

The Proprietary Consequences of Loving and Living Together

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Introduction

Tasmania has recently followed a strong legislative trend across Australia to elevate the legal rights of heterosexual and same sex de facto couples to the same level as their married counterparts by enacting the *Relationships Act 2003* (Tas) (*Relationships Act*).¹ This legislation repealed the *De Facto Relationships Act 1999* (Tas) which had previously provided a legislative framework for property adjustment for separating de facto couples.² Unlike the previous legislation, the *Relationships Act* applies not only to heterosexual, but also to same sex couples, and provides them with equal rights to their heterosexual counterparts.³ Moreover, the act expands the rights of de facto couples by providing them with a voluntary process by which they can achieve legal recognition of their relationships.⁴

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¹ The Act received assent on 17 September 2003. The impetus for this legislation was an inquiry into issues associated with the legal recognition of significant personal relationships and the inclusion of same sex relationships in the De Facto Relationships Act. This Inquiry was conducted by the Joint Standing Committee on Community Development. The resultant report, the Joint Standing Committee on Community Development, Parliament of Tasmania, *Report on the Legal Recognition of Significant Personal Relationships* (2001) was released on 19 December 2001. The Inquiry and Report were discussed in Hardy and Middleton, 'Legal Recognition of Significant Personal Relationships in Tasmania' (2001) 20 (2) *University of Tasmania Law Review* 159.

² The *De Facto Relationships Act 1999* (Tas) enabled a court to make an order for property settlement for parties in a 'de facto relationship' which had been defined in section 4 as 'the relationship between a man and a woman who, although not legally married to each other, live together on a genuine domestic basis as husband and wife'. This Act commenced on 1 June 2000 and continues to apply to de facto couples that separated prior to the commencement of the *Relationships Act 2003* (Tas) on 1 January 2004. The *Relationships Act* also rescinds the *De Facto Relationship Regulations 2000* (Tas).

³ *Relationships Act 2003* (Tas) s 4(1) definition of 'significant relationship'.

⁴ By the registration of a deed of relationship with the Registrar of Births, Marriages and Deaths, *Relationships Act 2003* (Tas) Part 2.

This legislation resulted in Tasmania becoming the first jurisdiction in Australia to introduce a system of registration to provide formal legal recognition of a de facto relationship. This has been referred to as the 'opt in' facility of a registered partnership.⁵ This legislative model contrasts with the current model in all other Australian jurisdictions, where statutes attach legal obligations to de facto relationships, with the availability of an 'opt out' facility, in the form of a cohabitation agreement, if parties wish to withdraw from the legislative provisions.⁶ Significantly the Tasmanian legislation offers unmarried couples the best of both worlds. They can register their relationship to ensure that there is no need to establish the existence of their relationship in the event of separation, as is the case for married couples under the *Family Law Act 1975*(Cth).⁷ However if they have not registered their relationship, there are legislative provisions that the court will follow to determine their property adjustment, provided that the applicant has established the existence of the relationship and certain pre-requisites.⁸ This legal recognition of de facto relationships, at State level, results in important consequences for Tasmanian de facto couples. The legislation allows in some cases equivalent, and in other cases almost equivalent, legal rights to married couples in a range of situations.⁹

⁵ South Australia is considering whether to introduce a similar system of registration. The *Relationships Bill 2005* (SA) was introduced into the lower house, the House of Assembly, in the South Australian parliament on 25 May 2005. The terms 'opt in' and 'opt out' facilities were derived from Rebecca Bailey-Harris, 'Dividing the Assets of the Unmarried Family – Recent Lessons from Australia' (2000) *International Family Law* 90, 90.

⁶ All State and Territory de facto property legislation, except in Victoria, provides for this opt out facility. See *Property Law Act 1974* (Qld) s 270, *Family Court Act 1997* (WA) s 205Z0, *De Facto Relationship Act 1996* (SA) s 5, *Property (Relationships) Act 1984* (NSW) s 45, *De Facto Relationships Act 1991* (NT) s 44.

⁷ *Relationships Act 2003* (Tas) Part 2.

⁸ Section 37, the parties must have resided together for two years, or there is a child of both parties, or the applicant has made substantial contributions or has the care and control of a child of the respondent and failure to make an order would result in serious injustice. Under Part 6 of the *Relationships Act 2003* (Tas) a couple can enter into a personal relationship agreement or separation agreement if they wish to contract out of the *Relationships Act* and provide themselves as to how their property will be divided, in the event of separation.

⁹ The *Relationships (Consequential Amendments) Act 2003* (Tas) makes consequential amendments to enable de facto and same sex couples to claim the same entitlements as married couples under all relevant Tasmanian legislation, for example, the *Administration and Probate Act 1935*, *Duties Act 2001*, *Evidence Act 2001*, *Fatal Accidents Act 1934*, *Retirement Benefits Act 1993*, *Testator's Family Maintenance Act 1912*, and the *Workers Rehabilitation and Compensation Act 1988*. However, under s 20 of the *Adoption Act 1988* (Tas) step-parents can adopt their partner's children, however same sex couples do not have rights to general placement adoption.

The *Relationships Act* has been passed at a time when many other States and Territories in Australia have also enacted legislation to recognise de facto relationships, including same sex, and to remove the discrimination that previously existed against them.¹⁰ Further, at the federal level, the government has recently legislated to grant same sex partners the right to concessionally taxed Commonwealth superannuation entitlements upon the death of their partner.¹¹

These developments mirror the changes that are occurring in the nature of relationships in Australian society. There is a growing trend for couples to live together prior to marriage and for some to remain in de facto relationships and never marry. In 2001 12% of all couple families were in de facto relationships, an increase of 6% from 1986. The proportion of couples who chose to live together before marriage also increased by 26% from 1986 to 2001.¹² Similarly, there has been a rise in the number of same sex couples, in 2001 there were 37 800 persons in same sex de facto relationships, double the number than in 1996.¹³

Although these recent legislative developments improve the legal situation of de facto couples at State level, unfortunately, they also add to an already inconsistent, complex and confusing legal situation around Australia. For example, every State and Territory in Australia currently has separate legislation dealing with de facto property rights. This confusion is compounded because legislation in all States and Territories

Under s10C of the *Status of Children Act 1974* they also do not obtain the benefit of a presumption of parenthood for the same sex partners of women who conceive through fertilisation procedures.

¹⁰ See for example, *Discrimination Law Amendment Act 2002* (Qld), *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT), *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* (ACT), *Sexuality Discrimination Legislation Amendment Act 2004* (ACT), *Parentage Act 2004* (ACT), *Acts Amendment (Lesbian and Gay Law Reform) Act 2001* (WA), *Commonwealth Powers (De Facto Relationships) Bill 2003* (WA), *Statutes Amendment (Equal Superannuation Entitlements for Same Sex Couples) Act 2003* (SA).

¹¹ Section 27AAB *Superannuation Industry (Supervision) Act 1993* (Cth) and section 36 the *Income Tax Assessment Act 1936*(Cth).

¹² And the marriage rate declined from 7.2 to 5.3 marriages per 1,000 people over the same period. De facto relationships also remain more common among couples without children (17% in 2001), than couples with children (9%). Australian Bureau of Statistics, *Australian Social Trends, Family and Community - Living arrangements: Changing families* (2003), 4 available at <http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/ea563423fdbffd30ca256d39001bc33c!OpenDocument>>.

¹³ Australian Bureau of Statistics, *Marriages and Divorces in Australia* (26 November 2003) 5 at <http://www.abs.gov.au/ausstats/abs@.nsf/0/893c1288678fd232ca2568a90013939c?OpenDocument>>; N Bitá, 'Out, proud and parents', *The Australian*, 16 July 2002, 9, reporting unpublished data from the Australian Bureau of Statistics 2001 Census.

includes same sex couples, except South Australia, which is currently moving to correct this anomaly.¹⁴

This article will examine the Tasmanian legislation and the legal rights that it provides to de facto couples in comparison to the property rights of married couples, contained in the *Family Law Act*. It will also compare and contrast the Tasmanian legislation with the various de facto property statutes around Australia. Collectively, these various pieces of legislation will be categorised, according to the rights that they devolve and the pre-requisites that must be satisfied to access them. This article will illustrate that the Tasmanian legislation comes the closest to achieving equality before the law for de facto couples at State and Territory level. However, due to the importance of federal law to the overall rights of Australian citizens, this legislation still falls short of achieving true equality before the law for separating de facto couples.¹⁵

The contrasting policy arguments will be examined as to whether legal marriages as opposed to de facto relationships should continue to imply unique commitments and consequently devolve higher level legal rights to its participants. In the alternative, should the parties within de facto relationships be accorded the same level of legal rights and obligations as their married counterparts? A strong argument will be mounted that the Federal Government must accept referrals of power from all States and Territories in relation to de facto property adjustment, for both heterosexual and same sex de facto couples, as these couples are entitled to achieve true equality before the law.

¹⁴ The Relationships Bill 2005 (SA) was introduced into the lower house, the House of Assembly, in the South Australian parliament on 25 May 2005. This Bill seeks to provide a system of legal recognition of de facto relationships, including same sex relationships and caring relationships such as where one person provides domestic support and care for another. In this respect it mirrors the Tasmanian legislation. The Bill has been adjourned for debate. The Statutes Amendment (Relationships) Bill 2004 (SA) was read for the first time in the Legislative Council on 1 June 2005. The purpose of the Bill is to 'amend various Acts to make provision for same sex couples to be treated on an equal basis with opposite sex couples...' It seeks to amend legislation in various areas of the law such as domestic violence, family provision, stamp duties, superannuation and succession law.

¹⁵ For example, separating de facto couples do not obtain the benefit of provisions contained in Part VIII B of the *Family Law Act 1975* (Cth) which allow the court to make orders to split a party's superannuation entitlements into two separate funds upon separation. The Western Australian Parliament has sought to pass a Bill, the Commonwealth Powers (De Facto Relationships) Bill 2003 (WA), that would have enabled the Commonwealth Parliament to legislate to give the Family Court of Western Australia the same jurisdiction and powers in relation to de facto partners as it now has in relation to married couples under the superannuation-splitting arrangements in the *Family Law Act*. However, the Bill lapsed on 23 January 2005.

Relationships recognised under the *Relationships Act 2003* (Tas)

The *Relationships Act* provides for the recognition and registration of two different types of domestic arrangements. The first type of arrangement, and the subject of this article, is a couple in a ‘significant relationship’ which describes a heterosexual or homosexual couple.¹⁶ The second type of arrangement, a ‘caring relationship’ concerns the situation where one adult is providing another with domestic support and personal care.¹⁷ The legislation then groups both types of arrangements under the collective term ‘personal relationships’.¹⁸ Terminology such as ‘husband’, ‘wife’ and ‘de facto’ are then simply replaced with the collective term, ‘partner’.¹⁹

If the parties have registered their relationship, there is no requirement that they have lived together for any particular period of time.²⁰ However where they have not, and a party makes a property application, the applicant will need to establish a personal relationship ‘for a continuous period of two years’.²¹ The court then must ascertain whether a ‘significant relationship’ existed.²²

A comparison between the *Relationships Act* and the *Family Law Act 1975* (Cth)

The *Relationships Act* provides a legislative scheme to resolve disputes about property settlement and maintenance in the event that a de facto couple has separated.²³ The factors that the court must take into account

¹⁶ *Relationships Act 2003* (Tas) s 4.

¹⁷ And is not a paid carer or a person providing such support on behalf of an organisation or charity. *Relationships Act 2003* (Tas) s 5.

¹⁸ *Relationships Act 2003* (Tas) s 6. Couples who separated prior to the commencement of the Act on 1 January 2004 (the day it was proclaimed) are not covered by this Act. Similar definitions are proposed in the *Relationships Bill 2005* (SA).

¹⁹ *Relationships Act 2003* (Tas) s 3.

²⁰ Section 37(3).

²¹ Or that there was a child of the relationship, or that the applicant made substantial contributions, or has the care and control of the respondent’s child and failure to make an order would result in serious injustice, ss 37(1) and (2).

²² Section 4(3) contains a list of indicators, including the duration of the relationship, the nature and extent of common residence, whether or not a sexual relationship existed and the degree of financial dependence or interdependence. These indicators have been derived from and are identical to those set out in the *Property (Relationships) Act 1984* (NSW) s 4.

²³ Part 5 – Proceedings for Financial Adjustment and Maintenance. Note that in the previous legislation, under the *De Facto Relationships Act 1999* (Tas) an application for maintenance could also be made.

are set out in section 40(1).²⁴ These factors are identical to the previous provisions of the *De Facto Relationships Act 1999*, however, they can be compared and contrasted with those of the Commonwealth legislation applicable to married couples, the *Family Law Act 1975* (Cth).

The provisions of the Tasmanian legislation closely mirror those of the *Family Law Act* in that a court can take into account financial and non-financial contributions made directly or indirectly by or on behalf of either or both parties to the acquisition, conservation or improvement of any property.²⁵ It can also take into account contributions made in the capacity of homemaker or parent,²⁶ the financial resources of the parties²⁷ and their future economic needs.²⁸ It is interesting to note that the homemaker/parent provision is wider than that set out in the *Family Law Act* which covers only contributions made in relation to 'any children of the marriage'.²⁹ The Tasmanian provision includes contributions made regarding 'a child accepted by either or both the partners into the household of the partners, whether or not the child is a child of either of the partners'.³⁰

The Tasmanian legislation includes some provisions that appear to extend beyond the common law established by judicial decisions under the *Family Law Act*. The legislation sets out that the court can take into account the nature and duration of the relationship³¹ and whether the partner's earning capacity has been adversely affected by the circumstances of the relationship.³² It could be argued that this goes further than the *Family Law Act* provisions where the 'nature of the relationship' is not expressly mentioned and the words 'adversely affected' are also not included.³³

²⁴ A person wishing to make an application to the court must do so within two years of the date of separation, s 38(1). The court has the discretion to grant leave to apply out of time in section 38(2), if the applicant will suffer greater hardship if leave was not granted, than they would if leave were granted.

²⁵ Section 40(1)(a).

²⁶ Section 40(1)(c). Almost equivalent to *Family Law Act 1975* (Cth), s 79(4)(c).

²⁷ Section 40(1)(b).

²⁸ Section 47. This is identical to *De Facto Relationships Act 1999*, s 23 except for the reference to 'partner' instead of 'de facto partner' and 'personal relationship' in place of 'de facto relationship'.

²⁹ *Family Law Act 1975* (Cth) s 79(4)(c).

³⁰ *Relationships Act* s 40(1)(c)(ii).

³¹ Section 40(1)(d).

³² Section 47(1)(a).

³³ *Family Law Act 1975* s 75(2)(k).

This provision has the potential to give parties broader rights than those provided for under the *Family Law Act*. It could apply, for example, to the situation where there has been serious violence during the relationship that has impacted upon the victim's capacity to work. Consider the case of *In the Marriage of Kennon*.³⁴ Here it was stated that violence is only relevant to the issue of contributions in property adjustment where there has been a course of violent conduct during the marriage which has been demonstrated to have had a significant adverse impact upon the victim's contributions to the marriage. This has been interpreted to mean that the violence resulted in the victim's contributions under s 79 of the *Family Law Act* being more arduous.³⁵

Further factors set out in section 47(2) virtually mirror the *Family Law Act* provisions, apart from a few notable exceptions.³⁶ The Tasmanian Act has deleted s 75(2)(na) of the *Family Law Act*, which provides that any child support that a party must pay is relevant. It has also deleted s 75(2)(l) which stipulates that the need to protect a party who wishes to continue in their role of parent, is relevant. However, these provisions appear to be caught under other sections of the *Relationships Act*.³⁷ It is curious that the term 'maintenance of a child' has been included in section 47(2)(e), rather than the term 'child support' as appears in the *Family Law Act*, as the majority of children are now covered by the child support scheme.³⁸

It is interesting to note that the Tasmanian legislation has deleted the provision, 'if either party is cohabitating with any other person – the financial circumstances relating to the cohabitation.'³⁹ However, if a party

³⁴ (1997) FLC 92-757.

³⁵ *Ibid*, 84, 284.

³⁶ *Family Law Act 1975* (Cth), s75 (2).

³⁷ The court must take into account the financial needs and obligations of each partner, s 47(2)(b), the responsibilities to support any other person, s 47(2)(c), and any payments providing for the maintenance of a child in the care and control of either partner, s 47(2)(e).

³⁸ Child maintenance under the *Family Law Act* is a concept only relevant to a minority of Australian children, as most are now covered by administrative assessments of child support. The children who remain covered by the child maintenance provisions under the *Family Law Act* are children born prior to 1 October 1989 or whose parents separated before that time, s 20 *Child Support (Assessment) Act 1989* (Cth), adult children claiming maintenance under s 66L, *Family Law Act*, applications against step parents under s 66D, *Family Law Act*, applications for child bearing expenses under s 67B, *Family Law Act* and applications where the liable parent or child are overseas.

³⁹ Section 75 (2)(m) *Family Law Act*.

is supporting another person in a new relationship this can be taken into account.⁴⁰

Significantly, the *Relationships Act* provides that parties can apply for the equivalent of the *Family Law Act* term 'spousal maintenance' provided that the applicant cannot support himself or herself adequately, due to the factors set out in section 47.⁴¹ Entering into a new relationship disentitles a party to apply for maintenance under the Tasmanian legislation.⁴² This is stricter than the situation under the *Family Law Act* where, if a person is living with a new partner, they can still apply for spousal maintenance, however, the financial circumstances relating to their cohabitation can be taken into account.⁴³ Section 48 of the *Relationships Act* enables interim or urgent applications for maintenance to be made, and is identical to s 77 of the *Family Law Act*.⁴⁴

Consistent with a general policy around Australia promoting private ordering, the legislation provides a couple with the ability to contract out of the provisions of the Act.⁴⁵ A couple can enter into a 'personal relationship agreement' or a 'separation agreement'. This is similar to provisions in de facto legislation in other States.⁴⁶ The court must uphold such an agreement, provided that the agreement was in writing, signed by both parties and both had comprehensive and independent legal advice.⁴⁷

Comparison of *Relationships Act* with legislation in other States and Territories

⁴⁰ *Relationships Act 2003* (Tas), s 47 (2)(c) outlines that the 'responsibilities of either partner to support any other person' are relevant.

⁴¹ This is wider than the provisions of the *Family Law Act* where an application for spousal maintenance can only be made under s 72 provided that the applicant cannot support himself or herself as they have the care and control of a child of the marriage under 18, or by reason of age or physical or mental incapacity or for any other adequate reason. The matters that the court must take into account are set out in s 75(2).

⁴² If a party has formed a new 'personal relationship' or married a new partner they are not entitled to apply for spousal maintenance, s 49.

⁴³ *Family Law Act 1975*, s 75 (2)(m).

⁴⁴ The *Relationships Act* also provides that a maintenance order is terminated by the death of either partner, or upon marriage or entering into of a deed of relationship with a new partner, s 50.

⁴⁵ In Part 6. This policy promoting private ordering has been referred to in Bailey-Harris, above n 5, 90.

⁴⁶ For example, s 45 of the de facto legislation in New South Wales, the *Property (Relationships) Act 1984* (NSW) and s 270 of the *Property Law Act 1974* (Qld).

⁴⁷ Section 62. Section 61 also states that such an agreement is subject to, and enforceable, in accordance with the law of contract.

Across Australia, the various approaches of the States and Territories can be categorised into three different groups according to the range of factors that a court can take into account and the pre-requisites that must be satisfied to access the de facto property legislation.⁴⁸

In Queensland, Western Australia, the Australian Capital Territory and Tasmania the various pieces of legislation are modeled on the *Family Law Act* to the extent that the court can take into account the parties' financial and non-financial contributions, their present and future economic needs, and contributions as a homemaker and parent. However, in this group, Queensland is the only jurisdiction that does not replicate the *Family Law Act* rights to the equivalent of spousal maintenance, in the appropriate circumstances.

In Queensland, Western Australia and the ACT, couples must usually have resided together for two years, or have a child of the relationship, or one party has made substantial contributions.⁴⁹ In Tasmania, if there is a registered deed of relationship, there is no duration of cohabitation requirement. However, if the parties had not registered a deed, the duration of relationship requirements are the same as in the other three jurisdictions.⁵⁰ In all jurisdictions, apart from Western Australia, where the Family Court of Western Australia has power to deal with the application, a property application must be taken to a State or Territory court.

In the second group, in New South Wales, Victoria and the Northern Territory, for property adjustment, the court does not have the power to take into account the parties' future economic needs. It can only have regard to financial and non-financial contributions to the property or financial resources of the parties and the homemaker and parent contributions made by the parties to their child or a child of either party.⁵¹ This legislation is narrower than the *Family Law Act*. However, this group is not consistent in relation to maintenance rights. The New South Wales and Northern Territory legislation provides for 'spousal' maintenance rights and in this regard the court can take into account future economic needs, however, the Victorian legislation does not

⁴⁸ This approach has been derived from the approach taken by Willmott, Mathews, and Shoebridge, 'Defacto relationships property adjustment law – A national direction.' (2003) 17 *Australian Journal of Family Law* 1.

⁴⁹ *Property Law Act 1974* (Qld) ss 291-2, 297-309; *Family Court Act 1997* (WA) s 205Z; *Domestic Relationships Act 1994* (ACT) s 12.

⁵⁰ *Relationships Act* s 37.

⁵¹ *Property Relations Act 1984* (NSW) s 20 (1); *Property Law Act 1958* (VIC) s 285; *De Facto Relationships Act 1991* (NT) s 18.

provide for any possible maintenance application.⁵² Further, the Victorian legislation is the only statute that does not provide for the 'opt out' facility of a cohabitation agreement.⁵³

South Australia is the sole member of the third group. In relation to property adjustment, it falls between the other two groups, as the court can consider financial and non-financial contributions, financial resources, homemaker and parent contributions and 'other relevant matters.'⁵⁴ This is a wider situation than in New South Wales, Victoria and the Northern Territory with the court given greater scope as to what it can take into account. However, in many other respects, South Australia has devolved to its separated de facto couples the narrowest category of rights in Australia. There is no right to apply for maintenance and it is the only State in which the legislation has, to date, excluded same sex couples. However, a Bill introduced into the South Australian Parliament on 25 May 2005 seeks to include a same sex couple under a new term 'significant relationship', mirroring the Tasmanian legislation.⁵⁵

Under the South Australian legislation, an application can only be made after separation if the relationship was for a period of three years or there was a child of the relationship in question.⁵⁶ In addition, the application must be made within one year of the date of separation, unless serious injustice would result.⁵⁷ These provisions are much stricter than in other jurisdictions. In all other States and Territories the parties need to have resided together for two years, unless they have a child together. In all other jurisdictions, except Western Australia, parties are generally allowed a period of two years from the date of separation to make an application.⁵⁸

⁵² *Property (Relationships) Act 1985* (NSW) s 27; *De Facto Relationships Act* (NT) s 26.

⁵³ Bailey-Harris, above n 5, 90.

⁵⁴ *De Facto Relationships Act 1996* (SA) s 11(1)(d). The court will consider these same factors under the proposed Relationships Bill 2005 (SA).

⁵⁵ The Relationships Bill 2005 (SA). Section 4 states that 'a significant relationship is a relationship between 2 adult persons.' This Bill does not contain any rights to maintenance for de facto spouses.

⁵⁶ *De Facto Relationships Act 1996* (SA) s 9(2). The same period is required under the Relationships Bill 2005, s 23(2).

⁵⁷ *De Facto Relationships Act 1996* (SA) s 9(3). There is the same requirement under the Relationships Bill 2005, s 23(5).

⁵⁸ There is a one year requirement in Western Australia, *Family Court Act 1997* (WA) s 205ZB.

Regard that state courts will have to the Family Court approach to property adjustment

The unequal position in relation to the rights of de facto couples around Australia is illustrated by comparing the way in which different State courts interpret their legislation. For example, a comparison of the approaches of the Queensland and New South Wales Supreme Courts can be useful to highlight the different outcomes that can result.

On 3 October 2003, Mr Justice Mullins in the Supreme Court of Queensland in the case of *E v S*, delivered the first reported case in Queensland regarding the principles applicable to property adjustment under the *Property Law Act 1974* (Qld).⁵⁹ This judgement is instructive, as it sets out that, in determining de facto property adjustment, the Supreme Court in Queensland will have regard to Family Court case law decisions under the *Family Law Act*. Mullins J explained the Court's approach:

Amongst the objectives of the introduction of Part 19 into the *Property Law Act 1974* (Qld) in 1999 was the objective to facilitate a just and equitable property distribution at the end of a de facto relationship in relation to the de facto partners, rather than leave de facto couples to rely on the law of contract, trusts, unconscionable conduct, estoppel or other legal remedies which often gave rise to uncertainty as to the outcome of the dispute. ... The provisions in that proposed legislation dealing with when the court can alter interests in property on the breakdown of a de facto relationship were modeled closely on the equivalent provisions of the *Family Law Act 1975* (Cth), as are the provisions of Part 19 of the PLA. It is therefore appropriate to have regard to the authorities that have considered the equivalent provisions in the *Family Law Act 1975* (Cth) such as *Mallet v Mallet* (1984) 156 CLR 605.⁶⁰

This approach was confirmed in the case of *S v B*⁶¹ which made clear that Queensland courts will apply the Family Court approach to de facto property cases and will use an identical process to arrive at their final property adjustment. This process is firstly, to identify and value the property of the parties and secondly, to evaluate the financial, non-financial and homemaker and parent contributions that each of the parties made to the overall property.⁶² The court will then finally evaluate matters similar to those set out in section 75(2) of the *Family Law Act*, relating to future economic needs such as the financial circumstances of

⁵⁹ [2003] QSC 378.

⁶⁰ *Ibid*, 30.

⁶¹ [2004] QSC 80.

⁶² *Property Law Act 1974* (Qld) ss291-292.

the parties, their age and state of health and their responsibilities to support any other persons.⁶³

This approach can be contrasted with the position of the New South Wales Supreme Court in interpreting its much narrower legislation. Section 20 of the *Property (Relationships) Act 1984* (NSW) provides that

a court may make such order adjusting the interests of the parties in the property as to it seems just and equitable having regard to financial and non-financial contributions by the parties to the acquisition, conservation or improvements of the property or financial resources of either of them and homemaker or parent contributions.

In the case of *Evans v Marmont*,⁶⁴ the majority of the court interpreted this section strictly and held that when the court is deciding what type of property order is just and equitable, it should predominantly focus on the types of contributions outlined in section 20. However, the majority added that that the court could also consider the financial circumstances of the parties, the means and needs of the parties as subsidiary factors for the purpose of deciding what is just and equitable, the length of the relationship, any promise or future expectations of marriage and any opportunities lost by one party by reason of their contribution.

In that case, the court then allowed the appeal of the wife and took into account the parties' plan for retirement when deciding on the appropriate property adjustment. The evidence presented was that, during the course of the relationship, the parties had agreed that the husband would use his income to build up savings and investments for mutual future benefit and that the wife would use her income for household and living expenses. This was with the joint intention that, upon retirement, the wife would be left with limited assets and be entitled to a pension that both could benefit from. The Court of Appeal increased the wife's property adjustment from \$110,000 to \$175,000, to take into account the wife's resultant unfavourable financial position.

Therefore the factors that the court can take into account in New South Wales are far more limited than those in Queensland. Factors set out in the Queensland legislation that the New South Wales court may consider include, the effect of the proposed property order on the earning capacity of either party, any child support or maintenance that a party is paying for

⁶³ Outlined in *Property Law Act 1974* (Qld) ss 293-309. The family law cases in which this approach has been enunciated include *Mallett v Mallet* (1984) 156 CLR 605 and *Ferraro and Ferraro* (1993) FLC 92-335.

⁶⁴ (1997) DFC 95-184.

a child, the age and state of health of the parties, and the standard of living that is reasonable for each party in the circumstances.

A comparison of the positions in Queensland and New South Wales demonstrate the inequity of the present situation; different statutes around Australia devolving different levels of rights in similar circumstances. In one jurisdiction a party, particularly a party who is in a poorer financial position at separation, may be entitled to a lesser property adjustment than in another jurisdiction due to the failure of the more restrictive legislation to take into account present and future economic needs.

The referral by States and Territories of de facto property adjustment power to the Commonwealth

On 8 November 2002 a meeting of the Standing Committee of Attorneys-General (SCAG) in Fremantle agreed to refer power to the Commonwealth in relation to de facto property adjustment.⁶⁵ However, at the time of writing, only four jurisdictions have passed the appropriate referral legislation.⁶⁶ As agreed at the SCAG meeting in 2002, all pieces of legislation refer power to the Commonwealth under two separate property headings, those concerning heterosexual de facto couples and those concerning same sex de facto couples. This is to allow the Commonwealth to accept referrals and to legislate in relation to heterosexual couples only.⁶⁷

The Government has made it clear that they will accept a heterosexual, however, not a same sex referral of power from the States and Territories.⁶⁸ A spokesman on behalf of the Government has stated, 'The

⁶⁵ The Attorney-General, Commonwealth of Australia, 'Commonwealth Wins De Facto Property Powers' (Press Release, 8 November 2002) 1.

⁶⁶ The *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW) (assented to on 23 October 2003), *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic), the *Commonwealth Powers (De Facto Relationships) Bill 2003* (Qld) and *De Facto Relationships (Northern Territory Request) Act 2003* (NT) (assented to on 7 January 2004) all refer power to the Commonwealth in relation to property issues on the breakdown of de facto relationships. Other States, such as South Australia, have stated that they have no present plans to refer their power over de facto property adjustment to the Commonwealth, Letter from The Hon Michael Atkinson MP, The Attorney-General, South Australia to Donna Cooper, Faculty of Law, QUT, 21 July 2004.

⁶⁷ A Hodge, 'Family court bias is 'homophobic'', *Weekend Australian*, 27-28 July 2002, 7. 'Gay couples left out of court shift', *The Age* (Melbourne), 8 March 2002, 1.

⁶⁸ *Ibid.* At the time of writing the Family Law (De Facto Relationships) Amendment Bill is proposed to be introduced by the Federal Government in the 2005 Spring sittings. This Bill proposes to amend the Family Law Act 1975 (Cth) to implement the referrals of power over de facto property adjustment by the States and Territories. *Legislation Proposed for Introduction in the Spring Sittings* at <http://www.pmc.gov.au/parliamentary/docs/proposed_legislation.doc>.

Commonwealth regards same-sex couples as being in a different situation to heterosexual couples.⁶⁹ This policy position is consistent with recent moves by the Government to close off any possibility of same sex couples marrying overseas and then seeking to have their marriage validated by an Australian court upon their return. At the same time, the government made clear its intention to prevent same sex couples from adopting children from overseas.⁷⁰ The federal Attorney-General stated that the reasons for these amendments were due to 'community concern about the possible erosion of the institution of marriage.'⁷¹ He continued:

The government has consistently reiterated the fundamental importance of the place of marriage in our society. It is a central and fundamental institution. It is vital to the stability of our society and provides the best environment for raising children.⁷²

In March 2003 Victoria had announced that it too would refer its power over de facto property to the Commonwealth. The Victorian Attorney-General, Rob Hulls, criticised the Federal government for refusing to accept same sex referrals. Mr Hulls stated:

The Howard Government only wants heterosexual de facto couples in its courts and says same sex couples should not be given the same status as heterosexual couples. This attitude is discriminatory and blatantly homophobic, but not surprising. Victoria is giving the Howard government a golden opportunity to end its outdated, outmoded and outrageous views about same sex couples and ensure that the Family Court can deal with financial matters arising from the break up of all relationships. John Howard seems to believe that if he ignores the rights of same sex couples they will go away. I call on the Howard Government to get its head out of the 1950s and grant same sex couples the same rights as heterosexual couples.⁷³

Under the Constitution, only the Commonwealth Parliament has the power to make laws with respect to marriage, divorce and related matters. The State referral legislation will refer power to the Commonwealth, under s 51 (xxxvii) of the Constitution. These referrals of power will pave

⁶⁹ 'Gay couples left out of court shift', *The Age* (Melbourne), 8 March 2002, 1.

⁷⁰ Marriage Legislation Amendment Bill 2004 (Cth). The amendment to the *Marriage Act 1961* (Cth) to make it clear that marriage must be heterosexual was passed on 13 August 2004. The amendments that sought to prevent same sex couples adopting overseas children were referred to a Senate Legal and Constitutional Committee, this Committee was dissolved with the calling of the 2004 Federal Election.

⁷¹ The Commonwealth Attorney-General, Second Reading Speech, Marriage Legislation Amendment Bill 2004, House of Representatives, Hansard (27 May 2004) 29161.

⁷² *Ibid.*

⁷³ The Attorney-General, Victoria, 'Debate over the rights of same sex couples heats up' (Press Release, 8 March 2004) 1.

the way for Commonwealth legislation to amend the *Family Law Act* and give all courts with property jurisdiction the power to decide de facto property disputes.⁷⁴

The advantages of the States and Territories referring their powers over property and financial matters for de facto couples to the Commonwealth are many. Property matters could then be dealt with in the various family law courts in the same way and according to the same principles as for married couples.⁷⁵ This would mean that all cases could be dealt with consistently throughout Australia. There would no longer be a restriction on both child and property matters for de facto couples being dealt with together in the same hearing in the same family law courts.⁷⁶ Further, the provisions in the *Family Law Act* that allow for the division of superannuation entitlements as a component of property settlement and for spousal maintenance could also be accessed by de facto couples.⁷⁷

Policy arguments for and against parity at law between de facto couples and married couples

The arguments for and against de facto couples having equal property rights to married couples under the *Family Law Act* are many and varied. Statistics show that 73 percent of couples now choose to cohabit prior to marrying and upon marriage will acquire equal legal rights, in any event.⁷⁸ However, a proportion of these relationships will fail prior to marriage occurring. The question has then been raised as to whether couples who have experienced an unsuccessful period of trial cohabitation should have the legal implications of marriage imposed upon them?⁷⁹ A counter-argument is that the current legislative models around

⁷⁴ The Family Court, *Family Law Act* s 39; the Federal Magistrates Court, s 39(5AA), due to *Family Law Amendment Regulation 2001* No 3; *Statutory Rule 2001* No 264 the jurisdiction of the Federal Magistrates Court is limited to \$700,000 unless both parties consent, and the State Magistrates Courts, s 39(6) *Family Law Act*, subject to the limitations set out in s 46 that jurisdiction is limited to \$20,000, unless both parties consent.

⁷⁵ Part VIII *Family Law Act 1975* (Cth) in particular ss 79(4) and 75(2).

⁷⁶ The States and Territories referred their powers over children to the Commonwealth in the early 1990s. For example in Queensland the referral legislation was the *Commonwealth Powers (Family Law – Children) Act 1990* (Qld).

⁷⁷ Spousal maintenance is covered by ss 72, 75(2) *Family Law Act*. The provisions in relation to superannuation are set out above n 15.

⁷⁸ This statistic was for 2002. A comparison can be made with 1991 when only 30% of couples lived together prior to marriage. Australian Bureau of Statistics, *Marriages and Divorces in Australia* (26 November 2003) above n 13, 3.

⁷⁹ Ruth L Deech, 'The Case Against Legal Recognition of Cohabitation' (1980) 29 *International and Comparative law Quarterly* 480, 483.

Australia either require that the de facto relationship be registered or that the couple has resided together for a considerable period, usually two years, before the legislation will apply to them. This would result in many of these failed trial relationships, particularly if separation occurred within two years of the relationship commencing, presently falling outside the legislative provisions.⁸⁰ If these cases were referred to the Commonwealth under the *Family Law Act*, legislative provisions could be included that require registration of the relationship or a period of cohabitation of two years. Further, couples would also have the right to opt out of the legislation, in the form of a binding financial agreement.⁸¹

The second argument is that the institution of marriage and the unique commitment that married couples make to each other, should be protected by the law by the retention of clear legal distinctions between the rights of the married and unmarried.⁸² That married couples should have access to a higher level of legal rights, as marriage benefits society and is the entity that best promotes the institution of the family and the procreation of children.

There is some sociological support for this argument, for example, that marriages are more stable than de facto partnerships and that married couples are more inclined to pool their financial resources.⁸³ Research also reveals that de facto couples tend to have less traditional family values and more egalitarian views towards gender roles and the division of domestic labour.⁸⁴

It has been argued that 'marriage provides individuals with a sense of obligation to others, and it is an institution assumed to be a life-long commitment with contractual obligations.'⁸⁵ Further, that it is for the benefit of society that couples enter into legal marriages as these relationships result in more lasting unions that play an important role in the nurture and support of children.⁸⁶ At one level this argument is often

⁸⁰ Most provisions provide that the parties resided together for two years, or had a child of the relationship or that the applicant made substantial contributions, or has the care and control of the respondent's child and failure to make an order would result in serious injustice. For example s 37 *Relationships Act*.

⁸¹ *Family Law Act* s 90.

⁸² Willmott, Mathews, Shoebridge, above n 48. Deech, above n 79, 484.

⁸³ H Glezer, 'Cohabitation and Marriage Relationships in the 1990s' (1997) 47 *Family Matters* 5, 8.

⁸⁴ *Ibid*, 7-8.

⁸⁵ *Ibid*, 6.

⁸⁶ *Ibid*, 6; New South Wales Law Reform Commission, *De Facto Relationships Report* No 36 (1983), [5.49-5.50]. See also L Waite, 'Does Marriage Matter?' (1995) 32 (4) *Demography*, 483, 507.

mounted on religious grounds, that there is a 'qualitative difference' between marriage and a de facto relationship.⁸⁷ However, it has also been said that religious views are not necessarily held by all and should not be imposed on all.⁸⁸

These arguments can be countered by statistics showing the declining number of marriages in Australia and the growth in the number of de facto partnerships with children. In 2002 there were 105,400 marriages registered in Australia, and the marriage trend since 1981 shows that marriage rates are declining.⁸⁹ In that same year, there were 50,727 divorce applications lodged in Australia courts.⁹⁰ The 2001 Census figures reveal that fifty-nine percent of married couples had children living in their household. In that same year, twelve percent of all couples were living in de facto relationships and forty-two percent of these couples had the care of children.⁹¹ Further, there were 37,800 persons who identified as living in same sex de facto relationships and eleven percent of these couples had the care of children.⁹²

These figures show that the importance of marriage in our society is diminishing and that marriage does not necessarily provide a stable long-lasting partnership.⁹³ Further, the research indicates that the number of de facto relationships is increasing and many such partnerships are providing for the nurture and support of children. The fact that the characteristics of some de facto relationships differ in various respects from married relationships, does not detract from the overarching obligation of the law to protect the economic interests of both parties in a relationship.⁹⁴

⁸⁷ New South Wales Law Reform Commission, *De Facto Relationships*, Report No 36 (1983), [5.49-5.50].

⁸⁸ Willmott, Mathews, Shoebridge, above n 48, 9.

⁸⁹ Australian Bureau of Statistics, above n 13, 4.

⁹⁰ Family Court of Australia, Annual Report, 2001-2002, 29. These figures represent the total of divorce applications filed in both the Family Court of Australia and the Federal Magistrates Court.

⁹¹ Australian Bureau of Statistics, above n 13, 3.

⁹² Australian Bureau of Statistics, above n 13, 4.

⁹³ The birth rate in Australia is well below the world average. In 2000 the average was 1.75 babies per woman. Australian Bureau of Statistics, *Year Book Australia, 2003, Population and Births*, available at <http://www.abs.gov.au/ausstats/abs@.nsf/0/aed01ba4382accf5ca256cae00053f9f?OpenDocument>.

⁹⁴ Willmott, Mathews, Shoebridge, n 48, 10.

At present with a high divorce rate⁹⁵ and low birth rate⁹⁶ in Australia, it is argued that our legal system should be aiming to protect and support the entity of 'the family' rather than restricting protection to married relationships, and as such de facto partnerships, both heterosexual and same sex, should receive the full support and recognition of the law.⁹⁷

Another contention is that some de facto couples have made a conscious decision not to marry and to remain living together as they wish to opt out of both the social and legal implications of marriage.⁹⁸ This argument is most relevant to heterosexual de facto couples as they have a choice whether to marry or not.⁹⁹ However, the counter arguments are many. Family lawyers would attest to the fact that many people are not aware of the legal distinctions accompanying married or de facto status and may not even consider their legal rights until they separate and obtain legal advice. Further, the various statutes dealing with de facto property adjustment around Australia allow couples to opt out of their provisions by providing the option of a binding financial agreements which allows a couple to self-determine how their property will be divided upon separation.¹⁰⁰ In addition, parties to a de facto relationship can elect, when they separate, whether to access their legal rights. They have the option of agreeing at separation to come to their own private arrangements, without recourse to lawyers, courts or the law.¹⁰¹ Further, the law now casts many of the same responsibilities upon de facto

⁹⁵ In 2001 the crude divorce rate was 2.8 per 1,000 population and 55,330 divorces were granted that year. Australian Bureau of Statistics, Year Book Australia, 2003, Population, Marriages and divorces, 4.

⁹⁶ Australian Bureau of Statistics, Year Book Australia, 2003, Population and Births above n 93.

⁹⁷ There is also community acceptance of cohabitation as an alternative to marriage. As long ago as 1995, the Australian Family Values survey conducted by Vaus found that 62% of the Australian adult population agreed it was alright for a man and woman to live together without being married. Glezer, above n 83 at 6.

⁹⁸ New South Wales Law Reform Commission, above n 86, [5.51-5.55].

⁹⁹ Recent amendments to the *Marriage Act 1961* (Cth) have made the position clear that a legal marriage must be heterosexual. Marriage Act Amendment Bill 2004 (Cth) passed by the Senate on 13 August 2004.

¹⁰⁰ Except in Victoria, above n 6.

¹⁰¹ Willmott, Mathews, Shoebridge, above n 48, 10.

couples as married couples, for example in relation to parenting orders¹⁰² and child support obligations.¹⁰³

It is submitted that the primary and overarching policy argument for all de facto property adjustment to fall under the *Family Law Act* is to protect the financially weaker or dependent party. This is most significant when one party has stayed at home or relegated their career as secondary to the nurture and support of the family and the children of the relationship. It is after commencing a family, that often for practical and financial reasons, one partner will play a greater role in the care of the home and children. Even though research has concluded that de facto couples have a more egalitarian sharing of household tasks, this is not reflected in the division of their child care roles. In heterosexual relationships, women still undertake the majority of child care in the family, whether they are married or in a de facto relationship.¹⁰⁴

At present, the key deficiencies in the legal rights of the unmarried as opposed to the married are that, depending on what State or Territory they live in, future economic needs may not be taken into account in determining property adjustment¹⁰⁵ and they may not have the right to apply for ‘spousal’ maintenance.¹⁰⁶ Moreover, in all jurisdictions at present they cannot access the super-splitting laws that enable a party’s superannuation fund to be split into two funds to benefit both parties.¹⁰⁷ These are the key rights that are crucial for a partner, who has stayed at home to care for the home and family, to access.

Further arguments in support of equality before the law

Apart from the various policy arguments outlined above, there is the general notion that de facto couples, both heterosexual and same sex, are entitled to equality before the law. Although the current federal government has stated that it would accept a referral for heterosexual and not homosexual couples, there are strong arguments as to why such a

¹⁰² Part VII of the *Family Law Act 1975* (Cth). The States and Territories referred their power to the Commonwealth over ex-nuptial children over a decade ago, for example in Queensland see the *Commonwealth Powers (Family Law – Children) Act 1990* (Qld).

¹⁰³ The *Child Support Assessment Act 1989* (Cth) applies to children whether or not their parents were legally married, s 20(2).

¹⁰⁴ Janeen Baxter, ‘Marital Status and the division of household labour, cohabitation vs marriage’ (2001) 58 *Autumn Family Matters* 16, 19.

¹⁰⁵ In New South Wales, Victoria and the Northern Territory.

¹⁰⁶ In Queensland, Victoria and South Australia.

¹⁰⁷ Under Part VIIIB of the *Family Law Act 1975* (Cth), above n 15.

policy position is unjust and inconsistent with Australian democratic liberal ideals. Australia purports to be a country that upholds the principles of a liberal democracy, including adherence to the principles of the rule of law.¹⁰⁸ An element of this concept is that all Australians should have equality before the law. The unequal rights of heterosexual and same sex de facto couples, founded on the State or Territory in which they reside, and possible future inequality based on sexuality, are contrary to these principles.¹⁰⁹

Today, the term 'equality before the law' is used in the sense that all Australians should have equal rights and are entitled to equal outcomes in their treatment by the law.¹¹⁰ Australia as a liberal democracy has both a political and legal system that seeks to uphold liberal ideals such as justice, freedom, individual rights and equality before the law. A feature of liberalism is that all individuals have rights, including the right to be treated as political equals.¹¹¹ Flowing from this, it has been argued that homosexual individuals have the right to be treated by the Commonwealth government with equal concern and respect in relation to their economic interests. Consequently, homosexual de facto couples are entitled to equal rights as their heterosexual and married counterparts, to property adjustment upon separation.¹¹² This is also reflected in Australia's obligations under international law; Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) outlines that '(a)ll persons should be equal before the courts and tribunals' and Article 26 setting out that '(a)ll persons are equal before the law and are entitled without discrimination to the equal protection of the law.'¹¹³

¹⁰⁸ D Clarke, *Principles of Australian Public Law* (2003) 101; Bottomley and Parker, *Law in Context* (2nd ed. 1997) 51.

¹⁰⁹ An early definition of equality before the law was expounded by A V Dicey in his definition of the rule of law. He stated that equality before the law required, 'the equal subjection of all classes to the ordinary law of the land.' Dicey's concept of what equality before the law meant was not our modern interpretation, his intent was that ordinary citizens, including officials, should be subject to ordinary courts and there should not be separate administrative courts set up to deal with officials. Clarke, above n 108.

¹¹⁰ Clarke, above n 108.

¹¹¹ Willmott, Mathews, Shoebridge, above n 48, 15. Ronald Dworkin, *Taking Rights Seriously*, (1977) 198-9. See also Ronald Dworkin, *A Matter of Principle*, (1985), 359-72.

¹¹² Willmott, Mathews, Shoebridge, above n 48, 14 -17.

¹¹³ Entry into force generally (except Article 41): 23 March 1976. Entry into force for Australia (except Article 41): 13 November 1980. Article 41 came into force generally on 28 March 1979 and for Australia on 28 January 1993.

Although Australia has no central human rights instrument as in the United States which has the benefit of a *Bill of Rights* and in Canada which has a *Charter of Rights and Freedoms*,¹¹⁴ we do have a written Constitution. Unfortunately, this document contains only a handful of what could be described as ‘human rights’ and does not contain any provision upholding equality before the law.¹¹⁵ However, State legislation throughout Australia prohibits discrimination against parties on the basis of sexual orientation.¹¹⁶

There has also been a recent development in relation to human rights legislation in the Australian Capital Territory. The *Human Rights Act 2004* (ACT) contains a specific provision about equality before the law and is based on Article 15 of the *Canadian Charter*. Section 8(3) states that ‘Everyone is equal before the law and entitled to the equal protection of the law without discrimination.’ The section also sets out examples of discrimination including discrimination on the basis of sex, sexual orientation or other status.¹¹⁷

Apart from arguments based upon rights and principles of equality before the law, it is clearly inconsistent for people to possess different rights based upon where they live within Australia. It also creates inequity, as the economic interests of parties upon separation are identical, regardless of their marital status and sexuality.¹¹⁸ Further, it is inconsistent in a policy sense for the federal government to indicate that it will devolve to same sex couples the same rights as married couples in some quarters, for example, the right to access concessional superannuation entitlements

¹¹⁴ The *Canadian Charter* contains article 15(1):

Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹¹⁵ The Constitution does not contain many human rights. An example of what may be termed a ‘human right’ is contained in s 116 which provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

¹¹⁶ *Equal Opportunity Act 1995* (Vic) s 6(d) and (l); *Anti-Discrimination Act 1991* (Qld) s 7(1); *Anti-Discrimination Act 1977* (NSW) s 49ZG; *Equal Opportunity Act 1984* (SA) s 29(3); *Anti-Discrimination Act 1998* (Tas) s 16(c) and (d); *Anti-Discrimination Act 1992* (NT) s19(c); *Discrimination Act 1991* (ACT) s 7(1)(b); *The Equal Opportunity Act 1984* (WA).

¹¹⁷ The Act commenced on 1 July 2004.

¹¹⁸ Willmott, Mathews, Shoebridge, above n 48, 14.

upon the death of a partner,¹¹⁹ and then to deny such couples the same levels of rights in property settlement, at separation.¹²⁰

Conclusion: Towards the Future

An examination of the de facto property statutes around Australia has indicated that already four State and Territory jurisdictions have legislation that mirrors the provisions of the *Family Law Act*. Developments at common law show that in some jurisdictions, such as in Queensland, State courts are prepared to follow the approach of the Family Court and will also have regard to *Family Law Act* common law precedent.¹²¹ If the Relationships Bill 2005 in South Australia is passed, all State and Territory legislation providing for de facto property adjustment will cover same-sex couples.¹²²

The policy considerations, both for and against de facto couples having equality before the law with their married counterparts, have been examined in some detail in this article. It is argued that the primary and overriding policy consideration in this debate is that the law should protect the financially dependent party in a relationship. In either a heterosexual or same sex relationship, this will usually be the partner who has spent more time at home caring for children. In a heterosexual relationship, this will often be the female partner.¹²³ This primary goal of protecting the economic interests of the homemaker and primary caregiver supports the principle that the family is of fundamental importance in our society.¹²⁴

Underlying this policy consideration is the fundamental requirement that the law keep abreast of social change. It has been shown that the nature of relationships in our society are evolving and that de facto relationships are now common, either as a pre-requisite to marriage or as a continuing

¹¹⁹ Above n 11.

¹²⁰ It could also be argued that it is inconsistent to deny same sex couples the right to legally marry. This position is inconsistent with Australia's obligations under the *International Covenant on Civil and Political Rights* (ICCPR) which sets out in Article 23, 'The right of men and women of marriageable age to marry and to found a family shall be recognised.'

¹²¹ *E v S* [2003] QSC 378, *S v B* [2004] QSC 80.

¹²² Above n 14.

¹²³ Baxter, above n 104.

¹²⁴ *Family Law Act* s 43 and Article 16 of the *Universal Declaration of Human Rights* both state that family is the natural and fundamental group unit of society. The *Universal Declaration of Human Rights* was adopted and proclaimed on 10 December 1948.

relationship in their own right.¹²⁵ It has also been shown that many de facto relationships, including same sex relationships, are now providing for the nurture and support children¹²⁶ and with our escalating divorce and declining birth rate, the overall policy aim of government should be to protect the institution of the family in our society, in whatever shape or form it may take.¹²⁷

This clear social direction is supported by the many legislative developments that have occurred around Australia to provide equality before the law for de facto couples, both heterosexual and homosexual.¹²⁸ We should now send a message to our federal lawmakers that Australians are ready to embrace the concept of equality before the law for all de facto couples, including same sex couples. It is consistent that if these couples have access to the same rights as their married counterparts, such as access to superannuation benefits upon death, then they should also have access to the same legal principles and courts if they need to determine their property settlement upon separation. The current situation has created unfairness and inequity.

It is clear that all remaining States and Territories should now move to pass legislation to refer their power to the Commonwealth over de facto property adjustment. Further, that the Commonwealth should accept such referrals, for both same sex and heterosexual couples. This is the only way that equality before the law and a level of consistency can be achieved for these groups throughout Australia.

¹²⁵ Above n 13, 3.

¹²⁶ Above n 13, 3 - 4.

¹²⁷ Above n 95 and n 96.

¹²⁸ Above n 10.