DE FACTO RELATIONSHIPS:

Claims by surviving de facto partners under the Common Law Practice Act 1867 for damages for wrongful death

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Queensland Law Reform Commission
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Previous Queensland Law Reform Commission publications on this Reference:

> *Shared Property,* Queensland Law Reform Commission Discussion Paper No 36, October 1991.
> *De Facto Relationships,* Queensland Law Reform Commission Working Paper No 40, September 1992.
> *De Facto Relationships,* Queensland Law Reform Commission Report No 44, June 1993.
> *De Facto Relationships: Claims by surviving de facto partners under the Common Law Practice Act 1867 for damages for wrongful death,* Queensland Law Reform Commission Draft Report No M.P.8, October 1994.

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TO: The Hon. Dean Wells MLA,
Minister for Justice and Attorney-General
and Minister for the Arts

In accordance with the provisions of section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its report on *De Facto Relationships: Claims by Surviving De Facto Partners under the Common Law Practice Act 1867 for Damages for Wrongful Death*.

Although the Commission's preliminary recommendations set out in its Draft Report (M.P.8 October 1994) have generally been endorsed by Cabinet, this Report and the Commission's final recommendations should be of assistance to Parliament when it considers the legislation.

Given the Commission's specific terms of reference[1] and the limited time available within which to prepare its Report, the Commission has confined its attention principally to the definitions of "de facto partner" and "de facto relationship". The Commission is concerned that this definitional approach excludes the broader issues which should be addressed when considering the effects of a death caused by the fault of another. In particular, it is apparent that economic dependency upon the deceased prior to his or her death is a far more relevant issue than the sexual or "marriage-like" relationship existing between the deceased and his or her surviving partner prior to his death. Victorian legislation enables people to claim damages for wrongful death once they have established that they were dependent on the deceased.[2] The type of relationship they had with the deceased is irrelevant. They may have been the brother, sister, spouse, de facto partner or friend of the deceased. What is relevant is that as a result only of the wrongdoing of another the surviving dependant has been left without adequate means of support and may very well have to resort to social security to make ends meet.

The Commission's recommendations build on earlier work of the Commission in the area of de facto relationships. In previous relevant Reports and in the current Report, the Commission has stressed the discriminatory and unjust effect of current laws which exclude partners to de facto relationships from the protections, rights and responsibilities afforded to partners to a marriage. The Commission has also stressed the discriminatory and unjust effect of restricting such protections and rights to members of heterosexual relationships.

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1 See pp. 1-3 below.

2 See Ch.4 below.

Both the Commonwealth Parliament[3] and the Queensland Parliament[4] have recognised that discrimination on the ground of marital status (including being a member of a de facto relationship) and discrimination on the ground of lawful sexual activity are unacceptable.

The anti-discrimination legislation at Commonwealth and at State levels is primarily concerned with the conduct of individuals and organisations who discriminate against individuals on the basis of one or more of a number of attributes. However, the philosophy underlying such legislation can be used just as effectively in support of the removal of the discriminatory effect of other Queensland statutory provisions such as section 13 of the *Common Law Practice Act 1867*. To be consistent with the Government's previous stance on discrimination, de facto partners, whether of the same or of a different gender to their deceased partner, should no longer be excluded from claiming compensation for wrongful death. This would also be consistent with the Commission's recommendations in previous Reports dealing with de facto relationships.[5]

The only factors which should be taken into account to determine a de facto partner's entitlement to compensation should be: the genuineness of his or her "marriage-like" relationship with the deceased partner; whether there is a child of the relationship; and, in all cases, the existence of dependency on the deceased immediately prior to his or her death.

Awards of damages are based solely on the level of the surviving partner's financial dependence on the deceased person. If the partners were financially independent at the time of the fatal accident, there will be no compensation payable to the surviving partner. Partial dependence will also only be reflected in compensation calculated by reference to the level of dependence.

Under the Commission's recommendations, unless there is a child of the relationship, the surviving partner will have to establish that a marriage-like relationship existed for at least 12 months up to the time of death. The Commission does not believe that that will be an unduly easy test to pass. The Commission's recommendations are based upon the interests of justice. Cost implications have not been given a priority in this Report as cost analysis is outside the terms of reference and outside the Commission's area of expertise. However, it is apparent that the Commission's recommendations can be justified to a certain extent on an economic basis. Without compensation to replace financial dependency, there will be surviving partners of de facto relationships who will need

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3 S3 *Human Rights and Equal Opportunity Commission Act 1986* and Cl4 *Human Rights and Equal Opportunity Commission Regulations 1989 No. 407 (commenced 1990)* which define "discrimination" to include "any distinction, exclusion or preference" made:-

"(a) on the ground of ...
 (v) marital status; or ...
 (ix) sexual preference".

4 S6 *Anti-Discrimination Act 1991* (Qld). But note, however, the Act itself discriminates in the definition of "de facto spouse" (s4).

5 Report Nos 42 & 44.

to resort to social security in order to make ends meet. It could be argued that replacing the financial dependency should be the responsibility of the wrongdoer (and the wrongdoer's insurer) rather than the whole community. Further, as is noted below, there are currently so very few Lord Campbell's actions commenced in Queensland that it is unlikely that making de facto partners eligible to bring claims will increase significantly the cost to the system.

The Hon. Justice G N Williams
Chairperson

Ms P A Cooper
Member

R. Atkinson.

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W. A. Lee

Mr W G Briscoe
Member

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CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE

In September 1990, the Queensland Law Reform Commission was asked by the Attorney-General to review matters impacting on de facto relationships. As part of its review the Commission has published three papers - a discussion paper on Shared Property,[6] a working paper on De Facto Relationships[7] and a report on De Facto Relationships.[8] In each of those papers the Commission concentrated on the law governing issues arising on the breakdown of de facto relationships and in particular, the law relating to property distribution.

In its Report on Intestacy Rules[9] the Commission also dealt with the issue of whether a surviving de facto partner of a person who died without leaving a will or an effective will should be entitled to any part of the intestate's estate.

Recognition by the law of de facto relationships and de facto partners has necessarily been a gradual and piecemeal process - primarily because of the variety and number of contexts within which there is a perception that people in de facto relationships are suffering from an injustice, and the different considerations which prevail in each of those contexts. The gradual process of recognition also reflects the gradual change in community attitudes towards people living in a relationship other than a formalised union.

An alternative approach would be to recommend State legislation deeming people in de facto relationships to be married for the purposes of State laws. Such an approach would, however, not permit the flexibility of examining the particular issues involved in different legal contexts. Further, the Commission does not believe that an approach which simply equates marriage with de facto relationships would be acceptable to the general community where there is probably still a view that there is a qualitative difference between marriage and de facto relationships,[10] nor to people living in de facto relationships, who may consider such a law to be an unnecessary interference with their chosen lifestyle.

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6 Discussion Paper No. 36.

7 Working Paper No. 40.

8 Report No. 44.

9 Report No. 42.

10 This view was expressed in submissions 2, 3, 4, 11, 12, 13, 21, 27, 31, 35.

The Commission is aware of a number of issues affecting de facto relationships in Queensland which need to be considered with a view to eliminating circumstances of injustice or discrimination.

One of these issues was highlighted by the Moura underground mine disaster on 7 August 1994. The de facto partners of men killed in the disaster are unable to institute a common law claim for damages for the wrongful death of their partners because "de facto partner" does not fall within the list of persons entitled to make such a claim under the *Common Law Practice Act 1867* (Qld).[11]

The need to update the *Common Law Practice Act 1867* in this and other respects has been recognised in general terms for some time.[12] Although the Commission examined section 15C of that Act in 1993 pursuant to a specific request of the Attorney-General, it had not been requested to report on any other specific issue to do with the Act.

The Commission, in consultation with the Attorney-General's office, determined to report on the following specific matters:

(a) Whether section 13 of the *Common Law Practice Act 1867* (Qld) should be amended to allow de facto partners of persons wrongfully killed to institute claims for damages against the tortfeasor?

(b) If the answer to the first question is in the affirmative, what are the options for an appropriate definition of de facto partner?

The Attorney-General's office requested a Draft Report on these questions relating to section 13 of the *Common Law Practice Act 1867* by the close of business on 13 October 1994 in order that Cabinet could consider the Commission's preliminary recommendations at its meeting on 17 October 1994.

The Commission was not asked to address other more political issues which could be seen to be specifically related to the Moura disaster. For example, the Commission was not to examine the question whether the proposed amendments

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11 S13 *Common Law Practice Act 1867* reads:
Every ... action [for wrongful death] shall be for the benefit of the wife husband parent and child of the person whose death shall have been so caused and shall be brought by and in the name of the executor or administrator of the person deceased and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought and the amount so recovered after deducting the costs not recovered from the defendant shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct.

12 For example see Queensland Law Reform Commission Report No. 45 June 1993 at 106 "it has become apparent during the course of this Reference that there may be a need for a general review of Lord Campbell's actions in Queensland". See also, that Report at footnote 251. In its Report No. 44 June 1993 at 1 "The Commission is, of course, aware that some legislation (such as adoption and fatal accidents legislation) which impacts on de facto couples may also need to be reviewed".

to the *Common Law Practice Act 1867* were to operate retrospectively. That decision was addressed by Cabinet at its meeting on 17 October 1994.[13]

The Commission was not asked to review other aspects of section 13 of the *Common Law Practice Act 1867* such as, for example:

* what should happen if the deceased person is survived by a legal spouse and by a de facto partner either or both of whom might have had children by the deceased;

* whether people in addition to de facto partners of the deceased person, should be added to the list of those entitled to commence an action;

* whether dependency alone should determine a person's eligibility to claim compensation.[14]

There are other problems with the *Common Law Practice Act 1867* which are in need of attention.[15] However, the Commission has not been asked to undertake a review of the entire Act.

2. THE DRAFT REPORT

On 13 October 1994 the Commission delivered its Draft Report to the Attorney-General for consideration by Cabinet on 17 October 1994.

Given the very short period of time within which the Commission had to prepare the Draft Report, it was unable to consult widely. A limited number of organisations, including government and private insurers, unions and law bodies were contacted, as well as relevant organisations in other Australian jurisdictions.

The Commission relied heavily on recent investigations which it conducted in relation to wrongful death litigation[16] and to property distribution upon the breakdown of de facto relationships.[17]

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13 See p 5 below.

14 As is the case in Victoria. See p 22 below.

15 See Queensland Law Reform Commission *The Assessment of Damage in Personal Injury and Wrongful Death Litigation: Griffiths v Kerkemeyer; Section 15C Common Law Practice Act 1867* Report No. 45, October 1993 at 106.

16 Report No. 45.

17 Report No. 44.

In its Draft Report, the Commission invited comment on the following preliminary recommendations:

1. that section 13 of the *Common Law Practice Act 1867* be amended to include the term "de facto partner" in the list of persons to benefit from an action for wrongful death;

2. that "de facto partner" be defined as—

   (a) where the deceased left a dependant who is a child of the relationship—a person who was in a "de facto relationship" with the deceased person immediately before the deceased person's death;[18] or

   (b) where the deceased did not leave a dependant who is a child of the relationship—a person who was in a "de facto relationship" with the deceased person for a continuous period of **one year** immediately before the deceased person's death;[19]

3. that "de facto relationship" be defined as the relationship between two persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.[20]

An alternative to Recommendation 2 above which found some support within the Commission, and upon which the Commission also invited comment, is as follows:

4. that "de facto partner" be defined as—

   (a) where the deceased left a dependant who is a child of the relationship—a person who was in a "de facto relationship" with the deceased person immediately before the deceased person's death; or

   (b) where the deceased did not leave a dependant who is a child of the relationship—a person who was in a "de facto relationship" with the deceased person for a continuous period of **two years** immediately before the deceased person's death; or

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18 Compare *Wrongs Act 1936* (SA) ss20(1), 3A (definition "spouse") and *Family Relationships Act 1975* (SA) s11(1)(b); *Fatal Accidents Act 1959* (WA) s6(1)(c) and Schedule 2 para (h)(i).

19 Compare *Wrongs Act 1936* (SA) ss20(1), 3A (definition "spouse") and *Family Relationships Act 1975* (SA) s11(1)(a); *Fatal Accidents Act 1959* (WA) s6(1)(c) and Schedule 2 para (h)(ii).

20 Cl5 *De Facto Relationships Bill* (Appendix to Report No. 44).

(c) a person who was in a "de facto relationship" with the deceased person at some time during the **two years** before the deceased person's death, and in respect of whom the court considers that obvious injustice would result if that person were not treated as a "de facto partner" of the deceased for the purposes of section 13 of the Act.[21]

In the Draft Report, the Commission expressed the desire that its preliminary proposals for reform, as set out in the Draft Report, be the subject of widespread public discussion and debate before it made its final recommendations.

3. CABINET'S DECISION OF 17 OCTOBER 1994

On 17 October 1994, Cabinet decided in principle to amend section 13 of the *Common Law Practice Act 1867* to include de facto partners in the list of persons to benefit from an action for wrongful death. As a result of that decision, legislation is currently being drafted to amend the *Common Law Practice Act 1867.*[22] Cabinet also decided that the amending legislation should be effective from 17 October 1994.

Matters which need to be settled for inclusion in the legislation include:-

* definitions of "de facto partner" and "de facto relationship";
* what, if any, qualifying period should apply to a "de facto relationship" to entitle the surviving partner to benefit from an action for wrongful death;
* what, if any, amendments should be made to the *Workers' Compensation Act 1990* to ensure parity between the rights of de facto partners to seek damages by way of action for wrongful death and their rights to workers' compensation.

4. CONSULTATION FOR THE REPORT

It is anticipated that legislation amending the *Common Law Practice Act 1867* will be introduced during the last sitting of Parliament for 1994. The last sitting day will be 25 November 1994.

To ensure that an analysis of public submissions and the Commission's final recommendations are before the Parliament during its deliberations on the

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21 Compare *Fatal Accidents Act 1934* (Tas) s3A.

22 Press release of the Hon. D. Wells M.L.A., Minister for Justice and Attorney-General and the Hon. M. Foley M.L.A., Minister for Employment, Training and Industrial Relations, 17 October 1994 "De Factos Gain Legal Equality".

legislation, a fairly short consultation period was imposed on the Commission's Draft Report and preliminary recommendations.

Advertisements were placed in *The Courier-Mail* on 29 October 1994[23] and 2 November 1994, setting out the Commission's preliminary recommendations and calling for submissions by 18 November 1994.

A press release in similar terms to the advertisement was sent to a large number of metropolitan and regional television, radio and newspaper organisations.

In addition, over 100 copies of the Draft Report were sent to people and organisations believed by the Commission to have a particular interest in the issues raised by the Draft Report.

By 18 November 1994, 41 submissions were received by the Commission, including the three submissions appended to the Draft Report. A list of those persons and organisations who have made submissions to the Commission on this matter can be found in Appendix A. The Commission is most grateful to all respondents for the time and effort taken to respond - particularly in light of the limited period open for submissions. The Commission has considered all submissions in its deliberations on the various issues covered by the Report.

5. THE COMMISSION'S RECOMMENDATIONS

In this Report, the Commission makes the following recommendations:-

(i) that section 13 of the *Common Law Practice Act 1867* be amended to include the term "de facto partner" in the list of persons to benefit from an action for wrongful death;

(ii) that "de facto partner" be defined as:-

> "(a) where the deceased left a dependant who is a child of the relationship—a person who was in a "de facto relationship" with the deceased person immediately before the deceased person's death;[24]
>
> (b) where the deceased did not leave a dependant who is a child of the relationship—a person who was in a "de facto relationship" with the deceased person for a continuous period

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23 A copy of the advertisement is found in Appendix B.

24 Compare *Wrongs Act 1936* (SA) ss20(1), 3A (definition "spouse") and *Family Relationships Act 1975* (SA) s11(1)(b); *Fatal Accidents Act 1959* (WA) s6(1)(c) and Schedule 2 para (h)(i).

of **one year** immediately before the deceased person's death";[25]

(c) for the purposes of this definition a "child of the relationship" is a child of the deceased person and the "de facto partner" and includes a child born after the death.

(iii) that "de facto relationship" be defined as:-

> "The relationship between two persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple."

If the Parliament is not prepared to adopt a gender-neutral definition of "de facto relationship", then the definition should be along the lines of the following:-

> "The relationship between a man and a woman who, although they are not legally married to each other, live in a relationship like the relationship between a married couple."

(iv) that the *Workers' Compensation Act 1990* should be amended so that de facto partners and de facto relationships are defined in identical terms to the definitions to be adopted for the *Common Law Practice Act 1867*.

(v) that a preferable approach to determining a person's entitlement to benefit from an action for wrongful death is found in the Victorian *Wrongs Act 1958*. That Act provides that a person's dependency on the deceased prior to his or her death is the sole criterion to satisfy. This approach should be explored in more detail as a potential model for Queensland.

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[25] Compare *Wrongs Act 1936* (SA) ss20(1), 3A (definition "spouse") and *Family Relationships Act 1975* (SA) s11(1)(a); *Fatal Accidents Act 1959* (WA) s6(1)(c) and Schedule 2 para (h)(ii).

CHAPTER 2

ACTIONS FOR WRONGFUL DEATH

1. COMMON LAW AND LEGISLATIVE INTERVENTION

At common law "[i]n a civil court, the death of a human being could not be complained of as an injury".[26] The result is that until a statute says otherwise, anyone who suffers loss as a result of the death of another cannot sue the wrongdoer who caused the death.

Before the enactment of wrongful death statutes, dependants could not sue the wrongdoer when they lost the support of a breadwinner. The origin of this rule appears to be in the felony-merger doctrine.[27] The policy behind that doctrine was that misconduct resulting in the death of another involved the commission of a public wrong, which extinguished all private remedies arising as a result of the death. The public interest was given more importance than that of the individuals. It could also be seen that the King's desire to obtain the felon's goods and lands (which in those days were forfeited to the Crown when the felon was convicted) exhausted the estate of the deceased felon so that there were no assets left to compensate the felon's victim.[28]

The Alberta Law Reform Institute has described the history of the felony-merger doctrine as follows:[29]

> At first, the felony-merger doctrine established in *Higgins v Butcher* met with strong approval. However, beginning in 1625 there were cases that held that a conviction of felony did not extinguish a cause of action in trespass. By 1873 it was clear

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26 *Baker v Bolton* (1808) 1 Camp 493, 170 ER 1033 (Nisi Prius) per Lord Ellenborough; *Woolworths Ltd v Crotty* (1942) 66 CLR 663. See for general discussion Luntz H, *Assessment of Damages for Personal Injury and Death* (3rd ed 1990) Ch9.

27 See Holdsworth WS *The Origin of the Rule in Baker v Bolton* (1916) 32 Law Q. Rev. 431. The doctrine was first described by Tanfield J in *Higgins v Butcher* (1607), Yelv. 89 (80 E R 61):

> If a man beats the servant of J.S. so that he dies of the battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost."

28 A mechanism did develop, however, to provide the deceased's family with some funds. Any property involved in a person's death (referred to as a "deodand") was forfeited to the King's Almoner for charity. The funds generated from the sale of deodands were often used to assist the deceased's family. As the practice developed, the owner, rather than let the goods be sold, would ordinarily pay an amount assessed by the coroner's jury that investigated the death. The money so raised would be given to the deceased's family. For a brief history of deodands, see Law Reform Commission of British Columbia, Working Paper on *Pecuniary Loss and the Family Compensation Act*, 1992.

29 *Non-Pecuniary Damages in Wrongful Death Actions - A Review of Section 8 of the Fatal Accidents Act*, Report for Discussion No 12, June 1992.

> that the fact that the conduct complained of amounted to a felony did not stop civil proceedings for damages. At most, the felony was only a defence if the action was brought against the supposed criminal before prosecution. The felony only suspended the right to sue for the wrong to the person, it did not take away the right.
>
> Logic would dictate that if the conduct complained of did not amount to a felony, the felony-merger doctrine would not apply. Also, if the felony-merger doctrine was never the law of the country or if the doctrine was discarded, it would seem that *Baker v Bolton* should not be followed. Yet, logic did not prevail in this area of the law. The result is that the rule in *Baker v Bolton* applies even though the felony-merger doctrine was never the law in a particular country or was discarded.

In the United Kingdom, the right to claim compensation for the death of another was introduced by *An Act for Compensating the Families of Persons killed by Accidents 1846*[30] (commonly referred to as *Lord Campbell's Act*[31]) in a time when fatal accidents were becoming frequent in England with the development of factories and railways. Prior to that time wrongful death usually referred to death by violence. The wrongdoer was most often the thief or highwayman. Even if found and arrested, the murderer was more often than not impecunious and not worth suing. With the industrial revolution and deaths resulting from machines, the wrongdoer was often wealthy.

All Australian jurisdictions re-enacted the United Kingdom provisions[32] although they have been subsequently varied in a number of respects, including who is entitled to benefit from a wrongful death action, and allowing for the deduction from the assessment of damages any other benefits received by dependants as a result of the breadwinner's death (such as workers' compensation payments). The action based on the legislation is often referred to as a *Lord Campbell's* action or a *Fatal Accidents Act* action, irrespective of the title of the legislation.

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[30] 9 & 10 Vict. Cap. XCIII. The preamble to the Act read:

> Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in Damages for the Injury so caused by him.

[31] One of a number of important reforming Acts promoted or supported by Lord Campbell after he had become a member of the House of Lords. See Sir W. Holdsworth, *A History of English Law* Vol. xv pp220, 421.

[32] Ss12-15C *Common Law Practice Act 1867* (Qld); *Compensation to Relatives Act 1897* (NSW); Part II, *Wrongs Act 1936* (SA); *Fatal Accidents Act 1934* (Tas); Part III, *Wrongs Act 1958* (Vic); *Fatal Accidents Act 1959* (WA); *Compensation (Fatal Injuries) Ordinance 1968* (ACT); *Compensation (Fatal Injuries) Act 1974* (NT). The UK provision is now in the *Fatal Accidents Act 1976*. Deaths in commercial airline accidents are covered by different provisions in ss12 and 35 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cwth).

In some jurisdictions and in respect of deaths resulting from certain types of accidents, claims for damages have been abolished entirely[33] or have been abolished against particular defendants.[34]

In Queensland the *Lord Campbell's Act* provisions are found in sections 12-15C of the *Common Law Practice Act 1867*.

2. THE *LORD CAMPBELL'S* ACTION

The *Lord Campbell's* action brought by family members of a deceased person has been described in the following way by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd*:[35]

> [*The Fatal Accidents Acts*] provided a new cause of action and did not merely regulate or enlarge an "old one," as Lord Sumner observed in *Admiralty Commissioners v S.S. Amerika.*[36] The claim is, in the words of Bowen L.J., in *The Vera Cruz (No. 2)*[37] for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own lifetime, because it is for damages suffered not by himself, but by his family after his death. The Act of 1846, s. 2, provides that the action is to be for the benefit of the wife or other members of the family, and the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death.

The legislation restricts the action to family members of the deceased. The jury (or judge) could give such damages as may be thought proportioned to the injury resulting to such family members from the death.

The nature of the damages suffered by the family of the deceased which can be claimed under this action was not set out in the legislation although the courts have subsequently adopted the view that damages recoverable are restricted to pecuniary loss[38] and may not include anything by way of consolation for the

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33 E.g. *Motor Accidents (Compensation) Act 1979* (NT) s5.

34 E.g. *Workers' Compensation Act 1987* (NSW) s149(2).

35 [1942] AC 601 at 611-612.

36 [1917] AC 38 at 52.

37 (1884) 9 PD 96 at 101.

38 *Blake v Midland Railway* (1852) 18 QBD 93.

dependants for grief or sorrow.[39]

Balkin and Davis describe the calculation of the loss suffered by family members as a result of the death of a breadwinner as follows:[40]

> If the deceased was the breadwinner for the family, the loss suffered by the surviving members is calculated by reference to the lost earning capacity [after taking account of possible beneficial or adverse contingencies] of the deceased, after deducting income tax and the proportion of the product of that capacity which he would have spent on his own maintenance. The amount to be awarded to each member of the family also depends upon the length of time for which each had a reasonable expectation of receiving a benefit, so that each child's share will be assessed on the basis that he or she will in due course achieve financial independence. In assessing the widow's share, no account is taken of the fact that she has taken up employment after her husband's death, since that fact does not diminish her expectation of financial support from her husband; if she had been earning prior to his death, the amount of her income is of relevance only in determining what proportion of the deceased's earning capacity might have been spent solely for his own benefit .... [If] the deceased had devoted the whole (or a large part) of her time to caring for the family, it has been recognised that the loss of the remainder of the family is the value of the services of which they have been deprived of by death. That value may be assessed by reference to the cost of providing substitute services, but such a cost is no more than a guide.

The value of the dependency can include not only that part of the deceased's earnings which he or she would have expended annually in maintaining his or her dependants but also that part of his or her earnings which he or she would have saved and which would have come to the dependants by inheritance on his or her death. There may also be included a sum in respect of loss attributable to the cessation of contributions which the deceased, and his or her employers, had made to a superannuation or other fund of which the dependants were the nominated beneficiaries. A de facto partner may be less likely than a lawful spouse to be a nominated beneficiary. The Law Reform Commission of Western Australia has observed:[41]

> A de facto spouse is less likely than a lawful spouse to receive certain of the collateral benefits which are ignored in the calculation of damages under [the Western Australian equivalent of the *Common Law Practice Act 1867*]. For example, it is unlikely that a de facto spouse will have taken out a policy of insurance on the deceased's life. Under some superannuation schemes, only a lawful spouse can benefit from the scheme on the death of a member.

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39 **Note**, in South Australia in 1940, ss23a-23c were introduced to the *Wrongs Act 1936* providing for the payment of a sum of money "as the court thinks just by way of solatium for the suffering caused" to the parents of an infant and to the spouse of an adult who has been killed. The provisions prescribed upper limits for awards. The Northern Territory *Compensation (Fatal Injuries) Act 1974* provides in s10(3)(f) that the "damages in an action may include ... solatium." It may be awarded to any of the persons for whose benefit the action is brought and is not subject to an upper limit.

40 Balkin RP and Davis JLR *Law of Torts* 1991 at 391-392.

41 Law Reform Commission of Western Australia Report on *Fatal Accidents 1978* at 18-19.

CHAPTER 3

THE LAW AND EXPERIENCE IN QUEENSLAND

1. LIABILITY FOR DEATH CAUSED WRONGFULLY

The *Lord Campbell's* action for damages resulting from wrongful death was introduced in Queensland by section 12 of the *Common Law Practice Act 1867* which states:

> Whensoever the death of a person shall be caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.

2. PERSONS WHO MAY BENEFIT FROM SUCH AN ACTION

Only the husband, wife,[42] parent or child of the deceased person are entitled to benefit from such an action. Section 13 of the *Common Law Practice Act 1867* states:

> Every such action shall be for the benefit of the wife husband parent and child of the person whose death shall have been so caused and shall be brought by and in the name of the executor or administrator of the person deceased and in every such action the jury[43] may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought and the amount so recovered after deducting the costs not recovered from the defendant shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct.

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42 The United Kingdom fatal accidents legislation upon which s13 of the *Common Law Practice Act 1867* (Qld) was based (*An Act for Compensating the Families of Persons killed By Accidents 1846*) also referred to "husband" and "wife". De facto partners were not regarded, for the purpose of that legislation, as falling within the terms "husband" and "wife". See *K v JMP Co Ltd* [1976] QB 85; [1975], 1 All ER 1030, CA. This also appears to be the common understanding of the terms. They are both defined in the Australian Concise Oxford Dictionary by reference to the state of being "married". "Marriage" is defined as the "condition of man and woman legally united for purpose of living together". This would not cover de facto partners.

43 Very few actions for wrongful death would be heard before juries. S56 of the *Motor Accident Insurance Act 1994* requires an action based on a "motor vehicle accident claim" (which includes a claim for damages based on a liability for a fatal injury brought on behalf of the deceased's dependants) to be heard by a court sitting without a jury. Similarly, s10.6 of the *Workers' Compensation Act 1990* requires a claim brought against an employer in the Supreme or District Courts for damages relating to an injury (which includes death arising out of or in the course of employment) for which compensation is payable under the Act to be heard by a Judge without a jury. It is also presently proposed that jury trials will be excluded for wrongful death actions which are not based on a motor vehicle accident claim: see cl. 26 of the proposed *Personal Injuries Proceedings Bill 1994*. If that Bill is passed, no wrongful death action will be heard before a jury, irrespective of the facts giving rise to the claim.

The de facto partner of the deceased person has no right to commence an action. Nor has any other dependant of the deceased person who does not fall within the categories of: "husband, wife, parent or child".

3. NUMBER OF ACTIONS WHICH CAN BE BROUGHT

Consistently with similar provisions in other jurisdictions, section 14 of the *Common Law Practice Act 1867* states:

> Provided that not more than one action shall lie for and in respect of the same subject-matter of complaint.

4. DEDUCTIONS FROM THE ASSESSMENT OF DAMAGES

The amount to be awarded to a particular claimant pursuant to an action under the *Common Law Practice Act 1867* can be reduced by a number of factors. For example:

(a) If one of the claimants was partly responsible for the death, and he or she is the only person who can be sued for that death, that person is unable to claim under the Act. However, where one of the claimants was partly responsible and there are others outside the family who are also responsible for the death, the share which would otherwise have gone to that claimant is to be reduced in proportion to the degree to which he or she was responsible for the death.[44] Where the deceased had been contributorily negligent, damages will be reduced to a degree which is just and equitable having regard to his or her share in the responsibility for his or her own death.[45]

(b) Against the losses flowing from the death must be offset some of the pecuniary advantages which accrue to the dependants by reason of the death.[46] The most common pecuniary advantage which must be brought into account, in all jurisdictions except Tasmania and the Northern

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44 Even if a Lord Campbell's action settles prior to trial, it appears from the Commission's review of files held at the Workers' Compensation Board of Queensland that, in general, any contributory negligence of the employee is taken into account in the settlement negotiations.

45 *Law Reform (Tortfeasors' Contribution, Contributory Negligence, and Division of Chattels) Act 1951*. Where the damages are to be reduced for the deceased's contributory negligence, the reduction must be effected after there have been deducted from the prima facie loss any benefits accruing to the dependants, otherwise the dependants would be excessively penalised. See Luntz H *Assessment of Damages for Personal Injury and Death* (3rd ed) 1990 para 9.8.4.

46 For discussion see Balkin RP and Davis JLR *Law of Torts* 1991 at 393.

Territory,[47] is the acceleration of a testamentary benefaction resulting from the early death.

However, the acceleration of the benefit to a surviving spouse of owning the matrimonial home is disregarded on the basis that (in relation to a claim by a widow) she "merely continues to enjoy as owner what she previously enjoyed as wife".[48]

In all Australian jurisdictions other than the Northern Territory the prospect that a claimant will replace the pecuniary advantage provided by his or her deceased spouse with the same benefit from another person must also be taken into account.[49] That is, regard must be had to the possibility of a dependency being replaced.[50]

The legislation in all Australian jurisdictions now also precludes account being taken in the assessment of damages of the proceeds of a life insurance policy, superannuation payments or pensions or benefits payable under social security or similar legislation.[51] In all jurisdictions, either by reason of legislation or judicial decisions charitable gifts are also excluded.[52]

Section 15C of the *Common Law Practice Act 1867* in Queensland lists each of these exclusions.

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47 *Fatal Accidents Act 1934* (Tas) s10(1)(b) precludes consideration of up to $10,000 of the value of the deceased's estate which passes to the family. *Compensation (Fatal Injuries) Act 1974* (NT) s10(4)(g) prohibits the consideration of any gains or benefits consequent upon the death.

48 *Zordan v Metropolitan (Perth) Passenger Transport Trust* [1963] ALR 513 at 516 (HCA); *Tripodi v Leonello* (1982) 31 SASR 9 at 12-13 (FC); *McCullagh v Lawrence* [1989] 1 Qd R 163 at 165-6 (FC); Balkin and Davis note 23 at page 393 note also: "The same principle applies in relation to chattels such as a motor car: *Worden v Yeats* [1964] SASR 381 at 390 per Hogarth J; *Lamb v Southern Tablelands County Council* [1988] *Aust Torts Reports* 80-220 at 68, 198-9 per Campbell J (NSW SC)." The ACT (s10(4)(e)) and NT (s10(4)) have given this approach legislative sanction.

49 In *Carroll v Purcell* (1961) 107 CLR 73 at 79 the rule was regarded as so well established as no longer to require justification.

50 In the Northern Territory the legislation prevents the court from taking account of "[t]he remarriage or prospects of remarriage of the surviving spouse" (NT s10(4)(h)). This is also now the position in the United Kingdom.

51 The names of the statutes appear in footnote 32 above. The specific provisions are: Qld s15C; NSW s3(3); SA s20(2aa); Tas s10(1); Vic s19; WA s5(2); ACT s10(4); NT s10(4). Note, in the United Kingdom s4 of the *Fatal Accidents Act 1976* has been substituted by the following provision (introduced by the *Administration of Justice Act 1982*):

> In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.

52 The names of the statutes appear in footnote 32 above. The specific provisions are: Qld s15C(e); SA s20(2aa)(ii); Vic s19(d); ACT s10(4)(d); NT s10(4)(d). *Papowski v Commonwealth* [1958] SASR 293; *Mockridge Watson* [1960] VR 405. Both cases were decided prior to the enactment of the relevant provision and are therefore relevant to those jurisdictions without such statutory provision (WA, NSW, Tas).

In October 1993 the Commission recommended that there should be no amendment to section 15C.[53]

5. WORKERS' COMPENSATION

All Australian jurisdictions have established legislative schemes to provide compensation for work-related injuries and diseases. In Queensland, the scheme is found in the *Workers' Compensation Act 1990*.[54] For an injury or death to be compensated it must have arisen "out of or in the course of the worker's employment".[55] That is, there must be either a causal or temporal link between the injury and the employment. The employer does not have to have been negligent towards the employee for compensation to be payable. In Queensland and in all other Australian jurisdictions de facto partners are included in the class of persons eligible to be compensated in the event of the death of a worker.[56]

Every employer in Queensland is legally liable to pay the compensation which the Act prescribes that the worker employed by it shall be entitled to receive (out of the Workers' Compensation Fund).[57]

The Act directs every employer to insure itself and keep itself insured with the Workers' Compensation Board of Queensland against all sums for which, in respect of injury to or death of any employee employed by it, it may become legally liable to pay either by way of compensation under the Act or, independently of the Act (such as through negligence by the employer resulting in the worker's injury or death), by way of damages in respect of that injury or death.[58]

The amount of the premium payable by an employer is assessed by the Board and is calculated on payments estimated by the employer to be made to all employees in respect of wages, salaries and other earnings during the period of insurance. Currently, Queensland employers pay to the Board a premium of 1.6% of such earnings.[59] For an employee's average earnings of $450 per week, an employer

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[53] Queensland Law Reform Commission *The Assessment of Damages in Personal Injury and Wrongful Death Litigation: Griffiths v Kerkemeyer; Section 15C Common Law Practice Act 1867* Report No. 45, October 1993.

[54] In 1978 the administration of the Workers' Compensation Fund was placed with the newly constituted Workers' Compensation Board.

[55] S5.1 *Workers' Compensation Act 1990*

[56] Id Ch5.

[57] Id s4.9.

[58] Id s4.9(2).

[59] Until 1 July 1993 premiums were set at 1.4%. The net premiums received by the Board for the 1991/92 assessment were $299,711,623.00.

might expect to pay an extra $7 to the Board by way of workers' compensation premium.

Death benefits are payable to certain of an employee's (total and partial) dependants (including de facto partners) under the Queensland legislation.[60] The maximum amount which can be awarded is $89,000 and a weekly amount (10% of a prescribed base rate) for young dependants and an additional amount of up to $5,000 for each dependant as well as reasonable expenses of medical treatment or attendance on the employee, and reasonable expenses for the funeral of the employee.[61] There are provisions for the reduction in the amounts paid to dependants in certain circumstances.[62]

Although the deceased employee's dependants may be entitled to benefits under the *Workers' Compensation Act 1990*, they are not prevented from pursuing a *Lord Campbell's* action against the employer for the wrongful death. However, the workers' compensation paid or payable to the dependants will have to be either deducted at the time of judgment or reimbursed.[63] Even in the absence of a statutory direction the court will allow the workers' compensation payments to be taken into account in the assessment of damages unless it is clear that the beneficiary will have to repay the employer or insurer when successful in recovering damages.

6. PAYMENTS AND COMPENSATION FOLLOWING DEATH

If a worker dies, his or her dependants may be entitled to the following payments and compensation:

(a) Death benefits pursuant to the *Workers' Compensation Act 1990*. This compensation is paid by the Workers' Compensation Board from the

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60 *Workers' Compensation Act 1990* ss7.9, 7.10.

61 Id s8.13.

62 Id ss8.14, 8.15.

63 *Workers' Compensation Act 1990* s10.1 states:

> (1) If an injury in respect of which compensation under this Act is payable is suffered by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer who is -
> (a) indemnified by the Board under a policy in respect of the injury; or
> (b) required by this Act to be so indemnified;
> to pay damages in respect of the injury, then -
> (c) the amount of such damages that the employer is legally liable to pay is reduced by the total amount paid or payable from the Fund, by way of compensation under this Act in respect of the injury; and
> (d) subject to this Part, the worker is, or the worker's dependants are, to receive from the Fund such reduced amount....

Workers' Compensation Fund. The deceased's employer would normally have made premium payments into the Fund over the time the deceased was employed by the employer.

(b) A benefit from a superannuation policy held in the name of the deceased or his or her nominated beneficiaries. Contributions to the superannuation fund may have been made by the deceased during the period of his or her employment. Contributions would also have been made by the employer including compulsory contributions. However, as noted above, it may be less likely that a de facto partner will be the nominated beneficiary than it would be for a lawful spouse to have been nominated.[64]

(c) Other benefits, such as payments from any life insurance policy taken out on the life of the deceased which falls to the benefit of his or her dependants. Again, a de facto partner may not have been the nominated beneficiary - particularly if the insurance was taken out at the commencement of the deceased's employment and before entering into the de facto relationship.

(d) If the employer was personally or vicariously liable for the death through negligence, damages awarded in a *Lord Campbell's* action against the employer pursuant to the *Common Law Practice Act 1867*. In Queensland, only a husband, wife, parent or child can bring such an action.

If the dependants are successful in their *Lord Campbell's* action against the employer, at least the following deductions would have to be made from the assessment of damages, thus reducing the amount of the damages recoverable from the negligent employer's insurer, the Workers' Compensation Board:

(i) The workers' compensation benefits (deduction made pursuant to section 10.1 of the *Workers' Compensation Act 1990* which would probably have been deducted under the common law in any event);[65]

(ii) Any other benefits paid or payable to the dependants as a result of the death of the deceased not referred to in section 15C of the *Common Law Practice Act 1867*. Other benefits which may be excluded, such as the

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64 See p 11 above.

65 In *Mataic v Milinga* ([1970] VR 862) it was argued that a certain workers' compensation benefit came within the Victorian equivalent to s15C(d) of the *Common Law Practice Act 1864* (the Victorian phrase was "a sum paid or payable by way of pension, benefit or allowance under any law of the Commonwealth or the State."). The argument was rejected. Luntz (at para 9.5.15) notes, however, that:

> The reasons that led to that conclusion may have been weakened by subsequent legislation in a number of States which establishes a public fund out of which workers' compensation is paid, which does not place liability on the employer to make the payments, except in limited circumstances, or which provides for periodical payment of benefits. Nevertheless, the view would probably still be taken that it would be startling to find workers' compensation among the types of State benefit envisaged by that particular exclusion. In most instances the question will be comprehensively dealt with in the relevant workers' compensation legislation.

matrimonial home and the family car, are referred to above.[66]

The benefits referred to in section 15C of the *Common Law Practice Act 1867*, including life insurance and superannuation benefits paid or payable to the dependants upon the death of the deceased, must be ignored by the court in the assessment of damages.

7. INCIDENCE OF *LORD CAMPBELL'S* CLAIMS

For the period from 1 July 1989 to 30 June 1993 there were 35[67] *Lord Campbell's* claims for damages resulting from the death of an employee. The claims were made on the Workers' Compensation Board of Queensland in its role as the compulsory insurer of employers. Seven of these 35 claims have been finalised (either by settlement or judgment). Three of those seven cases were finalised for nil payment to the dependants. During the same period, 470 claims other than *Lord Campbell's* claims were made on the Board for fatal injuries occurring on or after 1 July 1989. These figures do not include fatalities occurring outside the worker's compensation scheme (for example, as a result of motor vehicle accidents and medical negligence).

For the period 1 July 1989 to 30 April 1993, *Lord Campbell's* claims make up only 6.9% of the claims for compensation at the Workers' Compensation Board which arose when an employee died as a result of injuries sustained "out of or in the course of the worker's employment".[68]

The Commission understands that very few *Lord Campbell's* claims are decided by the Courts.[69] Most claims settle. Some are not pursued by the dependants.

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66 See p 14 above.

67 These statistics have been provided by the Workers' Compensation Board of Queensland. Existing claims comprise claims where the injury causing death was on or after 1 July 1989, up to and including 30 June 1993. The total number of common law claims (injuries and death) made on the Board, including Lord Campbell's claims between 1 July 1989 and 30 June 1990 was 5,595 (at a steadily increasing rate each year). The number of statutory claims for workers' compensation benefits over the same period totals 323,586. The percentage of statutory claims which proceed to common law has risen steadily over that period:

1989-1990	...	1.36%
1990-1991	...	1.63%
1991-1992	...	1.94%
1992-1993	...	1.97%

68 S5.1 *Workers' Compensation Act 1990*.

69 In recent years, there have been only two cases where the Workers' Compensation Board has been the insurer where judgments have been handed down in relation to Lord Campbell's claims. This information was provided by the Workers' Compensation Board of Queensland.

CHAPTER 4

THE RIGHTS OF DE FACTO PARTNERS IN OTHER JURISDICTIONS

The position of de facto partners in Queensland stands in stark contrast to the position in all other Australian jurisdictions, and in other common law jurisdictions, such as the United Kingdom, in which de facto partners of people killed as a result of another's wrongdoing are entitled to take action against the wrongdoer for damages. The following is a summary of the position in each of those jurisdictions.

1. UNITED KINGDOM

The current United Kingdom legislation provides that the action available under that Act shall be for the benefit of the "dependants" of the deceased.[70]

"Dependants" is defined to include any person who:[71]

(i) was living with the deceased in the same household immediately before the date of the death; and

(ii) had been living with the deceased in the same household for at least two years before that date; and

(iii) was living during the whole of that period as the husband or wife of the deceased.

2. NEW SOUTH WALES

Section 4(1) of the *Compensation to Relatives Act 1897* provides that every action under that Act may be for the benefit of the wife or husband of the deceased, and wife or husband are defined to include de facto wife or de facto husband.[72]

De facto wife and de facto husband are further defined to mean a woman or man, as the case may be, who immediately before the date of death of the deceased (who must be the opposite sex to the de facto) lived with the deceased as his wife or her husband, as the case may be, on a bona fide domestic basis, although not

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70 S2 *Fatal Accidents Act 1976* (UK).

71 Id s1(3).

72 Ss4(1), 7 *Compensation to Relatives Act 1897* (NSW).

married to him or her.[73]

3. TASMANIA

Under the Tasmanian *Fatal Accidents Act 1934*, any member of the family of the deceased (which includes a de facto spouse) may benefit from an action taken under the Act.[74]

A "de facto spouse" is defined as a person:[75]

> (a) who co-habited with another person of the opposite sex as the spouse of that other person, although not legally married to that other person, for at least three years immediately before the death of that other person; and
>
> (b) who was principally dependent on that other person for financial support at the time when a wrongful act, neglect or default occurred in respect of that other person.

Notably, the Court has a discretion to treat a person as a de facto spouse for the purposes of the Act, if it is satisfied, taking all the circumstances of the case into account, that it is proper to do so.[76] In this regard, a person may apply to the Court to be treated as the de facto spouse of a deceased person, if that person would have been the de facto spouse of the deceased person but for the period during which the persons co-habited.[77] The executor or administrator of the deceased person may also apply for a determination in this regard.[78]

4. SOUTH AUSTRALIA

An action under the South Australian *Wrongs Act 1936* may be for the benefit of a spouse of the deceased.[79]

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73 S7 *Compensation to Relatives Act 1897* (NSW).

74 Ss3, 5 *Fatal Accidents Act 1934* (Tas).

75 Id s3.

76 Id s3A(4).

77 Id s3A(2).

78 Id s3A(3).

79 Ss3(1), 20(1) *Wrongs Act 1936* (SA).

A "spouse" is defined to include any person who was a "putative spouse", as defined in the *Family Relationships Act 1975*, on the day on which the cause of action arose, .

"Putative spouse" is defined in the *Family Relationships Act 1975* as follows:[80]

> A person is, on a certain date, the putative spouse of another if he is, on that date, cohabiting with that person as the husband or wife *de facto* of that other person and–
>
> (a) he–
>
> (i) has so cohabited 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 cohabited with that other person for periods aggregated not less than five years;
>
> or
>
> (b) a child, of which he and that other person are the parents, has been born (whether or not the child is still living at the date referred to above).

5. WESTERN AUSTRALIA

The Western Australian *Fatal Accidents Act 1959* states that every action brought under the Act shall be for the benefit of the "relatives of the deceased".

"Relative" is defined in the Act to include:

> any person who, although not married to the deceased person-[81]
>
> (i) lived with the deceased person as husband or wife of the deceased person on a permanent and bona fide domestic basis immediately before his or her death, if the deceased person left any dependant who is the child of that union; or
>
> (ii) lived with the deceased person as husband or wife of the deceased on a permanent and bona fide domestic basis for not less than three years, if the deceased person did not leave any dependant who is a child of that union.

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[80] S11 *Family Relationships Act 1975* (SA).

[81] S6(1)(c) *Fatal Accidents Act 1959* (WA) referring to Sch 2 of the Act.

6. NORTHERN TERRITORY

An action may be brought under the Northern Territory's *Compensation (Fatal Injuries) Act 1974* for the benefit of those members of the deceased person's family who sustained damage by reason of the death.[82] For the purposes of the Act, a member of the deceased person's family includes the surviving wife or husband of the deceased person and the following persons are to be treated as the wife or husband of a deceased.[83]

> A person who:
>
> (i) although not legally married to the deceased person, was, immediately before the death of the deceased person, living with the deceased person as wife or husband, as the case may be, on a permanent and bona fide domestic basis; or
>
> (ii) being an Aboriginal, has entered into a relationship with another Aboriginal that is recognised as a traditional marriage by the community or group to which either Aboriginal belongs.

7. AUSTRALIAN CAPITAL TERRITORY

In the Australian Capital Territory, the *Compensation (Fatal Injuries) Act 1968* provides that an action shall be for the benefit of those members of the deceased person's family who sustained damage by reason of his or her death, which is defined to include:[84]

> A person who, although not legally married to the deceased person, was immediately before the death of the deceased person living with the deceased person as wife or husband, as the case may be, on a permanent and bona fide domestic basis.

8. VICTORIA

The Victorian *Wrongs Act 1958* provides that an action under the Act shall be for the benefit of the "dependants" of the person whose death has been caused. "Dependants" is defined to mean:[85]

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82 S8(2) *Compensation (Fatal Injuries) Act 1967* (NT).

83 Id s4(3)(c).

84 S2(h) *Compensation (Fatal Injuries) Act 1968* (ACT).

85 S17(2) *Wrongs Act 1958* (Vic), introduced by the *Wrongs (Dependants) Act 1982*.

> such persons as were wholly, mainly or in part dependent on the person deceased at the time of his death or who would but for the incapacity due to the injury which led to the death have been so dependent.

9. INCONSISTENCIES BETWEEN JURISDICTIONS

As can be seen from the above description, there is no consistency in other Australian jurisdictions or the United Kingdom regarding the definition of a "de facto partner". For example, some jurisdictions require a period of cohabitation with a partner of the opposite sex for a person to be considered that other person's de facto partner. In other jurisdictions "dependency" on the deceased, whether financial or otherwise, at the time of death is all that must be shown.

However, in all those jurisdictions de facto partners, however defined, are entitled to bring actions under the equivalent of Queensland's *Common Law Practice Act 1867*.

The differences in the definitions between jurisdictions are highlighted in the following summary of the requirements to be satisfied for a de facto partner to be entitled to take action under the relevant legislation.

10. SUMMARY OF WRONGFUL DEATH LEGISLATION REQUIREMENTS FOR DE FACTO PARTNERS TO TAKE ACTION

	Act	Gender	Cohabitation	Dependence	Other
NSW	*Compensation to Relatives Act 1897*	De facto must be opposite gender to deceased	Cohabitation immediately prior to death	Not required	Nil
Vic	*Wrongs Act 1958*	De facto may be any gender	Not required	De facto must be wholly, mainly or in part dependent on deceased at time of death, or would have been but for preceding incapacity	Nil
SA	*Wrongs Act 1936*	De facto arguably must be opposite gender to deceased*	Cohabitation when cause of action arose **and**, if no child, either (a) 5 years continuous cohabitation prior to cause of action or (b) 5 years aggregate cohabitation during 6 years prior to cause of action	Not required	De facto may claim if there is a child of the union
WA	*Fatal Accidents Act 1959*	De facto arguably must be opposite gender to deceased*	Cohabitation immediately prior to death and, if no dependent child, for at least 3 years	Not required	De facto may claim if there is a dependent child of the union
Tas	*Fatal Accidents Act 1934*	De facto must be opposite gender to deceased	Cohabitation for at least 3 years prior to death (subject to general discretion of court)	De facto must have been principally dependent on deceased for financial support at time of wrongful act	Court has general discretion to determine a person to be a de facto partner
NT	*Compensation (Fatal Injuries) Act 1974*	De facto arguably must be opposite gender to deceased*	Cohabitation immediately prior to death unless traditional aboriginal marriage	Not required	De facto may claim if in a traditional aboriginal marriage
ACT	*Compensation (Fatal Injuries) Act 1968*	De facto arguably must be opposite gender to deceased*	Cohabitation immediately prior to death	Not required	Nil
UK	*Fatal Accidents Act 1976*	De facto arguably must be opposite gender to deceased*	Cohabitation for at least 2 years immediately prior to death	Not required	Nil

* It is arguable that use of the terms "wife" and "husband" in the legislation includes people of the same sex, although for the purposes of this Report, the terms have been taken to connote that the de facto partner must be of the opposite gender to his or her partner to be able to claim.

CHAPTER 5

THE NEED FOR REFORM

1. INTRODUCTION

The aftermath of the Moura mining disaster in August 1994 highlighted a potentially serious injustice to surviving partners of de facto relationships in Queensland. Four of the eleven men killed in the disaster were in de facto relationships at the time of the disaster. In one case the de facto relationship had lasted fourteen years and the couple had four children.[86]

Married wives of victims of the disaster are automatically entitled to institute common law proceedings pursuant to the *Common Law Practice Act 1867*[87] for damages irrespective of the duration of the marriage, irrespective of whether the husband and wife had been co-habiting at the time of the disaster and irrespective of whether there were children of the marriage.

There is a growing body of opinion in Australia that people who were in genuine de facto relationships with victims of fatal accidents should be in no worse position than the widows or widowers of victims of fatal accidents.[88] Both groups of surviving partners have suffered a catastrophic change in their family circumstances as the result of a wrongdoing of another and - apart from the legal recognition afforded to their respective relationships - are in no different situation to the other.

The Commission believes that Australians are now also far more aware of the injustices that may result from continued discrimination against people in same-sex relationships.[89] Commitment and inter-dependence are not qualities confined to the traditional heterosexual family unit. Nor are the financial, emotional and social consequences of the sudden death of a partner necessarily any less serious for a surviving partner of a same-sex relationship than for a surviving partner of a

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86 See *Mines walk-out threat* The Courier-Mail 11 October 1994 at 1.

87 S13 *Common Law Practice Act 1867* (Qld).

88 Note, at least 9.6% of Queensland couples live in a heterosexual de facto relationship (1991 Census of Population and Housing: ABS Catalogue No. 2722.3). For the purposes of the 1991 Census, couples were classified as being in a de facto relationship if the parties declared that they were in such a relationship, the parties were 15 years of age or over and, the parties were not of the same gender. It is understood that the Bureau proposes to classify same-sex couples as being in a de facto relationship in the next Census.

89 For example, instance the public debate concerning Tasmanian criminal laws discriminating against male homosexuals which resulted in the introduction of over-riding Commonwealth legislation. *The Human Rights (Sexual Conduct) Bill 1994* (Cwth) provides that sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights. The Bill has passed through the House of Representatives but is yet to be passed by the Senate.

heterosexual relationship. Such a catastrophic event should evoke the same compassion for all surviving partners irrespective of the nature of the relationships they had with their deceased partners.

2. SUBMISSIONS

Consultation with the general public prior to the Draft Report was necessarily limited and selective and resulted in only 3 written submissions[90] although the Commission was able to consult verbally with a number of other interested individuals and organisations. Since publishing and advertising the Draft Report the Commission received a further 38 submissions.

Although the submissions received may not be statistically significant they do provide valuable opinion and comment on the Commission's preliminary recommendations.

Twenty-five submissions were supportive of or silent as to the inclusion of de facto partners in section 13 of the *Common Law Practice Act 1867*. Twenty-nine submissions objected to a definition of "de facto relationship" which included same-sex couples. Six submissions openly supported the inclusion of same-sex couples - one of those submissions being from an organisation representing approximately 250,000 people in Queensland.

Given the relatively small number of submissions received in response to the Commission's advertisement, it is difficult to determine what weight should be given to the number in favour of and against the Commission's preliminary recommendations. It could be argued that the silence of an overwhelming majority of people on the issues raised indicates a general lack of concern with what has been proposed. Of course, it is possible that the contrary argument could be advanced. The Commission has therefore considered each submission on its merits and has based its final recommendations on what is considers to be just and, as far as possible, consistent with other relevant legislative responses to de facto relationships.

The submissions have addressed each of the issues covered by the Commission's preliminary recommendation, that is:

(a) Inclusion of De Facto Partners in Section 13 of the *Common Law Practice Act 1867*

The Law Society of Queensland, whose members represent both plaintiffs and defendants in personal injury and wrongful death litigation, has submitted to the Commission that the current situation is anomalous and unjust. The Bar

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90 The Law Society of Queensland; The Bar Association of Queensland and the Australian Council of Trade Unions. Those original submissions were included in the Appendix to the Draft Report.

Association of Queensland also sees no good reason for excluding de facto partners.

The Australian Council of Trade Unions has also emphasised the injustice of the current law.

Insurance bodies which are primarily interested in claims resulting from motor vehicle accidents[91] have presented the Commission with differing opinions as to the effect of a change in the law allowing surviving de facto partners to make a wrongful death claim. One organisation informed the Commission that such a reform would be unlikely to result in very many potential claims. Another organisation, however, predicted a massive increase in claims - particularly given the fact that most motor vehicle accidents involve people in the 18 to 25 year age group and that many of those people would have been in some form of relationship. The fear was expressed that whether or not partners considered their relationship to be permanent, the surviving partner would have a great incentive to exaggerate the length and the level of commitment involved in the relationship. Nevertheless, the surviving partner would have to establish that he or she was dependent on the deceased and suffered pecuniary damages as a result of the death.

Consultation with interstate insurance bodies indicates that, at least in relation to fatal accidents occurring in the work place, no other Australian jurisdiction has experienced serious problems with the inclusion of de facto partners in the category of persons entitled to institute a claim for wrongful death. Authorities concerned with the payment of compensation to relatives or dependants of victims of workplace fatal accidents also noted the low number of fatal accidents now occurring throughout Australia. Of more concern may be the inclusion of de facto partners of the victims of fatal motor vehicle accidents in the list of possible claimants. Although this is the case in all other Australian jurisdictions, either under the equivalent of Queensland's *Common Law Practice Act 1867* or under a compulsory third party insurance scheme, it is unclear without more research what proportion of the total number of claimants for death benefits are de facto partners.[92]

The Commission has received 16 submissions which argue against the inclusion of de facto partners in section 13. These submissions are based primarily on the belief that the institution of marriage should be upheld - for example:

> "[recognition of de facto relationships is] grossly discriminatory to married couples and inconsistent with the general understanding of the sanctity of

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91 And, to a far lesser extent, claims resulting from public liability.

92 It is known however, that at least 9.6 per cent of couples in Queensland live in a de facto relationship and that there is no obvious reason why wrongful deaths in Queensland should not reflect that proportion. Australian Bureau of Statistics 1991 Census of Population and Housing: ABS Catalogue No. 2722.3.

marriage"[93]

"I believe we as a society need to strengthen traditional marriage and family life and I ask that the desire to treat grieving partners with compassion be recognised without compromising marriage"[94]

One submission[95] also expressed the view that some couples do not expect to have the same legal rights as legally married couples, "but are quite happy with this knowledge".

The Commission respects such beliefs but does not consider that they justify the continuation of the current injustices resulting from the failure to recognise genuine cases of loss resulting from the wrongful death of a partner - whether or not the partners were legally married. The Commission is not suggesting that de facto relationships be generally equated with marriages, but is merely recognising the specific economic injustice which presently may befall a person whose de facto partner is killed as a result of the wrongful act of another person.

The Commission is of the view that to make provision for a dependent de facto partner in the event of the death of the breadwinner does not compromise the sanctity of marriage. Rather, it simply addresses an obvious injustice. The Commission considers it anomalous that a wrongdoer who causes the death of a breadwinner may escape liability for compensating the breadwinner's dependent partner on the basis that the breadwinner and the dependent partner were not legally married.

Queensland is the only jurisdiction in Australia which denies the de facto partner of a person killed as the result of the wrongful actions of another the opportunity to commence an action for damages against the wrongdoer.

(b) The Definition of "De Facto Partner" and "De Facto Relationship"

One submission[96] suggested that provision should be made for partners of relationships which ceased prior to the death. The respondent stated:-

"deserted people with children are frequently not being given support, which they are legally entitled and that these "debts" should be taken into account in settling any claims."

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93 Submission no. 3.

94 Submission no. 4.

95 Submission no. 3.

96 Submission no. 5.

The *Common Law Practice Act 1867* does not even make such a provision for ex-wives and ex-husbands.

During the lifetime of the non-custodial parent, a property settlement between the partners to the marriage can be made and maintenance for the children of the relationship can be sought pursuant to the *Family Law Act 1975* (Cwth).[97] The Commission has recommended in an earlier Report that de facto partners should also be entitled to claim maintenance on the breakdown of the relationship.[98]

If section 13 of the *Common Law Practice Act 1867* entitled all **dependants** of the deceased to claim compensation (as is the case in Victoria[99]), it might be possible for former de facto partners, not in a relationship with the deceased immediately prior to his or her death, to claim compensation. However, the Commission's terms of reference are restricted to de facto relationships existing at the time of death. Whether or not other dependants should be entitled to claim is an important issue which needs to be addressed by Government. Any number and variety of people other than the deceased's "wife, husband, parent and child"[100] may have been dependent on the deceased - such as siblings, other relatives or friends who have been in a property sharing situation with the deceased.

A number of submissions commented on the Commission's use of the words:-

> "live in a relationship like the relationship between a married couple",

when defining a "de facto relationship".

The Commission acknowledges that for people who cannot marry (for example, those of the same gender), and for those who choose not to marry, the words may appear inappropriate. For those who consider marriage the only adult union which should be recognised by law, the words might also be considered offensive. These words were used in the Commission's 1993 Report on *De Facto Relationships*[101] after consultation with the Office of Parliamentary Counsel. They were intended to limit the coverage of the recommendations in that report to adults living in a relationship which includes the elements most commonly associated with married couples, but without having been formally married. The definition does not

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97 Maintenance of ex-nuptial children was referred by Queensland to the Commonwealth by *Commonwealth Powers (Family Law - Children) Act 1990* and was adopted by the Commonwealth by the *Family Law Amendment Act 1987*. See also *Child Support (Assessment) Act 1989* (Cwth).

98 *De Facto Relationships* Report No. 44 1993.

99 See p 22 above.

100 S13 *Common Law Practice Act 1867*.

101 Report No. 44.

therefore extend to other types of relationships such as students sharing accommodation, siblings living together or friends sharing a house. The Commission does not have a current reference to consider the inclusion of such people in the list of those able to benefit from a wrongful death action. The Commission therefore considers the definition currently proposed to be the most appropriate to exclude those relationships which do not fit the common perception of a de facto relationship, such as siblings living together.[102]

All but six submissions received in response to the Draft Report[103] commented on the inclusion of same-sex couples in the definition of "de facto relationship". Most respondents objected to the inclusion of such couples, basing their objections on moral or pro-family bases, such as:-

> "The 'Year of the Family' would be best remembered for encouraging that which our children need, and in many cases are crying out for ... a family unit in the real sense. Should a person be sufficiently concerned for another of the same gender, those concerns can be materialised via a will."[104]

> "I would find it abhorrent ... People who step outside the natural and moral norm of a marriage must be prepared to forego any benefits under law for such a union."[105]

The Bar Association of Queensland determined that whether or not to include same-sex couples in the definition was essentially a moral issue. Associated with the moral issue is the question whether society would be willing to pay (by way of premiums for compulsory third party insurance and workers' compensation) for claims by partners to same-sex couples. The Association noted:-

> "Whilst it is recognised that society has broadened its views on morality by recognising a family unit as including de facto relationships between members of the opposite gender, the government may think that at this time society is not prepared to financially support through increased premiums the survivor of a relationship of people of the same gender.
>
> Further the present society may simply not recognise the survivor of such a relationship as a surviving family member."

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102 For example, during the Commission's deliberations on the recommendations for the *De Facto Relationships* Report (No. 44 1993) and on the recommendations for the *Intestacy Rules* Report (No. 42 1993).

103 Including submission nos 23, 33, 37.

104 Submission no. 8.

105 Submission no. 6.

The Association concluded that:[106]

> "The inclusion of de facto partners of the same gender as entitled to claim for dependency for wrongful death of their partner is a matter of policy for the government and not one upon which this Association is called upon to comment save for putting some arguments which may be of help to the government or the Commission."

Despite such moral arguments and possible economic implications of including partners of same-sex relationships in section 13 of the *Common Law Practice Act 1867*, the Commission notes that there will be surviving partners of such relationships who will need to resort to social security, at taxpayers' expense, to make ends meet. It could be argued that replacing the financial dependency should be the responsibility of the wrongdoer (and the wrongdoer's insurer) rather than the whole community.

Three submissions, one from an organisation representing some 250,000 Queensland employees, were strongly in favour of the inclusion of same-sex couples in the definition of "de facto relationship".

The Australian Council of Trade Unions, Queensland Branch, noted:

> "The ACTU supports the rights of all workers to be treated in a non-discriminatory manner. Industrial Relations reform is moving towards recognition of many forms of family groupings. It is unlawful to discriminate in employment conditions including dismissal on the grounds of sexuality."[107]

A further submission[108] noted:

> "Any couple needs the security of knowing that the person each loves and depends on will be in a secure position, both legally and financially, in the event of death".

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106 The Association recognised one situation where injustice may be prevented if same-sex relationships are recognised. Where the bread-winner dies leaving a dependent child and a dependent de facto partner of the same sex as the breadwinner, the child may be under-compensated if it was held that the expectation of benefit was to be shared between the child and the other person if there was no right in that other person to make a dependency claim.

107 The ACTU also noted that other State jurisdictions have expanded relevant legislative definitions to include same-sex partnerships (eg *Wrongs Act 1958* (Vic) and *Domestic Relationship Bill 1994* (ACT)).

108 Submission no. 19.

A submission from an organisation[109] gave examples of injustices which may occur under the current law:

> "* A lesbian couple who have been together for five years have a three-year old child who was born to one of them. If one were to die the situation could be:
>
> > If the partner to die were the mother of the child, the child could have a cause of action as a result of the death but the surviving partner would not, resulting in the family unit not receiving an adequate recompense for the wrongful death.
> >
> > If the partner to die were not the mother of the child no cause of action would be open to the surviving partner or the child, leaving them to fend for themselves.
>
> * A male homosexual couple live together sharing assets and income under an arrangement where one has a full-time job and supports the other who may be working part-time or be a student. The full-time worker dies; the surviving partner has no cause of action for financial recompense.
>
> These examples would both, of course, also apply to couple of the other gender.
>
> The need for same-sex couples to have access to Wrongful Death provisions is in fact much greater than for heterosexual couples, since the latter are recognised under the Workers' Compensation provisions and already receive a legislated level of benefit. Same-sex couples do not have any such access and so could be left without any recompense whatever if the provisions are not widened."

Although many of the submissions received expressed strong views against extending the definition of "de facto relationships" to same-gender relationships, the Commission has considered those submissions and is of the view that they are not consistent with the philosophy of State and Commonwealth legislation and the reality of modern society.

(c) The Appropriate Qualifying Period and Exception where there is a Child of the Relationship.

Fourteen submissions commented specifically on the qualifying period.[110] One

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[109] Submission no. 28.

[110] Submissions nos 5, 6, 7, 9, 15, 16, 18, 23, 24, 25, 33, 35, 36, 37.

submission suggested a 3 year qualifying period. The respondent considered one method of overcoming the problem of determining the duration of the relationship:[111]

> "I see no reason that a person wishing to 'enjoy' the benefits we are discussing should not register their relationship. A simple letter signed by both parties held at a central register would be all that was necessary. No letter - no claim."

Although this suggestion might overcome problems of proof of the duration of the relationship and would evidence an understanding of entitlements flowing from the death of one of the partners, it would not overcome the injustice that occurs when - through ignorance of the law, forgetfulness, philosophical or other personal objections to "registering" a relationship - no registration has taken place prior to the death of one partner. The dependency existing prior to death is the most important consideration - not whether the relationship had been formalised by marriage or evidenced by registration.

Seven submissions[112] supported the Commission's alternative preliminary recommendation of a two year qualifying period primarily on the basis that it is a more reasonable period for proving a commitment between parties to the relationship. Most submissions supporting the inclusion of de facto partners within section 13 of the *Common Law Practice Act 1867* did not comment on the appropriate qualifying period. Nor did most comment on the proposed exception for where there is a child of the relationship.

3. QUEENSLAND LAWS RECOGNISING DE FACTO RELATIONSHIPS

Although a wrongful death claim cannot be brought for the benefit of the surviving partner of a de facto relationship,[113] there are a number of other laws in Queensland which do recognise de facto relationships and afford rights to de facto partners which are similar to those afforded to married persons.

(a) Succession Law

Section 41 of the *Succession Act 1981* provides for the Supreme Court, on the application by the spouse, child or dependant of a deceased person, to order provision be made out of the estate of the deceased person for such a spouse, child or dependant. The definition of "dependant" includes -

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[111] Submission no. 5. This view was shared by submission no. 14.

[112] Submission nos 6, 7, 15, 18, 24, 33, 37.

[113] S13 *Common Law Practice Act 1867.*

(b) the parent of a surviving child under the age of eighteen years of that deceased person; ...

(d) a person who -

(i) has lived in a connubial relationship with the deceased person for a continuous period of five years at least terminating on the death of that deceased person; or

(ii) within the period of six years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for periods aggregating five years at least including a period terminating on the death of that deceased person.[114]

(b) Workers' Compensation Legislation

The *Workers' Compensation Act 1990* provides for compensation in respect of the death of a worker to be paid to the worker's legal personal representative, who is to pay or apply the same to or for the benefit of the worker's dependants or other persons entitled to compensation under that Act.[115]

"Dependants" is defined in section 2.1 of the Act to mean such members of the family of a worker as -

(a) in the case of the deceased worker - were wholly or partially dependent on the earnings of the worker at the time of the worker's death, or, but for the worker's incapacity due to injury would have been so dependent;...

"Member of the family" is then defined in section 2.1 of the Act to include a "spouse". The Act provides the following definition of spouse:[116]

"Spouse", in relation to any injured or deceased worker, includes a person who has lived in a connubial relationship with the worker for a continuous period of 1 year at the least immediately preceding the time of the injury to, or the death of, the worker, and who, in the case of an injured worker, continues in that relationship.

De facto partners were first included as persons eligible to be compensated in respect of the death of a deceased person as a result of the *Workers' Compensation Act Amendment Act 1973* which amended the *Workers' Compensation Act 1916* to include a more extensive definition of "dependant". That Act was repealed by the *Workers' Compensation Act 1990.* Under the earlier Act, there was a three year qualifying period rather than the one year period provided

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[114] S40 *Succession Act 1981* (Qld).

[115] S7.9 *Workers' Compensation Act 1990* (Qld).

[116] S2.1 *Workers' Compensation Act 1990.*

for under the current Act. It is not apparent from the second reading speech[117] why that period was reduced.

De facto partners are also provided for in the workers' compensation legislation applicable in all other Australian States and Territories.[118]

(c) Property and Maintenance Disputes

Although there is currently no legislation in Queensland equivalent to the Commonwealth *Family Law Act 1975* to assist de facto couples in resolving property and maintenance disputes, the Commission has previously recommended that there was a need to enact legislation to clarify the law and facilitate a more just and equitable regime for resolving disputes which could arise on the breakdown of de facto relationships.[119]

The Queensland Attorney-General has recently announced the Queensland Government's intention to refer State powers in relation to this matter to the Commonwealth Parliament.

4. QUEENSLAND LAWS RECOGNISING SAME-SEX RELATIONSHIPS

The Queensland Parliament has recognised that:[120]

> everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination.

Further, it has acknowledged the need to protect:[121]

> fragile freedoms... by legislation that reflects the aspirations and needs of contemporary society.

The *Anti-Discrimination Act 1991* (Qld) prohibits discrimination on the basis of,

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[117] Hansard 29 November 1990 at 5606.

[118] See the *Workers' Compensation Act 1987* (NSW), the *Accident Compensation Act 1985* (Vic), the *Workers Rehabilitation and Compensation Act 1986* (SA), the *Workers' Compensation and Rehabilitation Act 1981* (WA), the *Workers Compensation Act 1988* (Tas), the *Work Health Act 1986* (NT), the *Workers Compensation Act 1951* (ACT) and the *Safety Rehabilitation and Compensation Act 1988* (Cwth).

[119] Law Reform Commission Report No. 44 *De Facto Relationships*.

[120] S6 *Anti-Discrimination Act 1991*.

[121] Ibid. See also, Hansard 26 November 1991 at 3193.

among other attributes, "lawful sexual activity".[122]

Although that Act is primarily concerned with regulating the conduct of individuals who discriminate against other individuals on the basis of one or more of a number of attributes, the philosophy supporting such legislation can equally be used to support removing the discriminatory effect of other Queensland statutory provisions such as section 13 of the *Common Law Practice Act 1867*.

A general exemption from the operation of the *Anti-Discrimination Act 1991* is found in section 106(1)(a) which states:

> (1) a person may do an act that is necessary to comply with, or is specifically authorised by -
>
> (a) an existing provision of another Act;

This implies that there are circumstances where discrimination is justifiable. However, it can be truly justified only if the discriminatory provisions have been carefully scrutinised and upheld on the basis of some important public interest. To the Commission's knowledge such an exercise has not taken place with respect to section 13 of the *Common Law Practice Act 1867*. If discrimination is to continue without being examined and justified then the individual whose rights are being offended by legislation could rightfully claim that such rights are indeed "fragile".

In relation to same-sex parties to a de facto relationship, it could be argued that they are at a greater disadvantage or are subject to more deeply entrenched discrimination than heterosexual parties to a de facto relationship are - because same-sex partners are unable to marry, and thus formalise their relationship and to assume the rights and responsibilities of married people.

5. CONCLUSIONS

The Commission has recognised as a result of work undertaken in relation to other references that there is no longer any proper justification for drawing a general distinction between the rights and obligations of de facto partners and the rights and obligations of married persons.[123] Nor is there any proper justification for discriminating against partners in a same-sex relationship. Clearly, the present distinction in relation to the eligibility of a person to benefit by the bringing of a wrongful death claim is one which may cause grave injustice and economic hardship to de facto partners who suffer the death of their partner.

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[122] Sexual relationships between consenting male adults in private are no longer unlawful (s7 of *Criminal Code and Another Act Amendment Act 1990*). Sexual relationships between consenting adult females in private have never been unlawful. See also *The Human Rights (Sexual Conduct) Bill 1994* (Cwth) referred to in note 89, above.

[123] See Queensland Law Reform Commission Report No 44 *De Facto Relationships*, June 1993 at 50-53 and Queensland Law Reform Commission Report No 42 *Intestacy Rules*, June 1993 at 20.

Further, the Commission is of the view that there is a strong argument based on consistency for including de facto partners as beneficiaries of wrongful death actions having regard to-

- the current payment of compensation for the benefit of a de facto partner under the *Workers' Compensation Act 1990* (and under the equivalent legislation in all other Australian jurisdictions);

- the enactment of legislation in all other jurisdictions in Australia to enable de facto partners to benefit from actions brought for the wrongful death of their partners;

- the fact that in a number of significant respects de facto relationships are already recognised or have been recommended for recognition under Queensland laws.

The main argument against the inclusion of de facto partners as persons for whom a wrongful death action can be brought is that it could result in an increase in unmeritorious claims. However, the Commission has been informed by a representative of an interstate motor vehicle insurer that that organisation has not experienced any significant increase in the number of wrongful death actions since the introduction in that state of legislation enabling a de facto partner to bring such a claim.

Other factors in support of the inclusion of de facto partners in section 13 of the *Common Law Practice Act 1867* have been identified by other Australian law reform agencies[124] which have considered this matter in the context of their particular state's relevant legislation. All agencies strongly recommended the inclusion of de facto partners in their respective state's equivalent to the *Common Law Practice Act 1867* - and each of those states has subsequently implemented the recommendation. The factors identified by other law reform agencies are set out below. This Commission wholly endorses the relevance of each to the current situation in Queensland:

(a) The purpose of the legislation is to protect the family unit. The legislation enables members of the family to obtain compensation from a wrongdoer (in practice, in most cases, the wrongdoer's insurer) for loss of support by a breadwinner.

(b) A surviving de facto partner is likely to suffer the same financial loss as a surviving spouse.

124 The Law Reform Commission of Western Australia *Report on Fatal Accidents December 1978*; New South Wales Law Reform Commission *Report on De Facto Relationships* 1983; Law Reform Commission of Tasmania, *Compensation of Personal Injuries Arising out of Tort* 1980. See also Law Reform Committee of South Australia *Report relating to the Fatal Accidents Provisions of the Wrongs Act 1936*, 1981.

(c) The entitlement to compensation should not be confined to a de jure or legitimate family, but should also include de facto family units. It is the existence of a relationship of dependence and the effect which the death of the breadwinner can have upon it which is most important.

(d) The policy to include de facto partners is consistent with the policy of all Australian workers' compensation schemes which allow a dependent de facto partner compensation for the loss of a breadwinner in a work-related accident.

(e) Under the *Common Law Practice Act 1867* the children of a de facto relationship can claim in respect of the death of either of their parents. The children are, broadly speaking, entitled to enjoy the same material standard of life as they would have enjoyed if their deceased parent had continued to support them, and the wrongdoer must pay them enough to maintain them in the enjoyment to which the financial support of their deceased parent had accustomed them.[125] A result of this, explains the Law Reform Commission of Western Australia, is that:[126]

> The children must be compensated not only for the cost of their food and clothing but also for the whole of the cost for the rent of the home and its services such as lighting and heating, even though these are shared by the mother.[127]

Thus, permitting the de facto partner to claim would result, at least to some extent, merely in the de facto partner being compensated directly instead of indirectly.

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125 *K v JMP Co Ltd* [1976] QB 85; [1975] 1 All ER 1030.

126 *Report on Fatal Accidents* 1978 at 16.

127 The Law Reform Commission of Western Australia considered that the defendant would have to pay the cost of the surviving partner's food and clothing, if without that payment the care which the surviving partner was previously able to give to the children would be diminished despite the compensation otherwise payable to the children. In *K v JMP Co Ltd*, a claim by the children for the mother's food and clothing was rejected because she was entitled to a supplementary benefit under the *Ministry of Social Security Act 1966* intended to pay for her food and clothing. However, under s15C of the *Common Law Practice Act 1867* (Qld) social security payments may not be taken into account in assessing damages and in Queensland, given the same facts, the children's claim for her food and clothing would probably have succeeded. However, even in Queensland such a decision would not have indirectly placed the de facto partner in the same position as a lawful partner. If he or she was a lawful spouse he or she could expect to have been supported for many years to come and any multiplier used in his or her case, in that capacity, would be quite different from and much larger than any used in the case of his or her support as a parent until the children became independent. This would appear to address concerns expressed by the Bar Association of Queensland with the Commission's discussion of this point in its Draft Report. See Law Reform Commission of Western Australia Report on *Fatal Accidents* 1978 at 16, 17 and note 32.

CHAPTER 6

OPTIONS FOR REFORM

The Commission has found no convincing argument against the inclusion of the surviving partner of a de facto relationship in the list of those who are able to commence an action for damages for wrongful death. Not to include such people would be to perpetuate a grave injustice.

1. THE DEFINITION OF A "DE FACTO RELATIONSHIP"

The Commission's preferred definition of "de facto relationship" is the definition adopted for the purposes of the Commission's *Report on De Facto Relationships*[128] and for the draft legislation included in that Report:

> "A 'de facto relationship' is the relationship between 2 persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple."

"De facto partner" is defined to mean a person who lives or lived in a de facto relationship.

2. QUALIFYING PERIODS OR CIRCUMSTANCES

De facto relationships have been given legal recognition or have been recommended for legal recognition in a variety of contexts. The duration of the relationship and other factors which must be taken into account before the de facto relationship becomes relevant for various purposes differ according to the context.

(a) Property Settlements

For property settlements in relation to de facto relationships which have broken down, the Commission's De Facto Relationships Report[129] recommended that a Court could make orders under the proposed legislation only if:

(i) the de facto partners have lived together in a de facto relationship for at least 2 years; or

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[128] Report No. 44 June 1993. See clause 5 of the *De Facto Relationships Bill* in Appendix B of the Report.

[129] Pending the implementation of the Commission's recommendations in that Report, de facto partners in Queensland have no specific property rights upon the breakdown of their relationship.

(ii) there is a child of the de facto partners under 18; or

(iii) the de facto partner who applied for the order had made substantial relevant contributions and if failure to make the order would result in serious injustice to the de facto partner.

The Commission considered arguments supporting a 2 year, 3 year and 5 year qualifying period in relation to property settlements upon the breakdown of de facto relationships. The majority of the Commission favoured a 2 year period because:

* The 2 year period applies in the de facto relationships legislation in the other jurisdictions;[130]

* The 2 year period which is the relevant period in the New South Wales, Northern Territory and Victorian legislation[131] appears to be working satisfactorily. The Commission is not aware of any criticism of the 2 year period used in the legislation, nor has it been suggested in any of the published material that the 2 year period has led to the institution of unmeritorious claims;

* If the period were different in Queensland from the existing de facto relationships legislation in other jurisdictions, parties would be encouraged to forum shop;

* If the requisite period were 5 years, people who were living in de facto relationships for 2 to 5 years may not have access to the legislation. The benefits of the proposed legislation would, therefore, be available to fewer people in the community. Such people would be restricted to their rights at common law which, on the breakdown of a de facto relationship, are inadequate;

* An argument used in support of a 5 year period is that this is the period now used in Part IV - Family Provision, of the *Succession Act 1981* (Qld), and that uniformity in legislation should be maintained. While uniformity of legislation is certainly a desirable objective, uniformity on this point does not currently exist in the legislation in Queensland.[132] Under the *Workers' Compensation Act 1990* (Qld), for example, the relevant period to satisfy the term "spouse" is 1 year;[133]

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[130] S17 *De Facto Relationships Act 1984* (NSW), s16 *De Facto Relationships Act 1991* (NT) and s281 *Property Law Act 1958* (Vic).

[131] Ibid.

[132] See Ch 5 above.

[133] S2.1 *Worker's Compensation Act 1990* (Qld).

* Although the 2 year period would allow a person to claim an interest in property or maintenance, the court would take into account the length of the relationship in deciding whether or not to make a property or maintenance order.

(b) Intestacy

In the context of a person having died without having made a will or an effective will, in its Report on *Intestacy Rules*[134] the Commission recommended that a de facto partner should not have an entitlement under the intestacy unless he or she had been in a de facto relationship with the deceased for at least 5 years. A 5 year period was consistent with existing provisions under the *Succession Act* 1981 relating to Family Provision.

Where the surviving partner is the parent of the child under 18 years of age and was living on a genuine domestic basis with the intestate at the time of death, no qualifying period would be required under the Commission's Intestacy Rules recommendations.

(c) Family Provision

Under the *Succession Act 1981*[135] if any person dies whether or not having left a will or an effective will and, as a result, inadequate provision has been made from the estate for the proper maintenance and support of the deceased person's spouse, child or other dependant (as defined), the Court may in its discretion order that such provision as the Court thinks fit be made out of the deceased person's estate for the spouse, child or dependant. "Dependant" is defined so as to include:[136]

> (a) a person who:
>
> (i) has lived in a connubial relationship with that deceased person for a continuous period of 5 years at least terminating on the death of that deceased person; or
>
> (ii) within the period of six years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for periods aggregating five years at least including a period terminating on the death of that deceased person.

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[134] Report No. 42.

[135] Ss40-44.

[136] S40 *Succession Act 1981*.

(d) Workers' Compensation

Under the *Workers' Compensation Act 1990* for a "spouse" to qualify as a claimant he or she must have lived in a "connubial relationship" with the worker for a continuous period of one year at least before the death.[137] It is unclear why the period of one year was chosen.

(e) Inconsistencies between Qualifying Periods

The different qualifying periods for de facto relationships appearing in different Queensland statutes or proposals for reform, appear at first glance to be anomalous. The different periods referred to above are:

*	For property settlement upon breakdown of a de facto relationship (recommended)	2 Years
*	For rights of the surviving de facto partner upon an intestacy (recommended)	5 Years
*	For Family Provision applications by surviving de facto partners under the *Succession Act 1981*	5 Years
*	For compensation under the *Workers' Compensation Act 1990*	1 Year

It is therefore possible for a surviving partner of a de facto relationship of 12 months duration to claim compensation under the *Workers' Compensation Act 1990* - but to have no right to apply for Family Provision.

The different periods were introduced, or recommended, at different times and in various contexts and cannot be fully reconciled. The recognition of de facto partners for the purposes of Family Provision was introduced in 1981 - and at that time this was seen as a ground-breaking move. A 5 year period may very well have been considered as a trade-off for what was, at the time, a relatively liberal move to recognise de facto partners.

The Commission's recommendations relating to property settlement upon the breakdown of de facto relationships and Intestacy were to some extent influenced by the law of Family Provision. In both Intestacy and Family Provision, claims are made on limited funds (the deceased's estate) and a number of people may have claims on the same funds (for example, in relation to Family Provision there may be other family provision claims as well as testamentary bequests under a valid will). To have too few restrictions on those entitled to claim on or share in the estate could lead to insufficient funds going to the most deserving.

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[137] S2.1 *Workers' Compensation Act 1990*.

Also, with Intestacy and Family Provision - if the qualifying period for de facto relationships is too short, some people may attempt to become or to be seen as dependent upon sick or elderly people with a view to benefiting financially from their partner's death. Again, the result may be that other more worthy relatives or dependants will miss out on their appropriate share of the estate.

The Commission is currently co-ordinating an Australia-wide project on uniform succession law. It may be that during the course of that project, other qualifying periods will be recommended for de facto partners under an intestacy, and for de facto partners claiming Family Provision. The law relating to de facto relationships is relatively recent and will necessarily be subject to change as community attitudes on the subject become more obvious and a history of experience with the practical operation of the law develops.

The Commission justified the different qualifying periods recommended by the *De Facto Relationships Report* and the *Intestacy Report* as follows:[138]

> De facto relationships legislation in other jurisdictions is concerned with the resolution of property claims between partners to a de facto relationship who separate whilst alive. Intestacy rules are less flexible and cannot take account of any suggested wishes of the deceased person.... It is particularly difficult after the death of one partner to prove a de facto relationship which has endured only for a brief period.

Most people who die in Australia are elderly, and die from natural causes.[139] Thus the Rules of Intestacy and Family Provision have been developed over many years to cater for the dependants and families of elderly people dying from natural causes. In most cases therefore, the death is not totally unexpected and there may have been some thought given to the distribution of the estate (for example by will) and for the care of dependants. Further, it is unlikely that a survivor's economic future in these circumstances would have been dependent on the future income of the deceased. It is likely the deceased was retired and lived off either investment income or a pension, or both.

However, for families and dependants of people killed in an accident caused by the fault of another, the death will be an unexpected catastrophe. Most probably the person killed would have been of working age and his or her income would have been used to support in whole, or in part, family members and others. Unless dependants were insured against the consequences of the death, they could very well suddenly find themselves in the position, because of the wrong-doing of another, of having no financial support other than social security. This would almost certainly be the position of surviving de facto partners in Queensland.

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[138] Report No. 42 at 23.

[139] The average age for deaths amongst males in Australia in 1991 was 72.2 years and for women, 78.8 years (Australian Bureau of Statistics, *Deaths, Australia, 1991* (Cat. No. 2203.0) at 1).

(f) Work-related and Wrongful Death

For deaths resulting from work-related accidents de facto partners of at least one year's standing are entitled to claim workers' compensation. That relatively short qualifying period recognises the unnatural, catastrophic nature of the accident and the immediate financial impact it has on all dependants - irrespective of the formalities of marriage.

A successful claim for compensation from the wrongdoers has the same result as a successful workers' compensation claim. It transfers the financial responsibility of providing for dependants from the deceased breadwinner to another party - in this case the actual wrongdoer (or his or her insurer). It also avoids having to pass the cost of dependency on to the general community via social security and it helps to maintain a standard of living for surviving dependants which could not otherwise be guaranteed.

The Commission can find no reason why the "qualifying" periods under section 13 of the *Common Law Practice Act 1867* and under the *Workers' Compensation Act 1990* should differ.

It would be anomalous if a surviving partner of a relationship of at least one year's standing could claim workers' compensation benefits as a result of his or her partner's death but could not benefit from a common law action for wrongful death unless their relationship had been for a longer period. A lawful spouse is entitled to both forms of compensation without a qualifying period. A de facto partner may be in an identical position to the lawful spouse but is currently denied the opportunity to seek appropriate compensation for the wrongful death of his or her partner.

(g) A Child of the De Facto Parties

In its previous Reports relating to de facto relationships,[140] the Commission has recommended that a person who is the parent of a child of the deceased person should be classified as a de facto partner of the deceased if he or she had been in a relationship with the deceased immediately prior to the death, irrespective of the duration of the relationship. The responsibilities which attach to child-rearing are sufficiently important and onerous to justify over-riding even a 12 month co-habitation requirement. It should not matter when the child was born or adopted so long as a marriage-like relationship can be shown to have existed immediately prior to the death. A de facto partner who gives birth to a child of the deceased after the death should also be entitled to benefit from a wrongful death claim. Of course, for the purposes of wrongful death actions, financial dependency on the part of the partner will have to be established in addition to being a parent of the deceased's child. Being in a relationship immediately prior to the death, whether it be for 12 months or 2 months, goes some way to authenticating the dependency.

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[140] *De Facto Relationships* Report No. 44 1993; *Intestacy Rules* Report No. 42 1993.

(h) A Discretion in the Court

An alternative proposal considered by the Commission, based on the Tasmanian provision, had the attraction of flexibility to enable the Court to determine that a relationship qualified as a "de facto relationship" after any period. The basic qualifying period suggested was two years - with the possibility of a lesser period being acceptable if obvious injustice would otherwise result.

The major disadvantage of the alternative proposal is lack of certainty as to whether or not a de facto relationship existed at the time of death. It is also inconsistent with section 2.1 of the *Workers' Compensation Act 1990* which specifies 12 months as the qualifying period. As stated above, for work-related accidents, there is no justification for having different qualifying periods for essentially the same claim.

3. RECOMMENDATIONS

The Commission makes the following recommendations:

1. that section 13 of the *Common Law Practice Act 1867* be amended to include the term "de facto partner" in the list of persons to benefit from an action for wrongful death;

2. that "de facto partner" be defined as—

    (a) where the deceased left a dependant who is a child of the parties to the relationship—a person who was in a "de facto relationship" with the deceased person immediately before the deceased person's death;[141] or

    (b) where the deceased did not leave a dependant who is a child of the parties to the relationship—a person who was in a "de facto relationship" with the deceased person for a continuous period of **one year** immediately before the deceased person's death;[142]

    (c) for the purposes of this definition a "child of the relationship" is a child of the deceased person and the "de facto partner" and

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141 Compare *Wrongs Act 1936* (SA) ss20(1), 3A (definition "spouse") and *Family Relationships Act 1975* (SA) s11(1)(b); *Fatal Accidents Act 1959* (WA) s6(1)(c) and Sch 2 para (h)(i).

142 Compare *Wrongs Act 1936* (SA) ss20(1), 3A (definition "spouse") and *Family Relationships Act 1975* (SA) s11(1)(a); *Fatal Accidents Act 1959* (WA) s6(1)(c) and Sch 2 para (h)(ii).

includes a child born after the death.[143]

3. that "de facto relationship" be defined as the relationship between two persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.[144]

   If the Parliament is not prepared to adopt a gender-neutral definition of "de facto relationship", then the definition should be along the lines of the following:

   > "The relationship between a man and a woman who, although they are not legally married to each other, live in a relationship like the relationship between a married couple."

4. that for the sake of consistency, the *Workers' Compensation Act 1990* should be amended so that "de facto partners" and "de facto relationships"are defined in identical terms to the definitions adopted for the *Common Law Practice Act 1867.*

5. that a preferable approach to determining a person's entitlement to benefit from an action for wrongful death is found in the Victorian Wrongs Act 1958. That Act provides that a person's dependency on the deceased prior to his or her death is the sole criterion to satisfy. This approach should be explored in more detail as a potential model for Queensland.

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143 This would include children adopted by the partners and children conceived by use of donor gametes.

144 Clause 5, *De Facto Relationships Bill* (Appendix to Report No. 44).

APPENDIX A

SUBMISSIONS TO THE COMMISSION

Anonymous
Association of the Church of God of Australia
Australian Council of Trade Unions (Qld Branch) - two submissions
Australian Family Association (Townsville Branch)
Australian Family Association (Queensland)
Australian Plaintiff Lawyers' Association
Mr Peter Baade
Bar Association of Queensland - two submissions
Mr J Blake
F G Bowdler
Mr Norman J Byrne
Mr W J Challenger
Mrs E Clair
D Connolly
Mrs Mavis Crane
Mr & Mrs Davis
FAI General Insurance Company Ltd
J W & K L Ferguson
Mrs S Forsyth
Mr J Frame
Mr D Galligan
Gay & Lesbian Welfare Association
Mr Geoff Hoyte
Insurance Council of Australia Ltd
Mr C Landers
Mrs P Lynch
Mr Edward McEvoy-Bowe
Mr J D Moss
Mr N Mullins
Mr Michael O'Meara
A J Parker
Mr L J Rogers
Queensland Law Society Inc. - two submissions
Mrs M A Ross
Mr E Smith
Society of St Vincent De Paul - Kenmore Conference
Ms M Streamer
The Presbyterian Church of Queensland
Mr G G Tomkins

APPENDIX B

ADVERTISEMENT

**"De Facto Relationships
Wrongful Death"**

The Courier-Mail 29.10.94 & 2.11.94

QUEENSLAND LAW REFORM COMMISSION

De Facto Relationships Wrongful Death

Against the background of recent public debate in relation to issues raised by the Moura disaster, the Queensland Law Reform Commission has prepared a draft report on:

(i) whether or not a person who was in a de facto relationship should be able to benefit from a common law action for the wrongful death of his or her partner; and, if so,

(ii) what should be the definition of "de facto partner"/ "de facto relationship".

The Commission provided the Draft Report on these issues to the Attorney-General for consideration by Cabinet on 17 October 1994. The Draft Report included the following preliminary recommendations:

1. The surviving partner in a de facto relationship should be able to benefit from an action for wrongful death.
2. De facto partner should be defined as:
   (i) a person who had a dependant child by the deceased person and who was living in a "de facto relationship"" with the deceased person immediately prior to the deceased person's death; or
   (ii) where there was no dependant child, a person who was in a ""de facto relationship" with the deceased person for a continuous period of 1 year immediately before the deceased person's death.
3. "De facto relationship" should be defined as the relationship between two persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.

One alternative definition of "de facto partner" includes a 2 year qualifying period with a discretion in the Court to accept a lessor period if obvious injustice would otherwise result. If a definition is adopted which is different to the definition in the Workers' Compensation Act 1990 (i.e. 1 year living together, no exception for where there is a dependant child), the question will arise whether the definition in that Act should be brought into line with the definition for the purposes of a wrongful death action. On 17 October 1994, Cabinet determined, in principle, to include de facto partners in the categories of persons who may benefit from a common law action for wrongful death.

Copies of our Draft Report are available from the Commission free of charge. Comments are invited on the preliminary recommendations and on the contents of the Draft Report. Comments should be received by the Commission by **18 November 1994** and should be addressed to:

The Secretary
Queensland Law Reform Commission
PO Box 312
Roma Street
Brisbane Qld 4003

The Commission's telephone number is (07) 227 4544.
The Commission's facsimile number is (07) 227 9045.

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