, be capable of being varied or overturned by a court.

To avoid creating undue injustice, we consider that there should be one exception to this general rule. In proceedings for financial adjustment, the court should have power to override a cohabitation agreement where the parties' circumstances have so changed since the date of the agreement that enforcement of its terms would lead to serious injustice (clause 45(3)).

The power to vary a separation agreement should be more limited, as such agreements are more likely to be conducted with both partners being aware of their legal position. In such a case, the agreement may be varied only if it was obtained by fraud, is void or unenforceable at common law or circumstances, occurring since the agreement, make it impracticable to carry the agreement out (clause 45(4)).

(b) Property adjustment

Property disputes between de facto partners represent the most common cause of litigation between de facto partners. The existing common law relating to property and trusts are clearly inadequate. Submissions to the Committee recommended that reform of the law should deal with this area.

The Property Law (Amendment) Act 1988 (Vic) deals only with this aspect of de facto law reform.

Recommendation

In order to overcome this injustice we recommend that, in disputes between de facto partners relating to property, the law should be changed to give the court power to determine the respective interests of parties according to what is just and equitable. Accordingly, the court should be entitled to take into account the financial and non-financial contributions, by either partner, to the acquisition, conservation or improvement of property and to the welfare of the other partner or the family generally.

We think it is important to prevent claims being brought by people whose de facto relationships have lasted for only a relatively short time. It is also inappropriate to create rights and obligations in relation to property interests or financial matters that apply to people as soon as they enter into a de facto relationship. Accordingly, we recommend that, in general, an applicant should be able to institute proceedings for property adjustment (or financial adjustment which is dealt with later) only where the parties have lived together in a de facto relationship for at least 2 years.

To avoid creating new injustices, we consider that the court should be permitted to hear claims for adjustment in three special cases, where the de facto relationship is less than 2 years. These cases are where :-

- (i) the partners themselves have had a child,
- (ii) the claimant has made substantial contributions to the relationship which would not otherwise be recognised,
- (iii) the claimant has the care and control of the other partner's child.

In the cases (ii) and (iii) the Committee recommends that the court hear the application only if satisfied that failure to do so may lead to serious injustice.

Claims for adjustment of property or financial interests should be brought shortly after a relationship ends. While noting that Canadian legislation favours a period of 1 year for financial adjustment, we recommend 2 years, which is the same as the period in NSW legislation. The court should make orders in such a way that the financial relationship between the partners is settled once and for all. The latter is the "clean break" principle recognised under the Family Law Act. As the property interests of partners may not be static, we consider it appropriate that the court determining property interests have specific power to adjourn a proceeding, should there be a likelihood of a significant change in the financial circumstances of one or both partners.

We consider that, on the death of a party to an application for property adjustment, the application should continue against the estate of the deceased. If a partner dies before the survivor has instituted proceedings for the adjustment of property interests, we consider that the survivor should be confined to existing remedies available to him or her under the Family Provision Act (see part 8).

Suggested legislative provisions giving effect to this recommendation are contained in clauses 12 to 22 of the Draft Bill. These recommendations will not affect property disputes involving only a de facto partner and a third party. The common law will still apply.

(c) Financial adjustment

A de facto partner is under no legal obligation to support his or her partner, either during the relationship or after it has ended. The law does not allow a needy partner to claim support, regardless of the resources available to the other partner.

We consider that the law can cause injustice by failing to alleviate financial hardship where it arises because of the relationship.

A number of submissions to the NSW LRC pointed to the hardship involved in denying a claim to maintenance by a de facto partner, where there had been a prior period of dependence and special needs arise out of the relationship. The New South Wales Catholic Social Welfare Committee supported

"the right of a de facto spouse to seek maintenance from the other in cases where the party has been disadvantaged or made dependent because of the nature of the relationship ... Legislation should be specific in its terms and clearly define the circumstances in which such a claim can be made." (NSW LRC Report, page 156).

The Submissions to the Committee from the Office of Women's Affairs and the Uniting Church also supported the conferral of some form of maintenance right on a de facto partner.

Recommendations

We consider that it is not appropriate to alleviate this injustice by giving courts the same power to award maintenance as they have in relation to married couples. The court may require a married person to support his or her spouse where the spouse's needs are created by circumstances not related to the marriage, e.g. illness or accident.

We suggest that, in general, the parties to a de facto relationship should be required to support themselves, but the law should provide for maintenance in cases of hardship. These are :-

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

We consider that orders on the first ground should not continue beyond the date on which a child in the applicant's care attains the age of 18. Orders on the second ground should have a maximum life of 3 years from the date of the order, or 4 years from the end of the relationship, which ever is shorter.

We consider that a de facto partner who has since married, or entered into another de facto relationship, should not be able to bring an action for maintenance. It would clearly be inappropriate in these circumstances.

We consider that an application for maintenance against a partner should cease on that partner's death. The survivor should be confined to existing remedies available to him or her under the Family Provision Act (see Part 8).

We consider that, in accordance with general principles, a court should be empowered to vary a maintenance order, if the circumstances of either party has changed, or the cost of living has changed to such an extent as to justify making the variation. No variation should be capable of extending the period of the order beyond the maximum life we have recommended earlier.

Suggested legislative provisions giving effect to this recommendation are contained in clauses 12 to 16, 23 to 33 of the Draft Bill.

(d) Domestic Violence

Domestic violence has been examined in the last decade both overseas and in Australia. Most States have reformed their laws: NSW - Crimes (Domestic Violence) Amendment Act 1982, Periodic Detention of Prisoners (Domestic Violence) Amendment Act 1982, De Facto Relationships Act 1984 Part V: Tas. - Justices Amendment Act 1985: South Australia - Justices Act Amendment Act (No. 2) 1982: Queensland - Peace and Good Behaviour Act 1982: W.A. - Justices Amendment Act (No. 2) 1982.

In March 1984, the Northern Territory Government authorised the release of the d'Abbs report, Domestic Violence Between Adults in the Northern Territory: A Review of Existing Services and Strategy for the Future, and established an interdepartmental committee to prepare proposals for consideration by the Government on the issue. The Office of Women's Affairs co-ordinated a Working Group with representatives from Departments of Health and Community Services, Law and Northern Territory Police to prepare a Submission to Government, having considered the recommendations of the d'Abbs Report.

The Working Group, after consulting with community groups involved in assisting victims of domestic violence, recommended that reform in this area cover three areas:

- amendment to the existing law,
- a public education campaign,
- post crisis counselling.

These recommendations were accepted by the Government in February 1988.

A set of legislative reforms are contained in the Justices Amendment Bill (No. 2) 1988 and associated legislation tabled (see Appendix C) in May 1988 and are similar to legislation enacted in three Australian jurisdictions.

WA: Justices Act 1902, ss 172-174 (added 1982)

SA: Justices Act 1921, ss 99 (added 1982)

Tas: Justices Act 1959, ss 106A-F (added 1985)

The legislation -

- empowers police to enter premises where there is a belief on "reasonable grounds" that a person "is suffering or is in imminent danger of suffering personal injury at the hands of another person",
- permits the Court of Summary Jurisdiction to make an order imposing restraints on a person, including limiting the person's access to any premises,
- provides for making the order on the application of a victim of domestic violence or harassment, or a police officer. Domestic violence includes actual "personal injury or damage to property", threats of such violence,

and "provocative or offensive behaviour ... likely to lead to a breach of the peace",

- makes a breach of an order an offence and, consequently, the offender liable to arrest without warrant.

Recommendation

We consider that the general thrust of reforms contained in the Justices Amendment Bill 1988, and related legislation, are sufficiently comprehensive to deal with the legal aspects of the problem of domestic violence and are generally in accord with reforms the Committee was considering recommending. We agree that such reforms should not be in a De Facto Relationships Act, but in legislation which may be utilised by married people, children, neighbours and others.

1. PRESENT NORTHERN TERRITORY LEGISLATION AND RECOMMENDATIONS FOR REFORM

In many cases, specific injustices have been dealt with by Territory legislation (see Table 2). The most important example, addressed in most common law jurisdictions (i.e. jurisdictions whose laws derive from English law), is the case of a dependent de facto partner with children whose partner is killed. Under the Compensation (Fatal Injuries) Act a de facto partner is entitled to share in damages awarded to the partner's dependants - the "de facto widow" as this person is normally called.

(a) Adoption

The New South Wales Adoption of Children (Amendment) Act 1987 provides that adoption orders may be made generally in favour of de facto couples of at least 3 years cohabitation in respect of a child they have jointly brought up and maintained for at least 2 years (s.19(1A)(a)), with power to make adoption orders where either or both minimum periods are not satisfied if the welfare and interests of the child require it.

The Adoption of Children Act s.12 (see Table 1) does not permit de facto partners jointly to adopt a child. We recommend that the policy be changed to permit de facto partners, who have lived together for at least three years, to apply jointly to adopt a child.

Under the Act, an adoption order can only be made if the Supreme Court is satisfied that the applicants meet specified criteria, the primary concern being the welfare and interests of the child (s.10).

The Committee considers that, as the Act permits a single person to adopt a child, it would serve no purpose to restrict the ability of a de facto couple to adopt a child, beyond that imposed on married couples, as any restriction could be lawfully avoided by one partner choosing to adopt the child in that partner's name.

This recommendation was supported by the Office of Women's Affairs in its Submission to the Committee.

(b) Damages

Where a de facto partner suffers nervous shock as a result of the death or injury of his or her partner, he or she cannot bring an action for damages under section 23 of the Law Reform (Miscellaneous Provisions) Act (see Table 1). We recommend that such an action should be possible. This places a de facto partner in the same position as a parent, husband or wife who suffers nervous shock as the result of death or injury of a child or spouse. We see no need for a minimum period of cohabitation to apply in this case.

(c) Succession

The property of a deceased person may be distributed in three ways:

- . Pursuant to the terms of a will, or
- . If the deceased dies without leaving a valid will, i.e. intestate, then it goes to the surviving family members according to "rules of intestacy" in the Administration and Probate Act (see Table 1), or
- . The terms of a will or the effect of the rules of intestacy may be altered by a court under the Family Provision Act (see Table 2) in favour of certain dependants where the will or the rules of intestacy do not make adequate provision for their "maintenance, education or advancement in life" (s.8).

Under N.T. law a surviving de facto partner of a person who dies intestate is not entitled to a share in the estate. (This is also the case in all Australian jurisdictions except NSW and South Australia.) However, the survivor is eligible to apply to the Supreme Court under the Family Provision Act, for provision out of the estate. We do not consider that this provision adequately deals with all the problems of a person whose de facto partner dies intestate. Court proceedings may be time consuming and expensive, and may not be worthwhile where the estate is small.

The NSW Law Reform Commission stated the purposes of the rules of intestacy, which may be summarised as follows:

- . They have the virtue of certainty and thereby avoid disputes and delays in distribution,
- . They ensure that immediate relatives benefit from the estate in preference to more distant relatives,
- . They reflect community views on the way in which a spouse's estate should be distributed,
- . They reflect the deceased's assumed wishes.

These are, of course, general assumptions and may prove to be arbitrary in individual instances.

The Commission recommended -

- (i) Where a person dies intestate and is survived by both a spouse and a de facto partner, the de facto partner should be entitled to the spouse's share on intestacy to the exclusion of the spouse if the de facto partner lived with the deceased for a period of at least 2 years before his or her death. However, even where this condition is fulfilled, the de facto partner should not be entitled to take the spouse's share if the court is satisfied that

the deceased lived with his or her spouse during any part of that 2 year period.

- (ii) Where the deceased is survived by a de facto partner and children of another relationship the de facto partner should be entitled to the spouse's share on intestacy if she or he had lived with the deceased for a period of at least 2 years before the death.
- (iii) Where a person dies intestate leaving a de facto partner but neither a spouse or children of another relationship the de facto partner of the deceased, if living with the deceased at the time of his death, should be entitled to take the spouse's share on intestacy.

These recommendations have been enacted by the Wills, Probate and Administration (De Facto Relationships) Amendment Act 1984.

In the event that a person is survived by both a de facto partner and a husband or a wife, three options are possible:

- (a) The de facto partner of
 - (i) 2 or more years standing, or
 - (ii) no specified standing period takes the entire estate,
- (b) The de facto partner of
 - (i) 2 or more years standing, or
 - (ii) no specified standing period takes 50% of a spouse's share,
- (c) The de facto partner takes nothing.

New South Wales adopts option (a)(i), South Australia adopts option (b) in the case of a putative spouse (ie, a partner of 5 years standing or a partner with dependent children who has obtained a court declaration of his or her status). The Victorian De Facto Relationships Bill proposed option (c).

The Committee has concluded that

- (a) in the event that a person is survived by de facto partner but no spouse, the partner should take the share that would have gone to a spouse, if living with the deceased at the time of his or her death, and
- (b) in the event that a person is survived by both a de facto partner of 2 years standing and a spouse, the partner should take the share that would have gone to a spouse if living with the deceased at the time of his or her death.

The Committee considers that this recommendation is more likely to reflect the intention of the deceased than either option (b) or (c).

(d) Accident Compensation

The Work Health Act s.49 provides that a worker's dependants may claim compensation in respect of loss caused by a work-related injury to the worker. Dependant includes a de facto partner. There is no period specified for co-habitation.

The Committee considers the definition of de facto spouse in this Act should be made consistent with that provided in the draft De Facto Relationships Bill.

(e) Ancillary next of kin benefits/obligations

Under the Administrators Pension Act and Supreme Court (Judges Pensions) Act, de facto partners and their dependent children are not entitled to share in pension benefits. Under the Supreme Court (Judges Long Leave Payments) Act a widow (i.e. spouse) only is entitled to share in long leave benefits.

We recommend that, where there is a de facto partner, living with the Administrator at the time of his retirement, or with the Judge at the time of his demise, that partner should take the share that would have gone to a spouse.

Only, a "spouse" may object to cremation (Cemeteries Act); is covered by an Aboriginal land permit (Aboriginal Lands Act); is liable to pay dependant's medical bills (Medical Services Act); is classed as sharing in the land held by his/her spouse under the provisions of the Crown Lands Act limiting the area of land that may be held by a person; is protected from seizure of household furniture under a bill of sale under the Instruments Act she/he has not endorsed; may hold shares (other than as a partner) in an incorporated legal practice (Legal Practitioners (Incorporation) Act).

Under the Public Trustee Act, only a spouse or "dependant" can benefit from estate maintenance orders.

We recommend that all these benefits or obligations be extended to de facto partners, with no minimum qualifying cohabitation period, where there is no spouse.

(f) Exercise of incapacitated spouse's rights

Under the Aged and Infirm Persons Property Act only a spouse and children may apply for a protection order. Only a spouse may consent to emergency operations (Emergency Medical Operations Act).

We recommend that all these benefits or obligations be extended to de facto partners with no minimum cohabitation period.

(g) Marital Privileges

Under the Evidence Act, one spouse is not a competent or compellable prosecution witness against the other for certain

offences. This privilege, derived from the common law, has been much criticised and many recommendations for reform made.

The Committee considers it inappropriate to automatically extend this privilege to de facto spouses. The policy basis for the privilege has been criticised and the appropriate place to consider whether it should be abolished, modified or even extended (to such people as children or parents of the accused) is when the privilege is reviewed.

The Real Property Act contains provisions dealing with dealings by married women. These provisions are primarily directed at removing disabilities imposed by the common law on married women but, to some extent, preserve them. By s.69, a wife's title to land where the husband is wrongly registered as co-proprietor, is given priority against all persons except bona fide purchasers for value.

The Committee considers it inappropriate to automatically extend this corresponding privilege to de facto spouses because the lack of formal and public declaration of marital status makes such a provision extremely difficult to apply to de facto relationships. Further, existing common law and statutory provisions enable rectification of the title in such cases or permit a claim for compensation to be made.

The Wills Act provides that a will is revoked by marriage unless it is expressed to be in contemplation of marriage. The practical effect of this is that, until a new will is made, a spouse would inherit the entire estate of the deceased (in the absence of children) under the laws of intestacy.

The Committee considers it inappropriate to automatically extend this provision to de facto spouses for two reasons. The primary reason is that, as a matter of principle, it cannot be assumed that a person entering into a de facto relationship intends to make the same kind of commitment to his or her partner that is made in the ceremony of marriage. In Australia, most married couples execute mutual wills as part of, or immediately after, the marriage ceremony. The rule of law is well-known. By entering into a de facto relationship, it cannot be said that the partner's minds have turned to this question. In addition to rejecting an extension of the provision as a matter of principle, the Committee recognises substantial practical problems of proof of "the commencement" of the relationship, the consequent problem of status of the will if the de facto relationship ends (given that approximately 40% of de facto relationships last less than 2 years), and the varying state of mind of the partners. At some stage of the relationship a partner may intend to alter his or her will, but it is difficult to provide a rule of when the law presumes this to occur.

The Wills Act s.17 provides that a gift to the spouse of an attesting witness is void. The Committee recommended repeal of s.17 in its Report Relating to the Attestation of Wills by Interested Witnesses and the Due Execution of Wills

(Report No. 2, 1979). Whatever the continued rationale for this rule, the Committee considers no purpose would be served by extending such a rule to de facto partners.

However, the Committee considers that it may be appropriate to extend the above benefits or entitlements (or benefits or entitlements the Committee has not identified), available to married persons, to de facto spouses, where failure to do so would result in substantial injustice to a de facto partner.

Such extension should be available on application by the de facto partner to the Supreme Court, on reasonable notice to any person likely to be affected by an order of the Court.

CONCORDANCE OF LEGISLATION

| <u>NSW</u> | <u>NT</u> | <u>VIC</u> | <u>NSW</u> | <u>NT</u> | <u>VIC</u> |
|------------|-----------|------------|------------|-----------|------------|
| 1 | 1 | | 26 | 23 | |
| 2 | 2 | | 27 | 24 | |
| 3 | 3 | | 28 | 25 | |
| 4 | - | | 29 | 26 | |
| 5 | - | | 30 | 30 | |
| 6 | 4 | | 31 | 27 | |
| 7 | 5 | 277 | 32 | 28 | |
| 8 | 6 | 278 | 33 | 29 | |
| | | | 34 | 33 | |
| 9 | 8 | 297 | 35 | 31 | |
| 10 | 9 | | 36 | - | |
| 11 | 10 | 299 | 37 | 32 | |
| 12 | | | | | |
| 13 | 11 | 300 | 38 | 34 | 291 |
| | | | 39 | 35 | 292 |
| 14 | 12 | 279 | 40 | 36 | 293 |
| 15 | 13 | 280 | 41 | 37 | 294 |
| 16 | - | 283 | 42 | 38 | 295 |
| 17 | 14 | 281 | 43 | 39 | 296 |
| 18 | 15 | 282 | | | |
| 19 | 16 | 284 | 44 | 3 | |
| | | | 45 | 40 | |
| 20 | 17 | 285 | 46 | 42 | |
| 21 | 18 | 286 | 47 | 43 | |
| 22 | 19 | 287 | 48 | 44 | |
| 23 | 20 | 288 | 49 | 45 | |
| 24 | 21 | 289 | 50 | 46 | |
| 25 | 22 | 290 | 51 | 47 | |
| | | | 52 | 48 | |
| | | | * | | |
| | | | 56 | 7 | |

NSW: De Facto Relationships Act 1984

N.T.: De Facto Relationships Bill 1988

Vic.: Property Law (Amendment) Act 1988

SELECT BIBLIOGRAPHY1. Law reform papers and reports

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

New South Wales Law Reform Commission, De Facto Relationships: Issues Paper (1981).

New South Wales Law Reform Commission, Report on De Facto Relationships (1983).

Institute of Law Research and Reform (Edmondton, Alberta), Towards Reform of the Law Relating to Cohabitation Outside Marriage, Issues Paper No. 2 (1987), "Davies".

2. Text Books

Christine Davies, Family Law In Canada (1984, Carswell).

A. Dickey, Family Law (1985, Law Book), 181-196.

W.H. Holland, Unmarried Couples: Legal Aspects of Cohabitation (1982, Carswell).

3. Articles

Finlay, H.A. "Defining the Informal Marriage" (1980) 3 UNSWLJ 279.

APPENDIX A

- TABLE 1: Legislation which confers a benefit or obligation only on a spouse, wife etc.
- TABLE 2: Legislation which confers a benefit on a de facto partner
- TABLE 3: Legislation which removes a disability that only applies to a married woman.

TABLE 1: LEGISLATION WHICH CONFERS A BENEFIT OR OBLIGATION ONLY ON A SPOUSE, WIFE ETC.

| ACT | S. | BENEFIT |
|----------------------------|----|---|
| Aboriginal Lands | 6A | "Spouse" is covered by Aboriginal land permit |
| Administration and Probate | 22 | Administration may be granted to a husband/wife unless the Court is of opinion that they are not to be trusted with it |
| | 64 | Presumption of survivorship applies to intestate and "spouse" |
| | 66 | "Spouse" is entitled to distribution of intestate estate (see also Schedule 6) |
| | 67 | "Spouse" entitled to take absolutely intestate's personal chattels |
| | 73 | "Spouse" may have intestate's interest in the matrimonial home appropriated under s.81 to satisfy a legacy, interest etc. of deceased |
| | 77 | Personal representative may not dispose of intestate's interest in matrimonial home without spouse's consent |
| | 78 | Rule that trustee may not acquire trust property is abrogated where trustee is spouse and trust property is matrimonial home |

| ACT | S. | BENEFIT |
|---------------------------------|-------------|--|
| Administrators Pensions | 5 | Pension payable to surviving spouse of Administrator |
| Adoption of Children | 12 | Adoption order may only be made in favour of husband and wife (unless circumstances make it desirable to make the order in favour of one person) |
| | 19 | Adoption list maintained for benefit of married couples who wish to adopt |
| Aged & Infirm Persons' Property | 7 | Spouse and other relations may apply for a protection order. |
| | 17 | Manager may apply money to maintenance or advancement of spouse and children. |
| Crown Lands | 38A | (10A) Married persons holding beneficial interests in pastoral lands are deemed to hold the beneficial interests in all lands held by each of them |
| | | (10B) Same provision for shares in incorporated companies |
| Emergency Medical Operations | 2(1) | "next of kin" for the purpose of consent to emergency operations may be a spouse |
| Evidence | 7, 9 26K | Spouse not compellable witness against husband for certain offences. |
| Instruments | 12 | Bills of Sale made by married persons which comprise household furniture are not enforceable by seizure or sale unless endorsed by spouse in the manner prescribed in Schedule 1 |

| ACT | S. | BENEFIT |
|--|-------|---|
| Law Reform (Misc. Provisions) | 23 | Husband or wife included in the definition of "member of the family"; and can therefore sue for nervous shock. |
| Legal Practitioners (Incorporation) Act | 7 | Spouse of a director may hold shares in a practising company. |
| Maintenance | 12A | A husband whose conduct justifies wife living separately from him deemed to have deserted her. |
| | 12C | Husband or wife may rebut presumption of condonation. |
| | 13 | Wife may obtain maintenance/separation orders on specified grounds. |
| | 15 | Husband may obtain maintenance order. |
| | 30 | An offer to provide a home by a person whose conduct justifies spouse is living separately isn't a sufficient answer to an application for a maintenance order. |
| | 30A-B | Separation order relieves wife from obligation to live with husband; wife may enforce. |
| Medical Services | 5 | Spouse may be a "dependant" for the purposes of the Act. |
| | 13 | Where a dependant receives medical services, the person on whom he is dependent is liable to pay the charges. |

| ACT | S. | BENEFIT |
|----------------|-----|---|
| Public Trustee | 60 | Public Trustee empowered to apply property, money etc. for benefit of wife, husband, children or any other dependant (could catch some de facto partners). |
| Real Property | 28 | Married woman not to make application to bring land under provisions of Act without her husband's consent; unless the land is her separate property. |
| | 69 | VII where husband is wrongly registered as co-proprietor of land belonging to wife, title of wife prevails except as against a bona fide purchase for value. |
| | 189 | Where a female registered proprietor becomes married, the details of her marriage must be entered on the Register. |
| | 190 | Husband of female registered proprietor is entitled to be registered as co-proprietor unless the land is her separate property. |
| | 255 | Married women making applications to bring land under Act to which they're not separately entitled, or married women registered as co-proprietor of land with husband, entering into dealings which may alienate or diminish their interest, must be separately examined and declare that they know what they're doing. |
| | 257 | A married woman registered as separately entitled to land is treated as a <u>feme sole</u> for purposes of the Act, unless restraints have been placed on her ability to alienate. |

| ACT | S. | BENEFIT |
|--|------|---|
| Status of Children | 5(1) | Where a woman gives birth during, or within 10 months before the termination of, her marriage, the child is deemed to be a child of the marriage. |
| Supreme Court (Judges Long Leave Payments) | 5 | Long leave payment can be made to widow of Supreme Court Judge. |
| Supreme Court (Judges Pensions) | 5 | Pension payable to widow of Supreme Court Judge, or widow's children. |
| Wills | 17 | Gifts to the wife or husband of an attesting witness are void. |
| | 18 | A creditor whose wife or husband attests a will which charges the estate with the debt will still be admitted as a witness to prove the validity of the will. |
| | 20 | Will is revoked by marriage unless expressed to have been made in contemplation of marriage. |

TABLE 2: LEGISLATION WHICH CONFERS A BENEFIT ON A
DE FACTO PARTNER

| ACT | S. | BENEFIT |
|--|------|--|
| Compensation (Fatal Injuries) | 4(3) | De facto partner is treated as a family member for the purposes of the Act. |
| | S.8 | Action for damages may be brought for benefit of family members of deceased. |
| Coroners | 4 | "Spouse" includes de facto spouse for the purposes of the Act. |
| | 23 | Spouse entitled to a copy of Post-Mortem Report. |
| | 48A | Spouse may apply for exhumation and removal of remains. |
| Crimes Compensation | 4 | De facto widow/widower is a "relative" of the deceased for the purposes of the Act. |
| | 5 | Compensation Certificate may be obtained for benefit of dependant relatives. |
| | 9 | Pecuniary loss to dependent relatives is relevant to the assessment of compensation. |
| Family Provision | 7 | De facto widow/widower may apply to Court for provision from deceased's estate. |
| Home Loan Scheme Regulations Housing Concessional Loans Regulations | | Person ineligible for certain benefits if spouse (includes de facto spouse) owns certain property. |

| ACT | S. | BENEFIT |
|---|-------------------------|---|
| Human Tissue Transplant | 17 | De facto partner is taken to be a spouse for the purposes of the Act. |
| | 18 | Spouse may approve or object to the use of deceased's tissue after death. |
| Lands Acquisition | Sched 2, Rules 9, 11, 1 | Disadvantages to de facto spouse can be considered in assessing compensation or granting loans. |
| Legislative Assembly Members Superannuation | 18 | "Spouse" includes certain de facto partners (note: some limitations, eg minimum 3-year length of relationship) |
| | 24 | Pensions and benefits paid to widows/widowers. |
| Maintenance | 16 | Orders may be made that the father of a child must pay preliminary expenses of pregnancy. |
| | 19 | Orders may be made that the father of a child must pay funeral expenses of a mother who dies in childbirth. |
| Mental Health | 34 | A spouse is a "prescribed person" who may apply for review of an order - <u>Note</u> , however, the Supreme Court may also allow an application by "any other person who ... has, by reason of ties of blood or friendship or for any other reason, a bona fide interest in the welfare of the person who is the subject of the order" - would cover de facto partners. |

| ACT | S. | BENEFIT |
|---------------------------------|------|---|
| Motor Accidents Compensation | 4 | "Spouse" includes certain de facto partners (some limits - eg minimum length of 3 years etc) |
| | 7 | Benefits in respect of injuries where injured has died are payable to his spouse. |
| | 22 | Death benefits payable to spouses. |
| Status of Children | 5(3) | Where a woman gives birth to a child and within 44-20 weeks before the birth she cohabited with a man, the child is presumed to be theirs. |
| | 5A | "Husband or wife" includes de facto partner for purposes of AID program. |
| | 5D | Husband of a woman who has an AID child is deemed to be its father. |
| Work Health | 49 | Dependants entitled to compensation. "Dependant" includes person "ordinarily" living with the worker as husband or wife immediately preceding the accident. |

TABLE 3: LEGISLATION WHICH REMOVES A DISABILITY
THAT ONLY APPLIES TO MARRIED WOMEN

| ACT | S. | DISABILITY |
|-------------------------------|-----|--|
| Domicile | 5 | Married woman taken to have the domicile of her husband. |
| Guardianship of Infants | 22 | A married woman is capable of suing as next friend and of being appointed guardian <u>ad litem</u> on behalf of her own, or any other, children |
| Law Reform (Misc. Provisions) | 10 | Husband's liability for his wife's torts and ante-nuptial obligations. |
| Married Women's Property | 1 | Married women unable to deal with separate property, enter into contracts, sue and be sued etc. as a single woman. |
| | 3 | Wife unable to prove loans to husband in his bankruptcy. |
| | 2 | Women married after commencement of Act are entitled to hold as separate property everything belonging to them at time of marriage or acquired by them after marriage. |
| | 5 | Property acquired by married woman after commencement of Act to be held by her as separate property. |
| | 6-9 | Shares, stocks etc. in the name of a married woman deemed to be her separate property [doesn't apply as against creditors of husband in situations of fraud etc. s.10] |
| | 12 | Married woman to have same civil and criminal remedies and redress as a <u>feme sole</u> . |

| ACT | S. | DISABILITY |
|--------------------------------|-------|--|
| Trustee | 16 | Married woman in whom a freehold hereditament is vested as a bare trustee may not convey/surrender it as if she were a <u>feme sole</u> . |
| | 69(1) | Married woman unable to fully and effectually dispose of future/reversionary interests, and possibilities of interests in personality, without consent of husband. |
| | 69(2) | Married women unable to fully and effectually release powers/rights or equities to settlement in personal estate without consent of husband. |
| Married Persons (Torts) Act | 4 | Persons who were a party to a dissolved or annulled marriage have rights of action in tort against each other as though they had never been married. |

APPENDIX B

DRAFT DE FACTO RELATIONSHIPS BILL

(DRAFT No. 1)
NORTHERN TERRITORY OF AUSTRALIA
DE FACTO RELATIONSHIPS BILL 1988

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PART I - PRELIMINARY

1. SHORT TITLE

This Act may be cited as the *De Facto Relationships Act 1988*.

2. COMMENCEMENT

This Act shall commence on a date to be fixed by the Administrator by notice in the *Gazette*.

3. INTERPRETATION

In this Act, unless the context otherwise indicates or requires -

"applicant" includes a cross-applicant;

"child", in relation to de facto partners (whether the partners are referred to as the parties to an application or otherwise) means -

- (a) a child born as a result of sexual relations between the partners;
- (b) a child of the woman whose de facto partner is presumed to be the father of the child under section 5D of the *Status of Children Act*; or
- (c) a child adopted by the partners;

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"cohabitation agreement" means an agreement between a man and a woman, whether or not there are other parties to the agreement -

(a) made (whether before or after the commencement of this Act) -

(i) in contemplation of their entering into a de facto relationship; or

(ii) during a de facto relationship between them; and

(b) which makes provision at least with respect to financial matters.

"de facto partner" means -

(a) in relation to a man, a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him; and

(b) in relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her;

"de facto relationship" means the relationship between de facto partners, namely the relationship of living together as husband and wife on a bona fide domestic basis although not married to each other;

"financial matters" means matters with respect to any one or more of the following:

(a) the maintenance of one or both of the de facto partners;

(b) the property of one or both of those partners;

(c) the financial resources of one or both of those partners;

"financial resources", in relation to de facto partners or either of them, includes -

(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided;

(b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the de facto partners or either of them;

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(c) property, the alienation or disposition of which is wholly or partly under the control of the de facto partners or either of them and which is lawfully capable of being used or applied by or on behalf of the de facto partners or either of them in or towards their or his or her own purposes; and

(d) any other valuable benefit;

"periodic maintenance" means maintenance by means of a weekly, fortnightly, monthly, yearly or other periodic sum;

"property", in relation to de facto partners or either of them, includes -

(a) real and personal property and any estate or interest (whether present, future or contingent) in real or personal property;

(b) money;

(c) any debt or cause of action for damages; and

(d) any other chose in action, or right with respect to property;

"separation agreement" means an agreement between a man and a woman, whether or not there are other parties to the agreement -

(a) made (whether before or after the commencement of this Act) in contemplation of terminating a de facto relationship between them or after terminating it; and

(b) which makes provision at least with respect to financial matters;

4. APPLICATION

This Act applies to a person who has been a de facto partner, whether before or after the commencement of this Act, but does not apply to a person who was a partner in a de facto relationship which ended before the commencement of this Act.

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5. OTHER RIGHTS OF DE FACTO PARTNERS NOT AFFECTED BY THIS ACT

Nothing in this Act affects any right of a de facto partner to apply for any remedy or relief under any other Act or law.

6. DECLARATION OF INTERESTS IN PROPERTY

(1) Without limiting the generality of section 5, in proceedings between de facto partners with respect to existing rights in real or personal property, a court may declare any rights that a de facto partner has in respect of the property.

(2) If a court makes a declaration under subsection (1) it may make consequential orders to give effect to the declaration, including -

- (a) orders as to possession; and
- (b) in the case of a Local Court, orders of the kind which may be made under section 33(1)(b), (c), (i) and (j).

(3) An order under this section is binding on the de facto partners but not on any other person.

7. DECLARATION AS TO EXISTENCE OF DE FACTO RELATIONSHIP

(1) A person who alleges that a de facto relationship exists or has existed -

- (a) between himself or herself and another named person; or
- (b) between 2 named persons,

may apply to a court for a declaration as to the existence of the de facto relationship.

(2) If the court is satisfied that a de facto relationship exists or has existed, the court may make a declaration (which shall have effect as a judgment of the court) that persons named in the declaration have or have had a de facto relationship.

(3) The court shall state in its declaration that the de facto relationship existed -

- (a) at a date specified in the declaration; or
- (b) between dates specified in the declaration, or both.

(4) A declaration may be made whether or not the person or either of the persons named by the applicant as a partner or partners to a de facto relationship is alive.

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(5) If any person whose interests, in the opinion of the court, would be affected by a declaration is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of an application the court may, if it thinks that a person ought to be present or represented at the hearing, adjourn the hearing to enable that person to be given that opportunity.

(6) While a declaration remains in force the persons named in the declaration are presumed conclusively for all purposes to have had a de facto relationship at the date specified in the declaration or between the dates specified, or both.

(7) The court may make an order annulling a declaration, on the application of a person who applied or could have applied for the making of the declaration, or who is affected by it, if the court finds that new facts or circumstances have arisen that have not been, and could not reasonably have been, previously disclosed to the court.

(8) The declaration ceases to have effect on the order of annulment but the order does not affect anything done in reliance on the declaration before the making of the order.

(9) If any person whose interests, in the opinion of the Court, would be affected by an order of annulment is not present or represented and has not been given an opportunity to be present or represented at the hearing of the application for the order the court may, if it thinks that the person ought to be present or represented at the hearing, adjourn the hearing to enable that person to be given that opportunity.

(10) If the court makes an order annulling a declaration, it may, if it thinks that it would be just and equitable to do so, make any ancillary orders (including orders varying rights with respect to property or financial resources) that may be necessary to preserve, as far as practicable, the rights or interests of any person affected by the annulment.

PART II - JURISDICTION

8. COURTS WITH JURISDICTION UNDER THIS ACT

A person may apply to the Supreme Court or a Local Court for an order or relief under this Act.

9. LIMIT OF JURISDICTION OF LOCAL COURT

(1) A Local Court -

(a) shall not have jurisdiction under this Act to hear or determine proceedings seeking an order -

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- (i) in relation to property, to declare or adjust any estate or interest; or
- (ii) for maintenance,

of a value or amount in excess of the jurisdictional limit order the *Local Courts Act*;

- (b) shall transfer such proceedings to the Supreme Court unless the parties consent to the Local Court hearing and determining the proceedings.

(2) The Local Court may transfer proceedings referred to in subsection (1) of its own motion, even if the parties would be willing for the Local Court to hear and determine the proceedings, but the Local Court may first make such orders as it considers necessary pending the disposal of the proceedings by the Supreme Court.

(3) If proceedings are transferred from the Local Court to the Supreme Court, the Supreme Court shall, subject to the rules of court, proceed as if the proceedings had been originally instituted in that Court.

(4) Without affecting the duty of a Local Court to comply with this section, failure by the Local Court to comply does not invalidate any order of the Court in the proceedings.

10. SUSPENSION AND TRANSFER OF PROCEEDINGS

(1) A court may suspend or dismiss proceedings that have been instituted under this Act by or in relation to a person if it appears to the court that other proceedings have been instituted under this Act by or in relation to the same person in another court.

(2) A court may transfer pending proceedings instituted under this Act to another court with jurisdiction under this Act if it appears to the court that it is in the interests of justice that the proceedings be dealt with by that other court.

11. COURTS TO ACT IN AID OF EACH OTHER

All courts having jurisdiction under this Act shall act in aid of and be auxiliary to each other in all matters under this Act.

PART III - PROCEEDINGS FOR FINANCIAL ADJUSTMENT

Division 1 - Preliminary

12. APPLICATIONS FOR ORDERS UNDER THIS PART

A de facto partner may apply to a court (whether or not any other application for any remedy or relief is or

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may be made under this Act or any other Act or any other law) for an order under this Part -

- (a) for the adjustment of interests with respect to the property of the de facto partners or either of them; or
- (b) for the granting of maintenance,

or both.

13. CONDITIONS FOR MAKING OF ORDER - LIVING WITHIN TERRITORY, &c.

(1) A court shall not make an order under this Part unless it is satisfied that the parties to the application or either of them resided in the Territory on the day of the application and that -

- (a) both parties resided in the Territory for at least one-third of their de facto relationship; or
- (b) substantial contributions of the kind referred to in section 17(1)(a) or (b) have been made in the Territory by the applicant.

(2) If a court is satisfied about the matters specified in subsection (1) it may make or refuse to make an order because of facts and circumstances, including facts and circumstances that took place before the commencement of this Act or outside the Territory.

14. CONDITIONS FOR MAKING ORDER - LENGTH OF RELATIONSHIP, &c.

A court shall not make an order under this Part unless it is satisfied that the parties to the application have lived together in a de facto relationship for a continuous period of not less than 2 years, but irrespective of that circumstance, the court may make an order if it is satisfied that there is a child of the parties to the application, or that the applicant -

- (a) has made substantial contributions of the kind referred to in section 17(1)(a) or (b) for which the applicant would otherwise not be adequately compensated if the order were not made; or
- (b) has the care and control of a child of the respondent,

and if satisfied that the failure to make the order would result in serious injustice to the applicant.

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15. TIME LIMIT FOR APPLICATIONS.

If de facto partners have ended their de facto relationship an application to a court for an order under this Part shall be made before the expiration of the period of 2 years after the day on which the relationship ended.

However, a court may grant leave to a de facto partner to apply to the court at any time after that period for an order under this Part (other than an order under section 24(1)(b)) if the court is satisfied that greater hardship would be caused to the applicant if that leave were not granted than would be caused to the respondent if that leave were granted.

16. DUTY OF COURT TO END FINANCIAL RELATIONSHIPS

In proceedings for an order under this Part, a court shall, as far as is practicable, make orders that will finally determine the financial relationships between the de facto partners and avoid further proceedings between them.

Division 2 - Adjustment of Interests in Property

17. ORDER FOR ADJUSTMENT

(1) A court may make an order adjusting the interests of the partners in the property of one or both of them that it considers just and equitable having regard to -

- (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to the acquisition, conservation or improvement of any of the property or to the financial resources of the partners or either of them; and
- (b) the contributions (including any made in the capacity of homemaker or parent) made by either of the de facto partners to the welfare of the other partner or to the welfare of the family constituted by the partners and one or more of the following -
 - (i) a child of the partners;
 - (ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.

(2) A court may make the order in respect of property whether or not it has declared the title or rights of a de facto partner in respect of the property.

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18. ADJOURNMENT OF APPLICATION - LIKELIHOOD OF SIGNIFICANT CHANGE IN CIRCUMSTANCES

(1) A court may adjourn an application by a de facto partner for an order to adjust interests with respect to the property of one or both of the de facto partners, if the court is of the opinion that -

(a) there is likely to be a significant change in the financial circumstances of one or both of the partners and that it is reasonable to adjourn the proceedings having regard to the time when that change is likely to take place; and

(b) an order that the court could make with respect to the property if that significant change in financial circumstances occurs is more likely to do justice between the partners than an order that the court could make immediately.

(2) The court may adjourn an application -

(a) at the request of either partner; and

(b) until any time, before the end of a period specified by the court, that the partner requesting the adjournment applies for the application to be determined.

(3) Before a court adjourns an application it may make any order that it considers appropriate with respect to the property.

(4) In forming an opinion as to whether there is likely to be a significant change in the financial circumstances of one or both of the de facto partners a court may have regard to any change in the financial circumstances of a partner that may occur because of a financial resource of one or both of the partners being vested in or used for the purposes of one or both of the partners.

(5) Nothing in this section -

(a) limits the powers of the court to grant an adjournment in relation to any proceedings before it;

(b) requires the court to adjourn any application in any particular circumstances; or

(c) limits the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of one or both of the partners.

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19. ADJOURNMENT OF APPLICATION - PROCEEDINGS IN FAMILY COURT

(1) If proceedings in relation to the property of one or both of the de facto partners are commenced in the Family Court of Australia at any time before a court has made a final order to adjust interests with respect to the property of one or both of the partners the court may adjourn its hearing.

(2) If the hearing of the application has been adjourned, the applicant for the order may apply to the court for the hearing to proceed if the proceedings in the Family Court are delayed.

(3) Nothing in this section limits the power of the court to grant or refuse an adjournment in relation to any proceedings before it.

20. DEFERMENT OF ORDER

If a court is of the opinion that a de facto partner is likely, within a short period, to become entitled to property which may be applied in satisfaction of an order under section 17 the court may defer the operation of the order until the date or the occurrence of the event specified in the order.

21. EFFECT OF DEATH OF PARTIES ON APPLICATION

(1) If either party to an application for an order under section 17 dies before it is determined, the application may be continued by or against the legal personal representative of the deceased party.

(2) A court may make an order if it is of the opinion that -

(a) it would have adjusted interests in respect of property if the deceased party had not died; and

(b) despite the death of the deceased party, it is still appropriate to adjust those interests.

(3) The order may be enforced on behalf of, or against the estate of, the deceased party.

(4) The rules of a court may provide for the substitution of the legal personal representative as a party to the application.

22. EFFECT OF DEATH OF PARTY ON ORDER

If a party to an application under section 17 dies after an order is made against the party, the order may be enforced against the estate of the deceased party.

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Division 3 - Maintenance

23. NO GENERAL RIGHT OF DE FACTO PARTNER TO MAINTENANCE

A de facto partner is liable to maintain the other de facto partner and a de facto partner is entitled to claim maintenance from the other de facto partner only as provided by this Division.

24. ORDER FOR MAINTENANCE

(1) A court may make an order for periodic or other maintenance if the court is satisfied as to either or both of the following:

- (a) that the partner applying for the order is unable to support himself or herself adequately because of having the care and control of a child of the de facto partners or a child of the other partner who is under the age of 18 years on the day on which the application is made;
- (b) that the partner is unable to support himself or herself adequately because that partner's earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court -
 - (i) an order for maintenance would increase the partner's earning capacity by enabling the partner to undertake a course or programme of training or education; and
 - (ii) it is reasonable to make the order, having regard to all the circumstances of the case.

(2) In determining whether to make an order for maintenance and in fixing an amount to be paid, a court shall have regard to -

- (a) the income, property and financial resources of each de facto partner;
- (b) the physical and mental capacity of each de facto partner for appropriate gainful employment;
- (c) the financial needs and obligations of each de facto partner;
- (d) the responsibilities of either de facto partner to support any other person;
- (e) the terms of any order made or proposed to be made under section 17 with respect to the property of the de facto partners; and

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- (f) any payments made for the maintenance of a child or children in the care and control of the partner applying for the order.

(3) In making an order, a court shall disregard any entitlement of the child, or partner applying for the order, to an income tested pension, allowance or benefit.

25. INTERIM MAINTENANCE

If it appears to a court that the partner applying for the order for maintenance is in immediate need of financial assistance, but it is not practicable in the circumstances to decide immediately if any order should be made, the court may order the other partner to pay any periodic sum or other sums that the court considers reasonable until the application is determined.

26. EFFECT OF SUBSEQUENT MARRIAGE

If de facto partners have ended their de facto relationship, a partner who has subsequently married or entered into another de facto relationship may not apply for an order for maintenance against the previous de facto partner.

27. APPLICATION CANNOT CONTINUE AFTER DEATH OF PARTIES

An application under section 24 cannot be continued if either party to the application dies before the application is determined.

28. CESSATION OF ORDER - GENERALLY

- (1) An order for maintenance ceases to have effect -

- (a) on the death of either de facto partner; or

- (b) on the marriage of the de facto partner in whose favour the order was made.

- (2) If a de facto partner in whose favour an order for maintenance is made marries the partner must notify the de facto partner against whom the order was made of the date of the marriage without delay.

- (3) A de facto partner who paid any money under an order for periodic maintenance after a marriage referred to in subsection (1)(b) takes place may recover the money as a debt in a court of competent jurisdiction.

29. CESSATION OF ORDER - CHILD CARE RESPONSIBILITIES

An order for period maintenance under section 24(1)(a) ceases to have effect on the day on which the de facto partner in whose favour the order was made ceases to have the care and control of the child or the children in respect of whom the order was made.

30. DURATION OF ORDERS FOR PERIODIC MAINTENANCE

(1) An order for periodic maintenance under section 24(1)(a) applies for any period which the court may decide, not exceeding the period ending when the child to whom section 24(1)(a) applies, or the younger or youngest child, attains the age of 18 years.

(2) An order for periodic maintenance under section 24(1)(b) applies for any period that the court may decide not exceeding -

(a) 3 years after the day on which the order is made; and

(b) 4 years after the day on which the de facto partners last ceased to live together,

whichever is the shorter.

(3) An order for periodic maintenance under section 24(1)(a) and (b) applies for any period decided by the court, not exceeding the period permissible under subsection (1) or (2), whichever is the longer.

(4) Nothing in this section or in an order under this Part for periodic maintenance prevents the order from ceasing to have effect under section 28 or 29.

31. VARIATION, &c., OF ORDERS FOR PERIODIC MAINTENANCE

(1) On application by a de facto partner in respect of whom an order has been made for periodic maintenance, a court may -

(a) discharge the order;

(b) suspend the operation of the order wholly or in part and either until further order or until a fixed time or the happening of some future event;

(c) revive wholly or in part the operation of an order suspended under paragraph (b); or

(d) vary the order so as to increase or decrease any amount directed to be paid by the order or in any other manner.

(2) A court shall not make an order discharging, increasing or decreasing any amount directed to be paid by an order unless it is satisfied that -

(a) the circumstances of either of the de facto partners have changed in such a way; or

(b) the cost of living has changed to such an extent -

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as to justify making the order.

(3) In satisfying itself for the purposes of subsection (2)(b), a court shall have regard to any changes that have occurred, during the relevant period in -

- (a) the Consumer Price Index (All Groups Index) issued by the Australian Statistician; or
- (b) a group of numbers or of amounts, relating to the price of goods and services, and issued by the Australian Statistician which is prescribed for the purposes of this paragraph.

(4) A court shall not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have passed since the order was made, or last varied because of a change in the cost of living.

(5) A court may make a retrospective order decreasing the amount of a periodic sum payable under an order.

(6) For the purposes of this section, a court must have regard to sections 23 and 24.

32. EXTENSION OF ORDERS FOR PERIODIC MAINTENANCE

(1) Where a court has made an order for periodic maintenance for a period which is less than the maximum period permissible under section 30, the de facto partner in whose favour the order is made may apply to the court at any time before that maximum period ends for an extension of the period for which the order applies.

(2) A court shall not make an order to extend periodic maintenance unless it is satisfied that there are circumstances which justify an extension.

(3) An order may not extend the period beyond the maximum period permissible under section 30.

(4) For the purposes of this section, a court must have regard to sections 23 and 24.

33. RECOVERY OF ARREARS

Nothing in section 28 or 29 affects the recovery of arrears due under an order for maintenance at the time when the order ceased to have effect.

Division 4 - General

34. POWERS OF COURT

(1) A court, in exercising its powers under this Part, may do any one or more of the following:

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- (a) order the transfer of property;
- (b) order the sale of property and the distribution of the proceeds of sale in any proportions that the court thinks fit;
- (c) order that any necessary deed or instrument be executed and that documents of title be produced or other things be done that are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
- (d) order payment of a lump sum, whether in one amount or by instalments;
- (e) order payment of a weekly, fortnightly, monthly, yearly or other periodic sum;
- (f) order that payment of any sum ordered to be paid be wholly or partly secured in any manner that the court directs;
- (g) appoint or remove trustees;
- (h) make an order or grant an injunction -
 - (i) for the protection of, or otherwise relating to, the property or financial resources of one or both of the parties to an application; or
 - (ii) to aid the enforcement of any other order made,or both;
- (j) impose terms and conditions;
- (k) make an order by consent or in the absence of a party;
- (m) make any other order or grant any other injunction to do justice.

(2) A court may, in relation to an application under this Part -

- (a) make any order or grant any remedy or relief which it is empowered to make or grant under this or any other Act or any other law; and
- (b) make any order or grant any remedy or relief under this Part in addition to or in conjunction with making any other order or granting any other remedy or relief which it is empowered to make or grant under this Act or any other Act or any other law.

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(3) This section does not take away any other power of the court under this or any other Act or law.

35. EXECUTION OF INSTRUMENTS BY ORDER OF COURT

(1) If -

- (a) a person has refused or neglected to comply with an order to execute a deed or instrument; or
- (b) for any other reason, a court thinks it necessary,

the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person to whom the direction was given and to do everything necessary to make the deed or instrument valid and operative.

(2) The execution of the deed or instrument by the appointed person has the same force and validity as if it had been executed by the person directed by the order to execute it.

(3) A court may make any order it thinks just about the payment of the costs and expenses of and incidental to the preparation and execution of the deed or instrument.

36. ORDERS AND INJUNCTIONS IN THE ABSENCE OF A PARTY

(1) In the case of urgency, a court in the absence of a party may make or grant any one or more of the following:

- (a) an order under section 25;
- (b) an order or injunction for either or both of the purposes specified in section 34(1)(h).

(2) An application under this section may be made orally or in writing or in any form the court considers appropriate.

(3) If an application under this section is not made in writing, the court shall not make an order or grant an injunction unless it considers that it is necessary to do so because of the extreme urgency of the case.

(4) The court may give directions with respect to the filing, serving and further hearing of a written application.

(5) An order or injunction shall be expressed to operate or apply only until a specified time or the further order of the court.

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- (6) The court may give directions with respect to -
 - (a) the service of the order or injunction and any other documents it thinks fit; and
 - (b) the hearing of an application for a further order.

37. VARIATION AND SETTING ASIDE OF ORDERS

(1) If a court is satisfied, on the application of a person in respect of whom an order referred to in section 17 or 24 has been made -

- (a) that there has been a miscarriage of justice because of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;
- (b) that in the circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out; or
- (c) that a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make a substitute order,

the court may vary the order or set the order aside and, if it thinks fit, make a substitute order in accordance with this Part.

(2) An order for maintenance other than periodic maintenance may not be varied except in accordance with this section.

38. TRANSACTIONS TO DEFEAT CLAIMS

(1) In this section "disposition" includes a sale and a gift.

(2) The court may set aside, or restrain the making of, any instrument or disposition which is intended to or (irrespective of intention) likely to defeat any order applied for under this Part.

(3) The court may (without limiting section 35) order that -

- (a) any property dealt with by such an instrument or disposition be used to satisfy, or be charged with the payment of, any sums payable under an order under section 17 or this Part, or costs; or
- (b) that the proceeds of a sale be paid into court until it has made an order.

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(4) The court may order a party or a person acting in collusion with a party to pay the costs -

(a) payable or paid by any other party; or

(b) incurred by a purchaser in good faith or other interested person,

for and incidental to the making of the instrument or disposition, or setting it aside or restraining it.

39. INTERESTS OF OTHER PARTIES

(1) In the exercise of its powers under this Part, a court shall have regard to the interests of, and must make any order proper for the protection of, a purchaser in good faith or other interested person.

(2) A court may order that a person be given notice of the proceedings or be made a party to the proceedings on the application of that person or if it appears to the court that the person may be affected by an order under this Part.

PART IV - COHABITATION AGREEMENTS AND SEPARATION AGREEMENTS

40. ENTERING INTO AGREEMENTS

(1) Notwithstanding any rule of public policy to the contrary, a man and a woman who are not married to each other may enter into a cohabitation agreement or separation agreement.

(2) Nothing in a cohabitation agreement or separation agreement affects the power of a court to make an order with respect to the right to custody of, maintenance of, access to or any other matter relating to the children of the parties to the agreement.

41. SEPARATION AGREEMENT WHERE RELATIONSHIP CONTINUES

If a separation agreement is made in contemplation of terminating a de facto relationship and the relationship is not terminated within 3 months after the day on which the agreement was made, the agreement is to be treated as a cohabitation agreement.

42. AGREEMENTS SUBJECT TO LAW OF CONTRACT

Except as otherwise provided by this Part, a cohabitation agreement or separation agreement is subject to and enforceable in accordance with the law of contract.

43. EFFECT OF AGREEMENTS IN CERTAIN PROCEEDINGS

(1) If a court is satisfied, on an application by a de facto partner for an order under Part III -

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- (a) that there is a cohabitation agreement or separation agreement between the de facto partners;
- (b) that the agreement is in writing;
- (c) that the agreement is signed by the partner against whom it is sought to be enforced;
- (d) that before the time the parties signed the agreement a solicitor had advised each partner independently of the other about -
 - (i) the effect of the agreement on the rights of the partners to apply for an order under Part III;
 - (ii) whether or not, at that time, it was prudent for that partner to enter into the agreement;
 - (iii) whether or not the provisions of the agreement were fair and reasonable at that time and in the light of the circumstances which were then reasonably foreseeable; and
 - (iv) whether or not, at that time, it was to the advantage, financially or otherwise, of that partner to enter into the agreement -

and had given each partner a certificate in the prescribed form stating that the advice had been given; and

- (e) that copies of the certificate are endorsed on, attached to or accompany the agreement -

the court shall not make an order under Part III which is inconsistent with the terms of the agreement, except as provided by sections 45 and 46.

However, if the court is not satisfied about any of the matters referred to in paragraph (b), (c), (d) or (e), the court may make any order that it could have made if there were no cohabitation or separation agreement between the partners.

(2) In making an order under subsection (1) the court may have regard to the terms of the cohabitation agreement or separation agreement in addition to the matters which it is required to consider under Part III.

(3) A court may make an order under subsection (1) even if the cohabitation agreement claims to exclude the jurisdiction of the court to make that order.

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44. EFFECT OF CERTAIN EXCLUSION PROVISIONS IN AGREEMENTS

If a cohabitation agreement or separation agreement does not satisfy any one or more of the matters referred to in section 43(1)(b), (c), (d) or (e), the provisions of the agreement may be enforced in proceedings other than an application for an order under Part III even though the agreement claims to exclude the jurisdiction of a court to make an order under Part III.

45. VARIATION OF TERMS OF COHABITATION AGREEMENTS AND SEPARATION AGREEMENTS

(1) In this section only -

"cohabitation agreement" means a cohabitation agreement made between de facto partners which satisfies the matters referred to in section 43(1)(b), (c), (d) and (e);

"separation agreement" means a separation agreement made between de facto partners which satisfies the matters referred to in section 43(1)(b), (c), (d) and (e).

(2) A court may vary or set aside any or all of the provisions of a cohabitation agreement or a separation agreement on an application by a de facto partner for an order under Part III.

(3) The court may exercise its powers under subsection (2) in respect of a cohabitation agreement if, in the opinion of the court, the circumstances of the partners have changed since the agreement was entered into and that it would lead to serious injustice if any or all of the provisions of the agreement were enforced whether on the application for the order under Part III or on any other application for any remedy or relief under any other Act or any other law.

(4) The court may exercise its powers under subsection (2) in respect of a separation agreement only if in the opinion of the court -

(a) the agreement was obtained by fraud;

(b) the agreement is void, voidable or unenforceable; or

(c) in the circumstances since the agreement was made it is impracticable for the agreement or any provision of it to be carried out.

(5) A court may exercise its powers under subsection (2) despite any provision of the agreement to the contrary.

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46. EFFECT OF CANCELLATION, ETC., OF AGREEMENTS

On application by a de facto partner for an order under Part III, a court is not required to give effect to the terms of any cohabitation agreement or separation agreement entered into by that partner if the court is of the opinion that -

- (a) the de facto partners have cancelled or consented to the cancellation of the agreement by their words or conduct; or
- (b) the agreement has ceased to have effect for some other reason.

47. EFFECT OF DEATH OF DE FACTO PARTNER-PERIODIC MAINTENANCE

(1) On the death of a de facto partner the provisions of any cohabitation agreement or separation agreement requiring that a de facto partner to pay periodic maintenance to other de facto partner shall be unenforceable against that partner's estate except in so far as the cohabitation agreement or separation agreement provides to the contrary.

(2) The provisions of a cohabitation agreement or separation agreement requiring a de facto partner to pay periodic maintenance to the other de facto partner will, on the death of the second-mentioned partner, be unenforceable by his or her estate.

(3) Subsections (1) and (2) do not affect the right to recover arrears of periodic maintenance due and payable under a cohabitation agreement or separation agreement at the death of the partner.

48. EFFECT OF DEATH OF DE FACTO PARTNER-TRANSFER OF PROPERTY AND LUMP SUM PAYMENTS

The provisions of a cohabitation or separation agreement between de facto partners relating to property and lump sum payments may, on the death of one of the partners, be enforced on behalf of, or against, the estate of the deceased partner, except in so far as the agreement provides to the contrary.

PART V - MISCELLANEOUS

50. ENFORCEABILITY OF ORDERS

An order under this Act made -

- (a) by a Local Court is enforceable as if it were an order made by the Court on a claim under the *Local Courts Act*, or any other Act or law; and

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- (b) by the Supreme Court is enforceable as if it were an order made by the Court on a proceeding under the *Supreme Court Act* or any other Act or law.

51. REGULATIONS

(1) The Administrator may make regulations, not inconsistent with this Act, prescribing matters -

- (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act. to give effect to this Act.
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APPENDIX C

NORTHERN TERRITORY OF AUSTRALIA

DRAFT DOMESTIC VIOLENCE LEGISLATION

Justices Amendment Bill (No. 2)

Police Administration Amendment Bill (No. 2)

Bail Amendment Bill (No. 2)

(These Bills were tabled in the
Legislative Assembly by the
Hon. Stephen Paul Hatton, the Chief Minister,
during the May 1988 sittings of the Assembly)



Serial 107
Justices Amendment
(No. 2)
Mr Hatton

NORTHERN TERRITORY OF AUSTRALIA

A BILL for AN ACT

to amend the *Justices Act*

BE it enacted by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self-Government) Act 1978* of the Commonwealth, as follows:

1. SHORT TITLE

This Act may be cited as the *Justices Amendment Act (No. 2) 1988*.

2. COMMENCEMENT

This Act shall come into operation on a date to be fixed by the Administrator by notice in the *Gazette*.

3. PRINCIPAL ACT

The *Justices Act* is in this Act referred to as the Principal Act.

4. REPEAL AND SUBSTITUTION

Division 7 of Part IV of the Principal Act is repealed and the following substituted:

"Division 7 - Orders to Keep the Peace

"99. ORDER TO KEEP PEACE

"(1) Where, on a complaint made in accordance with subsection (2), the Court is satisfied, on the balance of probabilities -

(a) that the defendant -

(i) has caused personal injury or damage to property; and

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- (ii) is, unless restrained, likely again to cause personal injury or damage to property;
- (b) that the defendant -
 - (i) has threatened to cause personal injury or damage to property; and
 - (ii) is, unless restrained, likely to carry out that threat; or
- (c) that -
 - (i) the defendant has behaved in a provocative or offensive manner;
 - (ii) the behaviour is such as is likely to lead to a breach of the peace; and
 - (iii) the defendant is, unless restrained, likely again to behave in the same or a similar manner,

it may make an order imposing such restraints on the defendant as are necessary or desirable to prevent the defendant from acting in the apprehended manner.

"(2) A complaint under this section may be made by -

- (a) a member of the Police Force; or
- (b) a person against whom, or against whose property, the behaviour the subject of the complaint was or is likely to be directed.

"(3) An order under subsection (1) may be made in the absence of the defendant whether or not the defendant was summoned to appear at the hearing of the complaint.

"(4) As soon as practicable after an order under subsection (1) is made, the Clerk shall cause a copy of the order to be served personally on the defendant and shall forward a copy of the order to the Commissioner of Police and, where the complainant is not a member of the Police Force, the complainant.

"(5) Subject to subsection (6), an order under subsection (1) has effect immediately it is made notwithstanding that a copy of the order may not have been served under subsection (4) on the defendant.

"(6) Where an order under subsection (1) is made in the absence of the defendant and the defendant was not summoned to appear at the hearing of the complaint, the defendant shall be summoned to appear before the Court to show cause why the order should not be confirmed and the order is not effective after the conclusion of the hearing to which the defendant is summoned unless -

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- (a) the defendant does not appear at that hearing in obedience to the summons; or
- (b) the Court, having considered the evidence of or adduced by the defendant, and any other evidence before it, confirms the order.

"(7) As soon as practicable after the conclusion of the hearing to which the defendant is summoned under subsection (6), the Clerk shall cause a copy of the order recording the decision of the Court to be served personally on the defendant and shall also cause a copy to be sent to the Commissioner of Police and, where the complainant is not a member of the Police Force, also to the complainant.

"(8) An order confirmed as referred to in subsection (6) continues to have effect notwithstanding that a copy of the order recording the decision of the Court may not have been served under subsection (7) on the defendant.

"(9) Without limiting the generality of subsection (1), the Court may make an order under that subsection restraining the defendant from entering premises, or limiting his or her access to premises, whether or not the defendant has a legal or equitable interest in the premises, but before making such an order it shall consider the effect of making or declining to make the order -

- (a) on the accommodation of; and
- (b) on any children of, or in the care of,

the persons affected by the proceedings.

"100. ORDERS IN SPECIAL CIRCUMSTANCES

"(1) A member of the Police Force may, by telephone, apply to a magistrate for an order under this section.

"(2) Before applying to a magistrate for an order under this section the member of the Police Force shall prepare a form of complaint and affidavit setting out the grounds on which the making of the order is sought.

"(3) Where in the opinion of the magistrate to whom an application under subsection (1) is made it is not practicable for the member of the Police Force, in the circumstances of the case, to obtain from the Court an order under section 99(1), the magistrate may make an order under this section in the same terms as the Court may make an order under section 99(1) notwithstanding that the person against whom the order is made has not been given an opportunity to answer any allegation in the complaint, and the order has effect according to its tenor as if it were an order made under that section.

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"(4) A magistrate shall not make an order under this section unless satisfied that he or she might reasonably have made the order under section 99(1) on the grounds set out in the complaint and affidavit referred to in subsection (2) had the magistrate been sitting as the Court.

"(5) A magistrate who makes an order under this section shall -

- (a) reduce the application to writing;
- (b) complete and sign the order;
- (c) record on the order the reasons for making it and when and where it is to be returned;
- (d) inform the member of the Police Force, by telephone, of the terms of the order and the time and place it is to be returned; and
- (e) as soon as practicable, cause the writing referred to in paragraph (a), and a copy of the order, to be forwarded to the Clerk for the Court file.

"(6) On being informed under subsection (5) of the making and terms of the order, the member of the Police Force shall, in triplicate, prepare a form of the order in the terms furnished to the member by the magistrate and show on the form the name of the magistrate, the date and time the order was made, the time and place it is to be returned, and such other information (if any) as is prescribed.

"(7) As soon as practicable after an order under this section is made, the member of the Police Force shall cause a copy prepared under subsection (6) to be served personally on the defendant and shall forward a copy to the Clerk for the Court file.

"(8) A form of order referred to in subsection (6) shall be deemed to be a summons to the defendant requiring the defendant to appear before the Court, at the time and place shown on the form for its return, to show cause why the order should not be confirmed by the Court.

"(9) An order under this section has effect immediately it is made but has no effect after the conclusion of the hearing to which the defendant is summoned under subsection (8) unless -

- (a) the defendant does not appear at that hearing in obedience to the summons; or
- (b) the Court, having considered the evidence of or adduced by the defendant, and any other evidence before it, confirms the order.

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"(10) As soon as practicable after the conclusion of the hearing to which the defendant is summoned under subsection (8), the Clerk shall cause a copy of the order recording the decision of the Court to be served on the defendant.

"(11) An order confirmed as referred to in subsection (9) continues to have effect notwithstanding that a copy of the order recording the decision of the Court may not have been served under subsection (10) on the defendant.

"100A. VARIATION OF REVOCATION OF ORDER

"(1) A party to a proceeding in which an order has been made under section 99(1) or 100(3) may, at any time, apply to the Court for a variation or revocation of the order.

"(2) The Court may, on receiving an application under subsection (1) or of its own motion, after all parties and other person who, in the opinion of the Court, have a direct interest in the outcome have had an opportunity to be heard on the matter, vary or revoke, or refuse to vary or revoke, an order made under section 99(1) or 100(3).

"(3) Where an order made under section 99(1) or 100(3) is varied or revoked under this section, the Clerk shall, as soon as practicable, cause a copy of the order as so varied or notice of the revocation, as the case may be, to be served personally on the defendant and shall also notify the Commissioner of Police and, where the complainant in relation to the original order was not a member of the Police Force, the complainant, of the variation or revocation.

"(4) The variation of an order under this section has effect immediately the variation order is made, whether or not the defendant is present or has been served under subsection (3) with a copy of the order.

"100B. BREACH OF ORDER

"(1) A person against whom an order under this Division is in force who contravenes or fails to comply with the order is, subject to subsection (2), guilty of a regulatory offence.

Penalty: \$1,000 or imprisonment for 6 months.

"(2) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves on the balance of probabilities that -

- (a) the contravention or failure was as the result of such an emergency that an ordinary person similarly circumstanced would have acted in the same or a similar way;

- (b) the act complained of was reasonable and no more than was necessary to enable the defendant to exercise a right or perform a duty specifically given to or imposed on the defendant by a Commonwealth or Territory court or a court of a State or another Territory of the Commonwealth exercising Territory jurisdiction; or
- (c) the defendant did not know and had no reason to suspect that such an order had been made and was in force.

"100C. EXPARTE PROCEDURES NOT TO APPLY

"Sections 62, 62AB and 63A do not apply to or in relation to a complaint under section 99 or 100.

"100D. EVIDENCE

"In making, confirming, varying or revoking an order under this Division the Court or magistrate may admit and act on hearsay evidence."

5. TRANSITIONAL

(1) Notwithstanding the repeal effected by section 4 but subject to subsection (2) of this section, Division 7 of Part IV of the Principal Act continues to apply to and in relation to all orders made and recognizances entered into under, and sureties referred to in, that Division and in force immediately before the commencement of this Act as if this Act had never commenced, and they may be enforced accordingly.

(2) An order referred to in subsection (1) may be varied or revoked under Division 7 of Part IV of the Principal Act as amended by this Act as if it were an order duly made under section 99 of the Principal Act as amended by this Act, and section 100B of the Principal Act as amended by this Act applies accordingly.



Serial 110
Police Administration
Amendment (No. 2)
Mr Hatton

NORTHERN TERRITORY OF AUSTRALIA

A BILL for AN ACT

to amend the *Police Administration Act*

BE it enacted by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self-Government) Act 1978* of the Commonwealth, as follows:

1. SHORT TITLE

This Act may be cited as the *Police Administration Amendment Act (No. 2) 1988*.

2. COMMENCEMENT

This Act shall come into operation on the commencement of the *Justices Amendment Act (No. 2) 1988*

3. POWER TO ENTER TO MAKE ARREST OR PRESERVE PEACE

Section 126 of the *Police Administration Act* is amended by inserting after subsection (2) the following:

"(2A) A member of the Police Force may enter any premises, vehicle or vessel if he believes, on reasonable grounds, that -

- (a) a person on or in the premises, vehicle or vessel has suffered, is suffering or is in imminent danger of suffering personal injury at the hands of another person; or
- (b) a contravention of an order under Division 7 of Part IV of the *Justices Act* has occurred, is occurring or is about to occur on or in the premises, vehicle or vessel,

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and remain on or in the premises, vehicle or vessel for such period as the member considers necessary -

- (c) to verify the grounds of the member's belief;
- (d) to ensure that, in the member's opinion, the danger no longer exists;
- (e) to prevent a breach of the peace or a contravention of the order; or
- (f) where a person on or in the premises, vehicle or vessel has suffered personal injury, to give or arrange such assistance to that person as is reasonable in the circumstances.

"(2B) In subsection (2A) 'premises' includes land and any building or structure on land."



Serial 109
Bail Amendment
(No. 2)
Mr Hatton

NORTHERN TERRITORY OF AUSTRALIA

A BILL for AN ACT

to amend the *Bail Act*

BE it enacted by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self-Government) Act 1978* of the Commonwealth, as follows:

1. SHORT TITLE

This Act may be cited as the *Bail Amendment Act (No. 2) 1988*.

2. COMMENCEMENT

This Act shall come into operation on the commencement of the *Justices Amendment Act (No. 2) 1988*.

3. CRITERIA TO BE CONSIDERED IN BAIL APPLICATIONS

Section 24(1) of the *Bail Act* is amended -

- (a) by omitting from paragraph (b)(iv) "and";
- (b) by omitting from paragraph (c)(iv) "the child or juvenile." and substituting "the child or juvenile; and" and
- (c) by adding at the end the following:
 - "(d) where the offence alleged against the accused person involves the contravention of, or a failure to comply with, an order under Division 7 of Part IV of the *Justices Act*, the likelihood of -
 - (i) personal injury being caused, or threats being made, to a person for whose benefit, expressly or impliedly, the order exists;

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- (ii) damage to property in the possession of or being used by a person referred to in subparagraph (i) occurring; or
 - (iii) a breach of the peace involving the accused person occurring."
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-