DE FACTO RELATIONSHIPS

Working Paper No 40

Queensland Law Reform Commission
September 1992

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How to make comments and submissions

The Commission welcomes comments and submissions on the proposals made in this paper. Written comments and submissions should be sent to

The Secretary
Queensland Law Reform Commission
PO Box 312
North Quay Qld 4002

The closing date for submissions is 31 January 1993

If you would like your submission to be treated as confidential, please indicate this clearly. However, submissions may be subject to release under the Freedom of Information Act 1992 (Qld).

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DE FACTO RELATIONSHIPS

WORKING PAPER

Queensland Law Reform Commission

1992

INTRODUCTION

In today's society, many couples live in de facto relationships. As is the case with married relationships, the nature, length and quality of the de facto relationships differ from couple to couple.

In Queensland, legislation which imposes rights and obligations on de facto couples already exists. For example, where one person in a de facto relationship dies, the surviving partner may be entitled to claim against the deceased partner's estate under the Succession Act 1981 (Qld). If one partner in a de facto relationship is killed or injured at work, the other de facto partner partner may be entitled to compensation under the Workers' Compensation Act 1990 (Qld).

Where a de facto relationship breaks down for reasons other than death, however, the rights and obligations of the de facto partners to each other are very limited and governed by archaic legal rules. For de facto couples, there is no legislation equivalent to the Family Law Act 1975 (Cwth) which confers rights and obligations on married couples on the breakdown of the marriage.

To do justice to both parties on the breakdown of a de facto relationship, it may be necessary for there to be an adjustment of property interests or, at least in the short-term, for one partner to pay the other partner maintenance.

In October 1991, the Commission published a Discussion Paper on Shared Property. This Paper focused on difficulties which can arise where people, other than married couples, live together and share property.

Many members of the public expressed an interest in the issues raised in the Discussion Paper. As discussed in more detail in the opening chapters of the Working Paper, the submissions made to the Commission largely focused on the inadequacies in the law governing de facto relationships.

The focus of this Working Paper, therefore, has been limited to de facto relationships regardless of gender. Many issues relevant to couples living in de facto relationships are discussed in this Paper. These issues include any rights and obligations in terms of altering interests in property or paying maintenance that de facto couples should have on the breakdown of their relationship and whether de facto couples should be entitled to regulate their finances and avoid the provisions of any proposed legislation by entering into cohabitation or separation agreements. Other matters canvassed include the power of the court to declare interests in property and to declare whether or not a de facto relationship existed at a particular time or during a specific period.

It is hoped that the issues raised in the Working Paper will generate public comment and guide the Commission in making its final recommendations in this area of the law.

The Honourable Mr Justice R E Cooper
Chairman

Members of the Commission

The Honourable Mr Justice R E Cooper (Chairman)

Her Honour Judge H O'Sullivan (Deputy Chair)

Ms R G Atkinson

Mr W A Lee

Mr R S O'Regan QC

Ms L Willmott

Principal Legal Officer

Ms P Cooper

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A brief summary of the major recommendations made in the Working Paper follows. Before comments are made on these recommendations, they should be read in the context of the relevant chapter.

1. Need for Reform?

The Commission is concerned that the existing law is unsatisfactory with respect to both de facto couples and other domestic relationships where people live under the one roof. There is, therefore, a need for legislative reform to overcome injustices which occur because of the inadequacies of the common law to provide remedies in this area.

2. Scope of Reform

Given the force of the submissions received on the Discussion Paper on Shared Property, the results of surveys undertaken by the Commission and a review of the law in both Australian and overseas jurisdictions, the focus of the review in this Working Paper has been limited to heterosexual and homosexual de facto partners. On completion of its Report on De Facto Relationships, the Commission will consider the desirability of legislation whether generally or in specific instances in relation to other domestic relationships where people live under the one roof.

3. Forum for Resolution of Disputes

In deciding which court or courts would be the most suitable to resolve disputes between de facto partners, the choice is between the Family Court or the State Courts (Supreme, District and Magistrates Courts). While there are advantages with either choice, the Commission is of the view that the Family Court is the most suitable forum to hear and determine disputes which may arise on the breakdown of a de facto relationship.

However, possible constitutional difficulties arise where a State legislature attempts to confer jurisdiction on a Commonwealth Court (the Family Court). While there are a number of options available which may overcome these difficulties so that jurisdiction could be conferred on the Family Court, it is possible that a State government may elect to pursue none of these options. If this is the case, the jurisdiction will remain with the State and the legislation will be administered by State Courts according to their appropriate monetary jurisdiction.

4. Property Rights of De Facto Couples

The Commission is of the view that legislation must be enacted to ensure a just and equitable property distribution on the breakdown of a de facto relationship. It is also of the view that the limited property rights on the breakdown of a de facto relationship conferred by the De Facto Relationships legislation in both New South Wales and the Northern Territory can severely disadvantage the de facto partner who has assumed the homemaking and childbearing role. The Commission, therefore, recommends that provided a de facto couple is eligible to be considered under the proposed legislation, parties to the relationship should have, as far as it is possible, the same property rights and obligations as a married couple on the breakdown of their relationship.

5. Maintenance Rights of De Facto Couples

The Commission is concerned that under the existing law, serious injustice can arise on the breakdown of a de facto relationship if one partner is not entitled to claim maintenance from the other. Injustice is particularly likely if, during the relationship, it is agreed that one party, for childbearing or other reasons, has assumed the homemaking role and is, therefore, unable to support himself or herself on the breakdown of the relationship. The Commission, therefore, tentatively recommends that legislation should confer limited maintenance rights and obligations on de facto couples on the breakdown of the relationship.

The Commission does not consider that on the breakdown of a de facto relationship, a de facto couple should have the same maintenance rights and obligations as a married couple would have on the breakdown of a marriage. However, it also considers that the maintenance entitlements of the De Facto Relationships legislation in New South Wales and Northern Territory are inadequate to protect a de facto partner who may be in need of financial assistance on the breakdown of the relationship. The tentative recommendation of the Commission, therefore, is that provided the inability of the de facto partner to support himself or herself adequately results from the circumstances of the de facto relationship, the court should be able to consider the same matters as the Family Court in determining the amount of maintenance to be ordered.

6. Cohabitation and Separation Agreements

The Commission recommends that the proposed legislation provide for de facto couples to enter into binding cohabitation and separation agreements. It is essential that de facto couples be able to plan their financial future with some certainty and to elect not to be regulated by the proposed legislation.

The Commission has reviewed maintenance agreements which may be entered into under the Family Law Act and cohabitation and separation agreements which are regulated by the De Facto Relationships legislation in New South Wales and the Northern Territory. The Commission hopes that its recommendations provide an affordable means for couples to agree, with as little formality as possible, on financial and other matters. It is for this reason that the provisions in the proposed legislation governing cohabitation and separation agreements are based on the Northern Territory model.

7. Draft Legislation and Commentary

Chapter 7 of this Paper contains the legislation which reflects the recommendations outlined above. In addition to these matters, the following issues are also canvassed and public comment invited -

* the most appropriate way to accommodate Aboriginal and Torres Strait Islander customary law in the proposed legislation;

* the extent to which partners should be required to disclose details of their financial circumstances;

* mediation and arbitration as alternatives for resolving disputes;

* power of the court to make declarations concerning interests in property and whether or not a de facto relationship existed; and

* power of the court to enforce orders made under the proposed legislation.

8. Miscellaneous

The Commission also makes recommendations about stamp duty exemptions for instruments executed on the breakdown of a de facto relationship, incorporating into the proposed legislation provisions in the Family Law Act, Rules and Regulations which may be relevant and consequential amendments that should be made to the District Courts Act 1967 and the Magistrates Courts Act 1921.

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1. NEED FOR REFORM?

In September 1990, the Queensland Law Reform Commission was asked by the Attorney-General to review the law governing de facto relationships.

In a traditional marriage, if the wife and husband separate, there is a legislative regime which will resolve property disputes that can arise.[1] There is no statute that governs property division on the breakdown of a de facto relationship.

The Commission is also concerned about the absence of legislation to resolve other domestic property disputes. Disputes over property can arise in a variety of other domestic relationships.[2] The following examples illustrate the problem -

* A mother gives a son and daughter-in-law $35,000 to build an extra bedroom onto the house. The payment is made on the condition that the mother is able to live there for the rest of her life.

  If there is a dispute between the mother and the son and daughter-in-law and the mother is asked to leave, she may have difficulties in recovering the $35,000.

* An elderly and sick parent may ask an adult child to move in to a house owned and occupied by the parent and care for that parent. The adult child may give up employment to care for the parent on a full-time basis. After caring for the parent for 10 years, the parties fight and the adult child is asked to leave. The question arises whether the adult child should be able to claim an interest in the house to compensate for contributions made over the past 10 years.

Under the current law, any entitlements that the mother and adult child may have for the contributions made depends on equitable principles. Those principles, however, are not certain and well-defined. It can also be argued that such principles do not adequately keep pace with the increasingly diverse kinds of living arrangements which occur in society and the needs which arise out of such relationships.

In summary, the Commission is concerned that the existing law is unsatisfactory with respect to both de facto couples and other domestic relationships where people live under the one roof. The Commission also believes that many of the difficulties, particularly in relation to financial matters, experienced on the breakdown of a de facto relationship apply to the breakdown of other domestic relationships.

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[1] Section 79 Family Law Act 1975 (Cwth). Throughout the remainder of this Working Paper, this Act will be referred to as the "Family Law Act".

[2] The term "domestic relationship" is used in the context of the Working Paper simply to mean the relationship arising when people are living under the one roof. It does not have any sexual connotations.

It is for this reason that the legislation contained in the Commission's earlier publication on this topic, Discussion Paper No 36 on Shared Property,[3] extended to "sharers". "Sharers" was tentatively defined widely to mean "persons who ... have shared property, including de facto partners, not being persons married to each other, who ... have lived ... together under the one roof ... "[4].

A. VIEWS OF LEGAL PRACTITIONERS ON THE NEED FOR REFORM

As part of its review of the law governing property disputes between people who live under the one roof, the Commission distributed surveys to members of the Family Law Practitioners' Association, participants at the Kooralbyn Valley Family Law conference in May 1991, solicitors who attended meetings with the Commission in Townsville, Cairns and Roma and community legal centres. From the surveys distributed, the Commission received 155 completed responses.[5]

98% of the responding legal practitioners had been approached for advice about a de facto relationship over the previous 12 month period. 92% were of the view that the existing law relating to de facto relationships needed to be changed. The majority of the practitioners (77%) were of the view that the law was unsatisfactory and needed to be changed radically.

The practitioners were also asked whether within the past 5 years they had been approached by clients who had property disputes with a person with whom they were living not being a de facto or married spouse. 80% of the practitioners responded that they had given advice in such circumstances. 15% commented that they had done so frequently. The survey also indicated that in this non-de facto and non-marital context, most of the advice had been given to relatives (46%) and friends (32%) who were living together. 10% of practitioners commented that they had advised people living in homosexual relationships.

While a high percentage of those practitioners had been approached by people living with another in a non-de facto and non-marital relationship, a relatively small number of practitioners responded that any legislation which is introduced should extend beyond de facto relationships.[6]

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[3] Throughout the remainder of this Working Paper, this publication will be referred to as the "Shared Property Discussion Paper".

[4] Clause 1.5 draft Shared Property legislation.

[5] A summary of the survey findings is contained in Appendix A.

[6] It should be noted, however, that the practitioners were not asked specifically whether the law governing people living in a non-de facto and non-marital context needed to be reviewed.

B. COMMENTS MADE IN SUBMISSIONS ON THE NEED FOR REFORM

More than 1,500 Shared Property Discussion Papers were distributed throughout the community. The Commission received 30 written submissions commenting on matters raised in the Shared Property Discussion Paper.[7] The Commission was pleased that the responses were not made only by legal practitioners. 18 submissions were from lawyers or legal organisations. To the best of the Commission's knowledge, the remaining 12 people or organisations making submissions were not limited to the legal community.

25 people and groups making submissions supported the need for changes to the existing law. Three of the 30 expressly or impliedly stated that the law did not need to be reformed. The remaining 2 practitioners expressed concern that any legislation enacted might create more problems than it solved.[8]

C. VIEW OF THE COMMISSION ON THE NEED FOR REFORM

For the reasons given in the Shared Property Discussion Paper, the Commission is still of the view that there are difficulties in the existing law governing property disputes between people living under the one roof. There is a need for reform to overcome injustices which occur because of the inadequacies of the common law to provide remedies in this area. The extent to which reform is required will be discussed in the next chapter.

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[7] The names of the groups and organisations making submissions appear in Appendix E. Names have been published only if consent to publication was first obtained.

[8] The content of the submissions concerning how far-reaching reform should be will be discussed in more detail in the next chapter.

2. SCOPE OF REFORM

Part I Options for Reform

In the previous chapter, the arguments concerning whether there is a need for reform of the law governing property disputes in a non-marital domestic context were raised. As stated, the conclusion of the Commission is that there is a need for a legislative regime. The more difficult issue to be resolved is the extent of reform that is necessary. It must be decided which kinds of relationships should be governed by any proposed legislation.

A. EARLIER RECOMMENDATIONS OF THE COMMISSION

In Chapter 2 of the Shared Property Discussion Paper, the Commission recommended that any legislative proposals should cover people living under the one roof, regardless of the nature of the relationship. The legislation included in the Shared Property Discussion Paper, therefore, covered the examples given in the previous chapter of the mother contributing towards the granny flat and the adult child living with and caring for an ageing and sick parent.

The Commission had considerable difficulty in deciding which relationships should be regulated under any proposed legislation. While the Commission considered it essential that the legislation should govern de facto relationships, the position with respect to other domestic relationships was less straightforward. The Commission also considered the common law inadequate in the broader context of domestic relationships. However, it recognised that difficulties would be encountered in any legislative attempt to regulate both de facto and other domestic relationships in the one piece of legislation.

The problem which the Commission recognised in the Shared Property Discussion Paper was limiting the legislation so that frivolous or unmeritorious claims did not clog the system or bring the law into disrepute. For this reason, the Commission invited submissions on how to limit the definition of "sharer" in the legislation to avoid such claims while allowing the mother or adult child in the examples given to make a claim. The Commission also invited submissions on whether reform should extend beyond de facto relationships.

B. SUBMISSIONS RECEIVED ON THE DESIRED SCOPE OF REFORM

As mentioned in the previous chapter, the Commission received 30 written submissions commenting on the matters raised in the Shared Property Discussion Paper. 21 of the 30 people or organisations making submissions specifically discussed the ambit of the legislation.

Eight commented that legislation should cover only heterosexual and homosexual couples. An additional seven people were of the view that reform should cover heterosexual de facto couples. They did not refer to homosexual couples. Only three organisations supported the wide concept of sharers. Two people were of the view that no legislation was required, even in the de facto context. One group was strongly of the view that homosexual couples should be treated the same as heterosexual couples in any proposed legislation and not fall within the wider category of "sharers".

* *ARGUMENTS IN FAVOUR OF LIMITING THE DEFINITION OF "SHARERS"*

After analysing the submissions on whether or not the definition of "sharers" should be limited, it is clear that there were many reservations concerning the width of the proposals in the Shared Property Discussion Paper. These concerns are summarised below.

i. On the current drafting of the definition of "sharers" the legislation is inappropriate as it is too intrusive.

Many of the criticisms of the proposals stem from the perceived intrusiveness of the legislation proposed.

One person commented on how the legislation would affect flatmates. He stated that "such arrangements are intended to be temporary and the parties make financial arrangements which they consider equitable between themselves. If they are too stupid to do so, the law should not meddle."

Of concern in the context of non-de facto sharers was a comment made by a legal academic that students sharing accommodation will be a thing of the past under the Commission's proposals.

One legal organisation felt that it is inappropriate to intervene in arrangements that people make between themselves except where there is such an imbalance of power that the community has a separate and important cause for intervention. The submission continued that this is not the case in the non-de facto context.

The same organisation was also concerned that if legislation regulated sharers in the wider context, it could encourage rather than resolve conflicts.

Another person was concerned that the proposals amounted to "paternalistic" governmental intervention into the affairs of ordinary citizens. He also commented that legislative intervention in the manner contemplated would not, in everyone's eyes, be perceived as an improvement in the existing law.

The Commission received a submission from one Government Department. As the Director-General pointed out, some Australians have different kinds of family units. Many Aboriginal and Torres Strait Islander domestic situations extend beyond the nuclear family unit living under the one roof. She recommended that we proceed with caution as "certain notions around property ownership and distribution may not be relevant to Aboriginal and Torres Strait Islander domestic situations".

A community legal organisation noted that although wide remedies are required in the context of regulating de facto relationships, these remedies would be too far reaching in the context of other sharers.

ii. Inherent differences between the de facto relationship and other sharing relationships warrant that they be regulated by different legislation.

Another frequently occurring criticism of the proposals related to the inherent difference between the de facto relationship[9] and other non-de facto sharing relationships.

Two legal organisations in particular focused heavily on this aspect in deciding that legislation governing de facto couples should be kept separate from legislation resolving disputes in non-de facto situations.

It was commented that "the relevant underlying feature of intimate relationships is that the parties concerned have made a positive commitment to live specifically with the other person because of an emotional bond. Therefore, decisions are made by such couples within the framework of 'setting up house together' which is quite different from other sharing arrangements."

The other organisation made similar comments. The legislation is "too ambitious in that it attempts to provide the same answers to questions arising from diverse financial and non-financial arrangements and social circumstances." If legislation for non-de facto sharers were required, this should be contained in a separate piece of legislation. It is essential that legislation deals with "circumstances which have a true commonality of fundamental facts".

Similar comments were made by other people making submissions. Clearly of concern was that if all sharers were regulated by one piece of legislation, there could be a loss of focus on those aspects of the de facto relationship which did not exist in other relationships.

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[9] In many of the submissions, "de facto relationship" was defined to cover both homosexual and heterosexual couples.

iii. Because of the diversity of possible relationships and fact situations, it would be difficult to draft the definition of "sharers" sufficiently tightly.

In its Shared Property Discussion Paper, the Commission identified concerns arising from the breadth of the definition of "sharers". The Commission recognised that it would be difficult to draft a definition wide enough to allow meritorious claims but sufficiently narrow to exclude unmeritorious or undesirable claims.

The concerns of the Commission were strongly reiterated in the submissions. A number of people commented that the legislation could result in absurd claims not contemplated by the Commission. One person commented that the legislation could lead to exploitation and allow a dishonest person to make an unmeritorious claim where accommodation was the only thing being shared.

Because of the difficulty in drafting a tight definition, another possible problem is that the legislation could introduce uncertainty into an area of law which the Commission is attempting to improve and clarify. For example, it is clear from the submissions that there is not a consensus on what is meant by "share", "shared property" or "sharers". Unless these terms can be defined with absolute precision, there will be an element of uncertainty surrounding the legislation. Uncertainty leads to litigation.

iv. There already exist adequate legal remedies for non-de facto sharers.

From the consultations conducted by the Commission since beginning this review, there seems to be unanimous agreement that a remedy for the resolution of de facto property disputes is needed far more urgently than for other sharing relationships. These views were reflected in the submissions received. Many people commented that the existing common law remedies, though perhaps not perfect, did offer a reasonable remedy for non-de facto sharers. In contrast, the same remedies are totally inadequate in the de facto context.

Other people were of the view that property disputes in non-de facto sharing situations occurred so infrequently and generally involved property of such small value that introducing remedial legislation was not justified.

v. If the legislation is limited to regulating (homosexual or heterosexual) de facto couples, the enactment of legislation will be expedited.

As mentioned, there is almost unanimous support for the urgent introduction of legislation governing property disputes between de facto couples. It was acknowledged by some that the need for legislation governing non-de facto sharers was less urgent. One person made the comment that to widen the ambit of the legislation, the process of reform would become too "convoluted" because of the difficulties inherent in drafting legislation to cover sensibly a wide range of sharers.

vi. The far reaching nature of the proposals could lead to the erosion of the traditional family unit.

Two people expressed concern because the proposed legislation would cover the parent/child relationship. One example given to the Commission was particularly applicable to the family structure in ethnic communities. The example was given of a child working for little or no remuneration in the family business. Perhaps during a rebellious stage in that child's life, he or she would be tempted to make a claim against the parent for an interest in property. This could irreparably damage that family unit. This was considered to be an unacceptable erosion of the family unit.

Another person expressed concern at the possibility of giving children rights which they were not well equipped to use. This person also questioned whether it was appropriate for the State to intervene in family situations.

vii. It is doubtful whether the legislation would provide a logical jurisdictional basis for relief for non-de facto sharers.

As defined in the legislation proposed in the Shared Property Discussion Paper, the term "sharers" encompassed many people who were living together. For example, where an adult daughter is living with her ageing mother and provides care for the mother, the daughter may be entitled to make a claim against her mother's property under the Commission's proposals. However, if a daughter were living next door to her mother but provided the same amount of homemaking contributions, she would not be entitled to relief. It has been argued that in non-de facto sharing situations, the fact of living under one roof is not the appropriate jurisdictional basis for relief. It would lead to inconsistent results.

viii. Queensland legislation should be, so far as is possible, consistent with legislation of other Australian jurisdictions.

One reason which was raised in a submission and mentioned by the Commission in its Shared Property Discussion Paper for limiting the legislation to de facto couples, is the advantage of passing legislation consistent with other jurisdictions in Australia.[10] The benefits of this are clear. Firstly, the rights of de facto couples throughout Australia would not vary according to the State in which the claim is made. Secondly, Queensland courts could rely on cases decided in other jurisdictions.[11]

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[10] See the De Facto Relationships Act 1984 (NSW), Part IX Property Law Act 1958 (Vic) and the De Facto Relationships Act 1991 (NT). The Victorian legislation is narrower in its operation than New South Wales and Northern Territory legislation as it deals with applications to adjust interests in real property only.

[11] While not raised in the submissions, it should also be noted that to the best of the Commission's knowledge, there has been no equivalent legislation in other jurisdictions providing relief to non-de facto sharers.

* *ARGUMENTS AGAINST LIMITING THE DEFINITION OF "SHARERS"*

As mentioned earlier, only 3 organisations were in favour of the legislation extending to the wider category of sharers. The organisations did not elaborate on the reasons which influenced their decisions. Presumably reliance was placed on the arguments used in the Shared Property Discussion Paper. It can be argued that the definition of "sharers" should be extended to cover all people living together in a domestic relationship for the following reasons.

i. The common law provides inadequate remedies to resolve property disputes in the context of people living together in domestic relationships.

The Shared Property Shared Property Discussion Paper gives a number of illustrations of people living in shared accommodation.[12] The Commission illustrated the difficulties which can arise between the parties in those relationships while they are living under the one roof.[13] The Commission concluded that injustice arises because the common law does not provide an adequate remedy where disputes concerning entitlement to property arise in these situations. In contrast, where a marriage breaks down, the property distribution is governed by the Family Law Act.[14] The legislation proposed in the Shared Property Discussion Paper attempted to provide remedies where none exist or where existing remedies are uncertain.

ii. Legislation would decrease the cost of obtaining justice.

Even if the common law remedies (such as constructive trusts) were considered satisfactory, pursuing those remedies is expensive. As mentioned in the Shared Property Discussion Paper, there must be a full examination by the Supreme or District Court of all of the facts and the Court must apply intricate and sophisticated principles of equity. In providing legislative remedies, the Commission was attempting to provide better access to the law for a person entitled to relief.

iii. Providing remedies in legislation would improve a person's perception of their rights.

In the submissions received by the Commission, a number of people commented that the common law provided remedies to people in non-de facto sharing situations. On this basis, they argued that legislation was not necessary. This should not, however, be the end of the matter. If the rights of people concerning entitlement to property on the breakdown of a sharing relationship are enshrined in legislation, it is likely that in time people will become more aware of these rights. Although it may be a gradual

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[12] Shared Property Discussion Paper, page 1, paragraph 1.

[13] Shared Property Discussion Paper, page 1, paragraph 3.

[14] Section 79.

process, as people begin to recognise these rights, there may be a lesser need to institute legal proceedings to establish title. Having rights legislatively enshrined may encourage out of court settlements in property disputes. Legislation can relieve courts of the duty of examining and applying the extensive body of existing case law.

* *SUMMARY OF THE VIEWS IN THE SUBMISSIONS ON THE DEFINITION OF "SHARER"*

As mentioned earlier, not all of the people and organisations making submissions commented on the ambit of the legislation. From the comments received on the ambit of the legislation, however, it is clear that the overriding view was that major problems in the community stem from the lack of legislation governing de facto relationships. While some people recognise that the law governing other people living in a non-marital situation needs to be reviewed, this is of secondary importance when compared with the need for legislation governing de facto couples. An attempt to focus on both needs would detract from the primary goal of providing de facto couples with rights. Other people making submissions were of the view that the law would be too intrusive if it attempted to govern domestic relationships other than de facto or married relationships.

* *SUBMISSIONS RECEIVED ON THE LEGISLATION EXTENDING TO HOMOSEXUAL AND HETEROSEXUAL DE FACTO COUPLES*

Given the opinions expressed in the submissions with regard to the wide definition of "sharers" suggested in the proposed legislation, it is not surprising that most people or organisations suggested that the legislation extend to de facto couples only. A number of those making submissions commented on how the term "de facto relationship" should be defined. Nine of those commenting on the ambit of reform stated that the legislation should apply equally to heterosexual and homosexual de facto couples. Only 2 people specifically commented that legislation should not cover homosexual couples.[15]

In the submissions, the following arguments in favour of legislation covering both homosexual and heterosexual de facto couples were canvassed.

i. ***Homosexual and heterosexual de facto couples have the same kind of intimate relationship which can be distinguished from the other sharers.***

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[15] One of these submissions commented that there should also be no law governing de facto relationships on the ground that such relationships are immoral.

ii. Legislative attitudes concerning homosexual relationships are changing.

Sexual relationships between consenting male adults are no longer unlawful.[16] Sexual relationships between adult females have never been unlawful. The anti-discrimination legislation recently enacted prohibits (with some exceptions) discriminating against a person on the grounds of lawful sexual activity.[17] Given this climate of acceptance, it is inappropriate to discriminate against homosexual de facto couples by denying them the benefit of this proposed legislation.

It is also argued that legislation should cover homosexual de facto couples on the following grounds.

iii. Homosexual couples should be the subject of regulation.

If the homosexual and heterosexual de facto couples have similar emotional bonds, they should be subject to the same kind of regulation by the State. Under some legislation (such as that proposed by the Commission) this would result in rights being conferred on a homosexual partner. Of course, the corollary is also relevant. Such legislation will also subject a homosexual partner to certain obligations.

The same reasoning applies with respect to other kinds of legislation. For example, if a homosexual couple were classified as a "couple" for the purposes of the Commonwealth social security legislation, the couple may not be entitled to the same benefits that the partners currently enjoy.[18] In other words, regulation of homosexual couples in the same way as heterosexual de facto couples will lead to a more equitable legal regime.

iv. The recommendations of the Commission should be consistent with recommendations on intestacy rules.

In its recent Working Paper on the Intestacy Rules[19], the Queensland Commission recommended that homosexual and heterosexual de facto couples be given equal rights on intestacy. It would be inconsistent with this approach to deny homosexual couples the benefits of any legislation proposed by the Commission in this review.

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[16] Section 7 Criminal Code and Another Act Amendment Act 1990 (Qld).

[17] Section 7(1)(a) Anti-Discrimination Act 1991 (Qld).

[18] For example, the entitlement of a single person to a Job Search or Newstart allowance is more than that person's entitlement would be if he or she were part of a couple and that persons's partner was also entitled to the allowance. As homosexuals living in a de facto relationship do not come within the definition of "couple" in the legislation, in these circumstances they would be entitled to two single entitlements which would be larger than their entitlement if they were classified as a "couple".

[19] Working Paper No 37.

In only 2 of the submissions did people comment that reforms should not extend to homosexual couples. One person commented that homosexuality is "unnatural" and the practice should not "have to be sanctioned by the whole of the public".

The people making the other submission were of the view that "de facto and other immoral and corrupt relationships should not be addressed in any proposed law". It appears from that submission that these people considered any non-marital sexual union to be immoral and, therefore, should not have either the benefit of or the obligation arising under any legislation. In other words, these people would not discriminate between homosexual and heterosexual de facto couples.

C. SURVEY RESULTS

* *LEGAL PRACTITIONERS SURVEYS*

As mentioned in Chapter 1, the Commission distributed surveys to members of the Family Law Practitioners' Association, participants at the Kooralbyn Valley Family Law conference in May 1991, solicitors who attended meetings with the Commission in Townsville, Cairns and Roma in May and June 1991 and community legal centres. Of the surveys distributed, the Commission received 155 completed responses.

98% of the legal practitioners who responded to the survey had been approached for advice about a de facto relationship over the previous 12 month period. The practitioners were also asked whether in the past 5 years they had been approached by clients who had property disputes with the person with whom they were living, not being a de facto or married spouse. 80% of the practitioners responded that they had given such advice over the past 5 years.

When asked how frequently the practitioners had been approached to give advice to a person in a de facto relationship, 42% said that they had been approached more than 10 times during that 12 month period. In contrast, only 15% of the practitioners commented that they had advised frequently in a non-de facto, non-marital situation over the previous 5 years.

If these figures are indicative of the practitioners throughout Queensland, it appears that the frequency of advice given in a de facto relationship exceeds that given in a non-de facto domestic relationship.

* *LEGAL AID OFFICE SURVEY*

In 1991, the Commission conducted a survey at the head office of the Legal Aid Office (Queensland) in Brisbane.[20] The survey was to establish the number of sharers who had sought legal advice relating to property at the Brisbane branch of the

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[20] The Commission advises those who sought advice from the Legal Aid Office during that time that names of clients were not recorded by the Commission.

Legal Aid Office during 1991. The survey revealed that 89 people had approached the Legal Aid Office for advice concerning a property dispute with a person with whom they were living.[21] In 83 cases, the dispute arose between partners in a heterosexual or homosexual de facto relationship.[22] The remaining 6 of those sharers were in a non-de facto, non-marital relationship.[23]

If these results reflect the position throughout Queensland, it is clear that the overwhelming need for reform is in the de facto relationship context rather than the broader category of sharers.

D. OVERSEAS EXPERIENCE

As part of its review, as well as examining the law in all Australian States and Territories, the Commission has examined the law governing property disputes in New Zealand, England and three provinces in Canada (British Columbia, Ontario and Alberta).[24] So far as the Queensland Commission has been able to determine, in no other common law jurisdiction does there exist legislation which governs property disputes between non-married couples living under the one roof.

The countries and provinces which were reviewed had no specific legislation governing property rights between de facto spouses on the breakdown of the relationship.[25] Trust principles arising from case law apply to claims for property adjustment.

Part II Recommendation of the Commission

In Chapters 1 and 2 of the Shared Property Discussion Paper, the Commission expressed its concern about the inadequacies of the common law to govern property disputes in the non-marital context where people are living under the one roof. The Commission's views on these inadequacies have not altered.

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[21] A summary of the survey results is contained in Appendix B.

[22] 80 clients were in heterosexual relationships and 3 were in homosexual relationships.

[23] 5 were in family relationships; 3 were in homosexual relationships and one couple were friends.

[24] A review of the law in these common law jurisdictions is set out more fully in Appendix C.

[25] However, in the Canadian province of Ontario, in an application by a de facto spouse for maintenance the court may order that the property be transferred or vested in the applicant: Family Law Act 1986 S.O. 1986 C.4 section 34(1)(c).

Also, certain English statutes including section 17 of the Married Women's Property Act 1882, section 7 of the Matrimonial Causes (Property and Maintenance) Act 1958 and section 37 of the Matrimonial Proceedings and Property Act 1970, apply to married couples and couples formally engaged to be married. Engaged couples may have been living in a de facto relationship. These statutes may assist parties in the resolution of property disputes when the relationship has broken down. Section 2 of the Law Reform (Miscellaneous Provisions) Act 1970 equates engaged couples with married couples for these purposes provided an application is made within three years of the termination of the engagement.

In the Shared Property Discussion Paper, the Commission asked for submissions on an effective way of retaining a wide definition of "sharers" so that legislation would cover a wider group of sharers than de facto couples but still exclude the unmeritorious or frivolous claims of other sharers. Unfortunately, the submissions did not provide the solution. Most of the people commenting on the definition were of the view that it would be impossible to effectively limit the definition.[26]

Given the force of the submissions, the results of the surveys conducted by the Commission and a review of both Australian and overseas jurisdictions, **the Commission has decided that for the purpose of this Working Paper, the focus of the review should be limited to heterosexual and homosexual de facto couples.** Focusing on de facto relationships only also avoids the definitional difficulties experienced by the Commission in drafting the legislation contained in the Shared Property Discussion Paper.

The Commission is still concerned about inadequacies in the law in the non-de facto domestic context. On completion of its Report on De Facto Relationships, the Commission will consider the desirability of legislation whether generally or in specific instances in relation to sharers.

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[26] As mentioned earlier, many were also of the view that the law should not intervene in the non-de facto context even if an adequate definition could be found.

3. FORUM FOR RESOLUTION OF DISPUTES

Part I Appropriate Forum for Resolving Disputes

For the purposes of this Working Paper, the focus of the Commission's review has been limited to resolving disputes between de facto couples. The reasons for this decision were explained in the previous chapter.

The next issue to resolve is the most suitable court in which to hear and determine disputes concerning property and maintenance which can arise on the breakdown of a de facto relationship.

A. POSSIBLE CHOICES OF FORUM

When considering which court or courts would be the most suitable to resolve disputes between de facto couples, the most logical choice is between -

* the Family Court; or
* the State Courts (Supreme, District and Magistrates Courts).

B. ADVANTAGES OF EACH FORUM

* *FAMILY COURT*

The advantages of de facto disputes being heard and determined in the Family Court can be stated briefly as follows.

i. ***Expertise of the Family Court***

As the Family Court deals almost exclusively with Family Law matters, it has a special expertise in the area of resolution of property and maintenance disputes on the breakdown of personal relationships.

ii. ***Speed of resolution in the Family Court***

Because of the well developed case management procedures in the Family Court, Brisbane Registry, the time between commencing an action to resolve a property dispute and trial is on average only 28 weeks.

While the Commission has been unable to obtain comparable statistics from the Supreme Court Registry, it understands that the average time between entering the matter for trial in the Supreme Court and the matter proceeding to trial is in excess of 6 months. This 6 month period represents only the final stages in the litigation process. The action is likely to have commenced many months earlier and proceeded through the usual interlocutory stages.

The Commission understands, however, that in the District Court and Magistrates Court, there is currently very little delay in matters proceeding to trial once the case is ready for hearing.[27]

iii. Appropriate conference facilities are in operation in the Family Court

Before a property dispute goes to trial in the Family Court, except in special circumstances, the parties must attend a conference before a Deputy Registrar of the Family Court.[28] These conferences are designed to settle disputes and avoid matters proceeding to trial. In the Family Court, Brisbane Registry, in 1990/1991 these conferences had a resolution rate of 58.3%.[29]

iv. Familiarity with procedure

Family Law practitioners are familiar with the procedures of the Family Court. If de facto property disputes are handled by Family Law practitioners, their familiarity with these procedures will assist the resolution of de facto disputes within the existing framework of the Family Court structure.

v. Increased certainty of outcome

Currently in the Family Court, Brisbane Registry, the Commission understands on anecdotal evidence that Family Law practitioners can predict with reasonable certainty the likely distribution of property or maintenance that will be ordered if the

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[27] The Commission understands that currently in the District Court matters are listed for trial on the callover after the entry for trial has been filed. At the callover, the matter is given a trial date within 3 months of the callover. There are currently no statistics available concerning the length of time from when proceedings are instituted until the entry for trial is filed. The delay can depend on the diligence of the lawyers handling the matter and whether or not the parties are ready for trial.

There are no statistics kept in the Magistrates Court, Brisbane Registry, on the length of time from when the plaint is filed until the trial date. When a matter is ready to be tried, a Certificate of Readiness and Certificate of Trial are filed. Although no formal statistics are kept, if the matter is scheduled to last more than one day, the matter will be given a date for a pretrial conference. The Brisbane Registry estimates that this is usually within three to four weeks of filing the Certificates. If the matter does not settle at the pretrial conference, a trial date is given, usually within three to four weeks. If the matter is expected to last one day or less, a trial date will usually be given within three to four weeks from the filing of the Certificates. There are times during the year when delays occur. During these times, it may take up to eight weeks from the date of filing of the Certificates in a short matter, or the date of a pretrial conference in a long matter, before the matter proceeds to trial.

[28] Section 79(9) Family Law Act and Order 24 Family Law Rules.

[29] These figures were provided by the Regional Registrar (Northern Region) of the Family Court.

dispute goes to trial. If the Family Court determined disputes between de facto couples, it is possible that a reasonable degree of certainty would be introduced into the likely distribution of property or maintenance that would be ordered.

* *STATE COURTS*

There are a number of arguments which could be advanced, however, in favour of State Courts retaining jurisdiction to deal at least with property disputes between de facto couples.

i. Expertise of the Supreme Court

If the Family Court were chosen as the forum to hear disputes between de facto couples, it would mean that the expertise of the Supreme Court which has built up over centuries in non-marital property disputes would be lost.[30]

The Supreme Court has also built up expertise in the de facto context. For example, under the Succession Act 1981 (Qld),[31] a de facto spouse may be entitled to make a claim against the deceased de facto partner's estate provided dependency and the fact that the couple have lived in a "connubial relationship" for a specified period of time can be proved. The Supreme Court, therefore, is accustomed to making difficult decisions concerning whether a couple has been living in a de facto relationship.

Also of relevance is that if the Commission ultimately recommends the introduction of Shared Property legislation for other domestic situations, matters arising under the legislation will be heard and determined in the State Courts. For the sake of consistency of decisions, it would be preferable for all such disputes to be heard in the one forum.[32]

ii. New structure of the Supreme Court

In its Shared Property Discussion Paper, the Commission commented on the delays which currently exist for a matter in the Supreme Court proceeding to trial.[33] Although the Commission was unable to obtain statistics concerning the time between commencing an action in the Supreme Court and the date of trial, the Commission

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[30] The expertise referred to relates, in particular, to the equitable principles such as the constructive trust and unconscionability currently used by the Supreme Court to resolve such disputes. If the legislation recommended by the Commission requires the court to depart from a consideration of such principles in determining interests in property, this expertise will not be as important a consideration in the choice of the appropriate court.

[31] Section 41.

[32] In relation to the experience in New South Wales with respect to de facto relationships legislation, note the comments made by the Commission in Chapter 4 on page 29 and in Appendix D concerning the decisions made by the New South Wales Supreme Court on property distribution between de facto couples under the De Facto Relationships Act 1984 (NSW).

[33] Shared Property Discussion Paper, page 7.

was advised that from the time of entering a matter for hearing to the date of trial there is a delay in excess of six months. Of course, a matter will not be entered for hearing until well after the action has been commenced.

It is understood, however, that there is a current review which may lead to a substantial reduction in such delays.

iii. Case management procedures in the Supreme Court

The Commission also understands that the Supreme Court is considering issuing a Practice Direction concerning case management procedures. Such a Practice Direction could also result in the speedier resolution of matters heard in the Supreme Court.

If the Practice Direction contains provision for the introduction of mediation before a matter can be heard in court, this should decrease the number of matters that proceed to trial.

iv. Speed of resolution of matters in the District Court

Although there is a backlog of cases in the Supreme Court which leads to delays in matters being heard in that court, the Commission understands that the same is not the case in the District Court.[34]

As the maximum monetary jurisdiction of the District Court is $200,000,[35] it is likely that many of the property disputes between de facto couples would be dealt with in that Court.[36]

v. Speed of resolution of matters in the Magistrates Court

As mentioned earlier in this chapter,[37] once the Certificate of Readiness and Certificate of Trial have been filed in the Magistrates Court, in the Brisbane Registry it is likely that the matter will be given a hearing date within four to eight weeks.

vi. Increased certainty of outcome

An argument given earlier in favour of resolution of disputes in the Family Court was the increased certainty of outcome if the dispute were heard in that court. However, if new legislation is passed, there is no reason why there would not be similar

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[34] See footnote 27 of this chapter.

[35] Section 66(2) District Courts Act 1967 (Qld).

[36] It should also be noted that under clause 2.3 of the draft legislation in the Shared Property Discussion Paper, the parties could by consent agree to the relevant courts hearing matters although the monetary jurisdiction was exceeded.

[37] See footnote 27 of this chapter.

certainty of outcome if the matters were resolved in the Supreme, District or Magistrates Courts.

If the legislation which is introduced is based on legislation already operating in other jurisdictions in Australia, precedents would be established which would enable litigants and their legal advisers to predict the likely outcome of their disputes. As more cases are decided under the proposed legislation, the more likely it is that outcomes could be predicted. This would be the case regardless of whether the matters were heard in the Family Court or the Supreme, District or Magistrates Courts.

C. SUBMISSIONS RECEIVED ON APPROPRIATE FORUM

Nine of the 30 written submissions on the Shared Property Discussion Paper received by the Commission addressed the question of the appropriate forum for resolution of disputes. All 9 were of the view that the Family Court was the appropriate forum. The reasons given reflected those advanced earlier, and stressed the expertise of the Family Court in dealing with property disputes in personal relationships.

D. SURVEY RESULTS

In the survey of legal practitioners conducted by the Commission in 1991, practitioners were asked to give suggestions to improve the existing law governing de facto couples. Of the 104 practitioners who responded to this question, 89 (86%) suggested that legislation was required.

Although not specifically asked which court would be most suitable for resolving disputes between de facto couples, 20 practitioners volunteered their views on the issue. All 20 were of the view that the Family Court would be the appropriate forum to hear and determine such disputes. An additional 26 practitioners stated that the Family Law Act should govern de facto disputes. Presumably, these practitioners also considered the Family Court to be the appropriate forum for resolving the disputes.

The survey results did not indicate the same degree of support for the State Courts. However, six practitioners recommended the adoption of legislation in similar form to the De Facto Relationships Act 1984 (NSW). This legislation is administered by the State Courts in New South Wales, not the Family Court. Another practitioner responded that Magistrates Courts should have jurisdiction if the dispute concerned property of a value up to $20,000.

At the end of the survey form, practitioners were invited to give any other comments arising out of their experiences in advising people who had lived together and shared property. From the general comments made in response to this request, it is clear that some practitioners are concerned about the expense and uncertainty associated with current litigation in such disputes in the Supreme and District Courts. The lack of appropriate negotiation and mediation mechanisms were also concerns of practitioners when litigating in the Supreme and District Courts. Some practitioners were also concerned about the time delays currently experienced in matters

proceeding to trial in the Supreme Court.

One practitioner commented that to overcome the concerns about costs and delays, Magistrates Courts should have jurisdiction to resolve disputes.

E. RECOMMENDATION OF THE COMMISSION

In its Shared Property Discussion Paper, the Commission concluded that, for the reasons given in this chapter, the Family Court is the appropriate forum to resolve property and maintenance disputes in domestic relationships. Having considered the submissions received and the comments made by practitioners in response to the Commission's survey, the Commission recommends that the Family Court is the most suitable forum to hear and determine property and maintenance disputes which may arise on the breakdown of a de facto relationship.

Part II Conferring Jurisdiction on the Family Court

Although the Commission's view is that the Family Court is the most suitable forum within which to resolve de facto disputes, there may be legal difficulties involved in conferring jurisdiction on the Family Court within the existing Commonwealth/State constitutional framework.

A. OPTIONS FOR CONFERRING JURISDICTION ON THE FAMILY COURT

The following options for conferring jurisdiction on the Family Court were considered by the Commission.

i. Queensland legislature conferring jurisdiction on the Family Court

If the Commission recommends to the Attorney-General that the existing law in Queensland governing de facto disputes be altered, the Queensland government can do so by enacting State legislation. That legislation can confer on the Supreme, District and Magistrates Courts power to hear and determine matters arising under the Act. Difficulties arise, however, if a State legislature attempts to confer jurisdiction on a Commonwealth court such as the Family Court. There may be constitutional problems in doing so.[38]

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[38] Report No 36 of New South Wales Law Reform Commission on De Facto Relationships 1983, paragraph 5.34 and Report No 13 of Northern Territory Law Reform Committee on De Facto Relationships 1988, pages 27-28.

ii. Queensland legislature conferring jurisdiction on the Family Court; Commonwealth legislature consenting to the conferring of jurisdiction

Another option for conferring jurisdiction on the Family Court to deal with de facto disputes would be to recommend a legislative regime based on the existing cross-vesting legislation.[39] The scheme would operate in the following way -

* Queensland legislature would pass legislation dealing with de facto disputes;

* Queensland legislation would confer on the Family Court jurisdiction to hear and determine matters arising under that legislation;

* Commonwealth legislature would pass complementary legislation conferring jurisdiction on the Family Court and consenting to the conferral by the State of jurisdiction on the Family Court to hear and determine matters arising under the Queensland legislation.

Whether or not the State commences negotiations with the Commonwealth to implement such a scheme is a political decision.

iii. Referral of powers governing de facto relationships to the Commonwealth

While there is some constitutional doubt concerning whether Queensland can confer jurisdiction on the Family Court to hear and determine matters arising under State legislation, there is no constitutional difficulty with a referral of State powers relating to de facto couples to the Commonwealth.

Upon referral of the powers to the Commonwealth, it is for the Commonwealth to pass legislation to govern de facto disputes. If the Commonwealth considers it appropriate to do so, it can confer jurisdiction under the legislation on the Family Court.

Since the commencement of its review of the law governing de facto relationships, recommendations have been received by the Commission from a variety of sources to consider referring power to the Commonwealth. Those submissions advocating a referral of powers have usually been silent on how that referral should be effected.

If Queensland decides to refer its powers in this area, it could take one of the following courses -

* Refer power to the Commonwealth and leave it to the Commonwealth to enact legislation that it considers appropriate; or

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[39] See the Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld) and Jurisdiction of Courts (Cross-vesting) Act 1987 (Cwth). While the Commission is aware of doubts which have arisen on the constitutional basis of the cross-vesting legislation, it is beyond the scope of this reference to comment on this matter. The Commission notes, however, the decision of Ryan J in the Queensland Supreme Court in Re T (an infant) [1990] 1 Qd R 196 which upheld the validity of the cross-vesting scheme.

* Negotiate a referral of power to the Commonwealth so that Queensland can have an input into the nature of the legislation proposed to govern de facto relationships.

The advantages of a referral of power stem from the advantages of having the Family Court as the forum hearing disputes. These arguments were canvassed earlier in this chapter.

The disadvantages of a referral of power were discussed in the Shared Property Discussion Paper.[40] Of particular concern to the Commission is that a referral of powers to the Commonwealth may lead to a delay in passing legislation. This is more likely to be the case where the referral is a negotiated one in which the Queensland government insists on having an input into the nature of the proposed legislation. As stated in the Shared Property Discussion Paper, even if Queensland and the Commonwealth agree on the kind of legislation, there is no guarantee that the Commonwealth will pass such legislation promptly.

In its submission on the Shared Property Discussion Paper, the Family Law Council disagreed with the comments made by the Commission. The Council is of the view that any proposal to refer powers would be well received by the Commonwealth. It also commented that there "may not be delays on the Commonwealth's part in enacting legislation in this area". The Council further recommended that if Queensland is concerned about the delay, interim State legislation could be passed until the Commonwealth legislation becomes operative.

Submissions received on referral of powers

Seven of the individuals and groups making submissions specifically commented on the issue of referral. All seven were clearly of the view that the Family Court is the appropriate forum to resolve de facto disputes. Most of those seven, however, were concerned about the political difficulties inherent in negotiating a referral of power which could lead to a delay in the passing of legislation.

Both the Family Law Council and the Family Court of Australia are in favour of a referral of power to the Commonwealth.

The Family Court gives the following reasons for supporting a referral of power. Firstly, the Family Court notes that a referral of power by all States is likely to lead to uniformity of legislation. The advantages of this are then discussed in the Court's submission. The Family Court comments that legislation regulating de facto relationships relates to basic societal arrangements which affect an increasing number of citizens. It is highly desirable therefore that all citizens know of the basic principles which affect such arrangements. This understanding is far more likely if the legislation is uniform throughout Australia. The Family Court then goes on to state that there are other good reasons for uniformity of legislation in this area including

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[40] Shared Property Discussion Paper, pages 8-9.

the simple proposition that it is undesirable that de facto couples in State "A" have a different set of rights and obligations from the rights and obligations of a de facto couple in State "B".

The Commission acknowledges these arguments in support of having legislation governing de facto couples uniform throughout Australia. However, there are also disadvantages of uniformity. The first is the inevitable delay which would accompany any attempt by participating States and Territories to agree on the appropriate law to govern such relationships. The second point is that if uniformity is not chosen, legislation will be introduced by States and Territories over time. This provides an opportunity to improve earlier legislation by reviewing the relevant case law and deciding whether the decisions reflect how the legislation was designed to operate. In the context of this Working Paper, Queensland can take advantage of the experience under the New South Wales, Victorian and Northern Territory legislation.[41]

The second argument in favour of referral raised by the Family Court is that the "referral of power to the Commonwealth maximises the prospect of the specialist Family Court being invested with jurisdiction". The Court comments that difficulties may arise with regard to contributions towards the funding of the Family Court if there is an attempt to have the Family Court in Queensland exercise jurisdiction under State legislation. The Court also notes that a referral of power would avoid the problems generated by the decision in Re Chapman and Jansen.[42]

In its submission, the Family Law Council makes similar comments. As mentioned earlier, it also is not convinced that a referral of power will lead to a delay in passing legislation.

View of the Commission on referral

The Commission reiterates its view that the Family Court is the most suitable forum to resolve de facto disputes. Later in the Working Paper, the Commission makes tentative recommendations concerning the details of the legislative regime which should cover de facto couples. Whether the Queensland government refers its powers to the Commonwealth with or without agreement on the details of the proposed legislation is ultimately a political decision. The Commission is concerned, however, about delays which could be associated with a referral of powers, particularly if it is proposed that those jurisdictions referring power are to agree on the content of the legislation.

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[41] De Facto Relationships Act 1984 (NSW), Property Law Act 1958 (Vic) and De Facto Relationships Act 1991 (NT).

[42] (1990) FLC 92-139. The problem alluded to here by the Family Court is the difficulty in the Family Court hearing matters arising under State legislation notwithstanding the cross-vesting legislation. These difficulties were discussed in detail in the Shared Property Discussion Paper at pages 10-12 and are referred to below.

iv. Cross-vesting legislation

In its Shared Property Discussion Paper on Shared Property,[43] the Commission discussed the possibility of the cross-vesting legislation being used to facilitate the hearing in the Family Court of matters arising under de facto legislation passed by the Queensland legislature.

After examining the existing case law on the cross-vesting scheme[44] and the Family Court Practice Direction No 3 of 1990[45] it appears that if the only dispute between a de facto couple relates to property, it is unlikely that the Family Court will hear the matter. It is likely that this kind of matter will be transferred to the Supreme Court.

Unless there is a change in the current interpretation of the cross-vesting legislation together with a new Practice Direction altering the existing practice of the Family Court, the cross-vesting legislation will not facilitate the hearing of matters concerning de facto disputes arising under State legislation in the Family Court.

B. RECOMMENDATION OF THE COMMISSION

As a matter of principle, the Commission recommends that the Family Court is the appropriate court to determine disputes which can arise on the breakdown of a de facto relationship. However, there are some difficulties which were discussed above in conferring that jurisdiction on the Family Court. The main reason for the difficulties stems from doubts about the constitutional ability of a State legislature to confer jurisdiction on a Commonwealth Court (the Family Court).

In this chapter, the Commission has outlined a number of options which may overcome this difficulty. They include the Queensland legislature conferring jurisdiction on the Family Court and the Commonwealth legislature consenting to the conferring of jurisdiction; and the referral of powers governing de facto relationships by the State to the Commonwealth. If the latter option is chosen, the Queensland Commission is concerned about the delays which could result. These delays would seem inevitable if all Australian jurisdictions participate in the referral and agreement is required on the details of the legislation proposed.

As mentioned earlier while examining these options, the choice of option, if any, is a political one. It may be that the State government elects to pursue none of these suggestions. The Commission is of the view that in the event that none of these

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[43] Shared Property Discussion Paper, pages 10-12.

[44] Staples v McCall (1989) FLC 90-039, Re Chapman and Jansen (1990) FLC 92-139 and Bell v Street (1990) 14 FamLR 214.

[45] Under this Practice Direction, applications which, apart from cross-vesting legislation, fall outside the Family Court's jurisdiction, should not be filed unless there is a related proceeding within the Family Court's jurisdiction. If such an application falling outside the Family Court's jurisdiction is made in the Family Court, the Practice Direction provides that the matter is likely to be transferred to the Supreme Court.

approaches is adopted by the Queensland Parliament, the jurisdiction should remain with the State and the legislation be administered by State Courts according to their appropriate monetary jurisdiction. The proposed legislation has been drafted on that basis.

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4. PROPERTY RIGHTS OF DE FACTO COUPLES

On the breakdown of a marriage, one of the matters which must be resolved between the husband and the wife is the division of their property. Both husband and wife will benefit if they can agree on a fair property distribution without the need for legal intervention. If the property dispute cannot be resolved by agreement, however, and the matter proceeds to trial, the Family Court has the power to decide the division of property between the parties. In determining the breakdown of property, the Family Court must consider the matters set out in the Family Law Act.[46] These matters include -

* financial and non-financial contributions made by each party;
* homemaking and parenting contributions made by each party;
* financial circumstances of each of the parties; and
* financial needs of each of the parties.

On the breakdown of other kinds of relationships where people live together, disputes may also arise concerning the ownership of property, especially property accumulated since living together. Difficulties are compounded if property is bought out of funds which have been pooled during the relationship.

Clause 3.7 of the legislation proposed in the Commission's Shared Property Discussion Paper sets out the matters which the court is entitled to consider in determining whether to alter interests in property. These matters include -

* financial and non-financial contributions made by each party; and
* homemaking and parenting contributions made by each party.

Clause 3.7, however, does not allow the court to consider the financial circumstances or needs of each of the parties.

Because the Shared Property Discussion Paper dealt with sharers in general and not just de facto couples, the Commission had difficulty in drafting clause 3.7 so that the matters considered by the court in determining who should be entitled to property were appropriate to all kinds of sharers.

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[46] Section 79.

The Commission was of the view, for example, that different considerations may be relevant on the breakdown of a de facto relationship from those which may arise where two sisters have shared a house for many years, argue and decide to live apart.

As this Working Paper focuses on de facto relationships only, no such difficulties exist. The principles which should govern property distribution on the breakdown of de facto relationships must, therefore, now be considered.

A. PRINCIPLES GOVERNING ALTERATION OF PROPERTY INTERESTS

Because of the similarities between de facto relationships and married relationships, the question arises whether the matters considered by the court on the breakdown of a de facto relationship should be similar to, or the same as, those considered by the court on the breakdown of a marriage.

In discussing this issue, the Commission has considered the following two options.

(1) Provided a de facto partner is eligible to make an application to adjust property rights under the proposed legislation, a partner's entitlement to property should be the same as a married partner on the breakdown of the respective relationships.

If this option were chosen, the relevant clause of the proposed legislation would reflect as closely as possible section 79(4) of the Family Law Act. In other words, the matters considered by the court in a property dispute on the breakdown of a relationship would be the same for de facto couples as for married couples.

(2) On the breakdown of a de facto relationship, a partner should be given a right to apply for an adjustment of interests in property, but this right should be more limited than the right of a married person under the Family Law Act.

The De Facto Relationships Act 1984 (NSW), the Property Law Act 1958 (Vic) and the De Facto Relationships Act 1991 (NT) are examples of legislation based on this option.

The merits of these options are discussed below.

B. ARGUMENTS FOR CONFERRING THE SAME RIGHTS ON DE FACTO COUPLES

Under option (1) above, in adjusting property interests on the breakdown of a de facto relationship, the court would be able to consider the same matters as it could for a married couple under the Family Law Act.

A number of law reform bodies both in Australia and overseas have produced papers reviewing the law on de facto property entitlements and making recommendations for reform in this area.[47] As part of its review in this area, the Queensland Law Reform Commission considered the arguments advanced in favour of this option.

i. Similar nature of the de facto and married relationships

* There is no necessary difference between the nature, length and quality of a de facto relationship and the nature, length and quality of a marriage. As explained by the New South Wales Law Reform Commission, "each ... may involve a high degree of stability and commitment from the partners, substantial economic, social and emotional interdependence, care and support for children, and the establishment and development of relationships as a family unit with the outside community. Equally, marriages and de facto relationships might each be of relatively short duration, with the parties financially independent and not having any child care responsibilities".[48]

* The Australian Law Reform Commission in its Discussion Paper No 46 on Multiculturalism: Family Law considered whether there were special features of marriage which justified different treatment between married couples and de facto couples in terms of property and maintenance rights. The following is one of the arguments raised in that context.

> *Financial rights and obligations in marriage no longer depend solely on concepts of automatic dependence, but are based on the actual circumstances of the parties, their ability to support themselves, their contributions and their responsibilities towards children. Actual circumstances of these kinds arise in the same way for de facto couples.*[49]

* If there were no redistribution of property on the breakdown of a de facto relationship, the same injustices would arise as if there were no redistribution on the breakdown of a marriage.

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[47] Report No 12 of Tasmanian Law Reform Commission on Obligations Arising from De Facto Relationships 1977; Report No 36 of New South Wales Law Reform Commission on De Facto Relationships 1983; Report No 13 of Northern Territory Law Reform Committee on De Facto Relationships 1988; Discussion Paper No 46 of Australian Law Reform Commission on Multiculturalism: Family Law 1991; Report of Working Group on Matrimonial Property and Family Protection (New Zealand) 1988; Issues Paper No 2 of Institute of Law Research and Reform on Towards Reform of the Law Relating to Cohabitation Outside Marriage (Alberta) 1987; Research Paper by Professor Christine Davies (published as part of Issues Paper No 2 of Alberta Institute of Law Reform) 1987; Report No 53 of Alberta Law Reform Institute on Towards Reform of the Law Relating to Cohabitation Outside Marriage 1989.

[48] Report No 36 of New South Wales Law Reform Commission on De Facto Relationships 1983, paragraph 5.44.

[49] Discussion Paper No 46 of Australian Law Reform Commission on Multiculturalism: Family Law 1991, paragraph 3.47.

* Couples are free to enter into either a de facto or married relationship. On entering into a de facto relationship, however, to a greater or lesser extent, individuals take on responsibilities. In certain circumstances, entering into a de facto relationship may give rise to the same degree of responsibility as entering into a marriage.

ii. Failure to give a de facto couple the same rights as a married couple may lead to inequitable results on the breakdown of the de facto relationship

* In 1983, the New South Wales Law Reform Commission concluded that "the law should not attempt to equate the rights and duties of de facto partners, for all purposes with those of married persons".[50]

Based on the legislation recommended by the New South Wales Law Reform Commission, the De Facto Relationships Act 1984 (NSW) was passed. Although the legislation does provide for a de facto spouse to make an application for property adjustment, the matters that the court can consider when deciding on that application are not as comprehensive as the matters which may be considered by the Family Court on the breakdown of a marriage.[51]

The Commission has compared a number of cases concerning adjustment of property interests decided under the De Facto Relationships Act 1984 (NSW) with cases decided under the Family Law Act.[52] While it is impossible to find two cases with identical fact situations, a review of the case law strongly indicates that on the breakdown of a relationship, a de facto spouse who has foregone income earning to be a homemaker whether to bear children or for other reasons is not in as favourable a position as his or her married counterpart. This is of concern to the Commission.

It is, therefore, arguable that only if legislation confers the same rights on de facto couples as are conferred on married couples will justice be done for the de facto spouse on the breakdown of the relationship.

iii. Societal acceptance of de facto relationships

* In a number of the publications referred to earlier,[53] it was stated that non-marital relationships are gaining social acceptance. If this is true, then it is arguable that society is ready to accept the same property entitlements being given to de facto couples on the breakdown of the relationship.

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[50] Report No 36 of New South Wales Law Reform Commission on De Facto Relationships 1983, paragraph 5.57.

[51] Compare section 20(1) of the De Facto Relationships Act 1984 (NSW) with section 79(4) of the Family Law Act.

[52] See Appendix D.

[53] See footnote 47.

iv. Trend of increasing number of de facto relationships

* Although it is difficult to obtain accurate figures, there is no dispute that there is an increase in the number of couples who choose to live in a de facto relationship rather than a married relationship.[54] This apparent trend suggests the acceptance by some people of the de facto relationship as an alternative form of marriage. It is arguable that the same law should apply on the breakdown of this kind of relationship as applies on the breakdown of a marriage.

v. Religious reasons for distinguishing between marriage and de facto relationships not to impact on the law

* For some people, the failure of de facto partners to go through a marriage ceremony is a violation of religious values conscientiously held. Persons practising those values will not be affected by proposed legislation. It does not follow, however, that because adherents of some religions believe that marriage alone should be given legal recognition, persons who do not share or practise those religious beliefs should be exempted from financial obligation towards their partners. It is now an almost universally held belief that parents have financial obligations to their children whether or not the parents are married at the time of the birth of the child. It may also be argued that to the extent that the law imposes greater financial obligations upon married partners than it does upon de facto couples, it could be seen as discouraging a partner from taking the formal step of marrying his or her partner.

* In addition, it may be argued that it is not the function of a Law Reform Commission to attempt to arbitrate between different religious groups or between those who adhere to a religious group and those who do not. That would be to ignore the multi-cultural and secular components of Australian society. It is important to recognise that large numbers of people are in de facto relationships. This generates the need for the law to protect partners' needs in the event of the termination of the relationship. Those needs are the same whether the partners are married or not. The law cannot ignore social reality.

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[54] The statistics from the Census of Population and Housing which was conducted on 15 August 1991 are not yet available to the Commission. However, data from the Australian Bureau of Statistics shows an increase in the frequency of de facto relationships between 1982 and 1986. In 1982, de facto couples constituted 4.7% of coupled families. In 1986, this percentage had risen to 5.7%: Australian Families 1982 by Australian Bureau of Statistics Catalogue No 4408.0 (1984) at page 13 and Australian Families and Households Census 86 by Australian Bureau of Statistics Catalogue No 2506.0 (1989) at page 10 respectively.

vi. Perception of people in a long term de facto relationship that the relationship is a "common law marriage"

* In an Alberta survey which was conducted in 1983,[55] 57% of non-married cohabitants described their living arrangements as a "common law marriage". There was a tendency to select the term "common law marriage" to describe their relationship as the duration of the relationship increased. The results of the survey indicated that as the length of the de facto relationship increased, the perception of the parties was that the relationship had the same indicia as marriage.

vii. Possible economic inequality of partners

* In some cases, one partner to a de facto relationship may dominate the other partner economically. It is possible that one or both partners in a de facto relationship do not appreciate and accept the economic consequences of the relationship and their legal position on its termination. They may therefore need reasonably accessible legal protection.

C. ARGUMENTS FOR CONFERRING LIMITED RIGHTS ON DE FACTO COUPLES

Under option (2) above, de facto couples would be given limited rights to seek an alteration of interests in property. The court would not be able to consider as many matters as could the Family Court on the breakdown of a marriage. In the publications of the law reform bodies referred to earlier,[56] the following arguments were raised against giving de facto couples the same property rights as married couples on the breakdown of the respective relationships.

i. Erosion of institution of marriage

* Without exception, the law reform bodies in the publications reviewed[57] commented that by equating the de facto relationship with marriage, the institution of marriage will necessarily be eroded. The legal concept of marriage involves a private and public commitment. It is argued that the assimilation of marriage and cohabitation might undermine the status of marriage and act as a disincentive for parties to marry.

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[55] The purpose of this survey conducted by the Albertan Institute of Law Research and Reform was to obtain data on the living arrangements of adult urban Albertans, with the primary focus on non-marital cohabitational relationships. The objectives of the survey were to provide an estimate of the prevalence of non-marital cohabitations, to compare the socio-economic characteristics and living arrangements of non-married cohabitants with those of their married counterparts, to examine some of the reasons people give for cohabiting non-maritally and maritally and to document the attitudes of the urban Albertans about some of their legal issues associated with non-marital cohabitation.

[56] See footnote 47.

[57] See footnote 47.

* It was also argued that if fewer parties marry, this may lead to relationships of a shorter duration because divorce discourages hasty breakup of marriage which is not the case for de facto relationships.

* Another argument raised was that if a de facto spouse is given rights to property on the breakdown of a relationship, this may leave less property for distribution to an earlier married spouse where there has not yet been a divorce and property settlement.[58]

ii. Erosion of freedom of choice and autonomy

* The other comment made by all law reform bodies reviewing the existing law was that the concept of marriage involves a public commitment and an interdependence which are not a necessary part of a de facto relationship. It cannot be assumed that all cohabiting couples wish to be subject to the legal regime that applies to married persons. If people choose not to marry, their freedom and autonomy should not be eroded by equating their relationship with marriage.

* The ability of the Family Court to distribute property on the breakdown of a marriage is very wide. For example, although all of the property may be owned by one partner, in an appropriate case, the court has the discretion to transfer most of that property to the other partner. Couples may specifically choose not to be subject to this regime. Giving de facto couples the same property rights as a married couple on the breakdown of a relationship denies the de facto couple that right to choose not to be so regulated.

* In her Research Paper on Cohabitation Outside Marriage,[59] Professor Davies comments that some people make an ideological choice not to be thrust into a marriage relationship which fosters the concepts of subordination and financial dependence. It can be argued that a person making such a choice should not have a legal regime imposed on him or her.[60]

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[58] Report No 12 of Tasmanian Law Reform Commission on Obligations Arising from De Facto Relationships 1977, page 4. It should be noted, however, that this is an argument against giving de factos any property rights at all rather than against giving the de facto couple the same property rights on a breakdown as a married couple.

[59] Published as part of Issues Paper No 2 of Institute of Law Research and Reform on Towards Reform of the Law Relating to Cohabitation Outside Marriage (Alberta) 1987, page 43.

[60] In New Zealand, the Working Group on Matrimonial Property and Family Protection discussed the option of partners contracting into the Marriage Act. Under this option, de facto couples would have the choice of retaining their non-married status but choosing for certain purposes to be regulated by the Marriage Act. This approach was rejected because it was considered that only a small percentage of de facto couples would take advantage of this option.

iii. Qualitative difference in the relationships

* While there are undoubted similarities between the de facto and married relationships, major church groups made submissions to the New South Wales Law Reform Commission stressing the "qualitative difference" between a marriage and a de facto relationship. A number of the law reform bodies also commented on this perceived difference between the de facto and married relationships.

iv. Equation not supported by society

* One of the arguments mentioned earlier in favour of giving de facto couples the same property rights on separation as married couples is the increased societal acceptance of the de facto relationship. However, in her Research Paper,[61] Professor Davies comments that it is probably not true to say that Alberta society is as accepting of a de facto union as it is of a marital union. It is likely that the same is true of Australian society.

v. People should be responsible for their own actions

* One person making a submission to the Tasmanian Law Reform Commission argued that people who encourage financial dependence by entering into a de facto relationship must also undertake appropriate obligations and responsibilities. In other words, the onus of providing for a de facto partner should be on the de facto partners themselves. From this argument it follows that if the de facto partners themselves do not come to an arrangement, they should not have one imposed on them by legislation.

vi. Differing kinds of de facto relationships

* In March 1988, the New Zealand government established a Working Group on Matrimonial Property and Family Protection. As part of its review, the Working Group examined the law relating to the division of property of de facto partners. In its Report, the Working Group commented on the variety of personal relationships coming within the broad category of "de facto relationships". According to the Working Group, this fact combined with the difficulty of precise and objective definition of de facto couples that should be governed by legislation, meant that the law should provide reasonable flexibility in making provisions for these relationships. The Working Group concluded that giving a de facto couple the same property rights as a married couple would not provide that flexibility.

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[61] Published as part of Issues Paper No 2 of Institute of Law Research and Reform on Towards Reform of the Law Relating to Cohabitation Outside Marriage (Alberta) 1987, page 41.

Implicit in this argument is the fact that some de facto relationships are of such a nature that rights and obligations should not attach to either party on the dissolution of the relationship.

D. LAW IN OTHER JURISDICTIONS

As part of its review, the Commission has briefly examined the law in other jurisdictions with respect to property entitlements on the breakdown of de facto relationships.

Before reviewing that legislation, however, it is worth noting that de facto partners have already been given rights under legislation other than with respect to property rights on separation in both Queensland and other jurisdictions. For example, in Queensland where a couple have been living in a de facto relationship and one partner dies, the other may be entitled to make a claim against the estate provided the relationship was sufficiently long and dependency can be proved.[62] A surviving de facto partner may make a similar application against the estate of a deceased partner in New South Wales, the Northern Territory, Western Australia and South Australia.[63]

In New South Wales, the Northern Territory, Western Australia, South Australia, the Australian Capital Territory and Victoria, a surviving de facto partner may claim compensation if his or her partner has been killed as a result of the wrongful act, neglect or default of another person.[64] Another example of the rights being extended to de facto couples in New South Wales and South Australia is legislation conferring on de facto couples in certain circumstances the right to adopt a child.[65]

i. Australian jurisdictions

* New South Wales

In 1983, the New South Wales Law Reform Commission published its recommendations on the law governing de facto relationships. The New South Wales Commission concluded that the then existing law was inadequate to deal with property

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[62] Section 41 Succession Act 1981 (Qld). In Queensland, a de facto partner also has rights in certain circumstances to claim compensation where his or her partner is killed in an accident which occurred at work: Part V Workers' Compensation Act 1990 (Qld).

[63] Section 7 Family Provision Act 1982 (NSW), section 7 Family Provision Act 1970 (NT), section 6 Inheritance (Family and Dependents Provision) Act 1972 (WA) and section 7 Inheritance (Family Provision) Act 1972 (SA) respectively.

[64] Section 4(1) Compensation to Relatives Act 1897 (NSW), sections 8 and 13 Compensation (Fatal Injuries) Act 1974 (NT), section 4 Fatal Accidents Act 1959 (WA), section 19 Wrongs Act 1936 (SA), section 7 Compensation (Fatal Injuries) Act 1968 (ACT) and section 17 Wrongs Act 1958 (Vic) respectively.

[65] Section 19(1A) Adoption of Children Act 1965 (NSW) and section 12 Adoption of Children Act 1988 (SA) respectively.

disputes on the breakdown of the de facto relationship and recommended the enactment of legislation to provide de facto couples with limited property rights on the breakdown of the relationship. These recommendations were embodied in the De Facto Relationships Act 1984 (NSW). As mentioned earlier in this chapter, the matters that the court may consider in an application to alter property rights are fewer than may be considered by the Family Court in a property dispute between a married couple. By comparing the cases decided under the De Facto Relationships Act 1984 (NSW) with those decided under the Family Law Act, it appears that on the division of property the homemaking de facto spouse, particularly one who has the care and control of a child, is not treated as favourably as his or her married counterpart.[66]

* **Victoria**

In 1987, the Victorian legislature enacted the Property Law (Amendment) Act 1987. This legislation gave de facto couples similar entitlements to claim an interest in property on the breakdown of the de facto relationship as those conferred by the New South Wales legislation. Under the Victorian legislation, however, the application must be limited to real property.

* **Northern Territory**

The Northern Territory legislature passed the De Facto Relationships Act 1991 which largely mirrors the De Facto Relationships Act 1984 (NSW).

* **South Australia**

Comprehensive legislation governing de facto property rights does not exist in South Australia. The Family Relationships Act 1975 (SA), however, created the status of "putative spouse". A "putative spouse" is defined as a person who on a certain date has cohabited in a de facto relationship and -

(i) the cohabitation has been for a period of 5 years preceding that date;

(ii) the cohabitation has been for a total period of 5 years within the last 6 years preceding that date; or

(iii) there is a child of the relationship.[67]

If the de facto partner falls within that definition of putative spouse, for certain limited purposes those partners have the same rights and benefits as married spouses. Those limited purposes, however, are confined to the rights and benefits arising on

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[66] See Appendix D for a comparison of cases decided under these two Acts.

[67] Section 11(1) Family Relationships Act 1975 (SA).

the death of one of the partners.[68] South Australia, however, has not passed legislation allowing a de facto partner to claim an interest in property on the breakdown of a de facto relationship.

* **Tasmania and Western Australia**

In Tasmania and Western Australia, legislation governing de facto property rights has not yet been passed. In Western Australia in 1989, however, the Legislative Council established a Select Committee to recommend whether legislation should be passed to govern de facto relationships. In October 1990, the Committee recommended that a De Facto Relationships Act be passed. The recommendations concerning property applications appear to reflect those contained in the New South Wales legislation. To date, however, no such legislation has been enacted.

ii. Overseas jurisdictions

The Commission has briefly reviewed the law relating to de facto relationships in New Zealand, England and three provinces in Canada (British Columbia, Ontario and Alberta). None of these jurisdictions has legislation governing property rights between de facto spouses on the breakdown of the relationship.[69] Principles from the law of trusts apply to claims for property adjustment.

In New Zealand and Alberta, however, reform of the law governing de facto property rights has been recommended. These proposals for reform are discussed below.

* **New Zealand**

In 1988, a Working Group on Matrimonial Property and Family Protection was established to review various aspects of family law. The Working Group reported to the Cabinet Social Equity Committee in September 1988. As part of its review, the Group examined the law governing de facto property rights.

In relation to reform of the law governing property rights of de facto couples, the New Zealand Working Group made the following recommendations -

* Legal and de facto marriages should not simply be equated.

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[68] These purposes include entitlements to testators' family maintenance, intestacy, superannuation and in the event of a fatal accident.

[69] In an application by a de facto spouse for maintenance in the Canadian province of Ontario, however, the court may order that the property be transferred or vested in the applicant: Family Law Act 1986 S.O. 1986 C.4 section 34(1)(c).

Also, certain English statutes including section 17 of the Married Women's Property Act 1882, section 7 of the Matrimonial Causes (Property and Maintenance) Act 1958 and section 37 of the Matrimonial Proceedings and Property Act 1970 apply to married couples and couples formally engaged to be married. Engaged couples may have been living in a de facto relationship. These statutes may assist parties in the resolution of property disputes when the relationship has broken down. Section 2 of the Law Reform (Miscellaneous Provisions) Act 1970 equates engaged couples with married couples for these purposes provided an application is made within three years of the termination of the engagement.

* A special Part should be inserted into a new Matrimonial Property Act to deal with the property of de facto partners.

* "Property" should mean the property that would be "matrimonial property" if the parties were married to each other.

* If the court finds that a de facto relationship exists it would apply the Matrimonial Property Act if satisfied that in all the circumstances of the case justice so requires. Alternatively, there could be a rebuttable statutory presumption that the Act applied.

* If the court does not apply the Act, property interests should be adjusted in accordance with contributions to the de facto partnership. Financial contribution should be given no greater weight than non-financial contributions.[70]

In applying the Matrimonial Property Act (New Zealand) to a de facto relationship circumstances which the court would take into account should include -

* the length of the relationship;

* the contribution of both parties;

* children of the relationship;

* the similarity in nature and quality of the relationship and a marriage;

* if either party were still married, whether a property division had occurred between the spouses.[71]

* **Alberta**

In June 1989, the Alberta Law Reform Institute published Report No 53 "Towards Reform of the Law Relating to Cohabitation Outside Marriage". The Report made a number of recommendations concerning maintenance and property rights of de facto couples.[72]

The Institute recommended that non-marital cohabitation should not confer a marriage-like status on a couple, in terms of property entitlements on the breakdown of the relationship. It did, however, recommend an amendment of Alberta law in specific areas to cure inequities and situations of hardship.

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[70] Report of the Working Group on Matrimonial Property and Family Protection (New Zealand) 1988, page 85.

[71] Report of the Working Group on Matrimonial Property and Family Protection (New Zealand) 1988, page 71.

[72] Refer to Appendix C for a summary of these recommendations.

These recommendations included -

* cohabitation and separation agreements to be enforceable and governed by statute;

* orders for exclusive use and occupancy of the home in which the de facto couple was living before separation where the applicant has the care and control of a child aged 12 years or less who is a child of the relationship or a child to whom the respondent stands in loco parentis.[73]

To date, no legislation has been passed incorporating the recommendations made.

E. SUBMISSIONS RECEIVED

A number of the organisations and individuals making submissions to the Queensland Law Reform Commission commented on whether de facto couples should be given the same property rights on dissolution of their relationship as married couples. Five of the 8 commenting on this issue were of the view that the de facto legislation with respect to property disputes should as closely as possible parallel the Family Law Act provisions.

The Family Law Council stated that the law which gives recognition to non-economic contributions towards the acquisition, conservation or improvement of assets as set out in the Family Law Act should apply equally to de facto couples. The Council had not, however, at the time it made its submission, formulated a view on whether de facto couples should in general be treated in the same way as married couples.

On the other hand, one community legal service was of the view that the Family Law Act should not apply to de facto couples. In the view of that legal service, an Act based on the Family Law Act should not be used to regulate the affairs of people who have chosen not to enter into the legal institution of marriage.

One solicitor was of the view that in determining property distribution, the conduct of the parties including the cause of the relationship breakdown, should be relevant.

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[73] "Loco parentis" means a person who takes upon himself or herself the duty of a parent to a child by providing for that child.

F. SURVEY RESULTS

As explained earlier,[74] in 1991 the Queensland Law Reform Commission conducted a survey of legal practitioners. Of the surveys distributed, the Commission received 155 completed responses.[75] As part of the survey, practitioners were asked to give suggestions to improve the existing law. Of the 104 practitioners who responded to this question, 6 commented that legislation in similar terms to the De Facto Relationships Act 1984 (NSW) should be enacted. Another 31 practitioners were of the view that de facto couples should be in the same position as married couples so far as their property rights were concerned.

G. TENTATIVE RECOMMENDATION OF THE COMMISSION

In coming to its decision on the property entitlements which should be given to de facto couples on the breakdown of a relationship, the Commission considered the arguments canvassed earlier in this chapter. The Commission also considered the views expressed in submissions made to it and the data gathered from the survey of legal practitioners.

The Commission is also mindful of the concern which may be expressed by some members of the community that giving a de facto couple similar property rights to a married couple on the breakdown of the relationship would erode the institution of marriage.

However, on balance, it cannot be doubted that legislation must be enacted to ensure a just and equitable property distribution on the breakdown of a de facto relationship. If only limited property rights are conferred on de facto couples as is the case in New South Wales under the De Facto Relationships Act 1984, the Commission is concerned that on the breakdown of the relationship, the de facto partner who has assumed the homemaking and childbearing role may be severely disadvantaged. If this be the case, injustices may occur. For these reasons, **the Commission recommends that provided a de facto couple is eligible to be considered under the proposed legislation,[76] the parties to the relationship should have, as far as it is possible, the same property rights as a married couple on the dissolution of their relationship.**

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[74] See page 12.

[75] For a more detailed analysis of the survey results, refer to Appendix A.

[76] Refer to clause 3.3 of the draft legislation which specifies when a de facto partner will qualify to apply for relief under Part III of the proposed legislation.

5. MAINTENANCE RIGHTS OF DE FACTO COUPLES

In Chapter 4, the Commission discussed the options available for altering interests in property on the breakdown of a de facto relationship. A matter which is also of importance on the relationship breakdown is each de facto partner's ability to support himself or herself financially in the future.

Under the Family Law Act, on the breakdown of a marriage one partner may be entitled to claim maintenance from the other. An entitlement to maintenance from a former spouse is based on an inability to support oneself and on the other party's ability to pay.[77] If the parties cannot agree on maintenance entitlements, the matter is determined in the Family Court. In deciding whether to make an order for maintenance and, if so, the amount to be ordered, the court must consider the matters set out in the Family Law Act.[78] These matters focus primarily on the financial needs and obligations of the parties.

In its Shared Property Discussion Paper, the Commission considered the law governing all people who lived together and shared property. The review covered friends or siblings living together to share expenses, students sharing accommodation while undertaking a tertiary course or an adult child living with and caring for an elderly parent. In these situations, the issue of maintenance is not appropriate. For this reason, the legislation in the Shared Property Discussion Paper did not allow a sharer to claim maintenance against another sharer.[79]

The focus of this Working Paper is on de facto couples only. It must, therefore, be considered whether the legislation recommended by the Commission should allow one party to claim maintenance against the other. If maintenance is appropriate, then recommendations must be made on whether legislation should be based on the Family Law Act, de facto legislation in other jurisdictions, a combination of these models or any other model. These issues will be considered in this chapter.

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[77] Section 72 Family Law Act.

[78] Section 75(2).

[79] Clause 3.8 of the draft Shared Property legislation, however, allowed the court, when altering an interest in property, to take additional matters into consideration where the sharers were de facto couples. These additional matters are traditionally relevant in a claim for maintenance.

Part I Should de facto legislation confer maintenance entitlements?

In this Part, the matters which have been considered by the Commission in deciding whether the legislation should provide for maintenance are reviewed. The tentative recommendation of the Commission on whether legislation should confer maintenance rights and obligations on de facto couples appear at the end of Part I.

A. ARGUMENTS FOR AND AGAINST CONFERRING MAINTENANCE RIGHTS AND OBLIGATIONS ON DE FACTO COUPLES

In its Report on De Facto Relationships,[80] the New South Wales Law Reform Commission discussed the defects which then existed in the law concerning the lack of maintenance entitlements for de facto couples and the arguments against granting maintenance rights to de facto couples. The Commission is of the view that many of the matters raised in the Report are still relevant today.

* *ARGUMENTS FOR CONFERRING MAINTENANCE ENTITLEMENTS*

Under the existing law in Queensland, de facto partners are unable to claim maintenance for themselves from their partners on the breakdown of the de facto relationship.[81] This situation can result in serious injustice. The injustice which can occur is illustrated by the following example.

Example A

A couple lived in a de facto relationship for 30 years. The partners agreed that the woman would remain at home to have the children of the relationship and to support the man in his business career. The de facto husband was successful in his career and accumulated substantial wealth and has substantial earning capacity. On separation, the de facto wife had few assets and was not equipped to earn an income given the time spent out of the workforce.

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[80] Report No 36 of New South Wales Law Reform Commission on De Facto Relationships 1983, paragraphs 8.3-8.15.

[81] Note, however, that a de facto husband may be liable under section 66X of the Family Law Act to pay the child bearing expenses of his de facto partner.

In this example, it would seem fair that the de facto husband be obliged to support his former partner. The alternative is for the de facto wife to rely on social security. Under existing law, however, there is no legal avenue in Queensland for a de facto partner to make a claim for spousal maintenance.[82]

* *ARGUMENTS AGAINST CONFERRING MAINTENANCE ENTITLEMENTS*

i. Lack of public commitment of de facto couples

Marriage involves a public commitment by both parties to mutual support during a life long relationship. This commitment impliedly recognises that on a marriage breakdown, one party may have to provide support to the other. Public commitment, however, is not a necessary ingredient in a de facto relationship. A de facto couple can live together in a lengthy relationship without making such a commitment. Some would argue, therefore, that maintenance rights and obligations should not be imposed on de facto couples.

ii. Choice of freedom from obligation

It has also been argued that by choosing not to marry, de facto couples make a conscious decision not to be regulated by the legal obligations applicable to married couples.

iii. Changing role of maintenance

As discussed later in this chapter, there is a trend away from orders for long-term spousal maintenance. Maintenance orders are more likely to be made for a short term only, to enable the party receiving maintenance to become self supporting. It has been argued that it would be contrary to this trend for legislation to confer maintenance rights and obligations on de facto couples.

It was also argued by some groups who made submissions to the New South Wales Law Reform Commission that the concept of maintenance reinforces a traditional view that women are the dependent partner in any domestic relationship. To break down such traditional views, it is argued that maintenance should not be a feature of de facto legislation.

Implicit in this argument is the recognition that in many relationships today, the partners are financially independent of each other. The Queensland Commission is of the view that in many cases, the nature and duration of the relationship could not be seen as warranting the making of a maintenance application.

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[82] Contrast De Facto Relationships Act 1984 (NSW) and De Facto Relationships Act 1991 (NT) which allow a de facto partner to bring an application for maintenance after the relationship has ended. This legislation is discussed in more detail later in this chapter.

Example B

A couple lived in a de facto relationship for five years. Both partners remained in employment. There was no child of the relationship. Neither partner made substantial financial sacrifices or suffered financial detriment arising from the relationship.

Even if one partner has a higher earning capacity than the other, the Commission considers it inappropriate for either partner to claim maintenance in this example.

Recommendation of New South Wales Law Reform Commission

After considering the deficiencies in the existing law and the arguments against conferring maintenance rights, the New South Wales Law Reform Commission recommended that a de facto partner should be able to claim maintenance in certain limited circumstances.[83]

B. LAW IN OTHER JURISDICTIONS

As part of its review, the Queensland Law Reform Commission has examined maintenance entitlements on the breakdown of de facto relationships in other jurisdictions.[84]

i. Australian jurisdictions

* New South Wales

The recommendations of the New South Wales Law Reform Commission on the law governing de facto relationships including maintenance rights was embodied in the De Facto Relationships Act 1984 (NSW). The entitlement of a de facto spouse to claim maintenance is more limited than under the Family Law Act.[85]

* Northern Territory

The Northern Territory De Facto Relationships Act 1991 confers maintenance rights and obligations on de facto spouses. These maintenance rights and obligations largely mirror the De Facto Relationships Act 1984 (NSW).

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[83] The De Facto Relationships Act 1984 (NSW) incorporates the recommendations of the New South Wales Law Reform Commission and is discussed later in this chapter.

[84] In addition to the maintenance entitlements reviewed below, in all Australian jurisdictions de facto husbands may be required to pay child bearing expenses of his partner: section 66X Family Law Act and section 62 Family Court Act 1975 (WA). These entitlements are not considered in this review.

[85] The entitlement of a de facto spouse in New South Wales is discussed more fully later in this chapter.

* **Tasmania**

The Maintenance Act 1967 (Tas) confers on a woman, in limited circumstances, the right to claim maintenance. A woman must have cohabited with a man for twelve months. The court must be satisfied that the male partner has left her or a child of the relationship without adequate means of support, has been habitually intoxicated or has been guilty of cruelty or misconduct so as to render it unreasonable to expect her to live with him.[86] The Tasmanian legislation does not confer on a man the right to claim maintenance from his de facto partner. However, in 1977 the Tasmanian Law Reform Commission recommended that the Maintenance Act 1967 (Tas) should be amended to enable a dependent man to make a claim against a woman in similar circumstances to those in which a dependent woman can currently claim. The Commission has also recommended that provided the court is satisfied that a dependency exists, the court should have power to order payment of maintenance where special circumstances justify such a course even though the couple have not lived together for twelve months.[87] To date, these recommendations have not been implemented.

* **Western Australia, Victoria and South Australia**

No legislation has been passed in Western Australia, Victoria or South Australia conferring maintenance rights on de facto spouses on the breakdown of the relationship. In October 1990, however, the Select Committee on De Facto Relationships in Western Australia recommended that de facto couples be given the right to claim maintenance. The recommendations reflected those contained in the New South Wales legislation. To date, however, no legislation has been enacted.

ii. Overseas jurisdictions

As discussed in Chapter 3, the Commission has briefly reviewed the law relating to de facto relationships in New Zealand, England and three provinces in Canada (British Columbia, Ontario and Alberta). New Zealand, British Columbia and Ontario confer on de facto couples limited rights to claim maintenance. In both Alberta and New Zealand, reform of the law governing maintenance rights for de facto couples has been recommended.[88]

The law governing maintenance rights between de factos in New Zealand, British Columbia and Ontario is discussed below.

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[86] Section 16 of the Maintenance Act 1967 (Tas).

[87] Report No 12 of Tasmanian Law Reform Commission on Obligations Arising from De Facto Relationships 1977, page 7.

[88] The reforms recommended in Alberta and New Zealand are discussed in Appendix C.

* **New Zealand**

In New Zealand, the court may make a maintenance order for an unmarried parent (whether a mother or father) if -

1. the order is desirable in the interests of providing, or re-imbursing the applicant for having provided adequate care for the child; and

2. the order is reasonable having regard to the means (including potential earning capacity) of each parent, their needs, the support of any other person by the respondent and financial and any other responsibilities they may have.[89]

The New Zealand legislation is limited in its application. It applies only if a de facto partner is a parent. Moreover, it is not necessary that the parties have lived in a de facto relationship for this obligation to arise.

The order, unless it has already expired, ceases to have any effect once the partner who is receiving maintenance marries.[90]

* **Canada - British Columbia and Ontario**

British Columbia and Ontario have enacted legislation enabling de facto partners to obtain maintenance where the relationship comes to an end.[91] The legislation sets out a number of factors which the court must take into account in deciding whether to order maintenance. These factors focus on the financial needs and resources of the parties and their past financial and non-financial contributions to the relationship. In British Columbia, the court also has power to order that one de facto partner be given exclusive occupancy of the family home.[92]

C. SUBMISSIONS RECEIVED

In its Shared Property Discussion Paper, the Commission invited comment on whether legislation should allow a de facto partner to claim maintenance from his or her former de facto partner.

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[89] Sections 79 and 81(1) Family Proceedings Act 1980 (NZ).

[90] Section 81(3) Family Proceedings Act 1980 (NZ).

[91] For a more detailed analysis on the Canadian position, see Appendix C.

[92] Ontario legislation also confers on spouses a right for exclusive possession of the matrimonial home. It is uncertain whether the legislation extends to de facto couples: Issues Paper No 2 of Institute of Law Research and Reform on Towards Reform of the Law Relating to Cohabitation Outside Marriage (Alberta) 1987, page 77. This issue is also discussed in Appendix C.

Twelve of the thirteen people or groups who made submissions on this issue supported legislation allowing a court to make periodic or lump sum maintenance orders.[93]

D. SURVEY RESULTS

As explained earlier, the Law Reform Commission conducted a survey of legal practitioners.[94] In the survey, practitioners were asked whether they had been approached for legal advice about a de facto partner's entitlement to maintenance. Of the 135 practitioners who responded to this question, 84 practitioners had been requested to give such advice and 22 of those estimated that they had been approached frequently for such advice over the previous twelve months.

E. TRENDS IN SPOUSAL MAINTENANCE UNDER THE FAMILY LAW ACT

Under the Family Law Act, the Family Court may order one party to the marriage to pay the other maintenance.[95]

In 1985, the Australian Law Reform Commission carried out a survey of property orders made by the Family Court during a 12 month period.[96] The survey revealed a low incidence of spousal maintenance orders being made. Spousal maintenance was ordered in fully contested hearings in only 6.1% of cases surveyed.

In recent years, however, there have been shifts in public policy which may result in an increase in spousal orders being made. There is a shift from relying on the public purse in the form of pensions, to requiring a spouse to support a former partner if financially able to do so.

There are two clear examples of this trend away from payment out of the public purse. The first example is an amendment to the Family Law Act in 1987.[97] This amendment requires the court in an application for spousal maintenance to disregard any entitlement the applicant may have to an income-tested pension, allowance or

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[93] The Department of Family Services and Aboriginal and Islander Affairs drew the Commission's attention to the comments made by the Australian Law Reform Commission in its Report No 3 on the Recognition of Aboriginal Customary Law. In that Report, the Australian Law Reform Commission commented that there was no demonstrated need to extend to people in a traditional Aboriginal marriage the same maintenance rights and obligation as couples who marry under the Marriage Act 1961 (Cwth).

[94] For a more detailed analysis of the survey results, refer to Appendix A.

[95] Section 74 Family Law Act.

[96] Research Paper No 1 of Australian Law Reform Commission on Matrimonial Property - A Survey of Family Court Property Cases in Australia 1985.

[97] Family Law Act Amendment Act 1987 (Cwth) which introduced section 75(3) into the Family Law Act.

benefit such as the supporting parent's benefit. In other words, the court is not required to make a maintenance order that would preserve his or her entitlement to a pension.

The second example is the 1988 amendment to the then Social Security Act 1947 (Cwth).[98] This amendment enabled the Social Security Department in certain circumstances to ask social security recipients to commence spousal maintenance claims or risk losing their pensions.[99]

This shift in responsibility may over a period of time lead to an increase in the number of orders for spousal maintenance being made.

F. EARLIER RECOMMENDATION OF THE COMMISSION

In its Shared Property Discussion Paper, the Commission reviewed the law on property entitlements of all people who live together and share property. Of particular concern to the Commission was the situation which arose where one person contributed both financially and non-financially to the property of another. At the end of the relationship, injustices can arise under the existing law because of difficulties of the contributing person obtaining any interest in the property of the other. The Commission was seeking to provide a more accessible method of allowing the person to claim an interest in property to which he or she should be entitled.

As the focus of the Shared Property Discussion Paper was on altering interests in property and on a variety of sharers, the Commission considered it inappropriate for the legislation to provide for maintenance. The Commission recognised, however, that in the de facto context, issues of financial needs and obligations of each partner are also relevant. For this reason, clause 3.8 of the legislation proposed in the Shared Property Discussion Paper allowed the court to consider additional factors when altering interests in property on the application of a de facto partner.

Although clause 3.8 allowed the court to consider matters which are traditionally relevant in a maintenance claim,[100] the legislation proposed in the Shared Property Discussion Paper only empowered the court to alter interests in property. It did not enable the court to order the payment of maintenance.

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[98] Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Act 1988 (Cwth) which amended sections 47 and 55 of the now repealed Social Security Act 1947 (Cwth). (See sections 252 and 363 of the Social Security Act 1991 (Cwth).)

[99] The social security recipients affected by this amendment are those receiving a supporting parents benefit or a widow's pension.

[100] Compare section 75(2) Family Law Act, section 27(2) De Facto Relationships Act 1984 (NSW) and section 26(2) De Facto Relationships Act 1991 (NT).

G. TENTATIVE RECOMMENDATION - RIGHT TO CLAIM MAINTENANCE

For the reasons discussed in Chapter 2, the focus of this Working Paper is on the de facto relationship. In particular, the Commission is reviewing the financial situation of de facto couples on the breakdown of the relationship. It is, therefore, necessary for the Commission to re-examine its stance on allowing a de facto partner to claim maintenance.

In examining whether de facto couples should have maintenance rights and obligations conferred on them on the breakdown of the relationship, the Commission considered a number of factors. It considered the arguments for and against conferring maintenance rights and obligations on de facto couples, the views expressed in submissions made to it, the data gathered from its survey of legal practitioners, the laws on maintenance in other jurisdictions, the variety of circumstances in which de facto couples separate and the trends in the Family Court for making spousal maintenance orders.

Both New South Wales and the Northern Territory have enacted de facto legislation which recognises the rights and obligations of de facto spouses to maintain each other on the breakdown of the relationship.[101]

The Commission is concerned that under the existing law, serious injustice can arise on the breakdown of a de facto relationship if one spouse is not entitled to claim maintenance from the other. Injustice is particularly likely to occur if, during the de facto relationship, one partner has assumed the homemaking role and is, therefore, unable to support himself or herself on the breakdown of the relationship. In contrast, during the term of the de facto relationship, the other partner may have advanced considerably in his or her career.

After considering the material referred to above, the Commission tentatively recommends that legislation should confer limited maintenance rights and obligations on de facto couples on the breakdown of a relationship.

Part II Nature of maintenance entitlements for de facto couples

In Part I of this chapter, the Commission tentatively recommends that the legislation should confer maintenance rights and obligations on de facto couples on the breakdown of a relationship. In this Part, the nature of the maintenance entitlements which should be conferred will be considered. Three possible maintenance regimes

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[101] Section 27 De Facto Relationships Act 1984 (NSW) and section 26 De Facto Relationships Act 1991 (NT). In Victoria, the Property Law Amendment Act 1987 conferred on de facto couples the right to claim an interest in real property on the breakdown of a relationship. The legislation does not, however, confer on a de facto partner any entitlements to maintenance.

for de facto couples are canvassed. The provisions of the New South Wales and Northern Territory legislation as well as the Family Law Act are reviewed and compared. At the end of Part II, the tentative recommendation of the Commission on the most suitable option conferring maintenance entitlements on de facto couples is outlined and the reasons for choosing this option are discussed.

A. PRINCIPLES GOVERNING MAINTENANCE ENTITLEMENTS

In Chapter 4, the various legislative options for altering interests in property were discussed. Given the clear similarities between a married and de facto relationship, the Commission posed the question of whether the legislation altering interests in property should be the same for de facto couples as married couples. Arguments supporting and opposed to such a proposition were then canvassed.

To a large extent, the same question arises when considering maintenance rights and obligations of de facto couples. Given the similarity of the relationships, the question must be asked whether legislation governing de facto couples should reflect the maintenance provisions in the Family Law Act.[102]

Before coming to its tentative conclusion, the Commission considered the following three options.

(1) A de facto partner's entitlement to maintenance should be the same as a married partner's on the breakdown of their respective relationships.

If this option were chosen, the proposed clause would reflect as closely as possible the relevant sections in the Family Law Act.

(2) A de facto partner's entitlement to maintenance should be the same as a married partner's on the breakdown of their respective relationships, provided the partner can show an inability to support himself or herself which is a result of that partner's commitment to the relationship.

If this option were chosen, the proposed clause would reflect as closely as possible the relevant sections in the Family Law Act.[103] There would, however, have to be an additional section limiting the circumstances which would give rise to a claim for maintenance.

(3) A de facto partner's entitlement to maintenance should mirror the limited entitlements which exist under the De Facto Relationships Act 1984 (NSW) and the De Facto Relationships Act 1991 (NT).

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[102] Sections 72, 74 and 75.

[103] Sections 72, 74 and 75.

B. COMPARISON OF MAINTENANCE LEGISLATION FOR MARRIED AND DE FACTO COUPLES

It is clear from a comparison of the maintenance provisions in the New South Wales and Northern Territory de facto legislation that a de facto partner's entitlement to maintenance is far more restricted than a married person's. There are three specific areas where the de facto legislation and the Family Law Act differ.

i. The grounds on which a maintenance order may be made in New South Wales and Northern Territory are narrower than under the Family Law Act.

A spouse's right to maintenance under the Family Law Act is a limited entitlement. A person claiming maintenance must prove both an inability to support himself or herself adequately and the spouse paying the maintenance must have the financial ability to pay.

In New South Wales and the Northern Territory, however, the provisions are even more limited. A court can only make an order for spousal maintenance on two grounds. Firstly, the court can order maintenance if the partner cannot support himself or herself adequately because he or she has the care and control of the child of the relationship or child of the other partner.[104] The second ground is if the applicant's earning capacity would increase by undertaking a course or programme of training or education.[105]

The differences between the Family Law Act and the New South Wales and Northern Territory legislation are best illustrated by the following examples. In these examples, maintenance could be awarded under the Family Law Act but not under the New South Wales or Northern Territory legislation.

* *An elderly or invalid de facto wife will have no claim against even a wealthy de facto husband (or vice versa), as no suitable programme for increasing her earning capacity can be found.*

* *A needy de facto wife with no readily marketable job skills may fail in her maintenance claim if she also had no such skills at the beginning of the relationship. That is, she may have some difficulty establishing the causal connection between her role in the relationship and her decreasing earning capacity. ...*

* *A needy de facto wife will apparently fail in her claim for maintenance from even a wealthy partner (or vice versa) if she fails to produce specific claims that a training course which will (probably) increase her earning capacity upon graduation.*[106]

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[104] Section 27(1)(a) De Facto Relationships Act 1984 (NSW) and section 26(1)(a) De Facto Relationships Act 1991 (NT).

[105] Section 27(1)(b) De Facto Relationships Act 1984 (NSW) and section 26(1)(b) De Facto Relationships Act 1991 (NT).

[106] CCH Australian De Facto Relationships Law, paragraph 21-350.

ii. In awarding maintenance, fewer matters can be considered by the court under the New South Wales and Northern Territory legislation than under the Family Law Act.

If a married person or de facto partner has satisfied the relevant provisions described under (i) above,[107] he or she will be able to claim maintenance against the former spouse. The court must then decide on the amount of maintenance to order. The Family Law Act and the de facto legislation of New South Wales and Northern Territory set out the matters which the court may consider in determining the amount of maintenance.[108]

Under the Family Law Act, a court can consider more matters in deciding the amount of maintenance than can be considered by a court in an application under the New South Wales and Northern Territory legislation. The matters which may be considered under the Family Law Act but not the de facto legislation include -

* the age and state of health of each of the parties;[109]

* the care and control of a child of the marriage under 18 years;[110]

* a standard of living that in all the circumstances of separation is reasonable;[111]

* the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party;[112]

* the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;[113]

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[107] Section 72 Family Law Act, section 27(1) De Facto Relationships Act 1984 (NSW) and section 26(1) De Facto Relationships Act 1991 (NT).

[108] Section 75(2) Family Law Act, section 27(2) De Facto Relationships Act 1984 (NSW) and section 26(2) De Facto Relationships Act 1991 (NT) respectively.

[109] Section 75(2)(a) Family Law Act.

[110] Section 75(2)(c) Family Law Act.

[111] Section 75(2)(g) Family Law Act.

[112] Section 75(2)(h) Family Law Act.

[113] Section 75(2)(j) Family Law Act.

* the duration of the relationship and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;[114]

* the need to protect the party who wishes to continue that party's role as parent;[115]

* if either party has begun cohabiting with another person after separation, the financial circumstances relating to the cohabitation;[116]

* any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.[117]

Because of the number and extent of matters which can be considered by the Family Court on the breakdown of a marriage but not by a court on the breakdown of a de facto relationship, there is clearly greater scope for maintenance orders being made more frequently by the Family Court.

iii. There are limited time periods for which a court can order maintenance under the New South Wales and Northern Territory legislation.

Under the Family Law Act, there is no restriction on the period for which the court can order spousal maintenance to be paid. While such orders today are infrequently made, the court has power to order long-term spousal maintenance.[118]

In contrast, the New South Wales and Northern Territory de facto legislation imposes limitations on the duration of maintenance orders. The maximum length of the order depends on the reason for which maintenance is being ordered. If maintenance is ordered because the partner has the care and control of a child of the relationship or child of the other partner, in New South Wales the maintenance order may last only until the child reaches 12 years or, if the child is physically or mentally handicapped, 16 years.[119] The Northern Territory legislation allows the maintenance order to last until the child reaches 18 years.[120]

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[114] Section 75(2)(k) Family Law Act.

[115] Section 75(2)(l) Family Law Act.

[116] Section 75(2)(m) Family Law Act.

[117] Section 75(2)(o) Family Law Act.

[118] See, for example, the order of the Full Court of the Family Court in Spano and Spano (1979) FLC 90-707.

[119] Section 30(1) De Facto Relationships Act 1984 (NSW).

[120] Section 32(1) De Facto Relationships Act 1991 (NT).

The court can also order maintenance under the de facto legislation to enable the partner to undertake a course or program of training or education if that would be likely to increase his or her earning capacity. In these circumstances, the maintenance order may last until three years after the order is made or four years after the relationship ended, whichever period is shorter.[121]

While it is infrequent that the Family Court exercises its power to order long-term maintenance payments, it is important that such an order can be made if the circumstances warrant. Under the de facto legislation of New South Wales and Northern Territory, however, the courts are unable to make such long-term orders even if it would, in the circumstances, prevent injustice.

C. TENTATIVE RECOMMENDATION OF THE COMMISSION

It is now necessary to decide which of the following options should form the basis of the Commission's proposed legislation.

(1) A de facto partner's entitlement to maintenance should be the same as a married partner's on the breakdown of their respective relationships.

(2) A de facto partner's entitlement to maintenance should be the same as a married partner's on the breakdown of their respective relationships, provided the partner can show an inability to support himself or herself which is a result of that partner's commitment to the relationship.

If this option were chosen, the proposed clause would reflect as closely as possible the relevant sections in the Family Law Act.[122] There would, however, have to be an additional section limiting the circumstances which would give rise to a claim for maintenance.

(3) A de facto partner's entitlement to maintenance should mirror the limited entitlements which exist under the De Facto Relationships Act 1984 (NSW) and De Facto Relationships Act 1991 (NT).

In deciding which of the above options is the most desirable, the Commission has examined the relevant provisions of the Family Law Act and the New South Wales and Northern Territory de facto legislation; and the differences between them. The Commission has considered the deficiencies in the present law on maintenance entitlements of de facto partners as well as the arguments against allowing de facto partners to claim maintenance.

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[121] Section 30(2) De Facto Relationships Act 1984 (NSW) and section 32(2) De Facto Relationships Act 1991 (NT).

[122] Sections 72, 74 and 75.

Option 1

In Chapter 4, the Commission tentatively decided that as a matter of principle, on the termination of a relationship, the property rights and obligations of de facto couples should be the same as for married couples. Under option 1, on the breakdown of a de facto relationship, a de facto couple would have the same maintenance rights and obligations as a married couple.

This option would allow de facto partners to claim maintenance in situations where they could not under existing New South Wales and Northern Territory legislation. The examples given earlier in this chapter[123] of claims which would be unsuccessful in New South Wales could, if option 1 were adopted, result in orders for maintenance being made in Queensland.

The Commission, however, has major reservations about option 1. It is of the view that there are significant philosophical differences between property and maintenance claims. While the Commission considers it appropriate that property rights for de facto couples and married couples be the same on the dissolution of the relationships, the same reasoning does not apply for maintenance matters.

Applications to adjust interests in property are "one-off" actions. The decision of the court would generally put an end to financial relations. The dispute concerns existing property of the parties. In deciding how to adjust the interests in property, while the court is required to consider matters relevant to the parties' financial needs and obligations in the future, the primary focus of the court is on financial and non-financial contributions made by each party in the past. The court makes an order which is just and equitable in those circumstances.

In contrast, orders for spousal maintenance require one party to support the other for a certain period of time. This obligation of future support is not necessarily connected with contributions made by partners during the relationship.

Because a de facto relationship may involve a different degree of commitment from the partners than does a marriage, the Commission is reluctant to recommend the imposition on de facto couples the same rights and obligations for <u>future</u> support as a married couple.

For these reasons, the Commission has tentatively rejected option 1.

Option 3

Under option 3, the legislation of the Commission would embody the maintenance provisions of the New South Wales and Northern Territory de facto legislation.

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[123] See page 50.

The problems of the de facto legislation in New South Wales and Northern Territory were explained in this chapter. In three important areas the maintenance rights and obligations under the de facto legislation are inferior to the Family Law Act provisions. The Commission is of the view that these differences could lead to serious injustice.

For these reasons, the Commission has tentatively rejected option 3.

Option 2

Under option 2, a de facto partner's entitlement to maintenance would be the same as a married partner's provided the partner can show that the inability to support himself or herself resulted from that partner's commitment to the relationship.

While the Commission is satisfied that this option is a reasonable compromise between options 1 and 3, it may not resolve all injustices. The following example illustrates one of the concerns of the Commission.

Example C

Ms A and Mr B have lived in a de facto relationship for 40 years. Before Ms A moved in with Mr B, Ms A lived with her parents and was unemployed. Ms A and Mr B have had four children who are now all adults. Throughout the relationship, Ms A was the homemaker and supported Mr B as he advanced in his career. During his successful career, Mr B accumulated substantial wealth.

On separation, it is unlikely that Ms A will be able to find employment. In other words, she will be unable to support herself adequately. However, because she was unemployed at the beginning of the relationship, it may be argued that her inability to support herself is not a result of the de facto relationship. It would be of concern to the Commission if Ms A would not be able to claim maintenance against Mr B in these circumstances.

Summary

For the reasons given above, **the Commission tentatively recommends the adoption of option 2. If the inability to support oneself adequately results from the circumstances of the de facto relationship, in determining the amount of maintenance, the court should be able to consider the same matters as the Family Court in determining maintenance.**

The Commission is interested in obtaining submissions from members of the public on this recommendation, the options which have been discussed in this chapter and any other options.

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6. COHABITATION AND SEPARATION AGREEMENTS

Part I Providing for agreements in legislation

Historically, some cohabitation and separation agreements entered into by de facto couples could be regarded as unenforceable at law on the grounds of immorality.[124] The question is whether statute should specifically recognise all cohabitation and separation agreements as binding; and the circumstances in which they may be varied by the court or set aside.

Since publishing its Shared Property Discussion Paper, the Commission has received many submissions commenting on whether legislation should provide for de facto couples entering into binding cohabitation and separation agreements. The Commission has also reviewed information compiled from its survey of legal practitioners. The Commission has also reviewed the Northern Territory and New South Wales legislation and the provisions in the Family Law Act in relation to section 86 and 87 agreements. It has also considered possible trends under the Family Law Act in relation to pre-nuptial agreements. The tentative recommendation of the Commission on financial agreements are set out at the end of Part I.

A. EARLIER RECOMMENDATION OF THE COMMISSION

In its Shared Property Discussion Paper, the Commission discussed general policy considerations relevant to the topic of de facto couples entering into binding separation and cohabitation agreements.[125]

The following were listed as arguments in favour of allowing couples to enter into binding agreements.

(i) De facto couples would have freedom to regulate their own financial arrangements rather than having to be regulated by legislation;

(ii) De facto couples would be able to plan their financial future with a degree of certainty;

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[124] Fender v St. John Mildmay [1983] AC 1 at 42.

[125] Shared Property Discussion Paper, pages 75-80. This discussion related to "sharers" as broadly defined in that Discussion Paper entering into such agreements. As de facto couples were included within the definition of sharers, the comments were also relevant to de facto couples.

(iii) Because the agreement will contain terms governing their financial relationship, fewer disputes should arise and litigation would be less likely.[126]

Arguments against allowing de facto couples to enter binding cohabitation and separation agreements have also been raised.

(i) Hardship and injustice could result if one de facto partner signs an unfair agreement because of pressure applied by the other de facto partner or because of inequality of bargaining power;

(ii) If the parties enter into an agreement at the beginning of the relationship, the agreement may not be appropriate some years later when the nature of or the circumstances surrounding the relationship have substantially altered;

(iii) It is inappropriate for de facto couples to be regulated by a formal contract because this indicates a lack of trust between the parties which could ultimately undermine the relationship;[127]

(iv) Cohabitation and separation agreements are less likely to be used by socially or economically disadvantaged members of the community.

The Commission's tentative recommendation in the Shared Property Discussion Paper was that people should be able to regulate their own financial arrangements by entering into binding cohabitation and separation agreements.[128]

B. SUBMISSIONS RECEIVED

The Commission received submissions from eleven people or groups indicating their stance on legislation providing for de facto couples entering into binding cohabitation and separation agreements.[129] While four were opposed to cohabitation agreements and two were opposed to separation agreements, the other submissions supported legislation providing for financial agreements.[130]

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[126] Shared Property Discussion Paper, page 77.

[127] Shared Property Discussion Paper, pages 77-79.

[128] Shared Property Discussion Paper, page 79.

[129] Five people or groups did not specifically comment on whether they considered cohabitation and separation agreements to be appropriate to enshrine in legislation. However, from reading their responses to the specific questions raised in the Shared Property Discussion Paper, they implied that they thought that de facto partners should be entitled to enter into such agreements.

[130] Although there was considerable support for legislation to provide for financial agreements, some reservations were expressed about the aspects of the legislation suggested in the Shared Property Discussion Paper. These reservations are discussed in more detail later in this chapter and in Chapter 7 in the commentary to the clauses in Part VI.

Only two submissions opposed both cohabitation and separation agreements. One group commented that "de facto and other immoral and corrupt relationships should not be addressed in any proposed law ...". For this reason, that group was opposed to legislation providing for de facto couples entering into cohabitation or separation agreements.

The other person making a submission doubted whether agreements could provide adequately for the future because circumstances may change in a number of substantial aspects.

Two further submissions expressed reservations about allowing de facto couples to enter into cohabitation agreements.[131] One person felt that such contracts were immoral and could assist a de facto partner in avoiding responsibilities to his or her partner.

The other group was concerned that a cohabitation agreement would be unlikely to foresee the financial future of the parties. If this were the case, the agreement may not provide fairly for the parties on separation.

C. SURVEY RESULTS

In the survey of legal practitioners conducted by the Commission in 1991, practitioners were asked how frequently they had been approached to give advice regarding cohabitation agreements. Of the 152 practitioners who responded to this question, only four practitioners had been asked to give advice frequently regarding cohabitation agreements. However, more than half (51%) estimated that they had been approached for advice regarding cohabitation contracts by a de facto partner during the previous twelve months.

D. DE FACTO LEGISLATION IN OTHER AUSTRALIAN JURISDICTIONS

Both in New South Wales and the Northern Territory, the de facto legislation allows de facto couples to enter into binding cohabitation and separation agreements.[132] In Victoria, the de facto legislation is limited to allowing a de facto partner to apply for an alteration of an interest in real property.[133] The legislation does not provide for de facto couples entering into financial agreements.

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[131] Both of these submissions, however, supported de facto couples being able to enter into separation agreements.

[132] Part IV of the De Facto Relationships Act 1984 (NSW) and Part 3 of the De Facto Relationships Act 1991 (NT).

[133] Part IX of the Property Law (Amendment) Act 1987 (Vic).

In Western Australia, the Select Committee on De Facto Relationships referred to earlier[134] recommended that de facto couples be able to enter into binding cohabitation and separation agreements.[135]

E. FINANCIAL AGREEMENTS UNDER THE FAMILY LAW ACT

Under the Family Law Act, there are a number of ways in which parties can resolve both maintenance and property disputes without a contested hearing. Two of these involve the parties entering into agreements.[136]

i. Registered agreements (section 86)

Section 86 of the Family Law Act allows parties to a marriage who have entered into a maintenance agreement to register it in any court having jurisdiction under the Family Law Act. Once registered, it takes effect as an order of the court in which it is registered.[137] Although called a "maintenance agreement", the agreement can provide for both property distribution and maintenance payments.

Section 86 provides a relatively quick and cheap mechanism for resolving issues of property and maintenance.[138] Traditionally, the greatest disadvantage of a registered agreement when compared with an approved agreement under section 87 is its lack of finality.[139] There are a number of reasons for this lack of finality.

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134 See page 36.

135 The definition of "maintenance agreement" in section 4 of the Family Court Act 1975 (WA) is wide enough to cover agreements entered into by de facto couples. Section 70 provides for the registration of such agreements. It has been suggested, however, in the CCH Australian De Facto Relationships Law at paragraph 30-790, that these agreements may still be subject to the common law rules which may provide that these kind of agreements are void on grounds of public policy. Legislation expressly providing for de facto couples to enter into binding cohabitation and separation agreements has been recommended by the Select Committee. Such legislation will remove any doubts which currently exist concerning the validity of the agreements when entered into by de facto couples.

136 Another method is by the court making a consent order.

137 Section 88 Family Law Act.

138 Section 86 is quicker and cheaper than a contested hearing or a section 87 agreement, the latter option being discussed in more detail later in this chapter.

139 It should be noted, however, that since the introduction of sections 87(4A), (4B), (4C) and (4D) Family Law Act in 1989, the court has been given greater power to vary spousal and child maintenance provisions in section 87 agreements. Therefore, the comparative finality of a section 87 agreement has been significantly eroded.

Firstly, the case law indicates that registering an agreement does not prevent a later application for maintenance under section 74[140] or for division of property under section 79.[141] Secondly, the spousal maintenance and child maintenance provisions in an agreement may be varied on the same grounds as if the provisions were contained in a consent order for maintenance.[142] Thirdly, the agreement can also be set aside if the court is satisfied that the concurrence of the party was obtained by fraud or undue influence or the parties desire the agreement to be set aside.[143]

ii. Agreements in substitution for rights (section 87)

Section 87 allows parties to draw up their own agreement governing maintenance and property in substitution for their rights under the legislation.[144] A section 87 agreement will not be enforceable unless it has been approved by the court.[145] Once approved, the court cannot make an order with respect to financial matters in the agreement unless that agreement is revoked.[146]

The power of the court to vary a section 87 agreement is more limited than for a section 86 agreement.[147] Moreover, the court can revoke its approval of the agreement only in limited circumstances.[148]

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[140] See comments of Full Court in Burgoyne and Burgoyne (1978) 4 FLC 90-467 at 77,393.

[141] Maddocks and Maddocks (1981) FLC 91-031; Candlish and Pratt (1980) FLC 90-819; Dupont and Dupont (No 3) (1981) FLC 91-103; McIntyre and Malezer (1987) FLC 91-816.

[142] Section 86(2A) and section 86(2) Family Law Act respectively. Section 83 of the Family Law Act governs variation of maintenance. The grounds for variation of the amount of child maintenance are set out in section 66N(2) of the Family Law Act.

[143] Section 86(3) Family Law Act.

[144] Section 87(1) Family Law Act.

[145] Section 87(2) Family Law Act.

[146] Section 87(4)(b) Family Law Act. It should be noted, however, that section 87(4)(b) is subject to section 87(4A) and (4B) of the Family Law Act. Under these provisions, if the agreement has the effect of leaving one of the parties unable to support himself or herself without an income-tested pension, allowance or benefit, the court is not bound by the agreement and can make an order for spousal maintenance.

[147] For the power of court to vary a section 87 agreement, see sections 87(4A)-(4C) of the Family Law Act.

[148] These circumstances are set out in section 87(8) of the Family Law Act as follows -

(a) the approval was obtained by fraud;
(b) the parties to the agreement desire the revocation of the approval;
(c) the agreement is void, voidable or unenforceable; or
(d) in the circumstances that have arisen since the agreement was approved it is impracticable for the agreement to be carried out or impracticable for a part of the agreement to be carried out.

F. POSSIBLE TRENDS OF FINANCIAL AGREEMENTS UNDER THE FAMILY LAW ACT

i. Report of Australian Law Reform Commission on Matrimonial Property

In 1987, the Australian Law Reform Commission published Report No 39 on Matrimonial Property. In that Report, the ALRC commented on the existing provisions in the Family Law Act on maintenance agreements and made a number of recommendations for change.

The ALRC recommended that people should be able to enter into agreements either before or during a marriage which provides for division of property or payment of maintenance on separation or divorce, rather than having to rely on rights under the Family Law Act. The ALRC cited the following reasons for this stance -

* *desire for certainty*

Some spouses and intending spouses wish to feel that they have control over their financial affairs, even to the extent of providing for the contingency of the breakdown of their marriage. They seek a greater degree of certainty than is provided by a discretionary system.

* *multicultural society*

Australia is a multicultural society, with a significant number of people coming from countries where marriage contracts are traditional. Many such people believe that there should be some capacity within the law for spouses and intending spouses to make their own arrangements for the ownership and management of their property and finances during marriage and for its division in the event of separation.

* *de facto relationships*

There is an increasing trend for parties to live together for some time before marriage. Their financial relationship may be well established by the time of their marriage.

* *second marriages*

There are increasing numbers of second marriages, particularly second marriages where at least one spouse wishes to preserve assets of a former relationship, not only in self interest but, very often, for the children of that relationship.[149]

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[149] Report No 39 of Australian Law Reform Commission on Matrimonial Property 1987, paragraph 438.

After giving the reasons behind its decision, the ALRC framed the basic principle on which the recommended reforms exist in the following terms -

> *... with appropriate safeguards, agreements between spouses regarding their financial affairs should be given effect on the same basis as any other agreement between individuals. This principle extends to intending spouses: agreements between intending spouses, made in contemplation of their marriage, should have the same effect as agreements between spouses.*[150]

With this as the basic principle, parties or intending parties to a marriage should be able to agree on matters which would, in effect, modify the operation of the Family Law Act. The Report provides the following examples of clauses which may be contained in an agreement -

* *particular property be excluded completely from any re-allocation on marriage breakdown;*

* *the value of a particular piece of property, for example, the family farm, may be included in the assessment of the value of the property of the parties but no order transferring the property from its existing ownership be made; or*

* *responsibility to pay certain debts be allocated in particular ways.*[151]

ii. Joint Select Parliamentary Committee of the Commonwealth

A Joint Select Parliamentary Committee has been established to review the operation of a number of aspects of the Family Law Act. The Commission understands that one of the areas under review is the ability of couples to enter into pre-nuptial agreements. The Committee is expected to report to the Commonwealth towards the end of 1992.

G. RECOMMENDATION OF THE COMMISSION

The Commission is of the view that the arguments for allowing parties to enter into binding financial agreements outweigh the arguments against. The Commission considers it essential that de facto couples be able to plan their financial future with some certainty and to elect not to be regulated by the legislation proposed by the Commission. Also relevant to the Commission's decision is the general support in the submissions for the ability of de facto couples to enter into financial agreements, and the fact that legislation in other jurisdictions also makes provision for de facto couples entering into financial agreements.[152]

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[150] Report No 39 of Australian Law Reform Commission on Matrimonial Property 1987, paragraph 443.

[151] Report No 39 of Australian Law Reform Commission on Matrimonial Property 1987, paragraph 443.

[152] See Part IV of the De Facto Relationships Act 1984 (NSW), Part 3 of the De Facto Relationships Act 1991 (NT) and sections 4 and 70 of the Family Court Act 1975 (WA). Note, however, the reservations expressed on the validity of these agreements in footnote 135.

Part II Comparison of Approaches for Regulating Financial Agreements

In Part I of this chapter, the Commission recommends that the legislation should allow de facto couples to enter into binding cohabitation and separation agreements. The next step is to decide precisely whether and if so what legislative controls should be imposed on these agreements and to what extent they should be capable of being varied or set aside. In this part of the chapter, the differing legislative models for cohabitation and separation agreements are examined. This review will be followed by a discussion of the submissions received by the Commission on this topic. At the conclusion of this chapter, the recommendation of the Commission on the most suitable legislative model will be outlined and the reasons for that recommendation explained.

A. REGISTERED AGREEMENTS (SECTION 86 FAMILY LAW ACT)

As mentioned earlier, section 86 of the Family Law Act allows parties to a marriage to register a maintenance agreement in any court having jurisdiction under the Family Law Act. Once registered, it takes effect as an order of the court in which it is registered.[153] Although called a "maintenance agreement", the agreement can provide for both property distribution and maintenance payments.

"Maintenance agreement" is defined in section 4(1) of the Family Law Act as meaning an agreement which "*makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters ...*".

From consultations conducted by the Commission, it appears that in practice, most maintenance agreements, whether section 86 or section 87 agreements, are limited to financial matters.[154]

i. Receipt of independent legal advice or court approval

Before a section 86 agreement is signed or registered in the Family Court, there is no requirement that parties receive independent legal advice. All that has to be registered is a copy of the agreement together with an affidavit of a party to the agreement, or of the solicitor for that party, verifying the copy as a true copy of the agreement.[155] Although it is not necessary for legal advice to be obtained before the agreements are entered into, the Commission understands that very few section 86

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[153] Section 88 Family Law Act.

[154] "Financial matters" is defined in section 4(1) Family Law Act to mean matters concerning maintenance of one of the parties to or a child of the marriage or property of the parties to the marriage.

[155] Order 26 Rule 1(1) Family Court Rules.

agreements are entered into and registered without legal advice.[156] Once registered, the agreement becomes effective as an order of the court in which it is registered without the need to obtain court approval.[157]

No independent legal advice or court approval, therefore, is necessary for a section 86 maintenance agreement to be enforceable.

ii. Grounds for varying and setting aside agreements

A section 86 agreement will only be set aside if the court is satisfied that the concurrence of a party to the agreement was obtained by fraud or undue influence or that both parties desire the agreement to be set aside.[158]

In addition to the power of the court to set aside an agreement, the spousal maintenance provisions in an agreement may be varied on the same grounds as if the provisions were contained in a consent order.[159] The court may vary the amount of spousal maintenance in the agreement if, since the agreement was entered into, the circumstances of either of the parties or the cost of living has changed to such an extent as to justify the alteration, or the amount in the agreement was not proper or adequate.

These grounds give the court reasonably wide powers to alter spousal maintenance provisions in an agreement.[160]

iii. Later applications for maintenance and property

As mentioned earlier in this chapter, the fact that the parties have registered a section 86 agreement in court does not prevent a later maintenance or property application being made by one of the parties under the Family Law Act.[161]

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156 The Commission was advised by the Regional Registrar (Northern Region) of the Family Court that no statistics are kept on whether couples receive legal advice before entering into and registering section 86 agreements. However, anecdotal evidence from the Family Court Registry in Brisbane indicates that section 86 agreements are rarely entered into and registered without legal representation.

157 Section 88(1) Family Law Act.

158 Section 86(3) Family Law Act.

159 Section 86(2A) and 83(2) Family Law Act.

160 Section 86(2) of the Family Law Act gives the court powers to alter the amount of child maintenance specified in an agreement. The grounds for varying the amount are set out in section 66N of the Family Law Act and reflect the grounds for varying spousal maintenance described above.

161 Refer to authorities cited in footnotes 140 and 141 above.

iv. Summary

Because no court approval is required, section 86 agreements provide a relatively simple and cheap method of making financial arrangements on separation. The disadvantage is the lack of finality of the section 86 agreements for the reasons outlined above.

B. AGREEMENTS IN SUBSTITUTION FOR RIGHTS (SECTION 87 FAMILY LAW ACT)

As mentioned earlier in this chapter, a section 87 agreement allows parties to draw up their own agreement governing maintenance and property in substitution for their rights under the legislation.[162] Once the agreement is approved by the court, the court cannot make an order on the application of one of the parties for maintenance or property if these matters are dealt with in the agreement unless that agreement is revoked.[163]

i. Receipt of independent legal advice or court approval

Before a section 87 agreement will be enforceable, it must be approved by the court.[164] As it is usual for parties to appear before the court represented, they will probably have received independent legal advice on the terms of the agreement before court approval under section 87 is sought.

Because a section 87 agreement must receive court approval before it is enforceable, a greater degree of scrutiny is exercised over a section 87 maintenance agreement than a section 86 agreement. Approval of a maintenance agreement does not, of itself, enable the agreement to be enforced as if it were an order of the court. In proceedings to enforce the agreement, however, the court may order that the agreement be enforced as if it were an order of the court.[165]

ii. Approval by the court

The court may only approve a section 87 agreement if it is satisfied that its clauses with respect to financial matters are "proper".[166] This involves scrutiny of the agreement by the court.

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[162] Section 87(1) Family Law Act.

[163] Section 87(4)(b) Family Law Act.

[164] Section 87(2) Family Law Act.

[165] Section 87(11)(c) Family Law Act.

[166] Section 87(3) Family Law Act.

There is a divergence of opinion about the degree of court scrutiny required before the court may approve a section 87 maintenance agreement.[167] The authorities indicate that there will be less need for court scrutiny if the parties have been separately represented and therefore independently advised.[168]

iii. Powers of variation

Section 87 agreements have traditionally been popular because of the reasonably high degree of finality when compared with section 86 agreements. The degree of finality of section 87 agreements has been eroded, however, by the 1987 amendments to the Family Law Act.[169] These amendments gave the court greater power to vary the spousal maintenance provisions in an approved agreement. The court will have power to order or vary the spousal maintenance payments if at the time the agreement was approved, the spouse would not be able to support himself or herself without an income-tested pension, allowance or benefit.[170]

iv. Revocation of court approval

In addition to being able to vary the section 87 agreement as described above, a court can revoke approval of a section 87 agreement if the approval was obtained by fraud, the parties want the approval revoked, the agreement is void or voidable[171] or it is impracticable for the agreement to be carried out.[172]

v. Summary

Traditionally, the popularity of the section 87 agreement has stemmed from the finality of the agreement. Since the 1987 amendments to the Family Law Act outlined above, however, the court has greater powers to alter the provisions in a section 87 agreement. To this extent, the section 87 agreement will not have the same degree of finality. The Commission understands that the amendments have

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[167] Compare the less onerous requirements of scrutiny suggested by Watson J in the Full Court of the Family Court in Wright and Wright (1977) FLC 90-221 at 76,166 and the Full Court of the Family Court in In the Marriage of Siewert and Siewert (1980) FLC 90-892 at 75,628 with the higher degree of scrutiny suggested by Fogarty J in Bailey and Bailey (1981) FLC 91-041 at 79,352 and Lambert J in Lind and Lind (1980) FLC 90-858 at 75,458.

[168] See In the Marriage of Siewert and Siewert (1980) FLC 90-892 and Smith and Smith (1984) FLC 91-512.

[169] These amendments inserted section 87(4A) and (4B) of the Family Law Act.

[170] See also section 87(4C) and (4D) of the Family Law Act for the powers of the court in relation to child maintenance provisions in an approved agreement.

[171] An example of when an agreement will be voidable is when it was entered into as result of undue influence exerted by one party on the other.

[172] Section 87(8) Family Law Act.

resulted in fewer section 87 agreements being entered into.[173] Because court approval is required, a section 87 agreement is also a more expensive way for parties to resolve property and maintenance issues.

C. DE FACTO RELATIONSHIPS ACT 1984 (NSW)

Part IV of the De Facto Relationships Act 1984 (NSW)[174] governs cohabitation and separation agreements which may be entered into between de facto partners. A cohabitation agreement can be made either before the de facto relationship is entered into or during the relationship.[175] To the extent that it allows a couple to enter into an agreement before the relationship begins, a cohabitation agreement differs from a section 86 or 87 agreement. The provisions of the New South Wales legislation and the Family Law Act are similar in terms of the content of the agreements. They can make provision for financial matters whether or not they make provision for other matters as well.[176]

As the name suggests, a separation agreement is entered into when the parties are contemplating separation or have already separated.[177] As with the cohabitation agreement, the separation agreement can contain both financial and non-financial clauses.[178] As separation agreements are entered into at the end of a relationship, they more closely reflect section 86 and 87 agreements under the Family Law Act.[179]

i. Receipt of independent legal advice or court approval

Under the De Facto Relationships Act 1984 (NSW), there is no requirement for parties entering into cohabitation or separation agreements to obtain independent legal advice before signing. If they do not, however, in a later application by one of the parties to alter interests in property or for maintenance, the court is not bound to follow the terms of the agreement in making its order.[180]

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[173] The Commission was advised by the Regional Registrar (Northern Region) of the Family Court that until the middle of 1989 no statistics were kept on the number of section 87 agreements receiving court approval. However, anecdotal evidence from the Family Court Registry in Brisbane indicates that since the 1987 amendment came into effect, there has been a significant decrease in the number of applicants seeking approval of section 87 agreements.

[174] Sections 44-52.

[175] See definition of "cohabitation agreement" in section 44(1) of the De Facto Relationships Act 1984 (NSW).

[176] Section 44(1) De Facto Relationships Act 1984 (NSW) and definition of "maintenance agreement" in section 4(1) Family Law Act.

[177] See definition of "separation agreement" in section 44(1) of the De Facto Relationships Act 1984 (NSW).

[178] See definition of "separation agreement" in section 44(1) of the De Facto Relationships Act 1984 (NSW).

[179] The Commission notes, however, that there is nothing in the Family Law Act which prevents section 86 agreements being entered into or registered when the parties are not contemplating separation.

[180] Section 47(2) De Facto Relationships Act 1984 (NSW).

A cohabitation or separation agreement will only be binding on the court if there has been independent legal advice given to each party before signing the agreement and the agreement has been certified in accordance with the Act.[181]

The New South Wales legislation requires that the solicitor advise the de facto partner in relation to the following matters -

(a) the effect of the agreement on the rights of the partners to apply to the court for an order for maintenance or to alter interests in property;

(b) whether or not, at that time, it was to the advantage, financially or otherwise, of that partner to enter into the agreement;

(c) whether or not, at that time, it was prudent for that partner to enter into the agreement; and

(d) whether or not, at that time and in the light of such circumstances as were, at that time, reasonably foreseeable, the provisions of the agreement were fair and reasonable.[182]

In its Shared Property Discussion Paper,[183] the Commission expressed concern that because the solicitor is required to give such detailed advice, entering into such agreements will be extremely expensive for a client. There will be a lengthy consultation with the solicitor to give instructions. After the consultation, the solicitor must research the options available to the client based on the instructions. This will be followed by a lengthy consultation with the client advising on the merits of the agreement. To protect the solicitor's professional position, the solicitor's advice should be confirmed in writing.

Because of its concern about the cost of entering into cohabitation and separation agreements under the New South Wales legislation, the Commission invited comment on the certification requirements in that Act. The submissions on this point are considered later in this chapter.

ii. Variation of agreements

Because of the stringent requirements for entering into certified cohabitation and separation agreements in New South Wales described above, it is more difficult for a certified agreement to be varied.

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[181] Section 47(1) De Facto Relationships Act 1984 (NSW). As is the case for section 87 agreements, however, court approval is not required before the agreement will be enforceable.

[182] Section 47(1)(d) De Facto Relationships Act 1984 (NSW).

[183] Shared Property Discussion Paper, page 87.

* cohabitation agreement

The court may vary or set aside a certified cohabitation agreement if -

(a) the circumstances of the parties have changed since the agreement was entered into; and

(b) serious injustice would result from enforcing the provisions.[184]

* separation agreement

Unlike cohabitation agreements, separation agreements are entered into when the parties are in the process of separating and so it is less likely that there will be a change of circumstances between entering into the agreement and enforcing that agreement. For this reason, the legislation does not provide for the variation of a certified separation agreement.

iii. Summary

Under the New South Wales Act, parties may choose to enter into a cohabitation or separation agreement which, if certified, will have the advantage of being relatively final. It will, however, be expensive to achieve this degree of certainty because the onerous certification requirements described earlier must be satisfied. If these requirements are satisfied, the court will not be able to make an order inconsistent with the agreement. Moreover, a certified separation agreement cannot be varied by the court and a certified cohabitation agreement can only be varied in limited circumstances.

Alternatively, a de facto couple may choose to enter into an agreement without complying with the certification requirements of the Act. This will clearly be a cheaper alternative. However, if a partner later makes an application to alter an interest in property or for maintenance, the court will not be bound by the terms of the agreement.[185] Of course, the court in these circumstances may still have regard to the terms of the agreement.[186]

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[184] Section 49(1) De Facto Relationships Act 1984 (NSW).

[185] Section 47(2) De Facto Relationships Act 1984 (NSW).

[186] Section 47(2) De Facto Relationships Act 1984 (NSW).

D. DE FACTO RELATIONSHIPS ACT 1991 (NT)

Part 3 of the De Facto Relationships Act 1991 (NT)[187] governs cohabitation and separation agreements which may be entered into between de facto partners. Cohabitation and separation agreements are entered into for the same reasons and contain the same kind of provisions as cohabitation and separation agreements under the New South Wales legislation.[188]

i. Receipt of independent legal advice or court approval

In the earlier discussion on cohabitation and separation agreements under the New South Wales legislation, reference was made to the relatively onerous certification requirements. If the agreement does not comply with the requirements of the Act, it will still be binding on the parties but will not be binding on the court in a later application for an adjustment of interest in property or for an order for spousal maintenance.

The system under the Northern Territory legislation is different. There is no requirement for agreements under the Northern Territory legislation to be certified before they will bind the court. Under the Northern Territory Act, if the court is satisfied that the agreement is in writing and signed by the de facto partner who later makes an application to adjust an interest in property or to seek an order for maintenance, the court may not make an order which is inconsistent with the terms of the agreement.

Under the Northern Territory Act, therefore, the agreement can be binding on the parties although independent legal advice was not obtained before the agreement was entered into and court approval was not obtained.

ii. Variation of agreements

To safeguard against people entering into agreements which are unfair, the Northern Territory legislation gives the court wider powers than conferred by the New South Wales legislation to vary and set aside agreements. The court can vary or set aside a cohabitation or separation agreement if -

(a) enforcement of the agreement would lead to serious injustice between the parties; or

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[187] Sections 44-50.

[188] See definitions of "cohabitation agreement" and "separation agreement" in section 3 of the De Facto Relationships Act 1991 (NT) and the earlier discussion in this chapter.

(b) circumstances have arisen since the agreement was entered into which made it impracticable for its provisions to be carried out.[189]

iii. Summary

From the brief overview of the legislation in the Northern Territory, it can be seen that it is easier and cheaper for de facto partners to enter into a cohabitation or separation agreement which will be binding on the court if one of the parties later seeks to make an application to alter interests in property or to seek an order for maintenance. To compensate for the possibility that people will enter into unfair cohabitation and separation agreements, the powers of the court in the Northern Territory are wider than those in New South Wales for varying or setting aside agreements.

E. RECOMMENDATIONS FOR WESTERN AUSTRALIA

The Select Committee on De Facto Relationships recommended the introduction of a De Facto Relationships Act for Western Australia.

The Select Committee recommended that de facto couples should be able to enter into cohabitation or separation agreements with respect to financial matters.[190] The recommendation closely reflected the New South Wales model. If the agreement is in writing and signed by the partner against whom it is to be enforced and each of the parties has received separate independent legal advice before entering into the agreement, the agreement will be binding and the court cannot make an order adjusting property interests or awarding maintenance contrary to the agreement. The report of the Select Committee, however, does not elaborate on the extent of independent legal advice which must be given. It is unclear from the recommendations whether the onerous certification obligations imposed on a solicitor by the New South Wales legislation will apply.

The recommendations of the Select Committee also depart from the New South Wales model in relation to the variation of a separation agreement. The Select Committee recommended that the court should be given the same power to alter separation and cohabitation agreements.

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[189] Section 46 De Facto Relationships Act 1991 (NT). This section should be compared with section 49 De Facto Relationships Act 1984 (NSW) which sets out the more limited grounds for varying cohabitation, not separation, agreements.

[190] Refer also to footnote 135 which discusses the existing power of de facto couples to enter into and register maintenance agreements under the Family Court Act 1975 (WA). Note, however, the reservations expressed on the validity of these agreements at common law.

F. SUBMISSIONS RECEIVED

i. Certification requirements

Earlier in this chapter, the certification requirements of the De Facto Relationships Act 1984 (NSW) were described. It was also stated that the Commission had concerns about the impact that the certification requirements would have on the cost of a de facto couple entering into a cohabitation or separation agreement. The Shared Property Discussion Paper specifically invited comment on the certification requirements in the New South Wales legislation.

Eight people or groups commented on the duties imposed on a solicitor by the New South Wales Act. Many reservations were expressed about these duties. The following is a summary of those concerns.

* It may be difficult for the solicitor to predict the likely order of the court as the solicitor may not have all the evidence which would be available to a court;

* It would be expensive for the client to obtain a certified agreement;

* There may not be uniformity between solicitors certifying the agreement. Some solicitors, particularly those who are inexperienced in this area of the law, may be more inclined to certify without fully complying with the requirements of the Act than more experienced solicitors;

* There may be a risk of solicitors being sued for negligence because of perceived inadequacies of advice. This could mean that solicitors will not be prepared to certify agreements;

* It is preferable for the court rather than the solicitor who has not necessarily heard both parties to be satisfied that the arrangements will be fair for the parties;

* The legislation imposes too onerous a duty upon solicitors;

* It may be difficult for the solicitor to advise on the "fairness" of the agreement because of the wide possible meaning of that word.

Five of the eight making submissions on this issue were opposed to any Queensland legislation containing certification requirements. Only the Queensland Law Society supported the requirement that the agreement be certified by solicitors.[191]

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[191] The reason given for this view was that "the costs incurred *[from certification]* would be justified in the light of the service obtained".

The other two considered it preferable that legal advice be a requirement, but also expressed reservations about the stringency of the duties on the solicitors.

ii. Choice of approaches

The draft legislation suggested in the Shared Property Discussion Paper followed the New South Wales approach to the regulation of cohabitation and separation agreements. In the Shared Property Discussion Paper,[192] however, the Commission commented on section 86 of the Family Law Act which allows parties to register maintenance agreements. The effect of registering section 86 agreements is that the agreement will be enforceable as if it were an order of the court.[193]

The Commission was considering the desirability of the proposed legislation having a model based on section 86 of the Family Law Act. For this reason, in its Shared Property Discussion Paper the Commission specifically invited comments on whether the legislation should provide for cohabitation and separation agreements to be registered and, on registration, to be enforceable as an order of the court.

Eight of the people or groups making submissions on the Shared Property Discussion Paper responded to this question. All of those responding were of the view that it should be possible for separation agreements to be registered and, on registration, to be enforceable as an order of the court.

Six of the 8 people or groups responding were of the view that cohabitation agreements should also be registrable and, on registration, enforceable as an order of the court. Two groups had reservations about registering cohabitation agreements. One of the reservations expressed in the submissions was that it is difficult for a cohabitation agreement to accurately foresee the financial future of the parties. The effect of this is that the provisions in a cohabitation agreement may not justly reflect their interests at the date of separation.[194]

In summary, there was general support for the proposition that cohabitation and separation agreements should be registrable and enforceable as an order of the court.

G. TENTATIVE RECOMMENDATION OF THE COMMISSION

Having reviewed the models for financial agreements in New South Wales and Northern Territory, and the section 86 and 87 agreements under the Family Law Act, the Commission is of the view that the Queensland legislation on financial agreements should be based on the Northern Territory model.

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[192] Shared Property Discussion Paper, pages 81-82.

[193] Section 88 Family Law Act.

[194] The other body did not comment on the desirability of registering cohabitation agreements because it raised "philosophical/political" issues upon which it was not prepared to comment.

The Northern Territory model allows de facto couples the freedom to enter into their own financial agreements and provides some degree of certainty for their future. At the same time, this model avoids some of the problems associated with the other schemes.

i. De Facto Relationships Act 1984 (NSW)

The people and groups making submissions shared the Commission's concerns about the onerous certification requirements of the New South Wales legislation. The Commission considers that these requirements will place agreements out of the financial reach of many de facto couples. Moreover, some of the duties imposed on solicitors such as advising the client on whether it is prudent for that person to enter into the agreement place solicitors in a difficult position.[195] "Prudence" covers a wide range of factors, not necessarily limited to financial considerations.

ii. Section 86 agreements

Despite the support in the submissions for registering agreements and having them take effect as an order of the court, the Commission has reservations about this model.

Firstly, as these agreements would be registered in the court, it is unlikely that they would be prepared and filed without the assistance of a solicitor. The de facto couple will, of course, be required to pay for such representation. The Commission is of the view that on entering into cohabitation and separation agreements, de facto couples should have the option of whether or not to seek legal advice. If the agreement must be registered in court, it is likely that de facto couples will need legal representation.

The Commission does not consider it to be desirable for a registered agreement to have the effect of an order of the court if the court has not examined the terms of the agreement.

Legislation in Queensland does not currently make specific provision for de facto couples who enter into cohabitation and separation agreements. If the legislation recommended by the Commission is enacted, it will cover previously unchartered waters. It is difficult to predict how successful financial agreements will be, whether they will be used frequently or only in exceptional circumstances, whether legal advice will usually be obtained before the de facto couple enters into the agreement, or whether the agreement distributes property fairly or one partner will usually be better off. Until these questions can be answered, the Commission is reluctant to recommend that a registered agreement have the imprimatur of an order of the court. If after several years it seems that such agreements are being used frequently and successfully and are becoming standardised, it may be necessary to reconsider this issue and give registered agreements the effect of an order of the court. It would be premature to give them this effect from the beginning.

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[195] Section 47(1)(d)(iii) De Facto Relationships Act 1984 (NSW).

Thirdly, as mentioned earlier, one of the criticisms of the section 86 agreements is that they can be set aside relatively easily. It could be argued that there is little advantage of giving the agreement effect as an order of the court if the provisions of the agreement can be readily set aside. Moreover, registering a section 86 agreement does not prevent a later application by one of the parties for maintenance or to alter an interest in property.

iii. Section 87 agreements

The Commission also has reservations about recommending a model based on section 87 of the Family Law Act.

Firstly, because a section 87 agreement will only be enforceable if the approval of the court is obtained, the procedure will be even more expensive than the section 86 agreement. It is likely that solicitors will be consulted to both draw up the agreement and to obtain court approval.

The object of legislation providing for cohabitation and separation agreements is so that de facto couples can choose not to be regulated by legislation and can come to their own decisions on financial matters. It is hoped that the legislation proposed by the Commission will enable couples to cheaply and, with as little formality as possible, agree on financial and other matters. It would be contrary to this intention to require court approval before such agreements are enforceable.

It should also be noted that because of the 1987 amendments to the Family Law Act which inserted section 87(4A) and (4B), the clauses in the agreement governing spousal maintenance can be varied by the court if at the time the agreement was entered into, the person could not support himself or herself without an income-tested pension, allowance or benefit. For this reason, section 87 agreements do not have the same degree of finality as before the amendments. Perhaps these amendments to the Family Law Act reflect a view that the apparent advantages of finality are outweighed by the disadvantages of inflexibility.

iv. Summary

The legislation recommended by the Commission to govern financial agreements is set out in full in Chapter 7. Following each clause is a brief commentary. For the reasons outlined above, the draft legislation on cohabitation and separation agreements is based on the Northern Territory model. The Commission invites submissions on the most suitable model for cohabitation and separation agreements and reasons for that choice. The Commission also invites comments on the Northern Territory model and whether there are defects in that model which need to be addressed.

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7. DRAFT LEGISLATION AND COMMENTARY

DE FACTO RELATIONSHIPS ACT

For the reasons outlined in Chapter 2, the focus of this Working Paper is on de facto relationships only and not sharers generally. The draft legislation in this chapter reflects that decision.

The legislation in this chapter is based on the legislation contained in the Shared Property Discussion Paper. The legislation has been modified so that it applies only to de facto relationships. It has also been altered to reflect some of the suggestions made in submissions to and decisions made by the Commission.

As this publication is the Working Paper of the Commission, it does not represent the Commission's final views. Accordingly, comments on specific issues have been invited throughout the commentary. Of course, comments should not necessarily be limited to comments on these issues. Any constructive comments on the legislation will be considered by the Commission.

This chapter is divided into 6 parts. These parts represent the 6 Parts of the proposed legislation. Within each part are listed all of the sections of that Part. These sections are set out in full in the shaded boxes. In brackets after the section heading is an abbreviated reference to the equivalent section in the other jurisdictions, namely, De Facto Relationships Act 1984 (NSW), Property Law Act 1958 (Vic) and De Facto Relationships Act 1991 (NT). Reference in a section heading to "*FLA*" is a reference to the Family Law Act 1975 (Cwth).

Part 1 - Preliminary

Many clauses in this Part are straightforward and common to most legislation. No commentary is, therefore, required for those clauses. Of particular importance, however, is the definition clause 1.5. The Commission is interested in receiving comments on any words or phrases defined in this clause.

1.1 Purposes of this Act

The primary purposes of this Act are to -

(a) confer on de facto partners who separate rights to apply for an adjustment of interests in property or for maintenance;

(b) provide declaratory or injunctive relief with respect to existing rights to property;

(c) allow de facto relationships to be regulated by cohabitation and separation agreements;

(d) provide for the declaration of the existence or non-existence of a de facto relationship; and

(e) confer on courts the necessary jurisdiction and power required by this Act.

The purposes set out in this clause reflect the current legislative proposals in the Working Paper. If, as a result of submissions received on the Working Paper or consultations conducted by the Commission, there is a shift in the focus of the legislation, the purposes clause will alter to reflect those changes.

1.2 Title of this Act

This Act may be cited as the De Facto Relationships Act 1992.

1.3 Commencement

(1) Section 1.2 and this section commence on .
(2) The remaining provisions of this Act commence on .

1.4 Regulations

The Governor in Council may make regulations to promote the purposes of this Act and its administration.

Clauses 1.2, 1.3 and 1.4 are self explanatory and require no further comment.

1.5 Definitions *(ss.3 and 44 NSW ; s.275 Vic ; s.3 NT)*

"approved arbitrator" *means an arbitrator approved under the regulations.*

"approved mediator" *means a mediator approved under the regulations.*

The definitions of "approved arbitrator" and "approved mediator" are relevant in the clauses on mediation and arbitration in Part V and require no further comment.

> **"child"** *when used as a "child of the de facto partners" means -*
>
> *(a) a child born as a result of sexual relations between the de facto partners;*
>
> *(b) a child of the woman whose de facto partner is presumed, pursuant to the Status of Children Act 1978 (Qld), to be the father; or*
>
> *(c) a child adopted by the partners.*[196]

"Child" is referred to in different contexts throughout the legislation. When child is used in the context of "child of the de facto partners", it refers to a child as defined in paragraphs (a) to (c) above. However, child is also used in broader contexts, such as in clause 3.8(1)(b)(ii) where there is a reference to a "child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners". In this context, the definition of "child" in clause 1.5 is not relevant.

> **"cohabitation agreement"** *means an agreement between de facto partners, whether or not there are other parties to the agreement -*
>
> *(a) which is made (whether before, on or after the commencement of this Act) -*
>
> *(i) in contemplation of their entering into a de facto relationship; or*
>
> *(ii) during the existence of a de facto relationship between them; and*
>
> *(b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,*
>
> *and includes an agreement which varies a cohabitation agreement.*

This definition makes it clear that an agreement can be entered into before the de facto relationship is entered into. There is no requirement that the partners have been living together for a period of time before the agreement can be entered into.

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[196] Although the Adoption of Children Act 1964 (Qld) does not allow de facto partners to adopt a child, de facto partners are able to adopt a child in other jurisdictions. See, for example, Adoption of Children Act 1965 (NSW) and Adoption Act 1988 (SA). If a de facto couple adopt a child in New South Wales and move to Queensland that child should be treated as a child of the relationship for the purposes of this Act.

> **"court"** *means, unless the contrary intention appears, a court conferred with jurisdiction by Part II of this Act.*

The definition of "court" makes it clear that where the term is used in the legislation, it means the court having jurisdiction under the proposed legislation. Part II of the proposed legislation confers jurisdiction on the relevant courts and is discussed in more detail later in this chapter.

> **"de facto partner"** *means a person who -*
>
> *(a) is living or has lived with another person whether or not of the same gender on a bona fide domestic basis but is not legally married to the other person; or*
>
> *(b) has entered into a relationship that is recognised as a traditional marriage by the Aboriginal or Torres Strait Islander community or group to which either person in the relationship belongs.*

In Chapter 2, the Commission recommended that for the purpose of this Working Paper, the focus of the review should be limited to heterosexual and homosexual de facto partners. The Commission recommends that the legislation proposed in this Working Paper should affect heterosexual and homosexual couples in the same way. For this reason, the above definition of "de facto partner" is gender neutral.

The Commission has given consideration to Aboriginal and Torres Strait Islander customary law, under which a couple may enter into a traditional marriage which is not recognised as a marriage under the Marriage Act 1961 (Cwth).

The Family Law Act provides a mechanism to resolve property, maintenance and other disputes on the breakdown of a marriage. The "marriages" regulated by the Family Law Act, however, are only marriages which fall within the Marriage Act 1961 (Cwth) not marriages recognised by Aboriginal and Torres Strait Islander customary law.

The Commission considers it unacceptable that Aboriginal and Torres Strait Islanders are not entitled to the protection provided by the Family Law Act because their customary marriage is not recognised in this context at the Commonwealth level.

The best solution to this problem may be for the customary marriage to be recognised as a marriage under the Marriage Act 1961 (Cwth). This would give people in a customary marriage the same rights on the breakdown of the relationship as those whose marriages are currently recognised by the Marriage Act 1961 (Cwth). Some time in the future, Commonwealth legislation may be enacted. However, this Commission is not able to make recommendations to the Commonwealth government.

Until Commonwealth legislation is enacted, one possible solution is to extend the proposed legislation to people in a customary marriage. On the breakdown of the relationship, this would provide a person with the option of seeking relief in terms of financial adjustment.

The Commission's preliminary proposals are reflected in the definition of "de facto partner" above and in clause 3.3 which deals with prerequisites for making an order.

The Commission invites submissions on the most appropriate way to recognise customary law in the context of the proposed legislation.

> **"disposition"** *includes a sale or a gift.*

This definition is relevant to the definition of "financial resources" in clause 1.5 and to clause 3.29 only and requires no further comment.

> **"financial matters"**, *in relation to de facto partners, means matters with respect to any one or more of the following -*
>
> *(a) the maintenance of either or both of the partners;*
>
> *(b) the property of those partners or either of them;*
>
> *(c) the financial resources of those partners or either of them.*

Cohabitation and separation agreements make provisions for "financial matters". It is therefore necessary to define what is meant by this phrase. As the proposed legislation allows couples to make an application to the court to alter interests in property and to make a claim for maintenance, the Commission decided that cohabitation and separation agreements should be able to deal with the same subject matter. The definition of "financial matters" reflects this decision.

> **"financial resources"**, *in relation to de facto partners or either of them, includes -*
>
> *(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided;*
>
> *(b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the benefit of the de facto partners or either of them;*

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

(d) any other valuable benefit.

The definition of "financial resources" is relevant to a court in deciding whether to order an adjustment of interests in property under clause 3.8 or order maintenance under clause 3.15.

"private arbitration" *means arbitration by an arbitrator specified by the regulations for the purposes of this definition, other than arbitration carried out as a result of an order made under clause 5.4.*

"Private arbitration" is relevant in the context of the resolution of disputes by arbitration and is discussed in Part V.

"property", *in relation to de facto partners or either of them, includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property.*

This definition of "property" reflects or is similar to the definitions in the New South Wales, Victorian and Northern Territory legislation.[197] It is, however, broader than the definition in the Family Law Act.[198]

"separation agreement" *means an agreement between de facto partners, whether or not there are other parties to the agreement -*

(a) which is made (whether before, on or after the commencement of this Act) -

(i) in contemplation of ending a de facto relationship between them; or

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[197] Section 3 De Facto Relationships Act 1984 (NSW), section 275 Property Law Act 1958 (Vic) and section 3 De Facto Relationships Act 1991 (NT) respectively.

[198] Section 4(1).

(ii) after ending a de facto relationship; and

(b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,

and includes such an agreement which varies an earlier cohabitation agreement or separation agreement.

This definition of "separation agreement" explains the difference between a separation agreement and a cohabitation agreement. The former is made in contemplation of terminating a de facto relationship or after it has terminated. In contrast, a cohabitation agreement can be made before a de facto relationship is entered into or during that relationship. Part VI deals with cohabitation and separation agreements in detail.

1.6 Application *(s.6 NSW; s.276 Vic; s.51 NT)*

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

This clause provides that the Act does not apply to a person who has stopped living in a de facto relationship before the commencement of the legislation. It does, however, apply to a de facto partner where the relationship began before the commencement of the legislation and continued after the Act came into operation. That is, the legislation will apply to all de facto relationships existing at the date the Act came into effect and those relationships entered into subsequently.

Because the proposed legislation will not govern de facto relationships which have ended before the Act comes into effect, it will not be retrospective in its operation.[199] However, provided the relationship ended after the Act came into operation, the circumstances of the relationship before the commencement of the Act may be taken into consideration by the court in so far as they are relevant.

Some of the proposals in the draft legislation are remedial in the sense that, in certain circumstances, they give a de facto partner the right to apply for an alteration of interests in property and the right to apply for maintenance. Before such an application will succeed, however, there are a number of threshold issues which must

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[199] See Lord Denman CJ in R v St Mary, Whitechapel (Inhabitants) (1848) 12 QB 120 at 127 where he stated that " ... it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing".

be proved. Firstly, the applicant must satisfy the court that he or she is a "de facto partner" as defined in clause 1.5. Secondly, the applicant must satisfy clause 3.3 by proving that the relationship lasted for 2 years or that one of the other requirements in that clause is met. In addition to these issues, in an application for maintenance, the applicant must prove that he or she is unable to support himself or herself adequately by reasons arising from the relationship. It is only if these threshold matters are satisfied that the court will be able to grant relief. In granting relief, the circumstances of the relationship, even if the relationship commenced before the Act came into operation, may be considered by the court.

1.7 **Other rights of applicant not affected** *(s.7 NSW; s.277 Vic; s.51 NT)*

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

This clause makes it clear that the general law rights of de facto partners are retained.

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Part II - Jurisdiction

In Chapter 3 of the Working Paper, the possible choices of forum to resolve disputes between de facto couples were discussed. The advantages of having matters heard in the Family Court were compared with the advantages of the State Courts (Supreme, District and Magistrates Courts).

On balance, the Commission recommends that the Family Court be the forum to consider matters arising on the breakdown of a de facto relationship. The Commission recognises, however, that there are legal and administrative difficulties involved in the Queensland legislature conferring jurisdiction on the Family Court. It is, therefore, probable that at least initially the legislation recommended by the Commission will be administered by State Courts.

Under the proposed legislation, the court will be required to hear applications to alter interests in property and applications for maintenance which may be made on the breakdown of the de facto relationship. In deciding such applications, the court must assess contributions made by each partner, whether financial or non-financial; the income, property and financial resources of the parties; and the parties' responsibilities to support other people. Many of the matters which the court must take into account require the exercise of discretion. For example, the amount of maintenance, if any, that is ordered will depend on "a standard of living which is in all the circumstances reasonable".[200]

The proposed legislation also allows a person to seek a declaration from the court of existing interests in property. This may require the court to apply equitable doctrines such as constructive and resulting trusts. The legislation also empowers the court to give injunctive relief.

The question then arises of which courts should have jurisdiction under this Act.

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[200] Clause 3.15(2)(g) of the draft legislation.

2.1 Courts having jurisdiction under this Act *(s.9 NSW; s.297 Vic; s.4 NT)*

> *Subject to this Act,[201] the following courts shall have jurisdiction to hear and determine any application for an order or relief under this Act -*
>
> *(a) Supreme Court;*
> *(b) District Courts; or*
> *(c) Magistrates Courts.*

Because clause 2.1 confers wide powers on the Magistrates Court which it would not otherwise have, the Shared Property Discussion Paper called for submissions on whether the legislation should confer such powers on the Magistrates Court.

The responses in the submissions were mixed. While some agreed that the Magistrates Court should have jurisdiction under the Act, others expressed reservations about conferring on the Magistrates Court power to give declaratory relief and requiring it to make rulings applying equitable principles with which they may not have experience. In one submission, concern was expressed about the possibility of the Magistrates Court having jurisdiction over real property.[202]

The Commission hopes that the legislation it proposes will be accessible to members of the public. Many disputes which can arise on the breakdown of a de facto relationship involve relatively small amounts of money. For example, a couple may be disputing ownership of their car and furniture. It is more appropriate for this kind of a dispute to be heard and determined in the Magistrates Court.

Having matters heard in the Magistrates Court rather than the District or Supreme Court will reduce cost to litigants and possibly also avoid delays. For these reasons, the Commission is of the view that the Magistrates Court should have jurisdiction to make orders and provide relief under the proposed legislation. It should be noted, however, that unless the parties to the dispute consent, the District and Magistrates Court will only have jurisdiction to hear and determine matters within their respective monetary limits.[203] The Commission recommends that the District Courts Act 1967 (Qld) and Magistrates Courts Act 1921 (Qld) be amended to vest in the District Court and Magistrates Court relevant jurisdiction under the proposed legislation.

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[201] This qualification is necessary because in various cases under the proposed legislation, only the Supreme and District Courts may provide relief. See, for example, clause 7.4 of the draft legislation which confers only on the Supreme and District Courts power to grant declarations.

[202] As the existing monetary jurisdiction of the Magistrates Court under section 4 of the Magistrates Courts Act 1921 (Qld) is only $20,000, however, it is unlikely that many orders would be made by a Magistrates Court adjusting interests in land.

[203] Clauses 2.2 and 2.3 of draft legislation.

2.2 Limit of jurisdiction of District and Magistrates Courts *(s.10 NSW; s.5 NT)*

Except as provided by section 2.3, a District Court or a Magistrates Court shall not have jurisdiction under this Act -

(a) in relation to property, to declare a title or right or adjust an interest; or

(b) to make an order for maintenance,

of a value or amount in excess of the amount prescribed for the time being as the court's jurisdictional limit under the District Courts Act 1967 or the Magistrates Courts Act 1921.

The effect of this clause is that the District Court and Magistrates Court have jurisdiction under this Act only to the extent of the relevant court's jurisdictional limit.

2.3 Transfer of proceedings *(s.12 NSW; s.298 Vic; s.6 NT)*

(1) Where proceedings are instituted in a District Court or a Magistrates Court with respect to an interest in property, being an interest of a value or amount in excess of the court's jurisdictional limit under the District Courts Act 1967 or the Magistrates Courts Act 1921 respectively, the court must transfer the proceedings to a court where the value is within the jurisdictional limit unless -

(a) the parties file a form in accordance with the Rules agreeing to the first-mentioned court hearing and determining the proceedings; and

(b) the interest in property does not exceed twice the jurisdictional limit referred to above.

(2) A court may transfer the proceedings under subsection (1) of its own motion even if the parties agree to the court hearing and determining the proceedings.

(3) Before transferring proceedings, the court may make any orders it considers necessary pending the disposal of the proceedings by the court to which the proceedings are transferred.

(4) If proceedings are transferred to another court, that court must proceed as if the proceedings had been originally instituted in that court.

(5) Without prejudice to the duty of a court to comply with this section, failure by the court to comply does not invalidate any order of the court in the proceedings.

Clause 2.2 restricts the District and Magistrates Courts to hear and determine matters within the courts' jurisdictional limit. Clause 2.3(1), however, allows the parties by consent to increase the jurisdiction of the District or Magistrates Court to twice their monetary limit where the proceedings are with respect to an interest in property.

Clause 2.3(2) allows the District or Magistrates Court when hearing a matter outside its jurisdictional limit to transfer the proceedings even if the parties consent to the court hearing the matter.

2.4 Staying and transfer of proceedings *(s.11 NSW; s.299 Vic; ss.7 and 8 NT)*

(1) Where there are pending in a court proceedings that have been instituted under this Act by or in relation to a person and it appears to the court that other proceedings that have been so instituted by or in relation to the same person are pending in another court having jurisdiction under this Act, the first mentioned court -

(a) may stay the pending proceedings for such time as it thinks fit; or

(b) may dismiss the proceedings.

(2) Where there are pending in a court proceedings that have been instituted under this Act and it appears to the court that it is in the interests of justice that the proceedings be dealt with in another court having jurisdiction under this Act, the court may transfer the proceedings to the other court.

The court is likely to stay or dismiss proceedings under clause 2.4(1) where proceedings are instituted in two different courts at the same time.

Clause 2.4(2) provides for the transfer of proceedings. A transfer could be ordered if proceedings have been commenced at an inconvenient or inappropriate location. Alternatively, if proceedings concerning property within a lower jurisdictional limit are commenced in the Supreme Court, this clause allows the court to transfer these proceedings to the court with the appropriate limit.

2.5 Courts to act in aid of each other *(s.13 NSW; s.300 Vic; s.9 NT)*

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

This clause mirrors the New South Wales, Victorian and Northern Territory legislation.

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Part III - Proceedings for property adjustment and maintenance

Division 1 - Preliminary

3.1 Prerequisites for making of order - living or having assets in the State, contributions made *(s.15 NSW; s.280 Vic; s.15 NT)*

A court may make an order under this Part only if it is satisfied -

(a) that one or both of the de facto partners lived in Queensland on the day on which an application under this Part was made; and

(b) that -

(i) both partners have lived together in Queensland for at least one year;

(ii) substantial contributions of the kind referred to in section 3.8(1) have been made in Queensland by the partner making the application; or

(iii) a substantial part of the partners' assets or a substantial asset is situated in Queensland.

Clause 3.1 is necessary to ensure that a person applying for an order under the legislation has a sufficient connection with Queensland.

One way that a sufficient connection can be shown is by both partners having lived together in Queensland for a period of time. Paragraph (i) which appeared in the Shared Property Discussion Paper required that time to be at least one third of the relationship. Paragraph (i) which appeared in the Shared Property Discussion Paper read as follows -

> *(i) both (partners) have lived together in Queensland for at least one third of the period of their relationship;*

The Commission is of the view, however, that this paragraph could lead to anomalous results. For example, a couple who lived in Queensland for five years of a 20 year relationship may not qualify whereas a couple who lived in Queensland for nine months of a two year relationship would. For this reason, the Commission has redrafted paragraph (i) to require the couple to have lived together in Queensland for one year.

Clause 3.1 of the legislation proposed in the Shared Property Discussion Paper also did not contain paragraph (iii) of clause 3.1(b). This paragraph was inserted so that a person would be able to make a claim in the following circumstances.

Example A

A de facto couple lived in Tasmania for 5 years in a house owned by the de facto husband. The couple moved to Queensland so that the de facto husband could accept a promotion. The couple sold the house in Tasmania and bought a house in Queensland in the de facto husband's name. Three months after the couple arrived in Queensland, they separated, but continued to live in Queensland.

Unless clause 3.1(b) contained paragraph (iii), the de facto wife would be unable to claim under the legislation against the de facto husband.

In the Commission's view, paragraph (iii) should extend not only to the situation in example A where a substantial part of the partners' assets is situated in Queensland but also to the case where a substantial asset is situated in Queensland. The following fact situation will, therefore, be covered by the legislation.

Example B

A de facto couple lived in Tasmania for 5 years and accumulated substantial property in the name of the de facto husband. The couple moved to Queensland so that the de facto husband could accept a promotion. On moving to Queensland, the couple bought a house in the de facto husband's name. Three months after the couple arrived in Queensland, they separated, but continued to live in Queensland. The majority of the assets of the de facto husband remained in Tasmania.

There is no logical reason why the de facto wife should be able to bring a claim in example A but not example B. Accordingly, clause 3.1 allows a person to bring an application provided that either there is a substantial asset or a substantial part of the partners' assets situated in Queensland.

3.2 Relevant facts and circumstances *(s.16 NSW; s.283 Vic; s.17 NT)*

> *If a court is satisfied about the matters specified in section 3.1, it may make or refuse to make an order because of facts and circumstances even if those facts and circumstances, or some of them, occurred before the commencement of this Act or outside Queensland.*

In an application to adjust property rights, this clause specifically allows the court to take into account matters which occurred outside Queensland and before the commencement of the Act.

3.3 Prerequisites for making of order - length of relationship, care of child *(s.17 NSW; s.281 Vic; s.16 NT)*

(1) A court may only make an order under this Part if it is satisfied -

(a) that the de facto partners have lived together in a de facto relationship for a period of at least 2 years, except as provided by subsection (2); or

(b) that the de facto partner is a person who falls within paragraph (b) of the definition of "de facto partner" in clause 1.5.

(2) A court may make an order if it is satisfied -

(a) that there is a child of the de facto partners; or

(b) that the de facto partner who applied for the order -

(i) has made substantial contributions of the kind referred to in section 3.8(1)(a) or (b); or

(ii) has the care and control of a child of the other de facto partner,

and that failure to make the order would result in serious injustice to that de facto partner.

Before making an application to adjust property interests, the applicant must satisfy the requirements of clause 3.3. Under this clause, the applicant must prove one of the following 5 things before being able to make a claim under the Act -

(i) the de facto partner has lived in a de facto relationship (which is defined in clause 1.5) for at least 2 years;

(ii) the de facto partner is a person who has entered into a relationship that is recognised by Aboriginal or Torres Strait Islander customary law as a traditional marriage;

(iii) there is a child of the de facto relationship;

(iv) a de facto partner has made substantial contributions of the kind set out in clause 3.8(1)(a) and (b) and a serious injustice would result if the order were not made; or

(v) a de facto partner has the care and control of a child of the other de facto partner.

This clause has been altered from the clause in the Shared Property Discussion Paper by deleting from paragraph (i) of clause 3.3(2)(b) the words "for which the sharer would otherwise not be adequately compensated if the order were not made". The reason for deleting these words is that otherwise the court would have to estimate what the de facto partner would be likely to receive under the common law and compare the results to see if a serious injustice would occur. This would be a difficult comparison to make. Moreover, as the applicant must prove under clause 3.3(2)(b) that a serious injustice must result, this further requirement would place an excessive burden on the applicant.

This clause also makes it clear that Part III of the legislation applies to a person who has entered into a customary marriage that is recognised by Aboriginal or Torres Strait Islander law, where one of the parties to the relationship is an Aboriginal or Torres Strait Islander.

3.4 Prerequisites for making an order - disclosure of financial circumstances *(O.17 Family Court Rules)*

> *In proceedings under this Part, parties must disclose their financial circumstances in the manner prescribed by the Rules.*

While disclosure of financial circumstances is not a requirement of the de facto legislation in other jurisdictions, such a disclosure must be made in a contested application to alter interests in property under the Family Law Act.[204]

In the Shared Property Discussion Paper, submissions were invited on whether parties should have to disclose their financial circumstances in an application to alter interests in property. Predictably, responses varied according to whether or not the application was contested.

(i) Duty of disclosure in a contested property hearing

The submissions in relation to a contested property hearing were unanimous. All those making submissions on this issue were of the view that there should be disclosure in these circumstances. The Commission agrees with this view.

(ii) Duty of disclosure where parties consent to property order

The responses were mixed concerning whether disclosure should be required for consent orders. About half believed that full disclosure should be required in these circumstances.

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[204] Order 17 Family Court Rules.

Under the Family Law Act, if the parties to a dispute consent to the order being made, there is no requirement to produce a statement or affidavit of financial circumstances.[205] Under the existing case law, however, the fact that the parties agree to the order being made by the court does not relieve the court from its duty to ensure that the order is just and equitable in the circumstances.[206]

The Commission realises that by requiring disclosure of financial circumstances where parties agree to the order being made, the litigation process may be longer and, therefore, more costly. This is of particular concern where the parties have resolved their dispute as a result of mediation and the parties wish to formalise the agreement by obtaining a consent order. It is the view of the Commission, however, that only if each party fully discloses their financial situation can the court be certain that a just and equitable order will be made. For this reason, the Commission recommends that the duty to disclose should extend to consent orders.

The Commission invites comments on the recommendations made above.

3.5 Time limit for making applications *(s.18 NSW; s.282 Vic; s.14 NT; s.44(4)(a) FLA)*

> *(1) If de facto partners have ended their de facto relationship, an application to a court for an order under this Part must be made within 2 years after the day on which the relationship ended.*
>
> *(2) A court may grant leave to a de facto partner to apply for an order at any time after the end of the period referred to in subsection (1) if the court is satisfied that hardship would be caused to one of the de facto partners or a child of the de facto relationship if leave were not granted.*

Under clause 3.5, an application to adjust interests in property must be made within 2 years from the day on which the de facto relationship ended.

Clause 3.5(2) gives the court discretion to allow an application to be made out of time if hardship would be caused to a party of the de facto relationship or a child of the relationship if leave were not granted. It should be noted that the wording of clause 3.5(2) has been altered so that leave can be granted in the same circumstances as under the Family Law Act.[207]

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[205] Order 17 Rule 4 Family Court Rules.

[206] See comments of the High Court in Harris v Caladine (1991) 172 CLR 84. Contrast, however, the earlier comments of the Family Court in Smith and Smith (1984) FLC 91-512.

[207] Section 44(4)(a).

3.6 Duty of court to end financial relationships *(s.19 NSW; s.284 Vic; s.36 NT; s.81 FLA)*

> *So far as is practicable a court must make orders that will end the financial relationships between the de facto partners and avoid further proceedings between them.*

This clause requires the courts to make orders that will finally determine the financial relationship between the parties and avoid further proceedings between them as far as this is possible. The philosophy behind this "clean break" principle is that the parties are best able to recover from the former relationship by settling financial disputes and beginning new lives.

Division 2 - Adjustment of property interests

3.7 Application for order to adjust property interests *(s.20 NSW; s.279 Vic; s.13 NT; s.79 FLA)*

> *(1) After separation, a de facto partner may apply to a court for an order under this Division for adjustment of interests with respect to the property of the de facto partners or either of them for the benefit of either or both of the de facto partners or a child of the de facto partners.*
>
> *(2) An application may be made under subsection (1) whether or not an application for any other remedy or relief has been made, or may be made, under this Act or any other Act or law.*

This clause enables a de facto partner to apply to the court to adjust interests in the property of the other de facto partner. The adjustment may be made for the benefit of a de facto partner or a child of the de facto partners.

Clause 3.7(2) makes it clear that an application under clause 3.7(1) to alter an interest in property does not affect any other rights, for example under the common law, that the applicant may have.

3.8 Order for adjustment *(s.20 NSW; s.285 Vic; s.18 NT; s.79 FLA)*

> *(1) A court may make an order with respect to the property of the de facto partners or either of them adjusting the interests of the partners or a child of the de facto partners in the property that seems to it just and equitable having regard to -*
>
> *(a) the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners or a child of the de facto partners to the acquisition, conservation or improvement of any of the property of the partners or either of them or to the financial resources of the partners or either of them;*
>
> *(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following -*

(i) a child of the partners;

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

(c) the effect of any proposed order upon the earning capacity of either de facto partner;

(d) the matters referred to in section 3.15(2) so far as they are relevant;

(e) any other order made under this Act or under the Family Law Act 1975 (Cwth) affecting a de facto partner or a child of the de facto partners;[208]

(f) any child support under the Child Support (Assessment) Act 1989 (Cwth) that a de facto partner has provided, or is to provide, for a child of the de facto partners;

(g) any liabilities of either or both of the de facto partners.

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

(3) A court may only make an order (other than an order until further order or an order made with the consent of all parties to the proceedings) under this section if -

(a) the parties to the proceedings have attended a conference in relation to the matters in dispute with an officer appointed by the court;

(b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order although the parties to the proceedings have not attended a conference mentioned in paragraph (a); or

(c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference mentioned in paragraph (a).

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[208] Paragraph (e) would allow the court to consider orders including spousal maintenance orders made under the proposed legislation and any custody or access orders made under the Family Law Act.

In Chapter 4, the Commission explained its recommended approach to property distribution on the breakdown of a de facto relationship. The Commission recommended that in determining the distribution of property, the court should be able to take into consideration the same matters that can be considered by the Family Court under the Family Law Act. Therefore, clause 3.8(1) should reflect as closely as possible those matters listed in section 79(4) of the Family Law Act.

In the commentary to clause 3.7 in the Shared Property Discussion Paper, a number of issues were raised concerning the distribution of property. Because of the Commission's decision that a de facto couple's property entitlements should as closely as possible reflect the provisions in the Family Law Act, many of the issues have been resolved. Nevertheless, it may be helpful to comment on the following matters which were canvassed in the Shared Property Discussion Paper.

A. AGAINST WHICH PROPERTY CAN AN APPLICATION BE MADE?

The court has power under clause 3.8(1) to alter interests in the property of the de facto partners or either of them. "Property" is widely defined in clause 1.5. In this respect, clause 3.8(1) reflects the New South Wales, Victorian[209] and Northern Territory de facto legislation and the Family Law Act. As discussed in the commentary in clause 1.5, however, it is wider than the definition in the Family Law Act.

As clause 3.8(1) is currently drafted, if the respondent de facto partner does not own any property, no application can be brought. This would be the case even if that de facto partner had a regular income. This reflects the de facto legislation in other jurisdictions and the Family Law Act.

B. RELEVANCE OF FINANCIAL RESOURCES AND NEEDS

Under the De Facto Relationships Act 1984 (NSW),[210] when determining entitlements of a de facto partner to property, the court is not specifically directed to consider the financial resources and needs of each party. Therefore, even if the applicant de facto partner has very small financial resources and relatively large financial needs while the respondent has a large income with small financial commitments, the legislation does not specifically provide that the court should take these matters into account.[211]

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[209] Under the Victorian legislation, however, an application can only be made to alter interests in real property: section 285 Property Law Act 1958 (Vic).

[210] Section 20(1).

[211] The dicta of Hodgson J in Dwyer v Kaljo (1987) DFC 95-053 at 75,600 and the Full Court of the Supreme Court of New South Wales in Black v Black (1991) DFC 95-113 at 76,426, however, suggest that the court can consider such factors although not specifically referred to in the legislation.

In contrast, in an application to adjust property interests under the Family Law Act, the court is directed to consider the financial resources and needs of each party in determining the property allocation.[212]

Because of the decision of the Commission that the property entitlements of a de facto couple should reflect as closely as possible those of a married couple, clause 3.8(1) will direct the court to look at the financial resources and needs of each party in adjusting interests in the property.[213]

C. APPLICATION TO ADJUST DEBTS

In its Shared Property Discussion Paper, the Commission canvassed the difficulties which can arise on the dissolution of a relationship where parties own assets of little or no value but have incurred debts. The Commission cited the following example to illustrate the point.

Example C

A couple lived in a de facto relationship in rented accommodation for 5 years. There is a child of the relationship and the de facto wife provides full-time care for the child. During that period, the parties purchased on hire purchase terms a second-hand car in the de facto wife's name.[214] *The de facto husband lost his job, the parties defaulted in their hire purchase repayments and the finance company repossessed the car. The relationship broke down. The de facto wife retained custody of the child.*

The Commission has been advised that situations commonly occur where a car is purchased on hire purchase terms and at the end of the relationship one of the partners leaves the jurisdiction with the car. The other party, without the car, is then required to continue to make the hire purchase payments.

It has been argued to the Commission that the fair solution to this problem would be to require the person in possession of the car to make those hire purchase payments and relieve the other partner of liability.

This would constitute, however, an interference with contractual obligations. Moreover, in the example given where one party leaves with the car, it is unlikely that the creditor will recover any more hire purchase payments from that party. If the creditor cannot pursue the remaining de facto partner, the creditor will be left with no remedy.

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[212] Sections 79(4)(e) and 75(2)(b) and (d) Family Law Act.

[213] Clause 3.8(1)(d) and clause 3.15(2) of the draft legislation.

[214] A similar situation arises when the car is purchased in the name of one de facto partner, the other partner being guarantor of the hire purchase payments.

The Family Court does not have power to alter contractual obligations so that one party is no longer liable to a third party. It does, however, have power to -

* order one party to make the payments and make that party indemnify the other for liability which may arise;[215]

* make an order for division of property between husband and wife subject to the condition that the loan is repaid;[216] and

* take the existence of the debt into account when dividing the property between husband and wife.[217]

In one of the submissions received by the Commission, it was suggested that it should be possible for a creditor to be joined as a party to proceedings and to be bound by the order of the court. It was argued that the court should also be able to relieve one of the parties from liability under the contract or, at least, require the creditor to pursue the person made responsible for the debt to the fullest extent of the law before being able to take action against the other party.

The Commission acknowledges that in practice the situation does arise where one of the de facto partners will be required to continue making repayments on an asset at the end of the relationship even if the partner has left the jurisdiction with that asset. The Commission is concerned about the difficult situation in which the first de facto partner with the obligation to repay is placed.

However, the Commission has reservations about the suggestions made in this submission. The first suggestion that it be possible to join a creditor of one or both of the partners to an application to alter interests in property would be unworkable practically. It would be an enormous cost to join in an action those people who happened to be creditors of a de facto partner at the time of dissolution.

The second suggestion was that the courts be able to relieve one of the parties from liability under the contract. The Commission is reluctant to introduce into legislation power for the courts to rewrite contracts. If the contract was entered into as a result of fraud or undue influence, the court can provide relief. It is quite another matter to allow a court to rewrite the contract on the grounds that, in the circumstances of the breakdown the de facto relationship, it would be difficult to meet the obligations arising under the contract. To give the courts such power would lead to commercial uncertainty.

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[215] Anderson and Anderson (1981) FLC 91-104; In the Marriage of Pockran (1982) 8 FamLR 893.

[216] Zdravkovic and Zdravkovic (1982) FLC 91-220.

[217] Af Petersens and Af Petersens (1981) FLC 91-095.

The tentative conclusion of the Commission, therefore, is to give the courts the same powers as the Family Court in this regard. The court will be able to take the existence of the debt into account in determining division of property.[218]

D. MATTERS FOR CONSIDERATION BY THE COURT

In the Shared Property Discussion Paper, considerable attention was focused on the matters to be considered by the court in deciding distribution of property on the relationship breakdown. Because the draft legislation in the Shared Property Discussion Paper sought to cover a broad range of people who fell within the definition of "sharers", it was difficult to compile a list of matters to be considered by the court which would be suitable to all classes of sharers. For that reason, public comment was sought on these issues.

As the focus of this Working Paper is limited to de facto couples, many of these difficulties no longer exist. The matters listed in the legislation to be considered by the court in determining alteration of interests in property will be relevant to de facto couples only.

The principles to be applied by the court in determining distribution of property were discussed in Chapter 4. As mentioned earlier in the commentary to clause 3.8(1), the Commission has recommended that where a de facto couple qualifies to be considered under the legislation, property entitlements on the dissolution of a de facto relationship should as far as possible be the same as those of a married couple on dissolution of their marriage.

Therefore, the matters listed in clause 3.8(1) which must be considered by the court in a property application reflect as closely as possible the matters listed in section 79(4) of the Family Law Act.

E. MEANING OF "CHILD" FOR THE PURPOSES OF CLAUSE 3.8

In clause 3.8, the word "child" is relevant in three places. The different contexts in which the word is used are examined below.

(i) Entitlement to claim an interest in property

Section 79 of the Family Law Act allows the court to make an order altering interests in property for the benefit of the parties to the marriage or a child of the marriage. There is currently some doubt concerning whether a child has power to bring property proceedings under the Family Law Act without an application being made by one of

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[218] Unlike the Family Law Act, however, clause 3.8 of the draft legislation specifically states this as a matter which may be considered by the court in distributing property.

the parties to the marriage.[219] There is, however, no doubt that a child of the marriage may intervene in an application to alter property interests made by one of the parties to the marriage.[220] The Family Court has power to alter property interests in favour of the child who intervenes.

In New South Wales, Victoria and the Northern Territory, however, the de facto relationships legislation does not empower a court to order the alteration of property interests for the benefit of a child of the relationship.

A child of the marriage or a de facto relationship may have a legitimate reason to claim an interest in property. The following example illustrates why.

Example D

A husband and wife own and live on a farm. There is one son of the marriage. The son had always lived on the farm and, since finishing grade 12, worked on the farm on a full-time basis. After the son left school, the parents bought a second farm. At the request of his parents, the son worked on the farm for no wages assuming that, in time, the second farm would be his. When the son was 31 years, the parents separated.

The above fact situation could also occur in the de facto context. The Commission is of the view that in an application by a de facto partner to alter interests in property, the proposed legislation should, therefore, allow the court to make a property order in favour of that child. Clauses 3.7(1) and 3.8(1) reflect this view.

Other options for definition of "child" in this context

In section 79(1) of the Family Law Act and clauses 3.7(1) and 3.8(1) of the proposed legislation, the court is empowered to make a property order in favour of a child of the marriage or a child of the de facto partners respectively.

The situation could arise, however, where a person not the child of the partners may have a meritorious claim to an interest in the property. A slight alteration of the facts of example D above illustrates the point.

Example E

Peter and Karen enter into a de facto relationship. Karen has a son of a former relationship who is 12 months old when Karen and Peter move in together. The son is accepted by Peter as his son and the couple have no children of their own. The rest of the facts are as for example D.

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[219] This is particularly the case since the Family Law Act was amended in 1987 to allow under section 63C for proceedings to be instituted by a child.

[220] Dougherty v Dougherty (1987) 163 CLR 278.

It is difficult to justify allowing the son to make a claim for an interest in property under example D but not under example E. For this reason, the Commission is of the view that "child" in this context not be limited to a child of the de facto partners.

The Commission has encountered difficulties, however, in attempting to extend the definition of the "child" in whose favour a property order could be made. The following two options were considered -

(1) a child who, before the age of 18 years, was accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners; and

(2) a child who, before the age of 18 lived with and was wholly or substantially maintained or supported by the de facto couple for two years.

Option (1) is based on the wording used in the New South Wales, Victorian and Northern Territory legislation[221] and proposed clause 3.8(1)(b) in the context of defining the meaning of "family" to determine contributions made to welfare. The difficulty with this option is the vagueness of the words "accepted by the partners ... into the household". Presumably these words would cover the facts in example E above. It is more questionable, however, if they would cover, for example, a child who was fostered by the couple for six months.

Option (2) is less vague. Option (2) is also consistent with the threshold two year period for a de facto relationship required by clause 3.3(1) before an application for relief can be made under Part III. This requirement was suggested to prevent frivolous and unmeritorious claims being made by people who had lived with the couple for a relatively short period and whose claim to property would be unlikely to warrant litigation.

The Commission invites comments on whether the court should be able to alter interests in property for the benefit of a child in addition to a child of the de facto partners. If so, suggestions on an expanded definition of "child" are invited.

(ii) Contributions made by a child under clause 3.8

As mentioned above, the Family Court may make a property order in favour of a child of the marriage. To determine the kind of order to make, the court must assess the financial and non-financial contributions to the acquisition, conservation or improvement of the property made by the parties and the child.[222]

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[221] Section 20(1)(b) De Facto Relationships Act 1984 (NSW), section 285(1)(b) Property Law Act 1958 (Vic) and section 18(1)(b) De Facto Relationships Act 1991 (NT).

[222] Section 79(4)(a) and (b) Family Law Act.

As the Commission recommends that a court should be able to make a property order in favour of a child of the relationship, the court should also be able to consider contributions made by that child. Clause 3.8(1)(a) of the proposed legislation provides for this.

Other options for definition of "child" in this context

The meaning of "child" in clause 3.8(1)(a) must be identical to the meaning of "child" for whose benefit the order altering an interest in property is made.

Therefore, the discussion under (i) above concerning the possible ways to extend the meaning of "child" is equally applicable here.

(iii) Contributions to welfare of family

In determining the just and equitable order to make altering interests in property, the Family Law Act requires the Family Court to consider contributions made to the welfare of the family.[223] "Family" is stated to mean the parties to the marriage and any children of the marriage.

Under the equivalent sections in the de facto legislation in other jurisdictions, "family" is not limited to the de facto partners and children of the de facto relationship. In assessing entitlements to property, the court may also look at the contributions to the welfare of a child, not necessarily of the de facto relationship, but "accepted by the partners or either of them into the household of the partners".[224]

The inclusion of a "child accepted by the partners ... into the household of the partners" means that the court can consider contributions in the following context.

Example F

Jane and Neil lived in a de facto relationship for ten years. They have no children of their own. Neil has custody of a child of a former relationship who was only two when Jane and Neil began living together. As Jane and Neil intended to have children of their own, Jane agreed to stay at home to care for the child while Neil continued in paid employment.

Today, blended families are not rare. On the breakdown of a de facto relationship, if the court is entitled to consider the income from the partner in employment (Neil in example F), it should also be entitled to consider the contributions of the homemaker (Jane in example F) to the welfare of a child. It would produce an unjust result in Example F if the court could not consider the homemaking contributions of Jane because the child was not a child of the relationship but a child of Neil's.

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[223] Section 79(4)(c) Family Law Act.

[224] Section 20(1)(b)(ii) De Facto Relationships Act 1984 (NSW), section 285(1)(b)(ii) Property Law Act 1958 (Vic) and section 18(1)(b)(ii) De Facto Relationships Act 1991 (NT).

The Commission, therefore, is of the view that the court be entitled to consider at least the contributions to the welfare of the family as defined more broadly in the de facto legislation of New South Wales, Victoria and Northern Territory. Clause 3.8(1)(b)(ii) reflects this decision.

Other options for definition of "child" in this context

A further question arises whether the meaning of child should be extended in this context. Should the meaning of "child" in clause 3.8(1)(b)(ii) be the same as the meaning given to the word under headings (i) and (ii) above?

The Commission invites comment on the desirable meaning of "child" for the purposes of clause 3.8(1)(b)(ii).

F. COMPULSORY CONFERENCES

Where there is a property dispute between a married couple, section 79 of the Family Law Act allows the Family Court to alter interests in property. Before an order can be made under that section, however, the parties are required to attend a compulsory conference.[225]

In the Shared Property Discussion Paper, the Commission invited comment on whether an equivalent to the Family Law Act "compulsory conference" procedure would be beneficial to the legislation being proposed by the Commission.

The submissions received on this point were unanimously in favour of making compulsory conferences a feature of this legislation.

The Commission recognises that compulsory conferences will not be possible in all actions as is the case under the Family Law Act unless appropriate facilities are introduced into the existing court system. The Commission is also aware of the funding implications of requiring compulsory conferences. On balance, however, the Commission is of the view that the success of these conferences in the Family Court warrants their use in the proposed legislation. The Commission, therefore, recommends inserting in the legislation provisions to facilitate compulsory conferences. Clause 3.8(3) is drafted to reflect this recommendation.[226]

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[225] Section 79(a) Family Law Act and Order 24 Family Court Rules.

[226] The Rules to the proposed legislation will provide the details governing the operation of such conferences.

3.9 Adjournment of application - likelihood of significant change in circumstances *(s.21 NSW; s.286 Vic; s.19 NT; s.79(5) FLA)*

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

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

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

(2) The court may adjourn the application -

(a) at the request of either partner; and

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

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

(4) In forming an opinion as to whether there is likely to be a significant change in the financial circumstances of either or both of the de facto partners a court may have regard to any change in the financial circumstances of a partner that may occur by reason that a partner -

(a) is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme; or

(b) may become entitled to property as the result of the exercise in his or her favour, by the trustee of a discretionary trust, of a power to distribute trust properties.

(5) Nothing in this section -

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

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

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

This clause facilitates the adjournment of an application for property adjustment if there is likely to be a significant change in the financial circumstances of one or both of the de facto partners in the future. The clause reflects the position under the Family Law Act.

3.10 Adjournment of application - proceedings in Family Court of Australia *(s.22 NSW; s.287 Vic; s.20 NT)*

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

(2) Adjourned proceedings may be recommenced upon the application of a partner if there is a delay in the proceedings in the Family Court.

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

This clause gives the court hearing an application for property adjustment the discretion to adjourn proceedings if there is a dispute concerning property of one or both of the partners in the Family Court.

3.11 Deferment of order *(s.23 NSW; s.288 Vic; s.21 NT)*

If a court is of the opinion that a de facto partner is likely, within a short period, to become entitled to property which may be applied in satisfaction of an order made under section 3.8 the court may defer the operation of the order until the date of the occurrence of the event specified in the order.

This clause allows the court to defer operation of an order adjusting property entitlements if the court is satisfied that a de facto partner will become entitled to property within a short period. An order to defer would then enable this property to be applied later to satisfy the order made.

3.12 Effect of death of party on application *(s.24 NSW; s.289 Vic; s.22 NT)*

(1) If a party to the application dies before an application under section 3.7 is determined the application may be continued by or against the legal personal representative of the deceased party.

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

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

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

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

Provided an application has commenced for an adjustment of property rights, this clause allows the application to be continued notwithstanding the death of either of the parties. If the court makes an order altering interests in property, clause 3.12(3) allows that order to be enforced on behalf of, or against the estate of the deceased person.

3.13 Effect of death of party on order *(s.25 NSW; s.290 Vic; s.23 NT)*

If a party to an application under section 3.7 dies after an order is made in favour of or against that party, the order may be enforced by or against the estate of the deceased party.

The effect of this clause is straightforward. If a de facto partner dies after an order has been made in his or her favour, this clause allows the estate to enforce the order. Similarly, if the partner against whom an order had been made dies after the order is made, the order can be enforced against that person's estate.

Division 3 - Maintenance

3.14 Right of de facto partner to maintenance *(s.26 NSW, s.24 NT)*

> *(1) A de facto partner is liable to maintain the other de facto partner and a de facto partner is entitled to claim maintenance from the other de facto partner only as provided by this Division.*
>
> *(2) A de facto partner may apply to a court for an order under this Division for maintenance whether or not an application for any other remedy or relief has been made, or may be made, under this or any other Act or law.*

As outlined in Chapter 4, the draft legislation in the Commission's Shared Property Discussion Paper did not confer maintenance rights on sharers. The focus of the Shared Property Discussion Paper was on altering interests in property of sharers in general.

For the reasons outlined in Chapter 4, the Commission tentatively recommends conferring maintenance rights and obligations on de facto couples on the breakdown of a relationship providing that the de facto partner is in need and that need resulted from the relationship.[227] Clause 3.14(2) confers on a de facto partner the right to claim maintenance.

Clause 3.14(1) makes it clear, however, that a de facto's right to maintenance is not automatic. A claim can only be made if the applicant can satisfy the requirements of this Division.

3.15 Maintenance Orders *(s.27 NSW; s.26 NT; ss.72, 74 and 75 FLA)*

> *(1) A court may make an order for periodic or other maintenance if it is satisfied that the de facto partner applying for the order is unable to support himself or herself adequately whether -*
>
> *(a) by reason of having the care and control of a child of the de facto partners or a child of the other partner, who has not attained the age of 18 years on the day on which the application is made;*

[227] See clause 3.15(1) of the draft legislation.

(b) by reason that the partner's earning capacity has been adversely affected by the circumstances of the de facto relationship; or

(c) for any other adequate reason arising from the circumstances of the de facto relationship.

(2) In deciding the amount of maintenance, the court shall have regard to -

(a) the age and state of health of each of the parties;

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;

(c) whether either party has the care or control of a child of the de facto partners or a child of the respondent partner who has not attained the age of 18 years;

(d) commitments of each of the parties that are necessary to enable the party to support -

(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain;

(e) the responsibilities of either party to support any other person;

(f) subject to subsection(3), the eligibility of either party for a pension, allowance or benefit under any law of the Commonwealth, of a State or Territory of the Commonwealth or of another country, and the rate of any such pension, allowance or benefit being paid to either party;

(g) where the parties have separated, a standard of living that in all the circumstances is reasonable;

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

(i) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;

(j) the duration of the de facto relationship;

(k) the extent to which the de facto relationship has affected the earning capacity of the party whose maintenance is under consideration;

(l) the terms of any order made or proposed to be made under section 3.8 in relation to the property of the parties;

(m) if either party is cohabiting with another person, the financial circumstances relating to that cohabitation;[228]

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

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

(3) In making an order a court shall disregard any entitlement of the partner applying for the order to an income tested pension, allowance or benefit within the meaning of the Family Law Act 1975 (Cwth).

In Chapter 4, the Commission explained its tentative recommendation to confer maintenance rights on de facto couples. A partner's entitlement to maintenance should be the same as a married partner's on the breakdown of the respective relationships provided that the inability to adequately support the applicant arises from the circumstances of the de facto relationship.

1. Clause 3.15(1) - right to claim maintenance

An applicant must satisfy the court that he or she is unable to support himself or herself adequately by reason of one of the following matters listed in clause 3.15(1) before the court will be able to make an order for maintenance -

(a) the applicant has the care of a child of the de facto relationship or of the respondent partner;

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[228] Section 75(2)(m) of the Family Law Act directs the court to consider the financial circumstances of any cohabitation of either of the parties. While such cohabitation will usually be with a de facto partner, it could also relate to people such as a parent, sibling or friend of the partner. Paragraph (m) of the proposed legislation mirrors this section. It should be noted, however, that clause 3.19 of the proposed legislation prevents the court making an order for maintenance if the applicant remarries or enters into another de facto relationship unless there are exceptional circumstances. Clause 3.15(2)(m) will still be relevant in some circumstances such as if the applicant is cohabiting in a non-de facto context or if the respondent is living in a de facto relationship.

(b) the applicant's earning capacity has been adversely affected by the relationship;

(c) any other adequate reason arising out of the circumstances of the relationship.

This clause is modelled on section 72 of the Family Law Act. However, it departs from the Family Law Act in the following three ways.

* Clause 3.15(1) reflects the principle that the need for maintenance must arise from the relationship. The Family Law Act has no such qualification for married couples.

* Clause 3.15(1)(a) allows the court to consider an applicant's inability to support himself or herself adequately because of the care and control of the child. "Child" in clause 3.15(1)(a) means a child of the de facto relationship or a child of the other partner. Under section 72(a) of the Family Law Act, however, the court may only consider children of the marriage.[229] The children who can be considered by the court in the equivalent provisions in the New South Wales and Northern Territory legislation are the same as those referred to in the proposed clause 3.15(1)(a).[230]

  Blended families which include children other than children of the relationship are a feature of today's society. If, after the partners separate, a partner has the responsibility of caring for the other partner's child and this causes that partner to be unable to support himself or herself adequately, the Commission is of the view that the court should be able to hear an application for maintenance by that partner.

  On the current drafting of clause 3.15(1)(a), if an applicant is unable to support himself or herself because of the care and control of his or her own child, not being a child of the respondent, that person would be unable to apply for spousal maintenance. In certain circumstances, this may be harsh for the applicant. Take, for example, a de facto relationship which lasted for ten years. The woman brought her one year old daughter into the relationship. The man accepted the child into the household and the three formed a close-knit family unit. It could be argued that on separation, the man should be obliged to financially support his former partner because she has the care and control of a child who was accepted into the relationship.

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[229] Section 72 of the Family Law Act, however, allows the court to take into account the matters listed in subsection 75(2) in determining a party's entitlement to maintenance. Section 75(2)(d) and (e) of the Family Law Act require the court to consider commitments of either party to support a child and the responsibilities of either party to support any other person respectively. These clauses would clearly include a child of the other partner.

[230] Section 27(1)(a) De Facto Relationships Act 1984 (NSW) and section 26(1)(a) De Facto Relationships Act 1991 (NT) respectively. It should be noted, however, that under the New South Wales section the child may only be considered if under the age of 12 years or, if physically or mentally handicapped, under the age of 16 years.

The Commission invites comment on whether a child other than the kind described in clause 3.15(1)(a) should be considered in determining whether the court can make an order for spousal maintenance.

* In section 75(2), the Family Law Act lists many factors which are relevant to the court in deciding both whether an order for maintenance should be made and, if so, the amount of maintenance to be ordered. The matters in clause 3.15(2) of the draft legislation closely reflect the matters listed in section 75(2). Under the proposed legislation, however, these matters are only relevant in determining the amount of maintenance. In deciding whether the court may make a maintenance order, only the matters listed in clause 3.15(1) may be considered. The reason for this departure is to reflect the Commission's decision that a de facto partner will only be entitled to maintenance if the need arises from the de facto relationship itself.

2. Clause 3.15(2) - matters to be taken into account

If a de facto partner satisfies the court of one of the matters in clause 3.15(1), the court may make an order for maintenance. Clause 3.15(2) lists the matters which the court must consider in deciding the amount of maintenance to order. This clause closely mirrors section 75(2) of the Family Law Act. The equivalent sections in the New South Wales and Northern Territory legislation are not as exhaustive as the provisions in the proposed legislation and the Family Law Act.[231]

As many of the paragraphs in clause 3.15(2) are identical to or substantially mirror the paragraphs in section 75(2) of the Family Law Act, these matters are well understood and will not be discussed in this Working Paper. The paragraphs where departure from the Family Law Act provisions is proposed are discussed below.

* Clause 3.15(2)(c) - the care and control of a child

Under proposed clause 3.15(2)(c), a court can take into account whether either partner has the care and control of a child of the partners or of the respondent partner under 18 years.

Section 75(2)(c), however, only requires the court to consider the care and control of children of the marriage.[232]

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[231] See pages 51-52 for further discussion.

[232] As mentioned in footnote 229, however, the matters referred to in section 75(2)(d) and (e) of the Family Law Act may be relevant in this context and can be considered by the court.

* **Clause 3.15(2)(f) - the eligibility for a pension, allowance or benefit**

In the equivalent section in the Family Law Act,[233] the court is also required to consider the parties' superannuation entitlements. Under the proposed clause 3.15(2)(b), the court may consider the "financial resources" of the parties. Clause 1.5 defines "financial resources" to include superannuation entitlements. For this reason, the Commission considers it unnecessary to refer to superannuation entitlements under clause 3.15(2)(f).

* **Clause 3.15(2)(j) and (k) - the duration of the relationship and its effect**

Clause 3.15(2)(j) and (k) require the court to consider two matters independently. The first is the length of the relationship and the second is the extent to which the relationship has affected the earning capacity of the applicant. The Family Law Act combines subparagraphs (j) and (k) into one subparagraph.[234] When the subparagraphs are combined, there is some ambiguity about its interpretation. As the Commission is of the view that both matters should be independently considered, each matter has been listed in a separate paragraph.

* **Clause 3.15(2)(n) - child maintenance**

Under clause 3.15(2)(n) the court can take into account any payments made for the maintenance of the child or children in the care and control of the partner applying for a maintenance order. This provision is identical to section 27(2)(e) of the New South Wales legislation and section 26(2)(g) of the Northern Territory legislation. Under section 75(2)(na) of the Family Law Act, however, the court is directed only to take into account maintenance paid pursuant to the Child Support (Assessment) Act 1989 (Cwth).[235] Proposed clause 3.15(2)(n) also requires the court to consider voluntary maintenance payments, maintenance paid pursuant to child maintenance orders made on behalf of children of a de facto relationship before Queensland referred its power in respect of child maintenance to the Commonwealth,[236] and maintenance paid for children in the care of the applicant who are not children of the relationship.

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[233] Section 75(2)(f).

[234] Section 75(2)(k) Family Law Act.

[235] It should be noted, however, that other maintenance payments may be relevant under section 75(2)(d) or (e) Family Law Act.

[236] Since Queensland referred its power, the Family Court under the Child Support (Assessment) Act 1989 (Cwth) makes orders for the maintenance of a child of a de facto relationship. The child support legislation only applies to parents who separated or children born after 1 October 1989. Before Queensland referred its power, orders for the maintenance of a child of a de facto relationship were made under the Maintenance Act 1965 (Qld).

* **Section 75(2)(l) Family Law Act - need to protect role as parent**

There is one paragraph in section 75(2) of the Family Law Act which the Commission did not consider appropriate to insert in the proposed de facto legislation. This was section 72(2)(l) which requires the court to consider the need to protect a party who wishes to continue that party's role as a parent. The Commission did not consider that it was appropriate under the proposed legislation for the court to examine whether or not the person who has custody of the child wishes to continue that role as parent.

The Commission invites submissions on the matters which have been listed in clause 3.15(2) for consideration by the court in assessing the amount of maintenance.

3.16 Interim maintenance orders *(s.28 NSW; s.27 NT; s.77 FLA)*

> *Where it appears to a court that the partner applying for an order under this Division is in immediate need of financial assistance, but it is not practicable in the circumstances to decide immediately if any order should be made, the court may order the other partner to pay to the applicant such periodic or other amounts until the application is determined as the court considers reasonable.*

This clause enables a court to make urgent maintenance orders in appropriate circumstances. The order is temporary. It has effect only until the application can be disposed of by the court. The applicant must satisfy the court that he or she is in immediate need of financial assistance. In addition, the applicant must show that it is not practicable for the court to determine if any order should be made. The court can order payment of a periodic or lump sum.

3.17 Specification in orders for maintenance purposes *(s.77A FLA)*

> *(1) Where -*
>
> *(a) a court makes an order under this Act (whether or not the order is made in proceedings in relation to the maintenance of a party to a de facto relationship, is made by consent or varies an earlier order), and the order has the effect of requiring -*
>
> *(i) payment of a lump sum, whether in one amount or by instalments; or*
>
> *(ii) the transfer or settlement of property; and*

(b) the purpose, or one of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of a party to a de facto relationship,

the court shall -

(c) express the order to be an order to which this section applies; and

(d) specify the portion of the payment, or the value of the portion of the property, attributable to the provision of maintenance for the party.

(2) Where -

(a) a court makes an order of a kind referred to in paragraph (1)(a); and

(b) the order -

(i) is not expressed to be an order to which this section applies; or

(ii) is expressed to be an order to which this section applies, but does not comply with paragraph (1)(d),

any payment, transfer or settlement of a kind referred to in paragraph (1)(a), that the order has the effect of requiring, shall be taken not to make provision for the maintenance of a party to the relevant de facto relationship.

Under this clause a court, when making an order, is required to specify what portion of the payment or value of the property provides for the maintenance of a de facto partner. This clause mirrors section 77A of the Family Law Act. The section in the Family Law Act was introduced by an amendment in 1987. The explanatory notes to the Bill amending the Act explain the intention of the Commonwealth Parliament in inserting this clause. The primary focus is on "income-testing for social security purposes of maintenance received other than by way of periodic sums".[237] If the order made relates to maintenance, this can affect any income-tested benefit received by the person in whose favour the order is made.

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[237] Explanatory memorandum to the Family Law Act Amendment Bill 1987, paragraph 195.

It has been suggested that there may be some ambiguity in the Family Law context of the words in section 77A(1)(b) of the Family Law Act which is equivalent to proposed clause 3.17(1)(b).[238] The ambiguity relates to the words "make provision for the maintenance of a party to a marriage".

It is possible that the legislature intended these words to be a reference to a "pure" maintenance order made under section 74 of the Family Law Act. Alternatively, the words could refer to a "pure" maintenance order under section 74 combined with the maintenance component[239] of a property order made under section 79(1) of the Family Law Act.

The same arguments apply to the words "make provision for the maintenance of party to a de facto relationship" in clause 3.17. The words could refer to a "pure" maintenance order made under clause 3.15 or this order combined with the maintenance component[240] of a property order made under clause 3.8.

It is arguable that the second interpretation is more logical as it includes all forms of maintenance that a de facto partner may receive. It may in practice, however, be difficult to separate the maintenance component in a property order.

The Commission invites submissions on which interpretation should be adopted for the purposes of clause 3.17.

3.18 Applications after the death of either party *(s.31 NSW; s.29 NT)*[241]

An application for an order under this Division cannot be continued if either party to the application dies before the application is determined.

This clause prevents an application for maintenance continuing if either party to the application dies before the application is determined.

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238 CCH Australian Family Law and Practice, paragraph 38-383.

239 Section 79(4)(e) of the Family Law Act which requires a consideration of the matters listed in section 75(2) of the Family Law Act.

240 Clause 3.8(2)(d) of the draft legislation which requires a consideration of the matters listed in clause 3.15(2) of the draft legislation.

241 There is no provision in the Family Law Act which specifically relates to the effect of death on pending maintenance applications. The court in Sims and Sims (1981) FLC 91-072, however, held that pending maintenance proceedings cannot continue after the death of either party.

3.19 Effect of subsequent relationship or marriage *(cf.s.29 NSW; s.28 NT)*

After separation, except in exceptional circumstances, a court may not make an order under this Division in favour of an applicant who, at the time at which the application is made, has entered into a subsequent de facto relationship or has married or remarried.

This clause allows a court to order spousal maintenance in favour of a former partner if that partner has subsequently married or entered into another de facto relationship. Such an order can only be made, however, in exceptional circumstances.

3.20 Cessation of maintenance orders - generally *(ss.32 and 34 NSW; ss.30 and 35 NT; s.82 FLA)*

(1) An order under this Division ceases to have effect -

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

(b) subject to subsection (2), on the marriage of the de facto partner in whose favour the order was made.

(2) On application by a de facto partner in whose favour an order under this Division has been made who has married or plans to marry, a court may, if satisfied that exceptional circumstances exist, order that the maintenance order continue to have effect.

(3) Where a de facto partner in whose favour an order under this Division is made marries, he or she must, without delay, notify in writing the de facto partner against whom the order was made of the date of the marriage.

(4) Any moneys paid in respect of a period after the event referred to in subsection (1)(b) may be recovered as a debt due and payable by the de facto partner who has married.

(5) Nothing in this section affects the right to recover arrears due under an order at the time when the order ceased to have effect.

Under this clause an order is terminated on -

* the death of either party; or

* the marriage of the partner in whose favour the order is made.[242]

There is one qualification to this rule. If exceptional circumstances exist, a court may order that the earlier maintenance order should continue to have effect even though the partner receiving the maintenance has married.[243] The following example illustrates where this kind of order may be made.

Example G

Maree and Fred lived in a de facto relationship for 15 years. There are two children of the relationship who, on separation, were cared for by Maree. Maree remarried. Fred was very wealthy and during the de facto relationship, Maree lived a lifestyle commensurate with her former de facto partner's wealth. Maree's husband is a low income earner. The children attend very prestigious schools, the fees being paid by Fred.

In this example, Maree who has the care and control of the children of the de facto relationship may, despite her marriage, continue to need financial support from her former de facto partner.

Clause 3.20(2) allows a person who is receiving maintenance to bring an application to the court for an order to continue the maintenance if exceptional circumstances can be shown to exist, even though the person has married someone else.

The partner receiving the maintenance is required to bring the application. If that person does not apply, the order ceases to have effect.

Clause 3.20(3) imposes a duty on the person in whose favour the maintenance order was made to notify the former de facto partner paying the maintenance of the date of the marriage. Clause 3.20(4) allows the de facto partner who is paying the maintenance to recover any monies paid to his or her former partner after that partner has married. Clause 3.20(5) preserves the right to recover arrears of maintenance which may exist at the date of the marriage.

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[242] The position when a de facto partner in whose favour the order is made enters into a subsequent de facto relationship is discussed in clause 3.21 of the draft legislation.

[243] This also reflects the situation in relation to the payment of maintenance or remarriage under section 82(4) of the Family Law Act.

3.21 Cessation of maintenance orders - entry into subsequent de facto relationship

(1) An order under this Division ceases to have effect if -

(a) the de facto partner in whose favour the order was made enters into a subsequent de facto relationship; and

(b) the de facto partner has notified in writing the partner against whom the order is made that the subsequent de facto relationship has been entered into.

(2) On application by a de facto partner in whose favour an order under this Division has been made, who has entered or plans to enter into a de facto relationship, a court may, if satisfied that exceptional circumstances exist, order that the earlier maintenance order continue to have effect.

(3) Where a de facto partner in whose favour an order under this Division is made enters into another de facto relationship, he or she must, without delay, notify the de facto partner against whom the order was made that the subsequent de facto relationship has been entered into and the date it commenced.

(4) Any monies paid in respect of a period after the event referred to in subsection (1)(a) may be recovered as a debt due and payable by the de facto partner who has entered into the subsequent de facto relationship.

(5) Nothing in this section affects the right to recover arrears due under an order at the time when the order ceased to have effect.

This clause reflects as closely as possible clause 3.20 which deals with maintenance on remarriage. Under clause 3.20, on the marriage of a de facto partner, any maintenance payments made to that partner will cease unless the court is satisfied that exceptional circumstances exist. In principle, the Commission considers that entering a subsequent de facto relationship should have the same effect. The difference in these two cases, however, is one of proof. While it is easy to prove a marriage has taken place, it is not as easy to establish that a de facto relationship has begun. For this reason, clause 3.21 provides that maintenance payments will cease only if the de facto partner receiving maintenance notifies the partner paying the maintenance. Clause 3.21(3) imposes an obligation on the de facto partner to notify the partner paying the maintenance of the entry into another de facto relationship.

The Commission is aware, of course, that a party receiving maintenance may not, on entering another de facto relationship, be inclined to advise the payer of the maintenance of this fact. For this reason, the Commission suggests inserting clause 3.22 in the proposed legislation.

3.22 Application for discharge of maintenance order - entry into subsequent de facto relationship

(1) If a de facto partner against whom an order under this Division has been made believes that the other partner has entered into a subsequent de facto relationship, the first-mentioned partner may apply to the court for a discharge of the order.

(2) If the court is satisfied that the de facto partner in whose favour an order under this Division has been made has entered into a subsequent de facto relationship the court shall, subject to subsection (3), discharge the order for maintenance.

(3) Despite being satisfied of the existence of a subsequent de facto relationship, the court may refuse to discharge the order for maintenance if satisfied that exceptional circumstances exist.

(4) Any monies paid in respect of a period after the subsequent de facto relationship was entered into may be recovered as a debt due and payable by the de facto partner who has entered into the subsequent de facto relationship.

(5) Nothing in this section affects the right to recover arrears due under an order at the time the order ceased to have effect.

This clause enables the former de facto partner who is paying the maintenance to apply for discharge of the maintenance order if he or she believes that the other de facto partner has entered into a subsequent de facto relationship.

3.23 Modification of maintenance orders *(s.35 NSW; s.33 NT; s.83 FLA)*

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

(a) subject to subsection (2), discharge the order;

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

(c) revive, wholly or in part, an order suspended under paragraph (b); or

(d) subject to subsection (2), vary the order so as to increase or decrease any amount ordered to be paid or in any other manner.

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

(a) that, since the order was made or last varied -

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

(ii) the cost of living has changed to such an extent,

as to justify its so doing;

(b) in a case where the order was made by consent - that the amount ordered to be paid is not proper or adequate;

(c) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false.

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

(a) the Consumer Price Index (All Groups Index) issued by the Australian Statistician; or

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

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

(5) In satisfying itself for the purposes of subsection (2)(b), the court shall have regard to any payments, and any transfer or settlement of property, previously made by a party to the de facto relationship to -

(a) the other party; or

(b) any other person for the benefit of the other party.

(6) An order decreasing the amount of a periodic sum payable under an order or discharging an order may be expressed to be retrospective to such date as the court considers appropriate.

(7) For the purposes of this section, the court shall have regard to the provisions of section 3.15.

(8) The discharge of an order does not affect the right to recover arrears due under the order at the time as at which the discharge takes effect.

Where an earlier maintenance order has been made, under this clause a court may discharge it, suspend it, revive an order that was previously suspended or increase or decrease the amount ordered to be paid.

Clause 3.23 lists the matters a court must take into account when considering whether to discharge, increase or decrease the maintenance payable. The court may consider whether -

* the circumstances of either de facto partner or the cost of living have changed so as to justify a variation;[244]

* material facts were withheld from or false material evidence was given to the court that made or varied the order; or

* the amount of maintenance ordered to be paid by an order is not adequate or proper.

When a court reduces or discharges an order for maintenance, clause 3.23(6) provides that the order may be expressed to be retrospective to such date as the court considers appropriate.

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[244] A change in the cost of living will only be relevant if at least twelve months has elapsed since the order was made or last varied.

Division 4 - General

3.25 Powers of the court *(s.38 NSW; s.291 Vic; s.37 NT; ss.80 and 114 FLA)*

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

(a) order the transfer of property;

(b) order that a specified transfer or settlement of property be made by way of maintenance for a party to a de facto relationship;

(c) order the sale of property and the distribution of the proceeds of sale in any proportions that the court thinks fit;

(d) order that any necessary deed or instrument be executed and that documents of title be produced or other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

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

(f) order payment of a weekly, fortnightly, monthly, yearly or other periodic sum;

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

(h) appoint or remove trustees;

(i) make an order or grant an injunction -

(i) for the protection of or otherwise relating to the property or financial resources of the parties to an application or either of them; or

(ii) to aid enforcement of any other order made in respect of an application;

or both;

(j) make an order or grant an injunction in relation to the use or occupancy of the de facto couple's home;

> *(k) where a de facto partner is the lessee of the home in which the de facto couple have lived and upon separation the other partner wishes to remain in the home, the court may with the consent of the lessor order that the lease be assigned from the lessee to the other partner;*
>
> *(l) order that payments be made direct to a de facto partner, to a trustee or into court for the benefit of a de facto partner;*[245]
>
> *(m) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;*
>
> *(n) impose terms and conditions;*
>
> *(o) make an order by consent;*
>
> *(p) make any other order or grant any other injunction which it considers necessary to do justice.*
>
> *(2) This section does not take away any other power of the court under this or any other Act or any other law.*

The powers conferred on the court by the de facto relationships legislation of New South Wales, Victoria and Northern Territory are very similar. These powers also largely reflect the powers conferred on the Family Court by section 80 of the Family Law Act.

Earlier in this Working Paper the Commission made recommendations on property and maintenance entitlements of de facto couples on the breakdown of their relationships. It is recommended that, as far as possible, the property rights and obligations of de facto couples should reflect those of married couples on the relationship breakdown.

However, maintenance entitlements of a de facto partner will not arise unless the need of the de facto partner arises as a result of the circumstances of the de facto relationship.

Consistency with powers of the Family Court

To be consistent with these earlier recommendations, the Commission is of the view that the powers conferred on a court administering the proposed legislation should be similar to the powers of the Family Court. For this reason, the Commission recommends that

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[245] Paragraph (l) is based on section 80(1)(f) of the Family Law Act. Under section 80(1)(f), however, the court is given power to order payments be made directly to a public authority. This power would enable the court, for example, to order that one party pay the rates of the other party. In today's society, the Commission does not consider it appropriate that orders such as paying the rates on behalf of another person be made. Orders should be made in favour of the person himself or herself, that person being presumed competent to make the necessary payment on his or her own behalf.

the court be conferred with the powers which are contained in the Family Law Act although not contained in the de facto legislation in New South Wales, Victoria and Northern Territory. These powers are those conferred by clause 3.25(1)(b), (j), (l) and (m).

The insertion of clause 3.25(1)(j) is of particular importance. Paragraph (j) allows the court to make an order or grant an injunction for the sole use or occupancy of the de facto couple's home. This paragraph reflects section 114(1)(f) of the Family Law Act. The Commission considered that this kind of order would be particularly useful where there has been a breakdown of a relationship and one party is responsible for the care and control of a child of the relationship.

Power to transfer beneficial entitlements under a lease

One of the submissions made to the Commission suggested giving the court power to transfer beneficial entitlements under a lease, provided the consent of the landlord were obtained. The following example illustrates when it would be desirable for this kind of power to be used.

> **Example H**
>
> *Robyn and Keith lived in a de facto relationship for ten years. There are two children of the relationship. Robyn and Keith have rented the house in which they lived since the beginning of their relationship. The lease is in Robyn's name. The children attend the school and kindergarten in the vicinity of the house. During the relationship, Keith's mother who lives nearby regularly helped care for the children. On separation Keith obtained custody of the children. Both Keith and Robyn wish to stay in the home and have the other move out.*

In the circumstances of this case, an order allowing Keith to stay in the house could be as valuable to Keith as any property or maintenance order the court may make. If the landlord consents to Keith becoming lessee and being subject to the conditions of the lease, there is a strong argument that the court should be empowered to order the assignment of the lease from Robyn to Keith.

In considering whether to confer this power on the court, the Commission is concerned about interfering with contractual rights of a third party, namely the landlord. Provided the legislation makes it clear that this power can only be exercised if the landlord's consent were obtained, however, the concerns of the Commission in this regard are allayed.

The Commission invites comment on whether the proposed legislation should confer on the court the power under clause 3.25(1)(k).

3.26 Execution of instruments by order of court *(s.39 NSW; s.292 Vic; s.38 NT; s.84 FLA)*

> *(1) Where -*
>
> *(a) a person has refused or neglected to comply with an order directing the person to execute a deed or instrument; or*
>
> *(b) for any other reason, a court thinks it necessary to do so,*
>
> *the court may appoint an officer of the court or other person to execute the deed or instrument in the name of a person and to do everything necessary to give validity and operation to the deed or instrument.*
>
> *(2) The execution of the deed or instrument by the appointed person has the same force and validity as if it had been executed by the person directed by the order to execute it.*
>
> *(3) A court may make any order it thinks just about the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.*

This clause will be useful in the following situations.

(i) A person has not complied with an order to execute a deed or instrument.

If a person does not comply with an order that he or she execute a deed or instrument, this clause allows the court to appoint an officer of the court to execute the document instead.

(ii) The court is satisfied that a person would not comply with an order to execute a deed or instrument.

In an application for property adjustment under the proposed legislation, the court can order the transfer of property from one party to the other. As part of this order, the court can specifically require one party to execute the transfer document. If it is clear to the court, for example because of previous conduct of the party, that the party would not execute the transfer as ordered, it may be desirable that, in the first instance, the court orders that an officer of the court rather than the party executes the transfer.

In its Shared Property Discussion Paper the Commission invited comment on this option. The submissions almost unanimously supported the proposal. Clause 3.26(1)(b) is drafted to reflect the Commission's decision to allow such orders to be made.

3.27 Orders and injunctions in the absence of a party *(s.40 NSW; s.293 Vic; s.39 NT; O12 Family Law Rules)*

> *(1) In the case of urgency, a court may, in the absence of a party, make or grant an injunction or other order under this Act.*
>
> *(2) An application under this section may be made orally or in writing.*
>
> *(3) The court must not make an order or grant an injunction upon an oral application unless it considers that it is necessary to do so because of the extreme urgency of the case.*
>
> *(4) The court may give any directions with respect to the filing, serving and further hearing of an application.*
>
> *(5) An order or injunction granted under subsection (1) must be expressed to operate or apply only until a specified time or the further order of the court.*
>
> *(6) Where a court makes an order or grants an injunction under subsection (1), it may give directions with respect to -*
>
> *(a) the service of the order or injunction and any other documents it thinks fit; and*
>
> *(b) the hearing of an application for a further order.*

This clause empowers the court to make an order or grant an injunction even in the absence of the other party. Any order or injunction granted under clause 3.27 will operate only until a time specified in the order or until a further order of the court is made.

In the New South Wales, Northern Territory and Victorian legislation,[246] the power to grant relief in the absence of a party is limited to injunctive relief and, in New South Wales and Northern Territory, to granting interim maintenance. Under the Family Law Act, provided that there is sufficient urgency, the court is not restricted in the orders which can be made in the absence of a party. As the court may wish to exercise a power other than granting an injunction or ordering interim maintenance as a matter of urgency, the Commission recommends adopting the Family Law Act model.

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[246] Section 40 De Facto Relationships Act 1984 (NSW), section 39 De Facto Relationships Act 1991 (NT) and section 293 Property Law Act 1958 (Vic) respectively.

3.28 Variation and setting aside of orders *(s.41 NSW; s.294 Vic; s.40 NT; s.79A FLA)*

If, on the application of a person in respect of whom an order under section 3.8 or section 3.15 has been made, a court is satisfied that -

(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence, failing to disclose financial details as required by this Act or Rules[247] or any other circumstance;

(b) in the circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out;

(c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make a substitute order; or

(d) in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the welfare of a child of the de facto partners, the child or, where the applicant has the custody of the child, the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order,

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

Clause 3.28 sets out the circumstances in which an order for the adjustment of interests in property made under clause 3.8 or an order for maintenance made under clause 3.15 can be varied.

There are four circumstances which will justify variation of the order under this clause. These circumstances mirror the matters in the equivalent section in the Family Law Act.

The fourth situation in which the court may vary an order is if, since the making of the order, circumstances of an exceptional nature relating to the child of the relationship has arisen or the applicant who has custody of the child will suffer hardship if the order is not varied or set aside. This is also a ground for varying a property order under the Family Law Act. It may not, however, be considered by a court under the de facto relationships legislation in New South Wales, Victoria or Northern Territory.

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[247] As discussed in the commentary to clause 3.4 of the draft legislation, before an order for maintenance or to alter an interest in property can be made, each party must disclose their financial circumstances. Failure to do so will, under clause 3.28(a) of the draft legislation, be grounds for setting aside the order. While it is arguable that a failure to disclose could fall in any event under one of the other limbs in paragraph (a), the Commission is of the view that for the sake of clarity failure to disclose should be specifically referred to.

Paragraph (d) limits the "child" to a child of the de facto partners. If the applicant has the care and control of a child of the respondent partner not being the child of the applicant, it would seem illogical not to allow the order to be varied.

The Commission invites comment on whether "child" referred to in paragraph (d) should be more widely defined. If so, who should come within the definition. The Commission also invites submissions on whether there should be any other grounds under clause 3.28 for the court to vary or set aside an order.

3.29 Transactions to defeat claims *(s.42 NSW; s.295 Vic; s.41 NT; s.85 FLA)*

(1) On an application for an order under this Part a court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order relating to the application or which, irrespective of intention, is likely to defeat any such order.

(2) The court may, without limiting section 3.25, order that any property dealt with by an instrument or disposition referred to in subsection (1) be taken in execution or used or applied in, or charged with the payment of any sums payable under an order adjusting interests with respect to the property of one or more of the parties or for costs as the court directs, or that the proceeds of a sale be paid into court to abide its order.

(3) The court may order a party or a person acting in collusion with a party to pay the costs of any other party or of a purchaser in good faith or other person interested of and incidental to the instrument or disposition and the setting aside or restraining of the instrument or disposition.

Clause 3.29 enables the court, on application, to set aside a transaction where the other party is attempting to dispose of property. It mirrors the de facto legislation in New South Wales, Victoria, Northern Territory and the Family Law Act[248] and requires no further comment.

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[248] Section 42 De Facto Relationships Act 1984 (NSW), section 295 Property Law Act 1958 (Vic), section 41 De Facto Relationships Act 1991 (NT) and section 85 Family Law Act respectively.

3.30 Interests of other parties *(s.43 NSW; s.296 Vic; s.42 NT; s.85(3) FLA)*

> *(1) In the exercise of its powers under this Part, a court must have regard to the interest in the property of, and must make any order proper for the protection of, a purchaser in good faith or other person interested.*
>
> *(2) A court may order that a person be given notice of the proceedings or be made a party to the proceedings on the application of the person or if it appears to the court that the person may be affected by an order under this Part.*

This clause also relates to a disposition by one of the parties of the property in dispute.

When exercising its discretion under clause 3.29 to set aside or restrain the making of an instrument or disposition, the court must have regard to the interest in the property of a purchaser in good faith or other person interested. As for clause 3.29, clause 3.30 mirrors the provisions in the de facto legislation in New South Wales, Victoria, Northern Territory and in the Family Law Act.[249]

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[249] Section 43 De Facto Relationships Act 1984 (NSW), section 296 Property Law Act 1958 (Vic), section 42 De Facto Relationships Act 1991 (NT) and section 85(3) Family Law Act respectively.

Part IV - Declaring interests in property

4.1 Declaring interests in property *(s.8 NSW; s.278 Vic; s.12 NT; s.78 FLA)*

> *(1) In proceedings between de facto partners with respect to existing title or rights in property, a court may declare the title or rights, if any, that a de facto partner or any other party to the proceedings has in respect of that property.*
>
> *(2) The court may make orders to give effect to the declaration, including orders about possession.*
>
> *(3) An order under this section is not binding on a person who is not a party to the proceedings.*

No submissions were received on this clause which appeared in a slightly different form in the Shared Property Discussion Paper.[250]

Clause 4.1 allows the court to declare existing property rights. Existing property rights mean property rights existing at common law or in equity without regard to a person's entitlement under the proposed legislation.

The jurisdictional requirements in Part III which must be satisfied before applying for an adjustment of an interest in property or for an order for maintenance do not apply to Part IV. Accordingly, the power of the court in clause 4.1 to make a declaration may be exercised even although the jurisdictional requirements in Part III have not been satisfied.

Declaration binding on third parties

Clause 4.1 is modelled on the New South Wales, Victorian, Northern Territory and Family Law provisions.[251]

However clause 4.1 differs from the New South Wales and Northern Territory provisions in one significant way.

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[250] Clause 4.1 as drafted in the Shared Property Discussion Paper did not expressly provide that declarations could be binding on parties to the proceedings other than the de facto partners.

[251] Section 8 De Facto Relationships Act 1984 (NSW), section 278 Property Law Act 1958 (Vic), section 12 De Facto Relationships Act 1991 (NT) and section 78 Family Law Act respectively.

In New South Wales and the Northern Territory the relevant sections[252] provide that the declaration is binding on de facto partners but not on any other person. Under proposed clause 4.1, this provision does not exist. This reflects the position under the Victorian legislation and the Family Law Act.

During proceedings in the Supreme, District and Magistrates Court, a person with an interest in the proceedings may apply to be joined as a party to the proceedings.[253] In the context of the proposed legislation, joinder by a third party may be relevant in the following context.

Example I

A de facto couple buy a house which is registered in the de facto wife's name. The de facto husband and his mother each contribute 30% of the purchase price, the de facto wife contributing the remaining 40%. A dispute arises between the de facto couple concerning ownership of the property and the husband seeks a declaration of his interest in the property.

In this example, it is likely that the mother will want to be a party to the proceedings and any declaration made by the court to be binding on all parties. Clause 4.1(1) allows the court to make a declaration binding on all parties to the proceedings, not just the de facto couple.

Clause 4.1(3) makes it clear, however, that a declaration will only be binding on a third party if he or she is a party to the proceedings.

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[252] Section 8 De Facto Relationships Act 1984 (NSW) and section 12 De Facto Relationships Act 1991 (NT) respectively.

[253] Whether or not that application will be successful is in the discretion of the court: Order 3 Rule 1 Supreme Court Rules, Rule 13 District Courts Rules and Rule 17 Magistrates Courts Rules.

Part V - Mediation and arbitration

In 1991, Part IIIA on Mediation and Arbitration was inserted in the Family Law Act.[254] Part IIIA provides alternatives to the resolution of disputes in court. The Commission believes that such procedures would be equally relevant in resolving matters which may arise under the proposed legislation. For this reason, these provisions with the necessary modifications have been inserted in the proposed legislation. Whether the recommendations contained in these provisions are implemented may, of course, be a question of funding.

5.1 Request for mediation *(s.19A FLA)*

(1) A person who is -

(a) a party to a de facto relationship; or

(b) a child of the de facto partners;

and who is not a party to proceedings under this Act, may file in the court, a notice asking for the help of a mediator in settling a dispute to which the person is a party.

(2) Where a notice is filed in a court -

(a) the notice must be dealt with in accordance with the Rules of Court; and

(b) if a mediation service is available at the Registry of the court and the dispute is one that, under the Rules of Court, may be mediated, the Registrar of the court must make arrangements for an approved mediator to mediate the dispute in accordance with the Rules of Court.

(3) In this section "dispute" means a dispute about a matter with respect to which proceedings could be instituted under this Act.

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[254] Section 5 Courts (Mediation and Arbitration) Act 1991 (Cwth).

Clause 5.1 allows a partner in a de facto relationship or a child[255] before any proceedings have been commenced to request the assistance of an approved mediator in settling a dispute. Assistance is requested by that partner or child filing in the court the appropriate notice.

The Rules of Court will set out how the notice is to be dealt with. This clause envisages that the mediation service may not be available in all registries where the notice is filed. The Registry will only arrange for the mediation service if it is available at the Registry.

5.2 Court may refer matters for mediation *(s.19B FLA)*

(1) Subject to the Rules of Court, the court may, with the consent of the parties to any proceedings before it under this Act, make an order referring any or all of the matters in dispute in the proceedings for mediation by an approved mediator.

(2) Where a court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make such additional orders as it thinks appropriate to facilitate the effective conduct of the mediation.

(3) Where a court makes an order under subsection (1), the Registrar of the court must make arrangements for an approved mediator to mediate the relevant disputed matter in accordance with the Rules of Court.

(4) Where -

(a) a court makes an order under subsection (1) in relation to any matter in dispute in proceedings before it; and

(b) a party to the proceedings files a notice in the court that the mediation of the matter has ended,

the court may make such orders, or give such directions, as it thinks appropriate in relation to the proceedings.

Providing the consent of the parties is obtained, this clause enables the court to refer any matter in dispute in any proceedings between the parties for mediation by an approved mediator.

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[255] Under clause 3.8 of the proposed legislation, the court can order that an interest in property be altered for the benefit of a child of the de facto partners. For this reason a child may wish to seek the assistance of a mediator.

After referring a dispute to mediation the court may adjourn the proceedings and make such additional orders as it thinks appropriate to assist the mediation.

On referral to mediation, the appropriate officer of the court must arrange for the mediation. Once a court ordered mediation has ended and a party to the proceedings has filed a notice to that effect, the court may make orders or give directions that it considers appropriate.

5.3 Admissions made to mediators *(s.19C FLA)*

> *Evidence of anything said, or of any admission made, at a conference conducted by an approved mediator, acting as such a mediator, is not admissible in any court in any proceedings before a person authorised by a law or by the consent of the parties, to hear evidence.*

Under clause 5.3 evidence of anything said or of any admission made at a conference conducted by a mediator is not admissible in the proceedings referred to in that clause.

5.4 Court may refer proceedings to arbitration *(s.19D FLA)*

> *(1) In any proceedings under Parts III or IV, the court may, subject to the Rules of Court, make an order referring the proceedings, or any part of them, or any matter arising in them, to an approved arbitrator for arbitration in accordance with the Rules of Court.*
>
> *(2) A court may make an order under subsection (1) with or without the consent of the parties.*
>
> *(3) Where a court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make such additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.*
>
> *(4) Where a court makes an order under subsection (1), the arbitration must be carried out by the approved arbitrator in accordance with the Rules of Court.*
>
> *(5) A party to an award in an arbitration carried out as a result of an order under this section may register the award, in accordance with the Rules of Court, in the court that made that order and the award, when so registered, has effect as if it were an order made by that court.*

This clause allows a court to refer any Part III proceedings for property and spousal maintenance or Part IV proceedings for declaration of interest in property to arbitration. This referral may be ordered with or without the parties' consent.

After the court has referred a proceeding to arbitration, it may adjourn the proceedings and make any additional orders it thinks appropriate to assist the arbitration.

A party to an arbitration award may register the award in the court which ordered the arbitration. Upon registration the award has the effect as if it were an order of the court.

5.5 **Private arbitration** *(s.19E FLA)*

(1) *A court having jurisdiction under this Act may, on application by a party to the private arbitration of a dispute, make such orders as the court thinks appropriate to facilitate the effective conduct of the arbitration.*

(2) *A party to an award made in a private arbitration of a dispute may register the award, in accordance with the Rules of Court, in a court having jurisdiction under this Act and the award, when so registered, has effect as if it were an order made by that court.*

(3) *The arbitrator must, on application by a party to the arbitration, provide written reasons for the award.*

(4) *In this section "dispute" means -*

(a) *Part III or Part IV proceedings;*

(b) *any part of such proceedings;*

(c) *any matter arising in such proceedings; or*

(d) *a dispute about a matter with respect to which such proceedings could be instituted.*

Clause 5.5 empowers a court to make orders to assist a private arbitration of a dispute upon the application of a party to the private arbitration.

A party to an award made in private arbitration may register the award in any court having jurisdiction under this Act. Upon registration the award has the effect as if it were an order of that court.

5.6 Review of awards made in private arbitration *(s.19F FLA)*

> *(1) A party to a registered award made in private arbitration may apply to the Supreme or District Court for review of the award on questions of law.*
>
> *(2) On a review of an award under this section, the court may -*
>
> *(a) determine all questions of law arising in relation to the arbitration; and*
>
> *(b) make such orders as it thinks appropriate, including an order affirming, reversing or varying the award or remitting the award to the arbitrator.*

This clause allows a party to a private award to apply to the Supreme or District Court for a review on a question of law. On a review, the court may determine all questions of law relating to the arbitration and make any orders it considers appropriate, including an order affirming, referring or varying the award or remitting the award to the arbitrator.

5.7 Review of other awards *(s.19G FLA)*

> *(1) A party to a registered award made in arbitration carried out as a result of an order made under subsection 5.4(1) may apply to the Supreme or District Court for review of the award.*
>
> *(2) The court which reviews an award under this section must do so by rehearing the matters to which the award relates and -*
>
> *(a) must determine, as if for the first time, all questions of fact and law arising in relation to the arbitration; and*
>
> *(b) may, by order, either confirm the award or make such other award as the Judge thinks appropriate.*

Under clause 5.7, a party to a registered award may apply to the Supreme or District Court for a review of the award.

The review is by way of rehearing the matters to which the award relates. The court must determine as if for the first time all questions of fact and law arising in relation to the arbitration. The court can either confirm the award or make such other award as it thinks appropriate.

5.8 Advice about mediation and arbitration *(s.19J FLA)*

> *(1) The Registrar of the court must, as far as practicable, on request by a party to a de facto relationship or to proceedings under this Act, advise the party about any mediation or arbitration facilities available in the court and how those facilities are made available.*
>
> *(2) The Rules of Court must provide for persons who propose to institute proceedings under this Act, and (in appropriate cases) their partners, and other interested persons, to be given a document setting out particulars of any mediation and arbitration facilities available in the court and elsewhere.*

Clause 5.8 requires court officers to advise about mediation or arbitration facilities when requested to do so. This information must be given to a party who institutes proceedings and, in appropriate cases, to his or her partner and other interested persons.

5.9 Oath or affirmation by approved mediator *(s.19K FLA)*

> *An approved mediator must, before starting to perform the functions of such a mediator, make an oath or affirmation of secrecy in accordance with the prescribed form before a person authorised under a law of the State to take affidavits.*

Approved mediators must take an oath or affirmation of secrecy before starting to perform the functions of a mediator.

5.10 Oath or affirmation by approved arbitrator *(s.19L FLA)*

> *An approved arbitrator must, before starting to perform the functions of such an arbitrator, make an oath or affirmation in accordance with the prescribed form before a person authorised under a law of the State to take affidavits.*

An approved arbitrator must take an oath or affirmation before starting to perform the functions of an arbitrator.

5.11 Protection of mediators and arbitrators *(s.19M FLA)*

> *An approved mediator, an approved arbitrator, or an arbitrator who carries out a private arbitration, has, in performing the functions of such a mediator or arbitrator, the same protection and immunity as a Judge of the Supreme Court has in performing the functions of such a Judge.*

When performing the function of a mediator or arbitrator, an approved mediator or arbitrator has the same protection and immunity as a judge of the Supreme Court.

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Part VI - Cohabitation and separation agreements

In Chapter 6 of the Working Paper, the Commission recommended that the legislation proposed should provide for cohabitation and separation agreements and that the legislation should be based on the Northern Territory model.

1.5 Definitions

> **"financial matters"**, *in relation to de facto partners, means matters with respect to any one or more of the following -*
>
> *(a) the maintenance of either or both of the partners;*
>
> *(b) the property of those partners or either of them;*
>
> *(c) the financial resources of those partners or either of them.*

Before the clauses governing cohabitation and separation agreements are considered, the content of these agreements should be discussed. The draft legislation in the Shared Property Discussion Paper made provision for "financial matters" in agreements. "Financial matters" was defined in clause 1.5. This term was defined to include the property of the de facto couple. The question raised in the Shared Property Discussion Paper was whether "financial matters" should extend to clauses about maintenance.

The submissions received by the Commission were overwhelmingly in favour of cohabitation and separation agreements being able to contain clauses on maintenance.

Because of the strength of response on this matter and the decision of the Commission that de facto couples be given a limited entitlement to maintenance under the proposed legislation, the Commission recommends that the definition of "financial matters" should include a reference to the maintenance of the de facto partner.

6.1 Validity of agreements *(ss. 45 and 46 NSW; s.44 NT)*

> *(1) De facto partners may enter into a cohabitation agreement or separation agreement.*
>
> *(2) Except as otherwise provided by this Part, a cohabitation agreement or separation agreement shall be subject to and enforceable in accordance with the law of contract.*

(3) A provision in an agreement purporting to exclude the jurisdiction of the court is invalid, but its invalidity does not affect the validity of the rest of the agreement.

This clause is intended to remove any doubt about whether the cohabitation or separation agreements are void for offending public policy. As the contracts are enforceable in accordance with the law of contract, they can be set aside on the grounds of innocent, negligent or fraudulent misrepresentation, mistake, undue influence or unconscionability.

Clause 6.1(3) provides that a clause seeking to exclude the adjustive jurisdiction of the court under this Act will not affect the validity of the agreement. Inserting this provision removes any possible argument that such a clause is void on grounds of public policy and, therefore, invalidates the entire agreement.

6.2 Effect of agreements in proceedings for adjustment of property rights or maintenance orders *(s.47 NSW; s.45 NT)*

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

(a) that there is a cohabitation agreement or separation agreement between the de facto partners;

(b) that the agreement is in writing;

(c) that the agreement is signed by the de facto partners and witnessed by a Justice of the Peace or a solicitor; and

(d) that the agreement contains a statement of all property, financial resources and liabilities of each de facto partner at the date of signing the agreement,

the court may make an order under Part III, but (except as provided by sections 6.3 and 6.4) shall not make an order which is in any respect inconsistent with the provisions on financial matters in the agreement.

> *(2) Where, on an application by a de facto partner for an order under Part III, a court is satisfied that there is a cohabitation agreement or separation agreement between the de facto partners, but the court is not satisfied as to any one or more of the matters referred to in subsection (1)(b), (c) or (d), the court may make such order as it could have made if there were no cohabitation agreement or separation agreement between the partners, but in making its order, the court, in addition to the matters to which it is required to have regard under Part III, may have regard to the terms of the cohabitation agreement or separation agreement.*
>
> *(3) A court may make an order under this section notwithstanding that the cohabitation agreement or separation agreement purports to exclude the jurisdiction of the court to make that order.*

* *Signing of the agreement*

This clause is substantially different from the equivalent clause in the Shared Property Discussion Paper.[256] The clause in the Shared Property Discussion Paper was based on the New South Wales section.[257] In New South Wales, a cohabitation or separation agreement will be binding on the court only if the requirements of the section are satisfied. These include the detailed certification requirements. The concerns of the Commission and people and groups making submissions on the certification requirements were discussed in Chapter 6 of this Working Paper.

For an agreement to be binding on a court in the Northern Territory, all that is required is for the agreement to be in writing and signed by the de facto partner against whom the application to alter an interest in property or to obtain an order for maintenance is brought.[258] In New South Wales, in addition to other requirements which must be satisfied, the agreement must be signed by the party against whom the agreement is sought to be enforced.[259] In these two Acts there is no requirement for the agreement to be signed by both partners.

Under the proposed clause 6.2(1)(c), the agreement must be signed by both parties and witnessed by a Justice of the Peace or a solicitor. To this extent, it is more onerous than the New South Wales and Northern Territory sections.

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[256] Clause 5.3 of the draft legislation.

[257] Section 47 De Facto Relationships Act 1984 (NSW).

[258] Section 45(2) De Facto Relationships Act 1991 (NT).

[259] Section 47(1)(c) De Facto Relationships Act 1984 (NSW).

The Commission invites comment on whether the legislation should require that before an agreement can be binding on a court in an application under Part III it must, among other things, be signed by each partner and witnessed by a Justice of the Peace or a solicitor. Alternatively, should it be enough that it is signed by the party against whom it is sought to be enforced?

* *Duty to disclose property, financial resources and liabilities*

The requirements set out in clause 6.2(1)(a), (b) and (c) will be relatively easy to satisfy. Clause 6.2(d), however, requires the parties to disclose their property, financial resources and liabilities in the agreement. This requirement is not contained in either the New South Wales or the Northern Territory legislation.

The Family Law Act does not require parties to disclose financial circumstances before a section 86 maintenance agreement is entered into or registered in the court. In contrast, there must be full disclosure of financial circumstances before a court will approve a section 87 agreement.[260]

The Commission has mixed views about whether to insert in the legislation a disclosure requirement before a cohabitation or separation agreement will be binding on a court in an application under Part III. In principle, the Commission believes that a cohabitation or separation agreement can fairly provide for property or maintenance matters only if both partners are fully informed of at least the property, financial resources and liabilities of the other.

The Commission is concerned, however, that the requirement to disclose will make the agreement more complicated and discourage couples from entering into it. It is the aim of the Commission that financial agreements be relatively easy to enter into. The agreements must, therefore, be easy to draft. If there is a requirement to disclose financial details, this will complicate the agreement. It is possible that people will not feel confident about entering into such an agreement without the assistance of a solicitor. This will make financial agreements less accessible to de facto couples.

In the Shared Property Discussion Paper, people were asked whether there should be a statutory duty to disclose before a cohabitation or separation agreement was entered into. All people responding to this question were of the view that there should be a requirement of disclosure.[261]

The Commission is of the view that the advantages of de facto partners being able to draw up an agreement with knowledge of each other's property, financial resources and liabilities outweigh the disadvantages of requiring the parties to list in the agreement their property, financial resources and liabilities. The Commission, therefore, recommends the inclusion of clause 6.2(1)(d) in the proposed legislation.

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[260] Order 17 Rules 1-3 Family Court Rules. For an explanation of the section 86 and 87 maintenance agreements, see the earlier discussions in Chapter 6 at pages 59-60 and 63-67.

[261] In the submissions, the extent of disclosure which would be desirable was not examined in length.

It may be that there are other disclosure options which are preferable. For example, it would be less onerous if the de facto couples were required to disclose only "significant" assets or liabilities.[262] Another option would be to make disclosure not a mandatory requirement.

The Commission invites comment on whether the benefits of requiring parties to disclose their financial circumstances outweigh the costs discussed above. Are there other options for disclosure which would be preferable to the one outlined in clause 6.2(1)(d)?

* *Extent of disclosure*

The proposed clause 6.2(1)(d) requires parties to disclose only their property, financial resources and liabilities. The disclosure requirement under the Family Law Act is more onerous. The parties are required to disclose their "financial circumstances" either by a statement or affidavit of financial circumstances.[263] The parties must disclose their income from all sources, details of employment, expenses, income of members of their household, property and other financial resources including superannuation entitlements, and their liabilities.

The disadvantage of requiring this more detailed disclosure is the difficulty for the de facto couples entering into the agreement. The Commission understands that many clients who are required to give this information in Family Court actions need the assistance of their solicitor to fill out the statement of financial circumstances.

The Commission hopes that de facto couples will be able to enter into cohabitation and separation agreements without legal assistance. For this goal to be achievable, the process should be as uncomplicated as possible. Concerns were expressed above about difficulties which may arise if de facto couples are required to disclose their property, financial resources and liabilities. To extend the disclosure requirement would compound these difficulties. For this reason, the Commission recommends that de facto couples be required to disclose only their property, financial resources or liabilities.

The Commission invites comment on whether the legislation should require disclosure of financial circumstances in addition to property, financial resources and liabilities.

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[262] See, for example, the wording of Family Law Act 1986 S.O. 1986 C.4 section 56(4)(a) (Ontario).

[263] Order 17 Rule 2 Family Court Rules.

6.3 Varying and setting aside agreements *(s.49 NSW; s.46 NT)*

(1) On an application by a de facto partner for an order under Part III, the court may, in the circumstances specified in this section, vary or set aside all or any of the provisions of a cohabitation agreement or separation agreement made between that de facto partner and the other, being an agreement which satisfies the matters referred to in section 6.2(1)(b), (c) and (d).

(2) The court may exercise its powers under subsection (1) in respect of a cohabitation agreement or separation agreement only if, in its opinion, enforcement (whether on the application before the court or on any other application for any remedy or relief under any other Act or law) of the agreement would lead to injustice between the parties.

(3) A court may exercise its powers under subsection (1) notwithstanding any provision to the contrary in a cohabitation agreement or separation agreement.

(4) Nothing in this section deprives a person of any other right to have an agreement set aside or varied.

* *Grounds for varying or setting aside*

The circumstances in which a court is able to vary or set aside an agreement differ for the De Facto Relationships Act 1984 (NSW), the De Facto Relationships Act 1991 (NT) and the Family Law Act. Before drafting clause 6.3, the Commission reviewed the relevant provisions in these Acts.

i. Section 86 agreements

An agreement registered under section 86 of the Family Law Act can be set aside only if a court is satisfied that the agreement of a party was obtained by fraud or undue influence or that the parties want the agreement to be set aside.[264]

The power of the court to vary a section 86 agreement was discussed in Chapter 6.[265] To recap briefly, the court may vary the amount of spousal maintenance if the circumstances of either de facto partner or the cost of living have changed so as to justify a variation or the amount in the agreement is not proper or adequate.[266]

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[264] Section 86(3) Family Law Act.

[265] See page 64.

[266] Section 83(2) Family Law Act. Note also that under sections 86(2) and 66N of the Family Law Act, the court can vary a provision for child maintenance on similar grounds.

It should also be noted that a registered section 86 agreement does not prevent a later maintenance or property application under the Family Law Act being made by one of the parties.

ii. Section 87 agreements

A court can revoke approval of a section 87 agreement if the approval was obtained by fraud, the parties to the agreement want the approval to be revoked, the agreement is void or, in the circumstances that have arisen since the agreement was approved, it is impracticable for the agreement to be carried out.[267]

In limited circumstances, the provisions of a section 87 agreement can be varied.[268] If the effect of the agreement at the time the court gives its approval is that one party will be unable to support himself or herself without an income-tested pension, allowance or benefit, in a later application the court may order spousal maintenance or vary the amount of spousal maintenance in the agreement.[269]

iii. De Facto Relationships Act 1984 (NSW)

The advantage of the New South Wales legislation containing such onerous requirements[270] before a cohabitation or separation agreement will be binding on a court, is the degree of finality which attaches to such an agreement. These agreements will be relatively difficult to vary or set aside. Before the court can vary or set aside a cohabitation agreement, the circumstances of the partners must have so changed since the time the agreement was entered into that it would lead to serious injustice to enforce the agreement.

It should also be noted that under the New South Wales legislation, the court does not have power to vary or set aside a certified separation agreement.[271]

iv. De Facto Relationships Act 1991 (NT)

The Northern Territory requirements before an agreement will be binding on a court are not as onerous as in New South Wales. The legislation, therefore, gives the court wider powers to vary or set them aside. In the Northern Territory, a court may vary or set aside an agreement if its enforcement would lead to serious injustice between

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[267] Section 87(8) Family Law Act.

[268] See page 66.

[269] Section 87(4A) and (4B) Family Law Act. Note also the power of the court in section 87(4C) of the Family Law Act to order child maintenance.

[270] See pages 67-69.

[271] The reasons for this are discussed later in this chapter.

the de facto partners or circumstances have arisen since the time the agreement was made making it impracticable for it to be carried out.[272]

v. Submissions received

In its Shared Property Discussion Paper, the Commission asked whether the grounds for varying the agreement should be wider than the grounds set out in the New South Wales legislation. All the people or groups responding to this question were of the view that the grounds for variation should be widened.

Some of the people responding to this question outlined when they thought the court should be able to vary or set aside an agreement. The following suggestions were made -

* the court should be able to intervene if the agreement is "unfair";

* the court should be able to intervene if enforcing the agreement would result in "serious injustice";

* the court should be able to intervene if enforcing the agreement would cause "injustice";

* the court should be able to intervene if the terms of the agreement were "obviously or grossly unfair".

The Commission recommends adopting the third option listed above. Under clause 6.3(2), the court will be able to vary or set aside an agreement more easily than is the case under the Northern Territory and New South Wales legislation.

The Commission invites comment on whether the ground upon which a court will be entitled to vary or set aside an agreement under clause 6.3 is too wide. Any suggestions on the desirable grounds for this purpose are sought.

* *Separation agreements*

Under the New South Wales legislation, a court can vary or set aside a cohabitation agreement only if the circumstances have so changed since it was entered into that enforcement of the agreement would lead to serious injustice.[273] The court does not, however, have power to vary or set aside a separation agreement. The reason for the different approach is that the parties enter into a separation agreement when the relationship is ending. Therefore, it is less likely that there will be a change of circumstances which will cause serious injustice if the agreement were enforced.

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[272] Section 46 De Facto Relationships Act (1991) (NT).

[273] Section 49 De Facto Relationships Act 1984 (NSW).

By contrast, the Northern Territory legislation confers on the court the same powers to vary or set aside both cohabitation and separation agreements.

In the Shared Property Discussion Paper, the draft legislation adopted the New South Wales approach. The Commission, however, expressed concern about the court's lack of power to vary or set aside a separation agreement. It invited comment about whether the power of the court to vary or set aside a cohabitation agreement should extend to separation agreements.

Six of the eight people who responded to this question were of the view that the court should have the same powers to vary separation agreements as it does to vary cohabitation agreements. The other two felt that because separation agreements were intended to be binding and govern the financial affairs on the dissolution of the relationship, the power of the court to vary them should be very limited, if the court were given any power at all.

As the requirements of clause 6.2 for entry into a binding cohabitation or separation agreement are less onerous than in New South Wales, the Commission is of the view that the court should have greater power than in New South Wales to vary or set aside those agreements. For this reason, the powers of variation in clause 6.3 have been widened. Consistent with this approach, the Commission recommends that these powers should extend to varying and setting aside separation agreements.[274]

* *Preserving contractual law rights*

Clause 6.3(4) was inserted to emphasise that contractual law principles also apply in the context of varying or setting aside a cohabitation or separation agreement. In other words, the agreements will be enforceable in accordance with the law of contract and, therefore, can be set aside on such grounds as innocent, negligent or fraudulent misrepresentation, mistake, undue influence or unconscionability.

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[274] Clause 5.2 of the legislation in the Shared Property Discussion Paper deemed a separation agreement to be a cohabitation agreement in certain circumstances. The reason for this clause was to prevent parties from trying to obtain the finality of a separation agreement by calling a cohabitation agreement a separation agreement. Given the Commission's decision to give separation and cohabitation agreements the same degree of finality by allowing the court to vary each agreement in the same manner, there is no longer a need for this deeming provision. It is for this reason that the deeming provision of clause 5.2 in the Shared Property Discussion Paper does not appear in the legislation in the Working Paper.

6.4 Effect of revocation or cessation of agreements *(s.50 NSW; s.47 NT)*

> *On an application by a de facto partner for an order under Part III, a court is not required to give effect to the terms of a cohabitation agreement or separation agreement entered into by that partner where the court is of the opinion -*
>
> *(a) that the de facto partners have, by their words or conduct, revoked or consented to the revocation of the agreement; or*
>
> *(b) that the agreement has otherwise ceased to have effect.*

Under this clause, the court is not required to give effect to a cohabitation or separation agreement in an application under Part III if that agreement has ceased to have effect.

6.5 Effect of death of de facto partner - periodic maintenance *(s.51 NSW; s.48 NT)*

> *(1) A separation or cohabitation agreement ceases to have effect on the death of a de facto partner who is required to pay periodic maintenance unless the agreement provides otherwise.*
>
> *(2) A separation or cohabitation agreement ceases to have effect on the death of a de facto partner who is entitled to receive periodic maintenance under the agreement.*
>
> *(3) Subsections (1) and (2) do not affect the right to recover arrears of periodic maintenance due and payable under an agreement at the time of a partner's death.*

As the legislation proposed will allow the de facto partners to provide for maintenance in cohabitation and separation agreements, the legislation must also address what should happen with respect to periodic maintenance on the death of either of the partners.

Clause 6.5 reflects New South Wales and the Northern Territory sections.[275] If the partner entitled to receive the periodic maintenance dies, the obligation to pay that maintenance ceases.

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[275] Section 51 De Facto Relationships Act 1984 (NSW) and section 48 De Facto Relationships Act 1991 (NT) respectively.

The position is more complicated if the partner paying the periodic maintenance dies. The effect of clause 6.5 is that the partner's estate is not required to keep paying the maintenance. If the agreement provides for the payment of periodic maintenance to continue, however, this obligation will be enforceable against the estate of the deceased.

6.6 Effect of death of de facto partner - transfer of property and lump sum payments *(s.52 NSW; s.49 NT)*

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

Clause 6.6 deals with the effect of the death of a person on the obligation to transfer property or make a lump sum payment. It is modelled on section 52 of the De Facto Relationships Act 1984 (NSW) and section 49 of the De Facto Relationships Act 1991 (NT).

Under clause 6.6, an obligation to transfer property or pay a lump sum will be enforceable by or against the estate of the partner who has died. This will be the case unless the agreement provides to the contrary.

* *Effect on family maintenance obligations*

The Commission is concerned about possible injustices which may arise where an agreement contains a promise to make a lump sum payment on a partner's death. The following fact situation illustrates the Commission's concerns.

Example J

Ms X and Mr Y lived in a de facto relationship. After 12 months in the relationship, they entered into a cohabitation agreement which provided for the payment to Mr Y of $100,000 on Ms X's death. Ms X died six months later leaving behind a daughter of a former marriage. Ms X's estate was worth $100,000.

Under the proposed clause 6.6, the relevant sections of the New South Wales and Northern Territory legislation and the common law, the promise to Mr Y is enforceable against Ms X's estate. The payment of this money would have the effect of depleting Ms X's estate and denying her child a family maintenance claim she may have under the Succession Act 1981 (Qld).

While the Commission considers that injustice could be done in such a situation to dependants of the deceased, the kind of legislation being proposed by the Commission in this Working Paper is not the appropriate place to address the problem. The Commission has reviewed the Intestacy Rules[276] and will, in the near future, be reviewing the Succession Act 1981 (Qld). Problems which arise out of contractual promises being enforceable on the death of a person as described above will be addressed during this review.

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[276] Working Paper No 37 on Intestacy Rules.

Enforcement of orders and injunctions

The proposed legislation confers on the Supreme, District and Magistrates Courts the power to administer the Act. The Commission recommends that the District Courts Act 1967 (Qld) and Magistrates Courts Act 1921 (Qld) be specifically altered to confer this jurisdiction. The limitations imposed on the District and Magistrates Courts in the exercise of this jurisdiction were discussed in the commentary to Part II.

As the State Courts will be responsible for administering this Act, the usual enforcement powers of the relevant court will apply in enforcing orders made under the Act. For example, the Supreme Court has an array of powers to enforce judgments including power to garnishee wages,[277] power to seize and sell goods or land,[278] power to issue a writ of sequestration to seize the goods of a person until the order is complied with,[279] power to issue a writ of attachment enabling a person or the property of a person to be taken into custody,[280] power to appoint a receiver,[281] power to nominate a third party to perform an act or execute a document,[282] power to charge shares and securities[283] and power to bring proceedings for contempt of court for failing to comply with an order of the court.[284]

The Commission is recommending that section 66 of the District Courts Act 1967 (Qld) be amended to confer additional jurisdiction on the District Court. Section 67(1) of the District Court Act gives the District Court when exercising the jurisdiction under section 66 all the powers and authorities of the Supreme Court. The District Court is specifically given the power to "make any order, including an order for attachment or committal in consequence of disobedience to an order" as may be made by a Supreme Court Judge.[285] The District Court, therefore, will possess the powers referred to in the previous paragraph in enforcing an order made under the proposed legislation.

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[277] Order 49 Supreme Court Rules and section 3 Wages Attachment Act 1936 (Qld).

[278] Order 47 Rule 3 and Order 48 Rules 1 and 3 Supreme Court Rules.

[279] Order 48 Rule 4 Supreme Court Rules.

[280] Order 53 Supreme Court Rules.

[281] Order 47 Rules 3 and 36 Supreme Court Rules.

[282] Order 47 Rule 29 Supreme Court Rules.

[283] Order 50 Rule 3 Supreme Court Rules.

[284] Order 84 and Order 53 Rule 8 Supreme Court Rules.

[285] Section 67(1)(b) District Courts Act 1967 (Qld).

The Magistrates Court has several methods of enforcing orders to pay money. These methods include the issue of a warrant of execution authorising a bailiff to seize and sell goods,[286] seizure and sale of land[287] and power to garnishee.[288] In addition to these powers, in certain circumstances a judgment made in a Magistrates Court may be registered in the District Court and enforced as if it were a judgment of that Court.[289] The Magistrates Court does not, however, have power to enforce orders other than for the payment of money, for example an order that furniture be transferred from one partner to the other.

Having reviewed the enforcement procedures available to the Supreme, District and Magistrates Court, the Commission is of the view that in addition to existing powers, it may be necessary to provide further enforcement powers. These additional powers are discussed below.

i. Enforcement of orders for periodic spousal maintenance

In 1988, major amendments were made to the Family Law Act with respect to the collection of child and spousal maintenance.[290] This legislation established a Child Support Registrar[291] who is responsible for the collection of child and some spousal maintenance payments through automatic deduction from the salary or wages of the person liable to make the payments.[292]

One of the reasons for introducing this legislation was to increase the percentage of people complying with maintenance orders.[293] Because of the expense of enforcing orders for maintenance, before the amendments came into operation many maintenance defaulters were not followed up.

There is no reason to suggest that orders for periodic spousal maintenance made under the proposed legislation will be observed any more than was the case under the Family Law Act before the 1988 amendment. Under the next heading in this chapter, the option of making periodic maintenance orders made by the Supreme and District Court enforceable in the Magistrates Court is canvassed. While enforcement of such orders

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[286] Rule 230(4) Magistrates Courts Rules.

[287] Rule 238 Magistrates Courts Rules.

[288] Rules 259, 261A and 269 Magistrates Courts Rules.

[289] Section 100 District Courts Act 1967 (Qld).

[290] Child Support (Registration and Collection) Act 1988 (Cwth).

[291] Section 10 Child Support (Registration and Collection) Act 1988 (Cwth).

[292] Section 43 Child Support (Registration and Collection) Act 1988 (Cwth).

[293] Second Reading Speech, Hansard, House of Representatives 9 December 1987, pages 3137-3138.

would be less expensive in the Magistrates Court than in the Supreme and District Courts, it would be preferable to establish a mechanism to collect spousal maintenance automatically and ensure compliance with court orders.

The Commission therefore recommends the establishment of an agency to perform the equivalent functions of the existing Commonwealth Child Support Registrar. As the Commission anticipates that a relatively low incidence of periodic spousal maintenance orders are likely to be made under the proposed legislation, the State may be reluctant to establish such an agency. As an alternative, it may be possible for the State to access the Commonwealth Child Support structure which is already established. Any constitutional difficulties involved in such an approach would have to be explored further.

ii. Periodic maintenance orders enforceable in Magistrates Courts

In its Report on De Facto Relationships, the New South Wales Law Reform Commission recommended a mechanism which allowed the Local Court[294] to enforce orders for periodic maintenance made by the Supreme Court.[295] While the Report did not elaborate on the reasons for this mechanism, the intention presumably was to minimise the cost of enforcing orders, particularly as the Local Courts were sufficiently equipped to do so.

A similar argument would apply under the legislation proposed by the Commission. Under the proposed legislation orders for periodic maintenance can be made by the Supreme, District and Magistrates Courts. All of these courts have reasonably extensive powers to enforce compliance with such an order.

It would be preferable, both in terms of minimising the costs to the parties and reducing case loads in the Supreme and District Courts, for enforcement of periodic maintenance orders to be administered predominantly by the Magistrates Court.

The Commission invites comment on the merits of the recommendation that the Magistrates Court be given the power to enforce periodic spousal maintenance orders made by the Supreme and District Courts.

iii. Collection and payment of maintenance by an independent third party

Under regulation 6 made pursuant to the De Facto Relationships Act 1984 (NSW), the Local Court may appoint any person to be responsible for collecting spousal maintenance payments and, on receipt, paying them to the person entitled. The Local Court may, for example, appoint the Registrar or Clerk of the Court. While this mechanism is not as satisfactory as the Commonwealth Child Support structure discussed earlier because it does not facilitate automatic deductions of spousal maintenance from the salary of the person required to make the payments, it has the advantage of avoiding disputes

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[294] Local Courts in New South Wales are the equivalent to the Magistrates Courts.

[295] Report No 36 of the New South Wales Law Reform Commission on De Facto Relationships 1983, paragraph 10.43.

concerning the extent of non-payment of spousal maintenance. In an enforcement action, therefore, it is easier to quantify the arrears of maintenance being claimed.

The Commissions considers that such a mechanism may also be useful under the proposed legislation.

The Commission seeks comment on whether the collection and payment of maintenance by an independent third party would be a beneficial scheme to implement.

iv. Powers to enforce orders other than for the payment of money

At the beginning of the commentary on this Part, the powers of the Supreme, District and Magistrates Courts to enforce orders were briefly reviewed. It was mentioned that both the Supreme and District Courts have power to punish for contempt. For example, in those courts, if there is a failure to comply with an order to transfer property, the person in default could be committed for contempt. The Magistrates Court has no such power.

If a Magistrates Court makes an order under the proposed legislation other than for the payment of money, there would be no method for enforcing that order. For this reason, the enforcement provision of clause 7.2 is necessary. As all State Courts have satisfactory powers to enforce orders for the payment of money, clause 7.2 is limited to other kinds of orders.

v. Summary

The Commission considers that the powers of the State Courts to enforce orders made under the proposed legislation are to a large extent satisfactory. This view is made subject to the specific reservations expressed above concerning the enforcement of spousal maintenance orders and enforcement by the Magistrates Court of orders other than for the payment of money. The Commission, therefore, believes that there is no need for extensive enforcement procedures to be inserted in our legislation.

Clauses 7.1 and 7.2 (below) reflect the tentative recommendations discussed in the preceding commentary. The Commission welcomes comment on any of the matters discussed in the above commentary. In particular, the Commission invites submissions on inadequacies in the enforcement powers of the State Courts in comparison with those of the Family Court.

7.1 Enforcement of certain Supreme and District Court orders by Magistrates Court *(s.57 NSW)*

An order for the periodic payment of maintenance made by the Supreme or District Court may be enforced by a Magistrates Court as if it were a judgment of the Magistrates Court.

7.2 Enforcement of orders and injunctions *(s.59 NSW; s.301 Vic; s.42 NT)*

(1) If a court having jurisdiction under this Act is satisfied that a person has knowingly and without reasonable cause contravened or failed to comply with an order made or injunction granted under this Act (not being an order for the payment of money), the court may -

(a) order the person to pay a fine not exceeding X penalty units;[296]

(b) require the person to enter into a recognisance, with or without sureties, in such reasonable amount as the court thinks fit, that the person will comply with the order or injunction, or order the person to be imprisoned until the person enters into such a recognisance or until the expiration of 3 months, whichever first occurs;

(c) order the person to deliver up to the court such documents as the court thinks fit;

(d) appoint an officer of the court or other person to execute any document in the name of a person;[297] *and*

(e) make any other order that the court considers necessary to enforce compliance with the order or injunction.

(2) Nothing in subsection (1) affects the power of a court to punish a person for contempt of court.

(3) Where an act or omission referred to in subsection (1) is an offence against any other law, the person committing the offence may be prosecuted and convicted under that law, but nothing in this section renders any person liable to be punished twice in respect of the same offence.

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[296] The Commission recommends penalty units to the equivalent of $10,000.

[297] Although this power is not expressly conferred by the New South Wales or Northern Territory equivalents, the Commission is of the view that this is a useful enforcement power to be conferred on the courts.

7.3 Rules of Court *(s.60 NSW; s.123 FLA)*

> *For the purpose of regulating any proceedings under this Act in or before the Supreme, District or Magistrates Courts, Rules of Court may be made under the Supreme Court Act 1921, District Courts Act 1967 and Magistrates Courts Act 1921, respectively, for or with respect to any matter that is required or permitted to be prescribed by this Act or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.*

Clause 7.3 facilitates the making of rules to provide for the practice and procedure to be followed in a court exercising jurisdiction under this Act. Equivalent provisions exist in the New South Wales legislation and the Family Law Act.[298]

The kind of matters which will be dealt with in the Rules includes the form of disclosure of financial circumstances referred to in clauses 3.4 and 6.2, the form to be used in the various applications which can be made under this Act and procedures for convening and carrying out the conferences referred to in clause 3.8(3).

7.4 Declaration as to existence or non-existence of de facto relationship *(s.56 NSW; ss.10 and 11 NT)*

> *(1) A person -*
>
> *(a) who alleges that a de facto relationship exists or has existed between himself or herself and another named person; or*
>
> *(b) whose pecuniary interests, or whose rights or obligations at law or in equity, are affected according to whether a de facto relationship exists or has existed between two other persons,*
>
> *may apply to the Supreme or District Court for a declaration as to the existence of such a de facto relationship.*
>
> *(2) If on an application under subsection (1), it is proved to the satisfaction of the court that a de facto relationship exists or has existed or does not exist or did not at a particular time or during a particular period exist (whether or not it previously or subsequently existed), the court may make a declaration (which shall have effect as a judgment of the court) that persons named in the declaration have or have had a de facto relationship or are not in, or were not at a particular time or during a particular period in, a de facto relationship.*

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[298] Section 60 De Facto Relationships Act 1984 (NSW) and section 123 Family Law Act respectively.

(3) Where the court makes a declaration under subsection (2), it shall state in its declaration that the de facto relationship existed or did not exist -

(a) at a date specified in the declaration; or

(b) between dates specified in the declaration,

or both.

(4) Where any person whose interests would, in the opinion of the court, be affected by the making of a declaration under subsection (2) is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of an application under subsection (1), the court may, if it thinks that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.

(5) A declaration may be made under subsection (2) whether or not the person or either of the persons named by the applicant as a partner or partners to a de facto relationship is alive.

(6) While a declaration made under subsection (2) remains in force, the persons named in the declaration shall, for all purposes, be presumed conclusively to have had (or as the case may be not to have had) a de facto relationship as at the date specified in the declaration or between the dates so specified, or both, as the case may require.

(7) Where a declaration has been made under subsection (2) and, on the application of any person who applied or could have applied for the making of the declaration or who is affected by the declaration, it appears to the court that new facts or circumstances have arisen that have not previously been disclosed to the court and could not by the exercise of reasonable diligence have previously been disclosed to the court, the court may make an order annulling the declaration, and the declaration shall thereupon cease to have effect, but the annulment of the declaration shall not affect anything done in reliance on the declaration before the making of the order of annulment.

(8) Where any person whose interests would, in the opinion of the court, be affected by the making of an order under subsection (7) is not present or represented and has not been given an opportunity to be present or represented, at the hearing of an application made under that subsection, the court may, if it thinks that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.

> *(9) Where the court makes an order under subsection (7) annulling a declaration made under subsection (2), it may, if it thinks that it would be just and equitable to do so, make such ancillary orders (including orders varying rights with respect to property or financial resources) as may be necessary to place as far as practicable any person affected by the annulment of the declaration in the same position as that person would have been in if the declaration had not been made.*

This clause enables the Supreme and District Courts to declare the existence or non-existence of a de facto relationship.[299]

The purpose of this clause is to avoid duplication of proceedings. Whether or not a couple are living in a de facto relationship may be relevant in two unrelated actions. Take as an example a de facto partner who is killed in an accident at work. Whether or not the deceased's de facto partner can claim compensation under the Workers' Compensation Act 1990 (Qld) or under the family provisions of Part IV of the Succession Act 1981 (Qld) will depend on whether the parties were living in a de facto relationship at the time of the death.[300] It would avoid duplication of proceedings if this question could be litigated once and that declaration be binding for all proceedings.

Under the proposed clause, the category of persons who can apply for a declaration is limited. In addition to the de facto partners themselves, a person may make an application only if his or her pecuniary interests or rights or obligations at law or in equity are affected by the existence of the de facto relationship.[301]

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[299] Clause 7.4(2) of the draft legislation.

[300] This clause will be of greater advantage to a potential litigant where the qualifying period for a de facto relationship is the same in all legislation. The clause can still be of assistance, however, if this is not the case. If the qualifying period is different for the relevant legislation (the Workers' Compensation Act 1990 (Qld) and the Succession Act 1981 (Qld) in the example in the text), the court may be requested to grant a declaration that a de facto relationship existed for a period which will satisfy both Acts.

[301] Clause 7.4(1) of the draft legislation.

8. MISCELLANEOUS

A. STAMP DUTY

i. Family Law Act

On the breakdown of a marriage, the parties will want to settle their financial affairs so that they can, to as great an extent as possible, be financially independent and begin new lives. This may involve the transfer of the former matrimonial home or the family car into the other partner's name. An instrument transferring property will normally attract ad valorem stamp duty. The amount of stamp duty payable will depend on the value of the property.

So that people settling their property interests on the breakdown of a marriage do not incur this duty, the Family Law Act and Stamp Act 1894 (Qld) provide stamp duty exemption for certain instruments.[302]

In proceedings under the Family Law Act, the court may order the husband to transfer the matrimonial home to the wife.[303] To comply with this order, the husband will have to sign a transfer document. This document may attract stamp duty exemption.[304]

Instruments entered into pursuant to agreements registered in the Family Court under section 86 of the Family Law Act or approved by the court under section 87 of the Family Law Act may also attract stamp duty exemption.[305]

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[302] Section 90 Family Law Act and sections 59B and 59C Stamp Act 1894 (Qld) respectively. Consultations with the Queensland Office of State Revenue revealed that as a result of an internal administrative directive, such instruments are being exempt from stamp duty under section 90 of the Family Law Act rather than under sections 59B and 59C of the Stamp Act 1894 (Qld). (See also (1992) Vol 12 No 7 The Proctor (August) at page 20 which sets out the administrative statement by Ms Jane MacDonnell, Executive Director, Office of State Revenue.)

[303] Section 79 Family Law Act.

[304] Section 90(1)(a) Family Law Act.

[305] Sections 90(1)(b) and 90(2) Family Law Act.

ii. De Facto Relationships legislation

* **New South Wales**

The Stamp Duties Act 1920 (NSW) gives stamp duty exemptions where the de facto relationship has ended and an instrument is signed pursuant to an order made by a court or a separation agreement that is certified under the De Facto Relationships Act 1984 (NSW).[306]

* **Victoria**

Under the Property Law Act 1958 (Vic), on the breakdown of a de facto relationship a partner may seek an order altering interests in real property against the other partner. If the court makes such an order, as in New South Wales the instrument transferring the property will be exempt from stamp duty.[307]

This stamp duty exemption will also apply to an instrument of transfer between the de facto partners which resulted from the breakdown of the relationship, even though the instrument was not entered into pursuant to a court order.

* **Northern Territory**

The stamp duty exemption for instruments entered into on the breakdown of a de facto relationship is contained in the De Facto Relationships Act 1991 (NT).[308] This exemption applies to any instrument entered into as a result of the breakdown of the de facto relationship. In other words, the exemption will apply whether the instrument was entered into as a result of a court order under the De Facto Relationships Act 1991 (NT), pursuant to a cohabitation or separation agreement or other arrangements between the parties on the breakdown of the relationship.

iii. Recommendation of the Commission

The stamp duty exemptions which are available in Queensland in relation to an instrument entered into on the breakdown of a marriage were briefly discussed above.

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[306] Section 74CB(2) and (3) Stamp Duties Act 1920 (NSW).

[307] Exemption 20 of Heading VI of Third Schedule to Stamps Act 1958 (Vic).

[308] Section 50.

The Commission is of the view that instruments entered into as a result of the breakdown of a de facto relationship should also attract stamp duty exemption. Stamp duty exemption should apply whether the instrument is entered into pursuant to an order made under the proposed legislation, a cohabitation or separation agreement or other arrangement made between the parties. This reflects the stamp duty exemptions in Northern Territory and Victoria discussed above.[309]

B. REVIEW OF FAMILY LAW ACT, REGULATIONS AND RULES

For the purposes of this Working Paper, the de facto legislation in New South Wales, Victoria and the Northern Territory has been reviewed. Also, those provisions in the Family Law Act dealing with adjustment of interests in property, spousal maintenance and maintenance agreements have been examined thoroughly.

The Commission has not for the purposes of this Working Paper considered in detail all of the provisions of the Family Law Act and Regulations and Rules made under it.

After publication of the Working Paper, the Commission will examine all provisions of the Family Law Act, Regulations and Rules to determine whether the provisions are relevant to the proposed legislation.

As a matter of general policy, the Commission anticipates that the Family Law Act, Regulations and Rules will be followed to the extent that they are not inconsistent with the policies recommended in the Working Paper. This will, of course, be subject to any changes of policy which may result from responses to the Working Paper and adjustment of the wording of provisions in so far as it is restricted to married partners.

An advantage of adhering as far as is practicable to the Family Law Act, Regulations and Rules is that the courts vested with jurisdiction under the proposed legislation will have a body of reliable precedent.

The Commission invites comment on those provisions in the Family Law Act, Regulations and Rules which should be included in the proposed de facto relationships legislation.

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[309] In New South Wales, however, if the instrument is not made pursuant to a court order or a separation agreement certified under the De Facto Relationships Act 1984 (NSW), it will not attract stamp duty exemption: section 74CB(2) and (3) Stamp Duties Act 1920 (NSW).

C. AMENDMENT TO DISTRICT COURTS ACT 1967 AND MAGISTRATES COURTS ACT 1921

Clause 2.1 of the proposed legislation expressly confers on the Supreme, District and Magistrates Courts jurisdiction to hear any application for an order or relief under the Act. As discussed in Chapter 7, the Commission also recommends that the District Courts Act 1967 and Magistrates Courts Act 1921 be amended to reflect this increase in jurisdiction.[310]

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[310] Section 9 of the Supreme Court Act 1991 (Qld) provides that the Supreme Court is the "Court of general jurisdiction in and for the State; and has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise". Because of the inherent jurisdiction of the Supreme Court and wording used in section 9 it would be both unnecessary and inappropriate to alter the Supreme Court Act 1991 (Qld) to confer jurisdiction.

APPENDIX A

SURVEY RESULTS - LEGAL PRACTITIONERS

As part of its review of the law governing property disputes between people who live together under the one roof, the Queensland Law Reform Commission distributed surveys to members of the Family Law Practitioners Association, participants at the Kooralbyn Valley Family Law conference in May 1991, solicitors who attended meetings with the Commission in Townsville, Cairns and Roma and community legal centres. Of the surveys distributed, the Commission received 155 completed responses. This survey does not purport to be representative of the legal profession throughout Queensland. However, the results of the survey provide the Commission with useful information concerning the frequency with which practitioners have been approached for legal advice concerning a de facto relationship,[311] the kind of disputes that arise, perceived deficiencies in the law and suggestions for reform. The surveys also asked for information concerning property disputes in a non-marital and non-de facto context.

While the survey was not distributed to all members of the legal profession throughout Queensland, some interesting conclusions can be drawn from the responses of those who did complete the survey form. 155 legal practitioners responded to this survey, 73 from the country, 32 from Brisbane suburbs and 50 from Brisbane city. Almost one half of the responding practitioners, therefore, are outside the Brisbane metropolitan area.

In the following pages, the Commission has summarised the data which has been extracted from the surveys and has commented on the significance of that data in terms of necessary reform.[312]

Extent of need for reform

Given the increasing number of people living in de facto relationships, it is perhaps not surprising that 98% of the legal practitioners who responded to the survey had been approached for advice about a de facto relationship over the previous 12 month period.

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[311] For the purposes of this survey, "de facto relationship" referred only to heterosexual couples.

[312] The Commission has produced a more detailed document recording the information obtained from the surveys. Because of its volume, this document was not published. Any reader may obtain this information on request from the Commission.

The 152 practitioners who had been approached for legal advice estimated that they had seen 3,147 clients in the previous 12 months. 42% of the responding practitioners said that they had been approached by clients in a de facto relationship more than ten times during that period.

Length of de facto relationship

When asked the approximate length of the de facto relationship of the clients who approached them for advice, more than 50% of the responding practitioners estimated that their clients had been in de facto relationships for three or more years. 12% of the practitioners estimated that they had been in relationships for more than 10 years. Accordingly, it cannot be presumed that all people who live in de facto relationships and have property disputes have been living in such relationships for only a short time and that their contributions have been of little value.

Issues on which advice was sought

In question 5 of the survey, the practitioners were asked how frequently they had been approached over the previous 12 months to give advice by people living in a de facto relationship in relation to specified issues. A very high proportion of the practitioners responded that they had been approached for advice concerning real property (92%), personalty (96%) and debts incurred by one or both of the de facto partners (85%). For all of these categories, approximately half of the responding practitioners estimated that they had been approached frequently for such advice by people in de facto relationships.[313]

A relatively high percentage of practitioners also responded that they had been approached to give advice concerning the ownership of a business (64%) and maintenance of the client or the client's partner (62%) over the previous 12 months. Fewer practitioners, however, responded that they had been approached for such advice frequently.[314]

From these figures, it appears essential that any legislation proposed should cover disputes concerning real and personal property and debts incurred during the de facto relationship. The figures also indicate that disputes concerning maintenance and the ownership of businesses arise regularly.

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[313] 52% for real property; 56% for personalty and 40% for debts.

[314] 5% for disputes concerning ownership of a business and 16% for disputes concerning maintenance of the client or the client's partner.

Ownership of real property

The practitioners who responded that they had given advice concerning a real property dispute between de facto partners were asked to specify whether that real property was usually held as joint tenants, as tenants in common or in one name only. The practitioners responded that real property the subject of dispute was often held either in both names as joint tenants or in one name only.[315] Although 55% of practitioners responded that at times their clients had held property as tenants in common, only 3% responded that the property was often held in this way.

The fact that almost half (48%) of the practitioners responded that real property was held frequently in the name of one of the de facto partners only is cause for concern. It strengthens the case for legislation governing distribution of property between de facto partners.

Male/female clientele

The survey asked practitioners whether they were approached more frequently by men, women or by men and women with equal frequency. The responses of the practitioners were very polarised. 49 (44%) practitioners estimated that they were approached approximately equally by men and women. 60 (54%) estimated that they were approached more frequently by women than by men.[316] In contrast, only 3 (3%) estimated that they had been approached more by men than by women.

It is not possible from the survey to determine why practitioners estimated that they were approached more frequently by women than men. Several explanations are possible. One possible explanation is that at the end of a de facto relationship, women are generally not in as favourable a financial position as men. It is possible that a contributing factor to this situation is that many women assume the homemaking and parenting role for which no compensation is currently given.

Cohabitation contracts

In some of the other Australian jurisdictions, legislation provides for parties in de facto relationships to enter into cohabitation and separation agreements. Currently, no legislation in Queensland gives force to such agreements.[317] Notwithstanding this fact, the Commission had been advised that some solicitors have been approached by

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[315] 33% of responding practitioners estimated that the property was often held as joint tenants and 59% estimated that it was sometimes held this way; 48% estimated that the property was often held in one name only and 48% sometimes in one name only.

[316] Included within the figure of 60 practitioners is Women's Legal Service. Women's Legal Service is a community organisation providing legal services to women only.

[317] Cohabitation and separation agreements in Queensland are governed by ordinary contractual principles.

de facto clients to draw up cohabitation agreements. The Commission was interested to establish whether drafting of cohabitation agreements was widespread in practice.

In the survey, practitioners were asked how frequently they had been approached to give advice regarding cohabitation contracts. While only 4 practitioners had frequently been asked to give advice on cohabitation agreements, more than half (51%) estimated that they had been approached for advice regarding cohabitation contracts by a de facto partner during the previous 12 months.

Methods of resolving disputes

The Commission was interested to learn whether disputes concerning de facto couples were resolved through negotiation, court action or not satisfactorily resolved for some reason. The survey contained five specific questions about resolution of disputes. From the responses, there appears to be a reasonable resolution rate through negotiation both by clients and by the legal practitioners. 80% of practitioners estimated that they had had some success at resolution through negotiation by the client and 94% estimated that they had had resolution through negotiation by a legal practitioner. It was estimated that disputes were resolved more frequently when negotiation was conducted by a legal practitioner rather than by the client.[318]

A reasonably high percentage of the practitioners (35%) responded that disputes were never resolved through court action. Once again, there could be a number of reasons for this figure. One possible explanation is that only a small number of disputes between de facto couples are not satisfactorily resolved by negotiation. Given the responses in the previous paragraph on the resolution of disputes in this way, this explanation does not seem likely. Another possible explanation is that because of the uncertainty in the existing law on de facto rights, parties choose not to litigate to resolve disputes. If the latter is the case, it is a cause for concern.

Only 11% responded that disputes were frequently resolved through court action.

91% of practitioners estimated that at times disputes were not satisfactorily resolved because of the limited legal rights of their clients.[319] Similarly more than 80% of responding practitioners indicated that disputes had not been satisfactorily resolved for some other reason. Although only 31 practitioners specified the other reason, most of those who did so included cost as a factor for the dispute not being satisfactorily resolved. Other reasons given were the uncertainty of result, difficulty in coping with legal processes and that the size of the claim did not justify further action.

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[318] 11% of practitioners estimated that the disputes were frequently resolved through negotiation by the client compared with 33% where negotiation was conducted by the legal practitioner.

[319] 33% of practitioners responded that this was frequently the case and 57% that this was sometimes the case.

Clients' understanding of their legal rights

The Commission sought to establish what the de facto clients themselves thought their legal rights were. 57% of legal practitioners estimated that their clients often thought that their legal position was similar to that of a married couple. However, an even higher percentage of practitioners (66%) estimated that their clients frequently did not know what their legal rights were.[320]

It seems clear from these results that there is widespread misunderstanding of the law governing de facto couples. This is consistent with many of the comments made by practitioners in responding to this survey that there needs to be education of the public concerning rights on entering a de facto relationship.

Views of practitioners on the need for change

Legal practitioners were asked to comment on whether the law relating to de facto relationships was satisfactory, in need of radical change or in need of minor change. **92% of the responding practitioners were of the view that the existing law relating to de facto relationships needed to be changed. The majority of practitioners (77%) were of the view that the law was unsatisfactory and needed to be radically changed.**

2 of the 13 people who replied that the existing law was satisfactory responded in that way on moral grounds. They were of the view that introducing legislation to govern de facto couples would be an unwelcome endorsement of the de facto relationship. Another of the 13 people commented that people should be encouraged to accept responsibility for their own actions and not expect the government or courts to provide a solution. The remaining 10 people who considered the current law satisfactory did not expand on the reasons for this view.

Eligibility of de facto couple to invoke jurisdiction

The practitioners were also asked to comment on how long people should have lived together before qualifying as a de facto couple in any proposed legislation.

10% of practitioners commented that there should be no time pre-requisite for coming within any new legislation; 38% of practitioners gave responses varying between one and twelve months as the appropriate time to qualify for living in a de facto relationship; 25% considered two years to be the appropriate jurisdictional trigger; 79% of practitioners were of the view that there should be some time requirement before a person would be subject to legislation.[321]

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[320] In this survey, the practitioners were asked how frequently their clients thought that their legal position was similar to that of a married couple and how frequently their clients did not know what their legal rights were. Many practitioners responded "often" to both questions.

[321] This figure does not include practitioners who responded that time should not be the only or primary consideration for bringing a relationship within the ambit of the legislation.

In addition to comments in relation to time, a number of practitioners commented that time should not be the only or primary consideration for coming within the legislation. Many practitioners commented that if there were children of the relationship, the parties should be governed by the legislation. Others commented that if there is an indicator of permanence (such as the mixing of funds or buying property jointly), that should qualify the parties as de facto couples.

Suggestions to improve existing law

The practitioners were asked to give suggestions to improve the existing law.

Of the 104 legal practitioners who responded to this question 86% suggested that legislation was required. 49% of practitioners stated that there should be separate legislation enacted to govern the affairs of de facto couples. 30% were of the view that de facto couples should be in the same position as married couples so far as their property rights were concerned.[322]

20 (19%) practitioners indicated that the Family Court was the appropriate court to hear and determine matters arising between de facto couples.[323]

Of the 104 responses, only 6% considered that the law was satisfactory and that no alterations were necessary.

In addition to the above responses, 5% of practitioners commented that in any proposed legislation, provision should be made for sharers other than de facto couples.

Frequency of legal enquiries in non de facto context

The practitioners were also asked whether within the past 5 years they had been approached by clients who had property disputes with a person with whom they were living not being a de facto or married spouse. 80% of the practitioners responded that they had given advice in such circumstances. 15% commented that they had done so frequently. The survey also indicated that in this non-de facto and non-marital context most of the advice had been given to relatives (46%) and friends (32%) who were living together. 10% of practitioners commented that they had advised people living in homosexual relationships.

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[322] A further 7% of practitioners suggested other ways that legislation may help remedy existing difficulties.

[323] It should also be noted that the figure of 20 practitioners who recommended that the Family Court is the appropriate jurisdiction does not include those practitioners who replied that the Family Law Act should govern disputes between de facto couples. If it is presumed that the practitioners recommending that the Family Law Act govern de facto disputes, also recommend the Family Court as the appropriate forum, then a further 26 practitioners should be counted. This would mean that a total of 46 practitioners (44%) viewed the Family Court as the appropriate forum for resolving disputes.

While a high percentage of those practitioners had been approached by people living with another in a non-de facto and non-marital relationship, a relatively small number of practitioners responded that any legislation which is introduced should extend beyond de facto relationships.

Other comments made by practitioners

At the end of the survey, practitioners were invited to give any other comments arising out of their experiences in advising people who had lived together and shared property.

Many of the comments reflected the suggestions outlined above to improve the existing law.

Some of the other suggestions concentrated on the procedural steps which should be incorporated in any proposed legislation. These included suggestions that mediation and counselling as carried out in the Family Court be encouraged and that Magistrates Courts should also have power to handle disputes within their monetary jurisdiction. It was also suggested that de facto couples be educated on the legal rights arising from their relationship.

Many practitioners commented that the law on this topic is uncertain and needs clarification. Criticism was also levelled at the Supreme and District Courts because of the delays experienced in having matters proceed to trial.

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APPENDIX B

SURVEY RESULTS - LEGAL AID OFFICE

In 1991, the Queensland Law Reform Commission conducted a survey at the Head Office of the Legal Aid Office (Queensland) in Brisbane.

The focus of the survey was on sharers who had sought legal advice relating to property at the Brisbane branch of the Legal Aid Office (Queensland). 89 sharers sought advice in this regard.

For the purposes of the survey, sharers were divided into two categories. The first category were sharers who were living or had lived in a heterosexual or homosexual de facto relationship and sought advice on property.[324] 83 (93%) of the sharers fell within this category.[325] The second category were sharers not included in the first category who were living or had lived together and sought advice on property.[326] 6 (7%) fell within this category.

The survey sample consisted of people who had sought legal advice from the Legal Aid Office (Queensland) in Brisbane. The survey focused only on the number of clients who sought advice, not on subsequent action taken by the client after the advice was received.

The survey period was for the whole of the 1991 year.[327]

The aim of the survey was to provide an indication on the types of legal issues associated with shared relationships, the length of the relationships and the frequency sharers sought advice.

The survey results have been collated into tables on pages 274-276.

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[324] This did not include couples who sought advice only on custody, access, maintenance of children or domestic violence.

[325] Percentages are rounded off to the nearest whole number.

[326] This group excluded people who were married.

[327] The first stage of this survey involved a review by the Commission of people who had sought legal advice from the Legal Aid Office by a review of all relevant legal advice files for the period 1 January 1991 to 16 September 1991. The list of relevant legal aid advice files was generated by a computer search at the Legal Aid Office. This may not represent all of the target group as some files may have been mis-categorised on the computer. Over 2,000 legal advice files were examined. Only 12 of those files could not be located. From these written advice files, 73 survey forms were completed. The second stage of the survey was conducted from 17 September 1991 to 31 December 1991. Solicitors from the Legal Aid Office completed survey forms on the same target group as in the first stage. 16 survey forms were completed.

De Facto Relationships

93% of the sharers who sought advice were living or had lived in a de facto relationship. Of this group, 55 were female and 28 were male.

Most advice sought by de facto couples related to disputes about ownership of real property and personalty.[328]

All of the de facto couples in long-term relationships[329] owned real property. In addition, 2 out of the 3 couples in long-term relationships also owned a business. 34 of the 40 de facto couples in medium-term relationships also owned real property. At least 46% of those who sought advice about real property owned that property with their de facto partner.[330]

Approximately half of the clients sought advice about ownership of personalty.[331] At least 80% of the people who sought advice about the ownership of personalty were living in a short to medium-term de facto relationship.

Not as many people sought advice concerning debts.[332] It is possible that this low figure can be explained on the grounds that people do not see the merit in obtaining legal advice when there is no material gain in terms of actually receiving a share of the assets. No people living in long-term relationships sought advice about debts. It should be noted, however, that 2 out of the 3 couples involved in long-term relationships also sought advice in respect of ownership of a business. This would have included advice on debts where appropriate.

Only 3 people sought advice about maintenance for himself or herself or their partner. This may indicate that people are aware that there is no legislation allowing for de facto partners to claim maintenance from each other.[333] Alternatively, de facto partners may have no expectation that they will be maintained by the other.

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[328] In most cases the property was either owned in both names or one of the partners' names. There were two exceptions involving disputes about ownership of real property. One property was registered in a company name and the other was registered in the name of the brother of the de facto partner.

[329] The duration of 2 of the long-term relationships was between 13 to 14 years and the third was 14 years' duration.

[330] In 9 instances, clients did not specify how property was owned. One client who sought advice about property did not specify whether that property was real or personal property. This person, therefore, was not included in the calculation of the percentages.

[331] One client who sought advice about property did not specify whether that property was real or personal property. This person, therefore, was not included in the calculation of the percentages.

[332] 5 heterosexual de facto couples sought advice about debts.

[333] However, under section 66X of the Family Law Act the father of a child who is not married to the mother of the child is liable to contribute towards the childbearing expenses of the mother which may include paying maintenance to the mother during the childbirth period. This provision could be relevant if the mother and father have been living in a de facto relationship.

10% (8) of the de facto couples sought advice about cohabitation or separation agreements. This is not an insignificant percentage. Trends may be developing where people by agreement are regulating their financial affairs themselves.

Other Sharers

The number of sharers other than de facto couples who approached the Legal Aid Office (Queensland) was relatively small. Therefore, it is more difficult to discern trends from the results.

Only 6 fell into this category.[334]

However, it is interesting to note that 5 of the 6 sharers surveyed in this category sought advice about ownership of real property. All of these sharers were living in family relationships.

Of the 6 sharers who sought advice, 1 sought advice on debts that occurred during the time that they were living together.

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[334] 5 were in family relationships and one couple were friends.

DE FACTO RELATIONSHIPS

(83 de facto relationships [1] - 55 clients were female, 28 clients were male)

Type of Advice	Short Term [2]	Medium Term [3]	Long Term [4]	No Specification [5]	Total
Real Property	8	34	3	12	57 [6]
Personal Property	11	22	1	7	41
Property (no specification of type was given)	1	0	0	0	1
Debts	3	2	0	1	6
Superannuation	0	2	0	0	2
Business	0	3	2	1	6
Maintenance for self or partner	2	0	0	1	3
Cohabitation or Separation Agreements	3	3	0	2	8 [7]
General advice on law relating to de facto	1	0	0	1	2
General advice on entitlement to live in house	0	1	0	0	1
Compensation for loss of occupancy under oral agreement	0	1	0	0	1

Notes to De Facto Relationship Table

1. The survey allowed for multiple responses for the type of advice sought by the client. Therefore, there will be more than 80 responses.

2. 21 were in short term relationships. For the purposes of the survey, a short term relationship is defined as a relationship of less than 3 years duration.

3. 40 were in medium term relationships. For the purposes of the survey, a medium term relationship is defined as a relationship between 3 and 12 years (inclusive).

4. 3 were in long term relationships. For the purposes of the survey, a long term relationship is defined as a relationship of more than 12 years.

5. 19 did not specify the length of the relationship.

6. Real Property:
   19 registered in one name
   23 registered in both names
   1 registered in company name
   9 not specify
   5 had 2 properties
   (a) 1 registered in one name
   1 not specify
   (b) 1 not specify
   1 registered in name of brother of a de facto partner
   (c) 1 registered in one name
   1 registered in both names
   (d) 2 registered in both names (one of which was an interest under a time sharing scheme)
   (e) 1 registered in both names
   1 not specify (this was an interest under a time sharing scheme)

7. This figure included 2 clients who sought advice about pre-marital agreements.

OTHER SHARERS

(6 other sharers [1])

Type of Advice	Family Relationship [2]	Friends [4]	Total
Real Property	5	0	5 [5]
Personal Property	1	0	1
Advice about debts	0	1	1

Notes to Other Sharers Table

1. The survey allowed for multiple responses for the type of advice sought by the client. Therefore, there will be more than 6 responses.

2. 5 were in family relationships (4 were sibling relationships and one was a relationship between the parents of one spouse living with that spouse and her partner).

3. 1 couple were friends.

4. Real Property: 4 registered in both names
1 registered in all parties' names (4 parties)

APPENDIX C

OVERSEAS EXPERIENCE

The Commission has briefly reviewed the law relating to de facto relationships in New Zealand, England and three provinces in Canada (British Columbia, Ontario and Alberta). The focus of the review was to examine developments in other common law jurisdictions[335] relating to property division, maintenance,[336] cohabitation and separation agreements between de facto partners.

All common law countries and provinces which were reviewed had no specific legislation governing property rights between de facto partners on the breakdown of the relationship.[337] Principles from the law of trusts apply to claims for property adjustment.

The results of the Commission's review are set out below.

NEW ZEALAND

i. Maintenance

De facto partners have a limited right to claim maintenance from each other.[338]

A de facto partner may apply for an order for maintenance only if he or she is the natural parent of a child and has or has had the custody of the child.

On hearing a maintenance application the court may make a maintenance order, if it is satisfied that -

* it is desirable, in the interests of providing, or of reimbursing the applicant for having provided, adequate care for the child, to make a maintenance order; and

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[335] No jurisdiction examined confers any rights on homosexuals living in a de facto relationship. Accordingly, in this Appendix "de facto" is used only in the heterosexual context.

[336] In the course of this review, any entitlements that a woman living in a de facto relationship may have to childbirth expenses have not been investigated. Any reference to "maintenance" in this Appendix, therefore, refers to the spousal maintenance payments which may arise on separation regardless of childbirth expenses.

[337] See, however, footnote 69.

[338] Section 79 Family Proceedings Act 1980 (NZ). It is not necessary for the parties to have cohabited for this obligation to arise.

* it is reasonable to make a maintenance order having regard to -

  (i) the means, including the potential earning capacity of each parent;

  (ii) the reasonable needs of each parent;

  (iii) whether the parent who will be paying the maintenance is supporting any other person;

  (iv) the financial and other responsibilities of each parent.[339]

ii. Cohabitation or separation agreements

De facto partners may make agreements relating to the "status, ownership or division of property."[340] The property may be owned by both or either of them. There are no special provisions governing the making of these agreements.

iii. Reform

A Working Group on Matrimonial Property and Family Protection was established in March 1988 to review various aspects of family law. As part of its review, the Group examined the law governing de facto property and maintenance rights. The group also examined the ability of de facto partners to contract out of any proposed legislation. The Group reported to the Cabinet Social Equity Committee in September 1988.

In relation to the law governing property and maintenance rights of de facto partners and the ability of a de facto partner to contract out of any proposed legislation, the Working Group made the following recommendations.

* *Legal and de facto marriages should not simply be equated.*

* *A special part should be inserted into a new Matrimonial Property Act[341] to deal with the property of de facto partners.*

* *"Property" should mean the property that would be "matrimonial property" if the parties were married to each other.*

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[339] Section 81 Family Proceedings Act 1980 (NZ).

[340] Section 40A Property Law Act 1952 (NZ).

[341] The Matrimonial Property Act 1976 (NZ) governs division of property between married couples.

* *If the court finds that a de facto relationship exists it would apply the Matrimonial Property Act if satisfied that in all the circumstances of the case justice so requires. Alternatively, there could be a rebuttable statutory presumption that the Act applied.*

* *If the court does not apply the Act, property interests should be adjusted in accordance with contributions to the de facto partnership. Financial contributions should be given no greater weight than non-financial contributions.*

* *The maintenance provisions of the Family Proceedings Act 1980*[342] *should be extended to include de facto spouses.*[343]

* *It should be possible for de facto partners to contract out of the provisions of the Act.*[344]

To date, none of the recommendations which relate to de facto couples has been acted upon by the New Zealand government.

The Working Group was of the view that the law relating to other relationships where there is an "intermingling of property"[345] should be examined in the near future. Two members of the Group considered "that a new regime (referring to property rights) should be extended to couples living in homosexual relationships because their relationships have the same emotional, sexual and dependency dynamics as marriage relationships and ought to benefit from reform of the legislation".[346]

ENGLAND

i. Maintenance

There are no statutory provisions governing maintenance between de facto partners.

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[342] In assessing the amount of maintenance that one party to a marriage should pay to the other, the court has regard to the means of each party including the potential earning capacity, the means derived from the division of property, the reasonable needs of each party, whether the party paying maintenance is responsible for any other person and any other circumstance that makes one party liable to maintain the other: section 65 Family Proceedings Act 1980 section 65 (NZ).

[343] De facto partners currently have a limited right to claim maintenance as mentioned at pages 177-178.

[344] Report of the Working Group on Matrimonial Property and Family Protection (New Zealand) 1988, pages 85-86.

[345] Report of the Working Group on Matrimonial Property and Family Protection (New Zealand) 1988, page 85.

[346] Report of the Working Group on Matrimonial Property and Family Protection (New Zealand) 1988, page 67.

ii. Cohabitation or separation agreements

There are also no statutory provisions relating to cohabitation or separation agreements.

CANADA

The Commission reviewed the law relating to de facto relationships in three Canadian provinces - British Columbia, Ontario and Alberta.

British Columbia

i. Maintenance

De facto partners who have been cohabiting for a period of two years[347] may claim maintenance from each other[348].

In determining whether maintenance is appropriate the court may take into account the needs, means, capacities and economic circumstances of each de facto partner.[349]

These include -

* the effect on the earning capacity of each partner during the relationship due to responsibilities arising from the relationship;
* whether the de facto partner applying for an order for maintenance has any other source of support and maintenance;
* the obligation of the partner who would be making the payments to support other people;
* the capacity and reasonable prospects of the de facto partner applying for an order obtaining an education or training;
* the desirability of the de facto partner applying for maintenance having special assistance to achieve financial independence from the partner against whom the application is made.

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[347] Family Relations Act R.S.B.C. 1979 C.121 section 1 (British Columbia).

[348] Family Relations Act R.S.B.C. 1979 C.121 section 61 (British Columbia).

[349] Family Relations Act R.S.B.C. 1979 C.121 section 61 (British Columbia).

ii. Cohabitation or separation agreements

Provisions relating to custody, access or maintenance of a child or maintenance of a de facto partner may be contained in an agreement between de facto partners.[350] This type of agreement is enforceable as an order of the court. Provisions relating to property division are not included. Every person apart from a child against whom the agreement is enforced must be a party to the written agreement and sign a consent.[351] There is no provision for the party to receive legal advice. The court can alter, rescind or vary this type of agreement.[352]

iii. Possessory and occupation rights

A court may grant exclusive possession of the family residence and/or household goods to one de facto partner.[353] This is a form of temporary relief pending the determination of the rights to property of the partners.

Ontario

i. Maintenance

De facto partners who have cohabited for a period of three years or are the parents of a child[354] may claim maintenance from each other.[355]

The courts shall consider all the circumstances of the partner including -

* each partner's current and likely future assets and means;

* the applicant's capacity to contribute to his or her support and the respondent's capacity to provide the support;

* the age and physical and mental health of the partners;

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[350] Family Relations Act R.S.B.C. 1979 C.121 section 74(2) (British Columbia).

[351] Family Relations Act R.S.B.C. 1979 C.121 section 74(3) (British Columbia). The consent is in a prescribed form and must be completed before a commissioner for taking affidavits under sections 63, 67 or 68 of the Evidence Act (British Columbia).

[352] Family Relations Act R.S.B.C. 1979 C.121 section 74(4) (British Columbia).

[353] Family Relations Act R.S.B.C. 1979 C.121 section 77 (British Columbia).

[354] Family Law Act 1986 S.O. 1986 C.4 section 29 (Ontario).

[355] Family Law Act 1986 S.O. 1986 C.4 section 33 (Ontario).

* the applicant's needs, in determining which, the court shall have regard to the accustomed standard of living while the partners resided together;

* the measures available for the applicant to provide for his or her own support and the length of time and cost to enable the applicant to take those measures;

* any legal obligation of either partner to provide support for another person;

* the desirability of either partner remaining at home to care for a child;

* a contribution by the applicant to the realisation of the other partner's career potential;

* the length of cohabitation;

* the effect on the applicant's earning capacity because of the responsibilities assumed during cohabitation;

* whether the applicant has undertaken the care of a child who is 18 years or over and unable by reason of illness, disability or other cause to withdraw from the care of his or her parents;

* whether the applicant has undertaken to assist in the continuation of a program of education for a child 18 years or over who is unable for that reason to withdraw from the charge of his or her parents;

* the effect on the applicant's earning and career development because of the responsibility of caring for a child;

* any housekeeping, child care or other domestic service performed by the applicant for the family;

* any other legal right of the applicant to support, other than out of public money.[356]

The obligation to pay for maintenance exists without regard to the conduct of either party. However, the court in determining the amount of maintenance may have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship.[357]

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[356] Family Law Act 1986 S.O. 1986 C.4 section 33(9) (Ontario).

[357] Family Law Act 1986 S.O. 1986 C.4 section 33(10) (Ontario).

ii. Cohabitation or separation agreements

De facto partners may enter a cohabitation agreement before or during cohabitation. The agreement may regulate their rights and obligations during cohabitation or upon ceasing to cohabit or upon death. These rights and obligations include ownership in or division of property, maintenance obligations, the right to direct the education and moral training of their children and any other matter in the settlement of their affairs.[358]

De facto partners must have separated before entering a separation agreement.[359]

The agreement is unenforceable unless it is in writing, signed by the partners and witnessed.[360] The parties do not need to receive legal advice for either a cohabitation or separation agreement to be binding.

If the provisions in the agreement relating to children are not in the best interests of the children then the court may disregard those provisions.[361]

A court may set aside a cohabitation or separation agreement or a provision in it -

* if a party failed to disclose significant assets or significant debts or other liabilities existing when the agreement was made;

* if one party did not understand the nature and consequences of the agreement; or

* otherwise in accordance with the law of contract.[362]

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[358] Family Law Act 1986 S.O. 1986 C.4 section 53 (Ontario). However, the agreement may not deal with the right to custody of or access to the children.

[359] Family Law Act 1986 S.O. 1986 C.4 section 54 (Ontario). In these circumstances, the agreement can also deal with the right to custody of or access to the children.

[360] Family Law Act 1986 S.O. 1986 C.4 section 55 (Ontario).

[361] Family Law Act 1986 S.O. 1986 C.4 section 56 (Ontario).

[362] Family Law Act 1986 S.O. 1886 C.4 section 56(4) (Ontario).

iii. Possessory and occupation rights

Ontario legislation confers on a married partner a right to apply for the exclusive possession of the matrimonial home and furniture.[363] There is uncertainty whether this extends to de facto partners.[364]

Alberta

i. Maintenance

There are no statutory provisions for de facto partners to claim maintenance from each other.[365]

ii. Cohabitation or separation agreements

There are no statutory provisions relating to cohabitation or separation agreements.

iii. Possessory and occupation rights

There are also no statutory provisions granting an order for exclusive possession of the family residence and/or household goods to one de facto partner.

iv. Reform

In June 1989 the Alberta Law Research and Reform Institute produced a report addressing reform of the law relating to cohabitation outside marriage.[366] The Report considered only heterosexual cohabitation. In relation to the law governing property and maintenance rights of de facto partners and cohabitation and separation agreements between de facto partners, the Institute made the following recommendations.[367]

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[363] Family Law Act 1986 S.O. 1986 C.4 sections 24(1) and 34 (Ontario).

[364] See comments made in Issues Paper No 2 of Institute of Law Research and Reform on Towards Reform of the Law Relating to Cohabitation Outside Marriage (Alberta) 1987, page 77.

[365] However, Alberta legislation does make provision for the payment of alimony after a declaration of nullity has been made. Domestic Relations Act R.S.A. 1980 c.D - 37 section 22 (Alberta).

[366] Report No 53 of Alberta Law Reform Institute on Towards Reform of the Law Relating to Cohabitation Outside Marriage 1989.

[367] Report No 53 of Alberta Law Reform Institute on Towards Reform of the Law Relating to Cohabitation Outside Marriage 1989, pages 3-5.

Recommendation I

Non-marital cohabitation should not confer a marriage-like status but Alberta law should be amended in certain specific areas only in order to cure inequities and situations of hardship.

Recommendation II (majority recommendation)

(a) An order for the maintenance of one cohabitant by another should be made only where it is reasonable that such an order be made and:

(i) the applicant for maintenance has the care and control of a child of the cohabitational relationship and is unable to support himself or herself adequately by reason of the child care responsibilities; or

(ii) the earning capacity of the applicant has been adversely affected by the cohabitational relationship and some transitional maintenance is required to help the applicant to re-adjust his or her life.

(b) An order made in respect of a cohabitant falling into category (i) above will cease when the child reaches the age of 12 (or, if handicapped, 16). An order made in respect of a cohabitant falling into category (ii) above will cease three years from the date the maintenance order is made or four years from the termination of the cohabitational relationship, whichever period is shorter.

(c) In determining whether to make a maintenance order in favour of a cohabitant a court will take into account factors corresponding to those a court considers in making an order for spousal support under the Divorce Act. Further, the court will bear in mind objectives corresponding to those a court is directed to have in mind in making an order for spousal support under the Divorce Act. An application cannot be made by one who, at the time of the application, has entered into a subsequent cohabitational relationship or who has remarried.

(d) Variation or rescission of a support order in favour of a cohabitant may be granted on proof of a change of circumstances in a similar way and on a similar basis to an order for spousal support under the Divorce Act. However, an order for the support of a cohabitant will automatically terminate on that cohabitant marrying.

Recommendation II (minority position)

That no maintenance obligation attach to cohabitants inter se.

Recommendation III (majority recommendation)

That there be no statutory change in the law relating to allocation of title to property as between cohabitants.

Recommendation III (minority position)

That a new remedy be enacted that would replace the existing trust remedy. Essentially, this remedy would mirror the existing trust remedy but would provide that a contribution to family and household might give an interest in property.

Recommendation IV (majority recommendation)

That Part II of the Matrimonial Property Act dealing with matrimonial home possession be extended to cohabitants where the applicant for a possession order has care and control of a child aged 12 years or less, who is a child of the relationship (whether natural born or adopted), a child of the other or a child to whom the respondent stands in loco parentis.[368]

Recommendation IV (minority position)

That the majority recommendation set out above be extended so that an applicant for a possession order, who does not have care of such a child but who is asserting a proprietary claim to the premises of which possession is sought, might also be granted an order under Part II of the Matrimonial Property Act.

Recommendation V (majority recommendation)

(a) *That new statutory provisions be enacted providing for domestic contracts. These provisions should be similar to those in place in several other common law provinces.*

(b) *In order for such contracts to be enforceable they must be in writing, signed by the parties and witnessed.*

(c) *Subsequent intermarriage of parties to a cohabitation agreement should be one factor that the court be directed to consider in exercising its discretionary power to disregard any provision of a domestic contract.*

Recommendation V (minority position)

That the recommendation of the majority (above) be adopted save for part (b). In order for a domestic contract to be enforceable it must comply with formalities corresponding with those set out in s.38 of the Matrimonial Property Act of Alberta.

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[368] "Loco parentis" means a person who takes upon himself or herself the duty of a parent to a child by providing for that child.

Recommendation VI

That new statutory provisions be enacted providing for domestic contracts between married people and people entering marriage. These provisions would be similar to those in other provinces and would correlate with those referred to in Recommendation V above.

To date, the recommendations have not been enacted in legislation.

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APPENDIX D

PROPERTY DISTRIBUTION: A Comparison of the Family Law Act 1975 (Cwth) and De Facto Relationships Act 1984 (NSW)

On reviewing cases decided under the De Facto Relationships Act 1984 (NSW) (DFRA) and the Family Law Act 1975 (Cwth) (FLA), the Queensland Law Reform Commission is concerned that orders made in favour of the de facto spouse who is a homemaker have been consistently lower than orders made in favour of that person's married counterpart in similar circumstances. A comparison of cases decided under the different legislation is virtually impossible. No case will have precisely the same facts. It is therefore difficult to make direct comparisons about the nature of the orders made in favour of a spouse under each Act.

The Commission has, however, reviewed a number of cases decided under each Act. From the comments made in the judgments and the ultimate orders made, the Commission is of the view that orders made in favour of a homemaker under the DFRA are not as generous as those made in favour of a married spouse in similar circumstances under the FLA. From its review of the case law, the Commission has identified the following factors which it believes have contributed to the divergence in the orders made under the different legislation.[369]

i. Differences between the de facto and married relationships

In the cases decided under the DFRA, the New South Wales Supreme Court has indicated that a de facto relationship is quite different from a married relationship, and this should be reflected in the orders made by the court.[370]

ii. Origin of the De Facto Relationships Act

Section 20 of the DFRA sets out the matters which the court may consider in adjusting property interests on the breakdown of the de facto relationship. Section 79 of the FLA is the equivalent section for a married couple.

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[369] At the time this Working Paper went to print, the Commission was awaiting the judgment of the New South Wales Court of Appeal in Dwyer v Kaljo which was delivered on 19 August 1992. Comments of the Court of Appeal have therefore not been incorporated in the following review.

[370] See Powell J in D v McA (1986) DFC 95-030 at 75,356 and Young J in Wilcock v Sain (1986) DFC 95-040 at 75,449. Compare, however, the more recent comments of the Court of Appeal in Black v Black (1991) DFC 95-113 at 76,429.

In D v McA,[371] Powell J discussed the reason for enacting the DFRA. In his view, legislation was enacted because of criticisms made by the judges of the Supreme Court on the *"injustices which might arise as the result of applying orthodox principles of law and equity to questions relating to the property of persons who had lived in a de facto relationship ...".*[372]

On these grounds, Powell J considered it logical that there be differences between section 20 of the DFRA and section 79 of the FLA. This was one of the factors which justified different orders being made under the DFRA and the FLA.

iii. Differences in the wording of section 79 of the Family Law Act and section 20 of the De Facto Relationships Act

The difference in the wording between the DFRA and the FLA has also been offered as an explanation for the different orders being made under the Acts.[373]

Section 20(1)(a) and (b) of the DFRA refers the court to the financial and non-financial contributions to the property and financial resources of the partners and the contribution to the welfare of the other partner or the family including any contribution made in the capacity of homemaker or parent. These provisions are comparable with section 79(4)(a)-(c) of the FLA.

Under section 79(4) of the FLA, however, the court is required to take into account additional factors when adjusting interests in property. There is no equivalent in the DFRA. These additional factors are -

(d) the effect of any proposed order upon the earning capacity of either party to the marriage;

(e) the matters referred to in subsection 75(2) so far as they are relevant;

(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

(g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, or is to provide, for a child of the marriage.

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[371] (1986) DFC 95-030.

[372] Ibid, at 75,356. Compare, however, comments made by the Court of Appeal in Black v Black (1991) DFC 95-113 at 76,429.

[373] See, for example, Young J in Wilcock v Sain (1986) DFC 95,040 at 75,449-75,450 and Powell J in D v McA (1986) DFC 95-030 at 75,356.

Section 79(4)(e) requires the court to consider the matters referred to in section 75(2). The 15 factors listed in section 75(2) of the FLA are also relevant to the court in an application for spousal maintenance. In effect, the factors allow the court to consider everything which impacts on the financial circumstances of the parties.

As the FLA allows a court to consider substantially more factors in determining a property dispute than may be considered under the DFRA, it follows that the orders under the FLA will be higher.

iv. Irrelevance of Family Law decisions

Perhaps not surprisingly, in deciding cases under the DFRA, the Supreme Court of New South Wales has consistently commented that the Family Law cases on section 79 of the FLA can only be of limited assistance. The main reason given by the court is the difference in the wording of the sections.[374]

v. Four step approach of the Supreme Court of New South Wales

In adjusting interests in property under section 20 of the DFRA, the Supreme Court has developed a four step approach. This approach was first outlined by Powell J in D v McA as follows -

(a) identify and value the assets of the parties;

(b) determine whether any, and, if so, what contributions of the type contemplated by section 20(1)(a) and (b) have been made by each partner;

(c) determine whether, in the circumstances, the contributions of the applicant have already been sufficiently recognised and compensated for; and

(d) determine what order is called for to sufficiently recognise and compensate the applicant for his or her contributions.[375]

As part of the third step in the four step approach, the court reviews the benefit received by the person applying for an adjustment of the interests in property. There is a tendency in the de facto relationship cases for the court to decrease the order that the court would otherwise make or make no order at all if the applicant has received benefits during the relationship. In contrast, the "*sufficient compensation*" factor does not seem to assume the same prominence in Family Law cases.

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[374] See, however, comments of Court of Appeal in Black v Black (1991) DFC 95-113 at 76,429.

[375] (1986) DFC 95-030 at 75,356. This four step approach has subsequently been used by Powell J in Roy v Stugeon (1986) 11 NSWLR 454 at 467 and Young J in Wilcock v Sain (1986) DFC 95-040 at 75,450. The four-stage approach was referred to by Young J more recently in Trelore v Romeo (1991) DFC 95-108 at 76,390.

vi. Relevance of pre-relationship contributions

Before parties marry, it is possible for one or both of them to make contributions of the kind listed in section 79(4) of the FLA. It is also possible for a person to make contributions to his or her de facto partner before the parties begin living together.

In these situations, the question arises whether a party can receive compensation for pre-relationship contributions. Whether compensation is possible depends on whether the matter is decided under the DFRA or the FLA.

In an application under section 79 of the FLA to adjust interests in property, the court may consider contributions made by the parties before marriage.[376] In contrast, contributions made by a de facto partner before beginning the de facto relationship cannot be taken into account in a claim to adjust property interests under section 20 of the DFRA.

vii. Commercial equivalent of the homemaking contribution

In applications by the homemaker spouse under section 20 of the DFRA, it appears to be the practice of the New South Wales Supreme Court, particularly in the early decisions, to value the homemaking contribution in terms of the commercially equivalent value.[377] This approach is likely to lead to a lower order being made in favour of a homemaking de facto spouse when compared with his or her married counterpart.

viii. Award of property under the De Facto Relationships Act dependent upon reliance on promises made by respondent

Shortly after the enactment of the DFRA, the Supreme Court of New South Wales indicated that a de facto spouse will only receive a property adjustment in his or her favour if the relevant contributions were made as a result of a reliance on promises made by the respondent.[378] Such an approach could obviously limit the property adjustment in favour of the applicant.[379]

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[376] See comments of the Family Court in Olliver and Olliver (1978) FLC 90-499 at 77,599-77,600 and Collins and Collins (1977) FLC 90-286 at 76,540.

[377] See, for example, D v McA (1986) DFC 95-030 and Wilcock v Sain (1986) DFC 95-040 and Powell J at first instance in Black v Black, unreported, Supreme Court of New South Wales, No 1495 of 1988. Compare, however, comments of the Court of Appeal in Black v Black (1991) DFC 95-113 at 76,432.

[378] See comments of Young J in Wilcock v Sain (1986) DFC 95-040 at 75,450.

[379] Compare, however, comments of the Court of Appeal in Black v Black (1991) DFC 95-113 at 76,429.

ix. Conclusions

The Commission is encouraged by the Court of Appeal decision in Black v Black.[380] It is clear from that case that the Court of Appeal considers the contributions of a de facto spouse as homemaker to be the equivalent of the homemaking contributions of that person's married counterpart. The fact of marriage in that context is irrelevant.

However, the difference in wording of section 20 of the DFRA and section 79 of the FLA remain. Unless the Supreme Court is able to take into account the maintenance component (the needs and financial disparity of the parties), it is unlikely that the orders made in favour of a homemaker spouse under the DFRA will equate with orders made under the FLA in similar circumstances. It is for this reason that the legislation proposed in this Working Paper is couched in language which reflects more closely the provisions of the FLA.

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[380] (1991) DFC 95-113.

APPENDIX E

SUBMISSIONS LIST

The Commission received 30 written submissions on the Shared Property Discussion Paper No 36. The following individuals and organisations made written submissions and consented to the publication of their identity.

Bar Association of Queensland

Caxton Legal Centre Inc

Community of Inala Legal Service Inc

Mr P Cumming

Mr R Davis

Department of Family Services & Aboriginal and Islander Affairs

Family Court of Australia

Family Law Council

Family Law Practitioners' Association

Ms L Harley

Legal Aid Office (Queensland)

Legal Research Advisory Trust

Mr PW Masters

JP Morain

Mr C Pike

Queensland Law Society

Mr R Sawkins

Mr M Small

Mr M Smith

Dr S Robinson

Professor J Wade

Mr R Warren

Dr D Widdup

Women's Legal Service Inc

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APPENDIX F

DRAFT LEGISLATION

Part I - Preliminary

1.1 Purposes of this Act

The primary purposes of this Act are to -

(a) confer on de facto partners who separate rights to apply for an adjustment of interests in property or for maintenance;

(b) provide declaratory or injunctive relief with respect to existing rights to property;

(c) allow de facto relationships to be regulated by cohabitation and separation agreements;

(d) provide for the declaration of the existence or non-existence of a de facto relationship; and

(e) confer on courts the necessary jurisdiction and power required by this Act.

1.2 Title of this Act

This Act may be cited as the De Facto Relationships Act 1992.

1.3 Commencement

(1) Section 1.2 and this section commence on .
(2) The remaining provisions of this Act commence on .

1.4 Regulations

The Governor in Council may make regulations to promote the purposes of this Act and its administration.

1.5 Definitions *(ss.3 and 44 NSW ; s.275 Vic ; s.3 NT)*

"approved arbitrator" means an arbitrator approved under the regulations.

"approved mediator" means a mediator approved under the regulations.

"child" when used as a "child of the de facto partners" means -

(a) a child born as a result of sexual relations between the de facto partners;

(b) a child of the woman whose de facto partner is presumed, pursuant to the Status of Children Act 1978-1988, to be the father; or

(c) a child adopted by the partners.

"cohabitation agreement" means an agreement between de facto partners, whether or not there are other parties to the agreement -

(a) which is made (whether before, on or after the commencement of this Act) -

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

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

(b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,

and includes an agreement which varies a cohabitation agreement.

"court" means, unless the contrary intention appears, a court conferred with jurisdiction by Part II of this Act.

"de facto partner" means a person who -

(a) is living or has lived with another person whether or not of the same gender on a bona fide domestic basis but is not legally married to the other person; or

(b) has entered into a relationship that is recognised as a traditional marriage by the Aboriginal or Torres Strait Islander community or group to which either person in the relationship belongs.

"disposition" includes a sale or a gift.

"**financial matters**", in relation to de facto partners, means matters with respect to any one or more of the following -

(a) the maintenance of either or both of the partners;

(b) the property of those partners or either of them;

(c) the financial resources of those partners or either of them.

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

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

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

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

(d) any other valuable benefit.

"**private arbitration**" means arbitration by an arbitrator specified by the regulations for the purposes of this definition, other than arbitration carried out as a result of an order made under clause 3.4D.

"**property**", in relation to de facto partners or either of them, includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property.

"**separation agreement**" means an agreement between de facto partners, whether or not there are other parties to the agreement -

(a) which is made (whether before, on or after the commencement of this Act) -

(i) in contemplation of ending a de facto relationship between them; or

(ii) after ending a de facto relationship; and

(b) which makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,

and includes such an agreement which varies an earlier cohabitation agreement or separation agreement.

1.6 Application *(s.6 NSW; s.276 Vic; s.51 NT)*

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

1.7 Other rights of applicant not affected *(s.7 NSW; s.277 Vic; s.51 NT)*

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

Part II - Jurisdiction

2.1 Courts having jurisdiction under this Act *(s.9 NSW; s.297 Vic; s.4 NT)*

Subject to this Act, the following courts shall have jurisdiction to hear and determine any application for an order or relief under this Act -

(a) Supreme Court;
(b) District Courts; or
(c) Magistrates Courts.

2.2 Limit of jurisdiction of District and Magistrates Courts *(s.10 NSW; s.5 NT)*

Except as provided by section 2.3, a District Court or a Magistrates Court shall not have jurisdiction under this Act -

(a) in relation to property, to declare a title or right or adjust an interest; or

(b) to make an order for maintenance,

of a value or amount in excess of the amount prescribed for the time being as the court's jurisdictional limit under the District Courts Act 1967 or the Magistrates Courts Act 1921.

2.3 Transfer of proceedings *(s.12 NSW; s.298 Vic; s.6 NT)*

(1) Where proceedings are instituted in a District Court or a Magistrates Court with respect to an interest in property, being an interest of a value or amount in excess of the court's jurisdictional limit under the District Courts Act 1967 or the Magistrates Courts Act 1921 respectively, the court must transfer the proceedings to a court where the value is within the jurisdictional limit unless -

(a) the parties file a form in accordance with the Rules agreeing to the first-mentioned court hearing and determining the proceedings; and

(b) the interest in property does not exceed twice the jurisdictional limit referred to above.

(2) A court may transfer the proceedings under subsection (1) of its own motion even if the parties agree to the court hearing and determining the proceedings.

(3) Before transferring proceedings, the court may make any orders it considers necessary pending the disposal of the proceedings by the court to which the proceedings are transferred.

(4) If proceedings are transferred to another court, that court must proceed as if the proceedings had been originally instituted in that court.

(5) Without prejudice to the duty of a court to comply with this section, failure by the court to comply does not invalidate any order of the court in the proceedings.

2.4 Staying and transfer of proceedings *(s.11 NSW; s.299 Vic; ss.7 and 8 NT)*

(1) Where there are pending in a court proceedings that have been instituted under this Act by or in relation to a person and it appears to the court that other proceedings that have been so instituted by or in relation to the same person are pending in another court having jurisdiction under this Act, the first mentioned court -

(a) may stay the pending proceedings for such time as it thinks fit; or

(b) may dismiss the proceedings.

(2) Where there are pending in a court proceedings that have been instituted under this Act and it appears to the court that it is in the interests of justice that the proceedings be dealt with in another court having jurisdiction under this Act, the court may transfer the proceedings to the other court.

2.5 Courts to act in aid of each other *(s.13 NSW; s.300 Vic; s.9 NT)*

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

Part III - Proceedings for property adjustment and maintenance

Division 1 - Preliminary

3.1 Prerequisites for making of order - living or having assets in the State, contributions made *(s.15 NSW; s.280 Vic; s.15 NT)*

A court may make an order under this Part only if it is satisfied -

(a) that one or both of the de facto partners lived in Queensland on the day on which an application under this Part was made; and

(b) that -

(i) both partners have lived together in Queensland for at least one year;

(ii) substantial contributions of the kind referred to in section 3.8(1) have been made in Queensland by the partner making the application; or

(iii) a substantial part of the partners' assets or a substantial asset is situated in Queensland.

3.2 Relevant facts and circumstances *(s.16 NSW; s.283 Vic; s.17 NT)*

If a court is satisfied about the matters specified in section 3.1, it may make or refuse to make an order because of facts and circumstances even if those facts and circumstances, or some of them, occurred before the commencement of this Act or outside Queensland.

3.3 Prerequisites for making of order - length of relationship, care of child *(s.17 NSW; s.281 Vic; s.16 NT)*

(1) A court may only make an order under this Part if it is satisfied -

(a) that the de facto partners have lived together in a de facto relationship for a period of at least 2 years, except as provided by subsection (2); or

(b) that the de facto partner is a person who falls within paragraph (b) of the definition of "de facto partner" in clause 1.5.

(2) A court may make an order if it is satisfied -

(a) that there is a child of the de facto partners; or

(b) that the de facto partner who applied for the order -

(i) has made substantial contributions of the kind referred to in section 3.8(1)(a) or (b); or

(ii) has the care and control of a child of the other de facto partner,

and that failure to make the order would result in serious injustice to that de facto partner.

3.4 Prerequisites for making an order - disclosure of financial circumstances *(O.17 Family Court Rules)*

In proceedings under this Part, parties must disclose their financial circumstances in the manner prescribed by the Rules.

3.5 Time limit for making applications *(s.18 NSW; s.282 Vic; s.14 NT; s.44(4)(a) FLA)*

(1) If de facto partners have ended their de facto relationship, an application to a court for an order under this Part must be made within 2 years after the day on which the relationship ended.

(2) A court may grant leave to a de facto partner to apply for an order at any time after the end of the period referred to in subsection (1) if the court is satisfied that hardship would be caused to one of the de facto partners or a child of the de facto relationship if leave were not granted.

3.6 Duty of court to end financial relationships *(s.19 NSW; s.284 Vic; s.36 NT; s.81 FLA)*

So far as is practicable a court must make orders that will end the financial relationships between the de facto partners and avoid further proceedings between them.

Division 2 - Adjustment of property interests

3.7 Application for order to adjust property interests *(s.20 NSW; s.279 Vic; s.13 NT; s.79 FLA)*

(1) After separation, a de facto partner may apply to a court for an order under this Division for adjustment of interests with respect to the property of the de facto partners or either of them for the benefit of either or both of the de facto partners or a child of the de facto partners.

(2) An application may be made under subsection (1) whether or not an application for any other remedy or relief has been made, or may be made, under this Act or any other Act or law.

3.8 Order for adjustment *(s.20 NSW; s.285 Vic; s.18 NT; s.79 FLA)*

(1) A court may make an order with respect to the property of the de facto partners or either of them adjusting the interests of the partners or a child of the de facto partners in the property that seems to it just and equitable having regard to -

(a) the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners or a child of the de facto partners to the acquisition, conservation or improvement of any of the property of the partners or either of them or to the financial resources of the partners or either of them;

(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following -

(i) a child of the partners;

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

(c) the effect of any proposed order upon the earning capacity of either de facto partner;

(d) the matters referred to in section 3.15(2) so far as they are relevant;

(e) any other order made under this Act or under the Family Law Act 1975 (Cwth) affecting a de facto partner or a child of the de facto partners;

(f) any child support under the Child Support (Assessment) Act 1989 (Cwth) that a de facto partner has provided, or is to provide, for a child of the de facto partners;

(g) any liabilities of either or both of the de facto partners.

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

(3) A court may only make an order (other than an order until further order or an order made with the consent of all parties to the proceedings) under this section if -

(a) the parties to the proceedings have attended a conference in relation to the matters in dispute with an officer appointed by the court;

(b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order although the parties to the proceedings have not attended a conference mentioned in paragraph (a); or

(c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference mentioned in paragraph (a).

3.9 Adjournment of application - likelihood of significant change in circumstances *(s.21 NSW; s.286 Vic; s.19 NT; s.79(5) FLA)*

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

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

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

(2) The court may adjourn the application -

(a) at the request of either partner; and

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

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

(4) In forming an opinion as to whether there is likely to be a significant change in the financial circumstances of either or both of the de facto partners a court may have regard to any change in the financial circumstances of a partner that may occur by reason that a partner -

(a) is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme; or

(b) may become entitled to property as the result of the exercise in his or her favour, by the trustee of a discretionary trust, of a power to distribute trust properties.

(5) Nothing in this section -

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

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

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

3.10 Adjournment of application - proceedings in Family Court of Australia *(s.22 NSW; s.287 Vic; s.20 NT)*

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

(2) Adjourned proceedings may be recommenced upon the application of a partner if there is a delay in the proceedings in the Family Court.

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

3.11 Deferment of order *(s.23 NSW; s.288 Vic; s.21 NT)*

If a court is of the opinion that a de facto partner is likely, within a short period, to become entitled to property which may be applied in satisfaction of an order made under section 3.8 the court may defer the operation of the order until the date of the occurrence of the event specified in the order.

3.12 Effect of death of party on application *(s.24 NSW; s.289 Vic; s.22 NT)*

(1) If a party to the application dies before an application under section 3.7 is determined the application may be continued by or against the legal personal representative of the deceased party.

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

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

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

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

3.13 Effect of death of party on order *(s.25 NSW; s.290 Vic; s.23 NT)*

If a party to an application under section 3.7 dies after an order is made in favour of or against that party, the order may be enforced by or against the estate of the deceased party.

Division 3 - Maintenance

3.14 Right of de facto partner to maintenance *(s.26 NSW, s.24 NT)*

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

(2) A de facto partner may apply to a court for an order under this Division for maintenance whether or not an application for any other remedy or relief has been made, or may be made, under this or any other Act or law.

3.15 Maintenance Orders *(s.27 NSW; s.26 NT; ss.72, 74 and 75 FLA*)

(1) A court may make an order for periodic or other maintenance if it is satisfied that the de facto partner applying for the order is unable to support himself or herself adequately whether -

(a) by reason of having the care and control of a child of the de facto partners or a child of the other partner, who has not attained the age of 18 years on the day on which the application is made;

(b) by reason that the partner's earning capacity has been adversely affected by the circumstances of the de facto relationship; or

(c) for any other adequate reason arising from the circumstances of the de facto relationship.

(2) In deciding the amount of maintenance, the court shall have regard to -

(a) the age and state of health of each of the parties;

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;

(c) whether either party has the care or control of a child of the de facto partners or a child of the respondent partner who has not attained the age of 18 years;

(d) commitments of each of the parties that are necessary to enable the party to support -

(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain;

(e) the responsibilities of either party to support any other person;

(f) subject to subsection(3), the eligibility of either party for a pension, allowance or benefit under any law of the Commonwealth, of a State or Territory of the Commonwealth or of another country, and the rate of any such pension, allowance or benefit being paid to either party;

(g) where the parties have separated, a standard of living that in all the circumstances is reasonable;

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

(i) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;

(j) the duration of the de facto relationship;

(k) the extent to which the de facto relationship has affected the earning capacity of the party whose maintenance is under consideration;

(l) the terms of any order made or proposed to be made under section 3.8 in relation to the property of the parties;

(m) if either party is cohabiting with another person, the financial circumstances relating to that cohabitation;

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

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

(3) In making an order a court shall disregard any entitlement of the partner applying for the order to an income tested pension, allowance or benefit within the meaning of the Family Law Act 1975 (Cwth).

3.16 Interim maintenance orders *(s.28 NSW; s.27 NT; s.77 FLA)*

Where it appears to a court that the partner applying for an order under this Division is in immediate need of financial assistance, but it is not practicable in the circumstances to decide immediately if any order should be made, the court may order the other partner to pay to the applicant such periodic or other amounts until the application is determined as the court considers reasonable.

3.17 Specification in orders for maintenance purposes *(s.77A FLA)*

(1) Where -

(a) a court makes an order under this Act (whether or not the order is made in proceedings in relation to the maintenance of a party to a de facto relationship, is made by consent or varies an earlier order), and the order has the effect of requiring -

(i) payment of a lump sum, whether in one amount or by instalments; or

(ii) the transfer or settlement of property; and

(b) the purpose, or one of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of a party to a de facto relationship,

the court shall -

(c) express the order to be an order to which this section applies; and

(d) specify the portion of the payment, or the value of the portion of the property, attributable to the provision of maintenance for the party.

(2) Where -

(a) a court makes an order of a kind referred to in paragraph (1)(a); and

(b) the order -

(i) is not expressed to be an order to which this section applies; or

(ii) is expressed to be an order to which this section applies, but does not comply with paragraph (1)(d),

any payment, transfer or settlement of a kind referred to in paragraph (1)(a), that the order has the effect of requiring, shall be taken not to make provision for the maintenance of a party to the relevant de facto relationship.

3.18 Applications after the death of either party *(s.31 NSW; s.29 NT)*

An application for an order under this Division cannot be continued if either party to the application dies before the application is determined.

3.19 Effect of subsequent relationship or marriage *(cf.s.29 NSW; s.28 NT)*

After separation, except in exceptional circumstances, a court may not make an order under this Division in favour of an applicant who, at the time at which the application is made, has entered into a subsequent de facto relationship or has married or remarried.

3.20 Cessation of maintenance orders - generally *(ss.32 and 34 NSW; ss.30 and 35 NT; s.82 FLA)*

(1) An order under this Division ceases to have effect -

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

(b) subject to subsection (2), on the marriage of the de facto partner in whose favour the order was made.

(2) On application by a de facto partner in whose favour an order under this Division has been made who has married or plans to marry, a court may, if satisfied that exceptional circumstances exist, order that the maintenance order continue to have effect.

(3) Where a de facto partner in whose favour an order under this Division is made marries, he or she must, without delay, notify in writing the de facto partner against whom the order was made of the date of the marriage.

(4) Any moneys paid in respect of a period after the event referred to in subsection (1)(b) may be recovered as a debt due and payable by the de facto partner who has married.

(5) Nothing in this section affects the right to recover arrears due under an order at the time when the order ceased to have effect.

3.21 Cessation of maintenance orders - entry into subsequent de facto relationship

(1) An order under this Division ceases to have effect if -

(a) the de facto partner in whose favour the order was made enters into a subsequent de facto relationship; and

(b) the de facto partner has notified in writing the partner against whom the order is made that the subsequent de facto relationship has been entered into.

(2) On application by a de facto partner in whose favour an order under this Division has been made, who has entered or plans to enter into a de facto relationship, a court may, if satisfied that exceptional circumstances exist, order that the earlier maintenance order continue to have effect.

(3) Where a de facto partner in whose favour an order under this Division is made enters into another de facto relationship, he or she must, without delay, notify the de facto partner against whom the order was made that the subsequent de facto relationship has been entered into and the date it commenced.

(4) Any monies paid in respect of a period after the event referred to in subsection (1)(a) may be recovered as a debt due and payable by the de facto partner who has entered into the subsequent de facto relationship.

(5) Nothing in this section affects the right to recover arrears due under an order at the time when the order ceased to have effect.

3.22 Application for discharge of maintenance order - entry into subsequent de facto relationship

(1) If a de facto partner against whom an order under this Division has been made believes that the other partner has entered into a subsequent de facto relationship, the first-mentioned partner may apply to the court for a discharge of the order.

(2) If the court is satisfied that the de facto partner in whose favour an order under this Division has been made has entered into a subsequent de facto relationship the court shall, subject to subsection (3), discharge the order for maintenance.

(3) Despite being satisfied of the existence of a subsequent de facto relationship, the court may refuse to discharge the order for maintenance if satisfied that exceptional circumstances exist.

(4) Any monies paid in respect of a period after the subsequent de facto relationship was entered into may be recovered as a debt due and payable by the de facto partner who has entered into the subsequent de facto relationship.

(5) Nothing in this section affects the right to recover arrears due under an order at the time the order ceased to have effect.

3.23 Modification of maintenance orders *(s.35 NSW; s.33 NT; s.83 FLA)*

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

(a) subject to subsection (2), discharge the order;

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

(c) revive, wholly or in part, an order suspended under paragraph (b); or

(d) subject to subsection (2), vary the order so as to increase or decrease any amount ordered to be paid or in any other manner.

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

(a) that, since the order was made or last varied -

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

(ii) the cost of living has changed to such an extent,

as to justify its so doing;

(b) in a case where the order was made by consent - that the amount ordered to be paid is not proper or adequate;

(c) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false.

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

(a) the Consumer Price Index (All Groups Index) issued by the Australian Statistician; or

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

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

(5) In satisfying itself for the purposes of subsection (2)(b), the court shall have regard to any payments, and any transfer or settlement of property, previously made by a party to the de facto relationship to -

(a) the other party; or

(b) any other person for the benefit of the other party.

(6) An order decreasing the amount of a periodic sum payable under an order or discharging an order may be expressed to be retrospective to such date as the court considers appropriate.

(7) For the purposes of this section, the court shall have regard to the provisions of section 3.15.

(8) The discharge of an order does not affect the right to recover arrears due under the order at the time as at which the discharge takes effect.

Division 4 - General

3.25 Powers of the court *(s.38 NSW; s.291 Vic; s.37 NT; ss.80 and 114 FLA)*

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

(a) order the transfer of property;

(b) order that a specified transfer or settlement of property be made by way of maintenance for a party to a de facto relationship;

(c) order the sale of property and the distribution of the proceeds of sale in any proportions that the court thinks fit;

(d) order that any necessary deed or instrument be executed and that documents of title be produced or other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;

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

(f) order payment of a weekly, fortnightly, monthly, yearly or other periodic sum;

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

(h) appoint or remove trustees;

(i) make an order or grant an injunction -

(i) for the protection of or otherwise relating to the property or financial resources of the parties to an application or either of them; or

(ii) to aid enforcement of any other order made in respect of an application;

or both;

(j) make an order or grant an injunction in relation to the use or occupancy of the de facto couple's home;

(k) where a de facto partner is the lessee of the home in which the de facto couple have lived and upon separation the other partner wishes to remain in the home, the court may with the consent of the lessor order that the lease be assigned from the lessee to the other partner;

(l) order that payments be made direct to a de facto partner, to a trustee or into court for the benefit of a de facto partner;

(m) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;

(n) impose terms and conditions;

(o) make an order by consent;

(p) make any other order or grant any other injunction which it considers necessary to do justice.

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

3.26 Execution of instruments by order of court *(s.39 NSW; s.292 Vic; s.38 NT; s.84 FLA)*

(1) Where -

(a) a person has refused or neglected to comply with an order directing the person to execute a deed or instrument; or

(b) for any other reason, a court thinks it necessary to do so,

the court may appoint an officer of the court or other person to execute the deed or instrument in the name of a person and to do everything necessary to give validity and operation to the deed or instrument.

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

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

3.27 Orders and injunctions in the absence of a party *(s.40 NSW; s.293 Vic; s.39 NT; O12 Family Law Rules)*

(1) In the case of urgency, a court may, in the absence of a party, make or grant an injunction or other order under this Act.

(2) An application under this section may be made orally or in writing.

(3) The court must not make an order or grant an injunction upon an oral application unless it considers that it is necessary to do so because of the extreme urgency of the case.

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

(5) An order or injunction granted under subsection (1) must be expressed to operate or apply only until a specified time or the further order of the court.

(6) Where a court makes an order or grants an injunction under subsection (1), it may give directions with respect to -

(a) the service of the order or injunction and any other documents it thinks fit; and

(b) the hearing of an application for a further order.

3.28 Variation and setting aside of orders *(s.41 NSW; s.294 Vic; s.40 NT; s.79A FLA)*

If, on the application of a person in respect of whom an order under section 3.8 or section 3.15 has been made, a court is satisfied that -

(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence, failing to disclose financial details as required by this Act or Rules or any other circumstance;

(b) in the circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out;

(c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make a substitute order; or

(d) in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the welfare of a child of the de facto partners, the child or, where the applicant has the custody of the child, the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order,

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

3.29 Transactions to defeat claims *(s.42 NSW; s.295 Vic; s.41 NT; s.85 FLA)*

(1) On an application for an order under this Part a court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order relating to the application or which, irrespective of intention, is likely to defeat any such order.

(2) The court may, without limiting section 3.25, order that any property dealt with by an instrument or disposition referred to in subsection (1) be taken in execution or used or applied in, or charged with the payment of any sums payable under an order adjusting interests with respect to the property of one or more of the parties or for costs as the court directs, or that the proceeds of a sale be paid into court to abide its order.

(3) The court may order a party or a person acting in collusion with a party to pay the costs of any other party or of a purchaser in good faith or other person interested of and incidental to the instrument or disposition and the setting aside or restraining of the instrument or disposition.

3.30 Interests of other parties *(s.43 NSW; s.296 Vic; s.42 NT; s.85(3) FLA)*

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

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

Part IV - Declaring interests in property

4.1 Declaring interests in property (s.8 NSW; s.278 Vic; s.12 NT; s.78 FLA)

(1) In proceedings between de facto partners with respect to existing title or rights in property, a court may declare the title or rights, if any, that a de facto partner or any other party to the proceedings has in respect of that property.

(2) The court may make orders to give effect to the declaration, including orders about possession.

(3) An order under this section is not binding on a person who is not a party to the proceedings.

Part V - Mediation and Arbitration

5.1 Request for mediation *(s.19A FLA)*

(1) A person who is -

(a) a party to a de facto relationship; or

(b) a child of the de facto partners,

and who is not a party to proceedings under this Act, may file in the court, a notice asking for the help of a mediator in settling a dispute to which the person is a party.

(2) Where a notice is filed in a court -

(a) the notice must be dealt with in accordance with the Rules of Court; and

(b) if a mediation service is available at the Registry of the court and the dispute is one that, under the Rules of Court, may be mediated, the Registrar of the court must make arrangements for an approved mediator to mediate the dispute in accordance with the Rules of Court.

(3) In this section "dispute" means a dispute about a matter with respect to which proceedings could be instituted under this Act.

5.2 Court may refer matters for mediation *(s.19B FLA)*

(1) Subject to the Rules of Court, the court may, with the consent of the parties to any proceedings before it under this Act, make an order referring any or all of the matters in dispute in the proceedings for mediation by an approved mediator.

(2) Where a court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make such additional orders as it thinks appropriate to facilitate the effective conduct of the mediation.

(3) Where a court makes an order under subsection (1), the Registrar of the court must make arrangements for an approved mediator to mediate the relevant disputed matter in accordance with the Rules of Court.

(4) Where -

(a) a court makes an order under subsection (1) in relation to any matter in dispute in proceedings before it; and

(b) a party to the proceedings files a notice in the court that the mediation of the matter has ended,

the court may make such orders, or give such directions, as it thinks appropriate in relation to the proceedings.

5.3 Admissions made to mediators *(s.19C FLA)*

Evidence of anything said, or of any admission made, at a conference conducted by an approved mediator, acting as such a mediator, is not admissible in any court in any proceedings before a person authorised by a law or by the consent of the parties, to hear evidence.

5.4 Court may refer proceedings to arbitration *(s.19D FLA)*

(1) In any proceedings under Parts III or IV, the court may, subject to the Rules of Court, make an order referring the proceedings, or any part of them, or any matter arising in them, to an approved arbitrator for arbitration in accordance with the Rules of Court.

(2) A court may make an order under subsection (1) with or without the consent of the parties.

(3) Where a court makes an order under subsection (1), it may, if necessary, adjourn the proceedings and may make such additional orders as it thinks appropriate to facilitate the effective conduct of the arbitration.

(4) Where a court makes an order under subsection (1), the arbitration must be carried out by the approved arbitrator in accordance with the Rules of Court.

(5) A party to an award in an arbitration carried out as a result of an order under this section may register the award, in accordance with the Rules of Court, in the court that made that order and the award, when so registered, has effect as if it were an order made by that court.

5.5 Private arbitration *(s.19E FLA)*

(1) A court having jurisdiction under this Act may, on application by a party to the private arbitration of a dispute, make such orders as the court thinks appropriate to facilitate the effective conduct of the arbitration.

(2) A party to an award made in a private arbitration of a dispute may register the award, in accordance with the Rules of Court, in a court having jurisdiction under this Act and the award, when so registered, has effect as if it were an order made by that court.

(3) The arbitrator must, on application by a party to the arbitration, provide a written statement of reasons for the award.

(4) In this section "dispute" means -

(a) Part III or Part IV proceedings;

(b) any part of such proceedings;

(c) any matter arising in such proceedings; or

(d) a dispute about a matter with respect to which such proceedings could be instituted.

5.6 Review of awards made in private arbitration *(s.19F FLA)*

(1) A party to a registered award made in private arbitration may apply to the Supreme or District Court for review of the award on questions of law.

(2) On a review of an award under this section, the court may -

(a) determine all questions of law arising in relation to the arbitration; and

(b) make such orders as it thinks appropriate, including an order affirming, reversing or varying the award or remitting the award to the arbitrator.

5.7 Review of other awards *(s.19G FLA)*

(1) A party to a registered award made in arbitration carried out as a result of an order made under subsection 5.4(1) may apply to the Supreme or District Court for review of the award.

(2) The court which reviews an award under this section must do so by rehearing the matters to which the award relates and -

(a) must determine, as if for the first time, all questions of fact and law arising in relation to the arbitration; and

(b) may, by order, either confirm the award or make such other award as the Judge thinks appropriate.

5.8 Advice about mediation and arbitration *(s.19J FLA)*

(1) The Registrar of the court must, as far as practicable, on request by a party to a de facto relationship or to proceedings under this Act, advise the party about any mediation or arbitration facilities available in the court and how those facilities are made available.

(2) The Rules of Court must provide for persons who propose to institute proceedings under this Act, and (in appropriate cases) their partners, and other interested persons, to be given a document setting out particulars of any mediation and arbitration facilities available in the court and elsewhere.

5.9 Oath or affirmation by approved mediator *(s.19K FLA)*

An approved mediator must, before starting to perform the functions of such a mediator, make an oath or affirmation of secrecy in accordance with the prescribed form before a person authorised under a law of the State to take affidavits.

5.10 Oath or affirmation by approved arbitrator *(s.19L FLA)*

An approved arbitrator must, before starting to perform the functions of such an arbitrator, make an oath or affirmation in accordance with the prescribed form before a person authorised under a law of the State to take affidavits.

5.11 Protection of mediators and arbitrators *(s.19M FLA)*

An approved mediator, an approved arbitrator, or an arbitrator who carries out a private arbitration, has, in performing the functions of such a mediator or arbitrator, the same protection and immunity as a Judge of the Supreme Court has in performing the functions of such a Judge.

Part VI - Cohabitation and separation agreements

6.1 Validity of agreements *(ss. 45-46 NSW; s.44 NT)*

(1) De facto partners may enter into a cohabitation agreement or separation agreement.

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

(3) A provision in an agreement purporting to exclude the jurisdiction of the court is invalid, but its invalidity does not affect the validity of the rest of the agreement.

6.2 Effect of agreements in proceedings for adjustment of property rights or maintenance orders *(s.47 NSW; s.45 NT)*

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

(a) that there is a cohabitation agreement or separation agreement between the de facto partners;

(b) that the agreement is in writing;

(c) that the agreement is signed by the de facto partners and witnessed by a Justice of the Peace or a solicitor; and

(d) that the agreement contains a statement of all property, financial resources and liabilities of each de facto partner at the date of signing the agreement,

the court may make an order under Part III, but (except as provided by sections 6.3 and 6.4) shall not make an order which is in any respect inconsistent with the provisions on financial matters in the agreement.

(2) Where, on an application by a de facto partner for an order under Part III, a court is satisfied that there is a cohabitation agreement or separation agreement between the de facto partners, but the court is not satisfied as to any one or more of the matters referred to in subsection (1)(b), (c) or (d), the court may make such order as it could have made if there were no cohabitation agreement or separation agreement between the partners, but in making its order, the court, in addition to the matters to which it is required to have regard under Part

III, may have regard to the terms of the cohabitation agreement or separation agreement.

(3) A court may make an order under this section notwithstanding that the cohabitation agreement or separation agreement purports to exclude the jurisdiction of the court to make that order.

6.3 Varying and setting aside agreements *(s.49 NSW; s.46 NT)*

(1) On an application by a de facto partner for an order under Part III, the court may, in the circumstances specified in this section, vary or set aside all or any of the provisions of a cohabitation agreement or separation agreement made between that de facto partner and the other, being an agreement which satisfies the matters referred to in section 6.2(1)(b), (c) and (d).

(2) The court may exercise its powers under subsection (1) in respect of a cohabitation agreement or separation agreement only if, in its opinion, enforcement (whether on the application before the court or on any other application for any remedy or relief under any other Act or law) of the agreement would lead to injustice between the parties.

(3) A court may exercise its powers under subsection (1) notwithstanding any provision to the contrary in a cohabitation agreement or separation agreement.

(4) Nothing in this section deprives a person of any other right to have an agreement set aside or varied.

6.4 Effect of revocation or cessation of agreements *(s.50 NSW; s.47 NT)*

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

(a) that the de facto partners have, by their words or conduct, revoked or consented to the revocation of the agreement; or

(b) that the agreement has otherwise ceased to have effect.

6.5 Effect of death of de facto partner - periodic maintenance *(s.51 NSW; s.48 NT)*

(1) A separation or cohabitation agreement ceases to have effect on the death of a de facto partner who is required to pay periodic maintenance unless the agreement provides otherwise.

(2) A separation or cohabitation agreement ceases to have effect on the death of a de facto partner who is entitled to receive periodic maintenance under the agreement.

(3) Subsections (1) and (2) do not affect the right to recover arrears of periodic maintenance due and payable under an agreement at the time of a partner's death.

6.6 Effect of death of de facto partner - transfer of property and lump sum payments *(s.52 NSW; s.49 NT)*

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

7.1 Enforcement of certain Supreme and District Court orders by Magistrates Court *(s.57 NSW)*

An order for the periodic payment of maintenance made by the Supreme or District Court may be enforced by a Magistrates Court as if it were a judgment of the Magistrates Court.

7.2 Enforcement of orders and injunctions *(s.59 NSW; s.301 Vic; s.42 NT)*

(1) If a court having jurisdiction under this Act is satisfied that a person has knowingly and without reasonable cause contravened or failed to comply with an order made or injunction granted under this Act (not being an order for the payment of money), the court may -

(a) order the person to pay a fine not exceeding X penalty units;

(b) require the person to enter into a recognisance, with or without sureties, in such reasonable amount as the court thinks fit, that the person will comply with the order or injunction, or order the person to be imprisoned until the person enters into such a recognisance or until the expiration of 3 months, whichever first occurs;

(c) order the person to deliver up to the court such documents as the court thinks fit;

(d) appoint an officer of the court or other person to execute any document in the name of a person; and

(e) make any other order that the court considers necessary to enforce compliance with the order or injunction.

(2) Nothing in subsection (1) affects the power of a court to punish a person for contempt of court.

(3) Where an act or omission referred to in subsection (1) is an offence against any other law, the person committing the offence may be prosecuted and convicted under that law, but nothing in this section renders any person liable to be punished twice in respect of the same offence.

7.3 Rules of Court *(s.60 NSW; s.123 FLA)*

For the purpose of regulating any proceedings under this Act in or before the Supreme, District or Magistrates Courts, Rules of Court may be made under the Supreme Court Act 1921, District Courts Act 1967 and Magistrates Courts Act 1921 respectively, for or with respect to any matter that is required or permitted to be prescribed by this Act or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

7.4 Declaration as to existence or non-existence of de facto relationship *(s.56 NSW; ss.10 and 11 NT)*

(1) A person -

(a) who alleges that a de facto relationship exists or has existed between himself or herself and another named person; or

(b) whose pecuniary interests, or whose rights or obligations at law or in equity, are affected according to whether a de facto relationship exists or has existed between two other persons,

may apply to the Supreme or District Court for a declaration as to the existence of such a de facto relationship.

(2) If on an application under subsection (1), it is proved to the satisfaction of the court that a de facto relationship exists or has existed or does not exist or did not at a particular time or during a particular period exist (whether or not it previously or subsequently existed), the court may make a declaration (which shall have effect as a judgment of the court) that persons named in the declaration have or have had a de facto relationship or are not in, or were not at a particular time or during a particular period in, a de facto relationship.

(3) Where the court makes a declaration under subsection (2), it shall state in its declaration that the de facto relationship existed or did not exist -

(a) at a date specified in the declaration; or

(b) between dates specified in the declaration,

or both.

(4) Where any person whose interests would, in the opinion of the court, be affected by the making of a declaration under subsection (2) is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of an application under subsection (1), the court may, if it thinks that person ought to be

present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.

(5) A declaration may be made under subsection (2) whether or not the person or either of the persons named by the applicant as a partner or partners to a de facto relationship is alive.

(6) While a declaration made under subsection (2) remains in force, the persons named in the declaration shall, for all purposes, be presumed conclusively to have had (or as the case may be not to have had) a de facto relationship as at the date specified in the declaration or between the dates so specified, or both, as the case may require.

(7) Where a declaration has been made under subsection (2) and, on the application of any person who applied or could have applied for the making of the declaration or who is affected by the declaration, it appears to the court that new facts or circumstances have arisen that have not previously been disclosed to the court and could not by the exercise of reasonable diligence have previously been disclosed to the court, the court may make an order annulling the declaration, and the declaration shall thereupon cease to have effect, but the annulment of the declaration shall not affect anything done in reliance on the declaration before the making of the order of annulment.

(8) Where any person whose interests would, in the opinion of the court, be affected by the making of an order under subsection (7) is not present or represented and has not been given an opportunity to be present or represented, at the hearing of an application made under that subsection, the court may, if it thinks that person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given an opportunity to be so present or represented.

(9) Where the court makes an order under subsection (7) annulling a declaration made under subsection (2), it may, if it thinks that it would be just and equitable to do so, make such ancillary orders (including orders varying rights with respect to property or financial resources) as may be necessary to place as far as practicable any person affected by the annulment of the declaration in the same position as that person would have been in if the declaration had not been made.

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