LEGISLATIVE COUNCIL

STANDING COMMITTEE ON SOCIAL ISSUES

Domestic Relationships:
Issues for Reform

Inquiry into
De Facto Relationships Legislation

Ordered to be printed 2 December 1999

According to Resolution of the House

Report No 20 December 1999

Parliamentary Paper No. 127

Standing Committee on Social Issues

Domestic Relationships: Issues for Reform

Inquiry into De Facto Relationships Legislation

Ordered to be printed 2 December 1999
according to resolution of the House

How to contact the Committee

Members of the Standing Committee on Social Issues can be contacted through the committee secretariat. Written correspondence and inquiries should be directed to:

The Director

Standing Committee on Social Issues

Legislative Council

Parliament House, Macquarie Street

Sydney NSW 2000

Email socialissues@parliament.nsw.gov.au

Telephone 61-2-9230 3078

Facsimile 61-2-9230 2981

ISBN 0 9586019 8 4

Terms of Reference

That the Standing Committee on Social Issues inquire into, and report on:

- the rights and obligations of persons in interdependent personal relationships other than those defined in the *De Facto Relationships Act, 1984*; and

- the extension of those rights and obligations as proposed in the *De Facto Relationships Amendment Bill, 1998* introduced into the Legislative Council on 24 June 1998.

These Terms of Reference were referred on 15 October 1998 by the Hon Jeff Shaw QC MLC, Attorney General, and again in May 1999 following the reconstitution of the Committee.

Committee Membership

At the commencement of the Inquiry in October 1998:

- Jan Burnswoods MLC, Chair (Australian Labor Party)
- The Hon Dr Marlene Goldsmith MLC, Deputy Chair (Liberal Party)
- The Hon Dr Arthur Chesterfield-Evans MLC (Australian Democrats)
- The Hon James Kaldis MLC (Australian Labor Party)
- The Hon Doug Moppett MLC (National Party)
- The Hon Peter Primrose MLC (Australian Labor Party)
- The Hon Carmel Tebbutt MLC (Australian Labor Party)

On 25 May 1999, the Committee was reconstituted but with a reduced membership. The Committee now consists of five members:

- Jan Burnswoods MLC, Chair (Australian Labor Party)
- The Hon Doug Moppett MLC, Deputy Chair (National Party)
- The Hon Dr Arthur Chesterfield-Evans MLC (Australian Democrats)
- The Hon Andrew Manson MLC (Australian Labor Party)
- The Hon Henry Tsang MLC (Australian Labor Party).

Table of Contents

Chair's Foreword

I am pleased to present this Report of the Committee's Inquiry into domestic relationships.

The context in which this Inquiry commenced and continued should be noted from the outset. The extension of legal recognition to a wider range of personal relationships has been under consideration for some time, with the Carr Government signalling such an intention as early as 1995. Since then two Private Members' Bills to achieve such an outcome have been introduced, but have not been progressed. Debate on the second of these, the De Facto Relationships Amendment Bill, introduced by the Hon E Kirkby MLC in June 1998, ranged from strong support to resolute opposition, and on 15 October 1998 the Attorney General referred the issue to this Committee for examination.

The Inquiry commenced immediately, and numerous submissions commenting on the rights and obligations of people in non-traditional domestic relationships were received, but the work of the Committee was interrupted when Parliament was prorogued prior to the March 1999 State election. Following the reconstitution of the Committee in May 1999, the matter was again referred and the Inquiry re-commenced. However, the task before the Committee changed following the passage of the Government's *Property (Relationships) Legislation Amendment Act* in June 1999, which achieved many of the reforms contemplated in the De Facto Relationships Amendment Bill 1998. The Committee called for supplementary submissions from all those who had made submissions on this earlier Bill, seeking their views on the new legislation and whether there were any outstanding issues.

The passage of the *Property (Relationships) Legislation Amendment Act 1999* has meant the focus of the Inquiry has moved from consideration of various proposals for significant change in the law governing domestic relationships, to an examination of how this recently introduced legislative regime can be enhanced.

I would like to thank all Committee Members for their contributions to this Report. It is noteworthy that all the recommendations have our unanimous support. Such an approach is in keeping with the overall broad support evident in the debate on the *Property (Relationships) Legislation Amendment Act 1999*. Although the issue of recognition of same sex relationships remains controversial for some, the Committee believes that the recommendations in this Report represent a logical continuation of the non-discriminatory principles of the recently introduced legislative regime.

The Committee would like to thank all those who made submissions or gave evidence to the Inquiry. In particular, the briefings provided by those closely involved in the earlier proposals were of valuable assistance to the Committee in its consideration of the issues before it.

My thanks are also due to the Committee Secretariat who ensured the Inquiry process was carried out effectively and efficiently. The Acting Director, Mr Tony Davies, and Ms Beverley Duffy, Senior Project Officer, were involved in the initial planning and research stages of the Inquiry. Following the reconstitution of the Committee in May 1999, Ms Marie Swain, Research Officer Law/Social Issues, was seconded from the Parliamentary Library Research Service to complete the necessary research and draft the Report. We are grateful to her for her tireless effort in taking and completing such a complex

task. I would also like to thank the Parliamentary Librarian for enabling us to take advantage of her skills. Ms Heather Crichton, the Committee Officer, was responsible for managing the administrative aspects of the Inquiry including the processing of submissions, arranging hearings and assisting in the preparation of the Final Report for printing.

I commend this Report to the Government.

Jan Burnswoods MLC

Chair

Summary of Recommendations

Recommendation 1:
That the *Anti-Discrimination Act 1977* be amended to prohibit discrimination against people on the basis of their domestic relationships as defined in the *Property (Relationships) Legislation Amendment Act 1999* (p23).

Recommendation 2:
That the ground of discrimination be described as 'relationship status' in place of 'marital status' where it now exists in the *Anti-Discrimination Act 1977* (p23).

Recommendation 3:
That the terms 'relative' and 'near relative' in the *Anti-Discrimination Act 1977* be amended to reflect the definitions used in the *Property (Relationships) Legislation Amendment Act 1999*. The current definitions in the *Anti-Discrimination Act 1977* are not wide enough to cover those in the non-traditional domestic relationships provided for in the *Property (Relationships) Legislation Amendment Act 1999* (p23).

Recommendation 4:
That the general exception provisions in section 54(a) and (b) of the *Anti-Discrmination Act 1977* be repealed. These provisions were included in the *Anti-Discrimination Act 1977* to exempt acts done under statutory authority which would otherwise be seen as discriminatory, with the expectation that over time all legislation would be made consistent with the *Anti-Discrimination Act 1977* (p23).

Recommendation 5:
That a registration system should not be introduced as a mechanism for relationship recognition (p27).

Recommendation 6:
That the definition of 'de facto relationship' in section 4(1) of the *Property (Relationships) Act 1984* should not be amended (p55).

Recommendation 7:
That the 'close personal relationship' definition in section 5(1)(b) of the *Property (Relationships) Act 1984* be broadened to encompass a wider range of interdependent personal relationships (p55).

Recommendation 8:
That the *Property (Relationships) Act 1984* be amended to expand the definitions in section 4(2), which determine the existence of a de facto relationship, and to provide that these new criteria apply to all domestic relationships. (p55).

Recommendation 9:
That the *Property (Relationships) Act 1984* be amended to delineate the types of relationships which are covered (p55).

Recommendation 10:
That the Government review and amend all legislation and awards conferring employment benefits and entitlements, where a different application of the law is evident between married couples and those in other domestic relationships, to achieve consistency with the *Property (Relationships) Legislation Amendment Act 1999* (p67).

Recommendation 11:
That the Government review and amend all legislation imposing responsibilities and obligations to require similar compliance by those in same sex relationships as those in opposite sex relationships, but adequate mechanisms to protect the privacy of those making disclosures regarding their same sex relationship must be put in place (p67).

Recommendation 12:
That the Government undertake an examination of all NSW legislation to determine whether amendments need to be made to ensure a consistent application of the new definition of 'de facto' as contained in the *Property (Relationships) Legislation Amendment Act 1999* (p67).

Recommendation 13:
That a general drafting instruction be issued to the Parliamentary Counsel's Office that in all new legislation any reference to a 'de facto relationship' is to be consistent with the definition used in the *Property (Relationships) Legislation Amendment Act 1999* (p67).

Recommendation 14:
That the *District Court Act 1973*, the *Adoption Information Act 1990*, the *Wills, Probate and Administration Act 1898* and the *Workers Compensation Act 1987)* be amended to ensure that those in 'close personal relationships' are adequately provided for (p67).

Recommendation 15:
That the Government undertake an examination of all NSW legislation to identify any other Acts apart from those referred to in Recommendation 14, which may need amending to cover those in 'close personal relationships' (p67).

Recommendation 16:
That the Attorney General examine the *District Court Act 1973* to ensure all powers necessary for the District Court to deal with matters brought under the *Property (Relationships) Act 1984* are available (p70).

Recommendation 17:
That section 9 of the *Property (Relationships) Act 1984*, be amended to include the District Court in the Courts which can hear matters brought under this legislation (p70).

Recommendation 18:
That section 20 of the *Property (Relationships) Act 1984*, (applications for property adjustment), be amended to allow for future needs of de facto partners to be considered in a similar fashion to that provided for married couples under the *Family Law Act 1975* (p72).

Recommendation 19:
That the Attorney General fully explore the means by which adequate and appropriate alternatives to litigation could be made available under the *Property (Relationships) Act 1984*, with a view to making the necessary legislative amendments in due course (p74).

Recommendation 20:
That section 29 of the *Property (Relationships) Act 1984*, which deals with the effect of a subsequent relationship or marriage on claims for maintenance, not be amended (p75).

Recommendation 21:
That a review clause be inserted into the Act requiring the Attorney General to undertake a review of the *Property (Relationships) Legislation Amendment Act 1999*, three years from the date of assent of any amending legislation, and to provide a report of the review (p76).

Recommendation 22:
That the issue of legal recognition of non-biological parents to ensure children of those in non-traditional domestic relationships are not disadvantaged be fully examined, with a view to amending appropriate legislation if necessary (p82).

Recommendation 23:
That the NSW Minister for Community Services approach her Federal counterpart to request that the child support legislation be amended so that it applies to same sex co-parents in the same way as it currently applies to opposite sex parents and step-parents (p83).

Recommendation 24:
That the NSW Government approach the Commonwealth Government to urge amendments be made to the Commonwealth superannuation and taxation legislation to ensure Australia is complying with its obligations in relation to international human rights conventions (p91).

Recommendation 25:
That the Government implement the recommendations made by the Committee in this Report as a matter of urgency (p93).

Recommendation 26:
That the New South Wales Law Reform Commission examine the specific issues identified in this Report in Chapters 3, 6, 8, and 9 as requiring further investigation (p93).

Relevant Legislation and Terminology

1977 The *Anti-Discrimination Act* (ADA 1977) was introduced in New South Wales.

1982 The *Anti-Discrimination Act* was amended to prohibit discrimination on the grounds of homosexuality.

1984 The *De Facto Relationships Act* (DFR Act 1984) was introduced in New South Wales. The definitions used were:

> **De facto partner:**
>
> In relation to a man, a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him; and
>
> In relation to a woman, a man who is living or has lived with the woman as her husband on a bona fide domestic basis although not married to her.
>
> **De facto relationship:** the relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other.

1994 The *Anti-Discrimination Act* was amended to prohibit vilification on the grounds of homosexuality.

1997 The Significant Personal Relationships Bill (SPR Bill 1997) was introduced in the New South Wales Legislative Assembly. The definitions used in the SPR Bill 1997 were:

> **Significant personal relationship**: the umbrella term to cover both 'recognised relationships' and 'domestic relationships'. For such a relationship to exist two key elements must be present, namely mutuality and commitment. Aspects such as cohabitation, sexual intimacy, or sharing financial resources may be present but are not necessary.
>
> **Recognised relationship**: a significant personal relationship which has been formally recognised by a clearly defined legal process.
>
> **Domestic relationship**: a significant personal relationship which has not been formally recognised by a clearly defined legal process.

1998 The De Facto Relationships Amendment Bill (DFRA Bill 1998) was introduced in the New South Wales Legislative Council. The DFRA Bill 1998 used the following definitions:

> **Domestic relationship**: the umbrella term used to describe a relationship where there is interdependence, which may or may not be a de facto relationship, and where the parties may or may not live together or share a sexual relationship.
>
> **De facto relationship**: a relationship between two people who live together as a couple on a bona fide domestic basis. This would cover both heterosexual and homosexual relationships.

In October 1998 the Legislative Council Standing Committee on Social Issues received a reference from the Attorney General relating to the De Facto Relationships Amendment Bill 1998. The Terms of Reference required the Committee to inquire into, and report on:

(i) the rights and obligations of persons in interdependent personal relationships other than those defined in the *De Facto Relationships Act 1984*; and

(ii) the extension of those rights in the De Facto Relationships Amendment Bill 1998, introduced into the Legislative Council on 24 June 1998.

1999 The *Property (Relationships) Legislation Amendment Act* (PRLA Act 1999) was passed in the New South Wales Parliament. The definitions used in the PRLA Act 1999 have certain similarities with those listed above:

> **Domestic Relationship**: the umbrella term which covers both 'de facto relationships' as redefined and 'close personal relationships'.
>
> **De facto relationship**: a relationship in which the two adults involved live together as a couple and are not married or related by family. This definition covers both heterosexual and homosexual relationships.
>
> **Close Personal Relationship**: a relationship between two adults, whether or not related by family, who are living together, where one or each of whom provides the other with domestic support and personal care.

Section 1 of the PRLA Act 1999 renamed the *De Facto Relationships Act 1984*. This Act is now called the *Property (Relationships) Act 1984* (PR Act 1984). In large part the substantive provisions which existed under the earlier Act have been retained. The main changes relate to the incorporation of the domestic relationship definitions used in the *Property (Relationships) Legislation Amendment Act 1999*. This extends coverage of the Act to those in same sex relationships as well as those in a category which could be described as 'carers'.

References in this Report to the *De Facto Relationships Act 1984* reflect the state of the law prior to the end of June 1999, when the bulk of the *Property (Relationships Legislation) Amendment Act* commenced.

Chapter 1 - Background to the De Facto Relationships Legislation Inquiry

1.1 Developments Prior to the Inquiry

In 1995 the Carr Labor Government signalled its intention to give legal recognition to those in non-traditional interdependent personal relationships including those in same sex relationships. The Attorney General, the Hon J Shaw QC MLC, was reported as saying:

> I would like to see legislation which treats a variety of stable relationships in a non-discriminatory way. That includes same sex relationships and other relationships, irrespective of their sexuality ... We want to treat all relationships in a way which is not governed by the traditional heterosexual view. I think society has changed, and the community is ready to accept that relationships ought to be dealt with equitably, whether they are based on marriage or otherwise. [1]

Government legislation to achieve such change was introduced on 13 May 1999. Prior to this, however, two private members Bills had been introduced. The first was the Significant Personal Relationships Bill 1997 (referred to hereafter as the SPR Bill 1997) introduced by Ms C Moore MP in September 1997, [2] and the second was the De Facto Relationships Amendment Bill 1998 (referred to hereafter as the DFRA Bill 1998) introduced by the Hon E Kirkby MLC in June 1998. [3] Neither of these private members Bills proceeded to the Second Reading stage.

Debate on the DFRA Bill 1998 ranged from strong support to resolute opposition. On 15 October 1998 the Attorney General referred the issue to the Legislative Council's Standing Committee on Social Issues (referred to hereafter as the Committee). The Attorney General was reported as saying: 'Due to the emotive aspects of the issues, and the lack of clear bipartisan support, the Government considers this reference is the most appropriate method of having the matter properly considered.' [4]

1.2 Terms of Reference

The Terms of Reference received by the Committee required it to inquire into, and report on:

(i) The rights and obligations of persons in interdependent personal relationships other than those as defined in the *De Facto Relationships Act 1984*; and

(ii) The extension of those rights in the *De Facto Relationships Amendment Bill 1998* introduced into the Legislative Council on 24 June 1998.

1 'A Shaw thing: same-sex and trany reforms before Cabinet', *Star Observer*, No 270, September 21, 1995.
2 *NSWPD*, Legislative Assembly, 25 September 1997, p584.
3 *NSWPD*, Legislative Council, 24 June 1998, p6319.
4 'Gay rights backdown', *Daily Telegraph*, 16 October 1998.

De Facto Relationships Act 1984 [5]

To address the issues raised in paragraph (i) of the Terms of Reference, it is first necessary to identify which interdependent personal relationships were covered by the *De Facto Relationships Act 1984* (referred to hereafter as DFR Act 1984). It is clear from the definition section of that Act that only a specific type of interdependent personal relationship was covered, namely a 'de facto relationship'. Section 3 stated that:

a 'de facto partner' is:

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

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

For the purposes of the *De Facto Relationships Act 1984*, a 'de facto relationship' was 'the relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other'.

Taken together these provisions made the Act only applicable to heterosexual relationships. Those in non-traditional interdependent personal relationships such as those between partners of the same sex, heterosexual couples who do not live together, and people in close relationships who may not live together or share a sexual relationship but may be financially or emotionally interdependent were not included. Those relationships involving extended family or ties of kinship were also excluded. Furthermore, although the de facto relationship commenced immediately the couple began living together on a bona fide domestic basis, many of the provisions under the Act only applied to de facto partners who had lived together as de facto partners for at least two years or who had a child.

The task before the Committee was a wide ranging one, involving consideration of issues related to the adequacy of the current legislative regime for those in heterosexual de facto relationships, as well as an examination of how those in a broader group of non-traditional interdependent personal relationships were treated at law.

1.3 The Inquiry Process

Advertisements calling for public submissions were placed in a variety of publications in late October 1998 with a closing date of 11 December. A total of 138 submissions were received (see Appendix 1 for a list of submissions). However, due to the prorogation of the Parliament in the lead up to the March 1999 State election, the Inquiry lapsed. Following the election, and after the Committee was reconstituted (25 May 1999), the matter was referred back to the Committee. In the interim, on 11 May 1999, the Attorney General announced the Government's intention to introduce legislation which would amend the *De Facto Relationships Act 1984* and 'honour a commitment by Labor to extend the rights and obligations of de facto relationships to other domestic relationships between adult persons'. [6]

5 References in this Report to the *De Facto Relationships Act 1984* reflect the state of the law prior to the end of June 1999, when the bulk of the *Property (Relationships) Legislation Amendment Act 1999* commenced, and the DFR Act 1984 was renamed the *Property (Relationships) Act 1984*.

6 Hon J Shaw QC MLC, Media Release, 'Carr government introduces property relationships Bill', 11 May 1999.

The Property (Relationships) Legislation Amendment Bill 1999 was introduced on 13 May, and passed on 1 June 1999. The Attorney General explained the rationale behind the legislation:

> The Property (Relationships) Legislation Amendment Bill recognises that contemporary society has developed to a point where laws that regulate the division of property on the failure of a broad range of intimate relationships are necessary and desirable. Presently, persons living in intimate partnerships but who are not married or covered by the existing *De Facto Relationships Act* have limited rights to a share of the property of the partnership in the event that it fails or one partner dies.
>
> In New South Wales, partners without the protection of living in a de facto relationship as currently defined by statute, and interpreted by the courts, must rely on the vagaries of the common law relating to constructive trusts and the like on the breakdown of a relationship; or, in the event of a partner dying intestate or making inadequate provision for the surviving partner in a will, on the narrow grounds provided for in the *Family Provision Act*, but only if there was a relationship of dependency; or, for the purposes of making decisions about the incapacitated partner's medical treatment, confinement and the like, on their ability to establish, to the satisfaction of a person in authority, such a close personal relationship with an incapacitated partner that it should be regarded as the paramount relationship.
>
> Such reliance is costly, time consuming and, at times, unfair. In order to redress the inadequacies in the current laws concerning personal relationships, this bill extends the ambit of the *De Facto Relationships Act* to parties to domestic relationships which are defined in this bill as being a de facto relationship; or close personal relationship other than a marriage; or a de facto relationship between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care. [7]

While the *Property (Relationships) Legislation Amendment Act 1999* (hereafter referred to as the PRLA Act 1999) addressed many of the issues that were before the Committee, it was considered appropriate that all those who had made a submission relating to the DFRA Bill 1998 should be given the opportunity to comment on the new legislation, and indicate if there were any outstanding issues.

The Committee sent a letter calling for supplementary submissions to all those who had made a submission to the Inquiry (138 original submissions had been received). A total of 16 supplementary submissions were received. The Committee concludes from this that the majority of those who had made earlier submissions were of the view that their concerns had been addressed by the passage of the PRLA Act 1999, and did not feel the need to comment further.

The Committee held two days of hearings on 4 and 5 August 1999 to gather further information. 23 witnesses appeared, representing gay and lesbian organisations; legal centres; Church groups; and interested members of the public (see Appendix 2 for a list of witnesses).

The Committee found a broad level of acceptance of the amendments made by the PRLA Act 1999 in the supplementary submissions and evidence it received. Most accepted the principles put forward for reforming the legislative regime and much of the discussion related to how the process could be fine-tuned to further implement these principles.

7 Hon J Shaw QC MLC, *NSWPD*, Legislative Council, 13 May 1999, p228.

The Committee feels it important to stress that in light of the changes which have been introduced by the PRLA Act 1999, any recommendations made in this Report should be seen as enhancing the legislative regime which has recently been introduced.

1.4 Overview of Submissions and Evidence

Initially 138 submissions were received. Most were from individuals, including one or both partners in a same sex relationship, legal practitioners and academics. Submissions were also received from organisations representing gay men and lesbians, churches and community legal centres. The vast majority of submissions (114) supported the changes proposed by the DFRA Bill 1998; 12 submissions were opposed; 4 submissions were not relevant and there were 8 submissions where either there was no clear indication as to support or opposition or where preference for other legislative models, such as the SPR Bill 1997, was expressed.

The majority of submissions focussed on the legal recognition of same sex relationships, with comparatively little attention being paid to other types of interdependent personal relationships. The Committee interprets this response as indicating the high level of concern among members of the gay and lesbian community regarding the lack of legal recognition of their relationships.

Those opposed to recognising same sex relationships were of the view that such a step would devalue and undermine the institution of marriage in our society, with some expressing the belief that this approach would encourage a homosexual lifestyle.

1.5 Overview of the Supplementary Submissions

Of the 16 supplementary submissions received, 11 were supportive of the changes made by the PRLA Act 1999. However, a number of submissions identified other issues still requiring the Committee's attention. These included:

- amending the *Anti-Discrimination Act 1977* to make it available to those in same sex relationships;

- assessing whether the definitions adopted by the *Property (Relationships) Legislation Amendment Act 1999* were broad enough to protect a wide range of non-traditional domestic relationships; and

- amending legislation to ensure a consistent application of the definitions used in the *Property (Relationships) Legislation Amendment Act 1999* to remove discriminatory treatment from continuing in other areas of the law.

The Committee's attention was also drawn to potential technical and procedural issues which may emerge from the new legislation, and the ongoing disparate treatment which children in non-traditional domestic relationships may experience. Another major concern highlighted in the supplementary submissions was the different treatment experienced by those in same sex relationships in relation to superannuation benefits and entitlements.

Two supplementary submissions opposed the changes primarily on the basis that the legal recognition of other non-traditional domestic relationships would impact negatively on recognised relationships, and undermine the institution of marriage. Three submissions were not relevant.

1.6 Structure of the Report

In **Chapter Two** an overview of the regulation of domestic relationships in NSW is outlined. Models for achieving legal recognition of other non-traditional domestic relationships are discussed in **Chapter Three**, and examples of jurisdictions where such approaches have been implemented are presented in **Chapter Four**. The New South Wales position on the recognition of non-traditional domestic relationships is outlined in **Chapter Five**. The next five Chapters focus on matters arising from the passage of the *Property (Relationships) Legislation Amendment Act 1999*. **Chapter Six** deals with definitional issues; **Chapter Seven** canvasses areas where additional legislative amendments may be necessary; **Chapter Eight** discusses technical and procedural aspects arising from the new legislation; **Chapter Nine** looks at the impact on children in non-traditional domestic relationships; and **Chapter Ten** examines anomalies concerning distribution of superannuation entitlements. The Committee's concluding remarks are found in **Chapter Eleven**.

Chapter 2 – An Overview of Domestic Relationships Law in New South Wales

2.1 Existing Legislative Approaches to Domestic Relationships

Marriage: Under the Australian Constitution, only the Commonwealth Parliament has the power to legislate with respect to marriage and divorce, and the *Marriage Act 1961* (Cwlth) sets out who may marry and the requirements for a legal ceremony. Marriage was defined in the 1866 English case of *Hyde v Hyde and Woodmansee* [8] as 'the union of one man and one woman', and although the *Marriage Act 1961* (Cwlth) does not specify the sex of the parties to a marriage, it does provide in section 46(1) that the person performing the ceremony is required to say to the parties being married that: 'marriage, according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. It follows from this interpretation of the *Marriage Act 1961* that marriage is limited to heterosexual couples. [9]

The *Family Law Act 1975* (Cwlth) (referred to hereafter as the FLA 1975) covers divorce, property division and spouse maintenance for married people. On the breakdown of the marriage, this Act empowers the Family Court to look behind the parties' existing legal ownership of property and make orders that transfer property or responsibility for debt from one spouse to the other based on the general principle of what is fair in the circumstances. Since 1976 the only requirement for getting a divorce is the *irretrievable breakdown of the marriage*, [10] which is proved when the parties have lived separately and apart for at least 12 months, and there is no reasonable likelihood of them getting back together. [11] The FLA 1975 also deals with issues concerning where children will live and who has responsibility for their continued care, welfare and development if their parents are separated.

Prior to 1984

Prior to 1984 the only relationship which was formally recognised in the eyes of the law was marriage, although in practice many people were living together as 'common law husband and wife'. In response to the real circumstances in contemporary society, legislation was introduced to ensure that certain legal protections were extended to those in de facto relationships. [12] However, these protections were limited in effect to rights concerning property. In other matters, married couples received different legal treatment to de facto couples. This situation remains the same today, although the rationale for such disparate treatment has changed and the need to treat all interdependent personal relationships in a similar fashion appears to be more widely accepted.

8 [1861-1873] All ER Rep 175.
9 Senate Legal and Constitutional References Committee, *Inquiry into Sexuality Discrimination*, December 1997, paragraph 6.43.
10 FLA section 48(1).
11 FLA sections 48(2) and (3).
12 These relationships were originally referred to as 'de facto marriages' as they were marriages in fact, but not in law. Today the term 'de facto relationships' is more commonly used.

While the law plays a somewhat awkward role in regulating the area of personal relationships, it is necessary to have mechanisms in place which protect the rights and interests of people in relationships, particularly in crisis situations or when the relationship ends. This point was alluded to by the Hon P Landa, then Attorney General, when the original de facto relationship legislation was introduced. He said:

> The new legislation will be a major social reform and the Government regards its introduction as one of its most significant achievements. This is particularly so because legislative intrusions into areas involving personal relationships are matters of great sensitivity within the community. Yet where there is an area of law which is so obviously in need of attention because of manifest injustices, a responsible administration cannot shy away from difficult or controversial decisions.[13]

2.2 Background to the *De Facto Relationships Act 1984*

On 13 July 1981, the New South Wales Law Reform Commission (referred to hereafter as the NSW LRC) received a reference from the then Attorney General, the Hon FJ Walker. The Commission's Terms of Reference were:

> To inquire into and review the law relating to family and domestic relationships, with particular reference to the rights and obligations of a person living with another person as the husband or wife de facto of that other person, and including the rights and welfare of children of persons in such relationships. [14]

Several factors gave rise to the NSW LRC Inquiry: the increasing incidence of de facto relationships in the community; [15] the perceived deficiencies in the existing law; and professional and community opinion advocating change. Until this review was conducted in 1981 there had been no systematic and detailed examination in New South Wales of the policy issues raised by legal regulation of de facto relationships. In the NSW LRC Issues Paper, arguments both for and against the introduction of legislative regulation of de facto relationships, were presented.

The arguments levelled **against** such a move were: [16]

(i) granting de facto spouses the same rights and duties as married couples would undermine the institution of marriage;

(ii) granting rights to de facto spouses may adversely affect the rights of a legal spouse;

(iii) attaching rights and duties to people who have chosen not to marry subjects them to a legal regime which they may wish to avoid;

---

13 *NSWPD*, Legislative Assembly, 17 October 1984, p1999.

14 NSW LRC, *Issues Paper*, De Facto Relationships, 1981, p2.

15 Although the incidence of de facto relationships became more frequent from the late 1960s, the phenomenon was not new as illustrated by the *Widows' Pension Act 1942* (Cwlth), which included within the terms of eligibility for pension, certain classes of de facto wives whose husband had died. This legislative recognition of de facto wives for the purposes of Commonwealth pension programs, almost 60 years ago, suggests that recent increases in de facto relationships may be merely an extension of a well-established pattern in Australia.

16 NSW LRC, Issues Paper, *De Facto Relationships*, 1981, p88.

(iv) carrying further the legal regulation of de facto relationships reinforces the notion, unacceptable to many, that women are weaker than men and are still in special need of economic protection;

(v) once the law specifically acknowledges and regulates de facto relationships, there is no logical basis for refusing to take a similar approach to other domestic relationships, such as homosexual unions, brother and sister households and extended families;

(vi) if the law is to regulate de facto relationships it will be necessary to draft an appropriate legislative definition, and it may not be easy to identify whether a couple is living in a de facto relationship;

(vii) the regulation of de facto relationships may require far reaching changes to many areas of law; and

(viii) further legal regulation of de facto relationships will create a larger class of people who will have claims, directly or indirectly, on government or the community generally.

The arguments advanced **for** were: [17]

(i) except for the formal marriage tie, there is no necessary legal difference between the nature and quality of de facto relationships and the nature and quality of marriage relationships;

(ii) de facto spouses have the same need for adjustment of their rights and duties as do married couples in substantially identical circumstances;

(iii) the problem of defining de facto relationships is no more difficult than many other definitional questions facing legislatures and courts;

(iv) those in de facto relationships must also undertake appropriate obligations and responsibilities;

(v) if de facto spouses are not granted adequate legal protection of their rights, additional burdens may be placed on the social security system;

(vi) the changing patterns of marital and family relationships in Australia and elsewhere;

(vii) there is no compelling reason why similar regulation will be required for other domestic relationships, such as siblings who share a household or homosexual partnerships; and

(viii) not all those in de facto relationships have so chosen in a deliberate attempt to avoid incurring the rights and duties associated with marriage.

De Facto Relationships Bill 1984

In October 1984, the Government introduced the De Facto Relationships Bill, which followed very closely the recommendations made by the NSW LRC in its Final Report. [18] In the Second Reading speech to the Bill,[19] then Attorney General, the Hon P Landa, noted that:

17 Ibid.
18 NSW LRC, *Report on De Facto Relationships*, Report No 36, June 1983.
19 *NSWPD*, Legislative Assembly, 17 October 1984, pp1999-2004.

> The Government has determined that those recommendations of the Law Reform Commission ought to become law in this State, because it is evident that a significant number of people are experiencing considerable hardship because of the failure of the existing law to address rationally, serious legal difficulties associated with de facto relationships, and in particular the break up of such relationships. [20]

And further:

> The Law Reform Commission has reached the conclusion that the best path is to reform those specific areas where injustices presently occur. Submissions received by the Commission from interested groups support the view that reforms are needed, and an overwhelming majority of those submissions favour the examining of individual areas of law to identify the injustices and anomalies warranting attention. The Government has endorsed the approach taken by the Commission, recognising the special status that marriage has in our community. It is to be emphasised that these initiatives are directed at the legal consequences of de facto relationships, and neither encourage the establishment of such relationships nor in any way privilege those who enter them. [21]

In passing this Act, New South Wales became the first Australian jurisdiction to enact specific legislation dealing with the rights and duties of partners to a de facto relationship. The *De Facto Relationships Act 1984*, (referred to hereafter as the DFR Act 1984), was designed to meet the needs of heterosexual couples who were not legally married, but whose relationships were 'marriage-like'. This Act primarily dealt with division of property on relationship breakdown, and did not create a general definition of 'de facto' applicable across the board.

2.3 Issues Arising from the *De Facto Relationships Act 1984*

The DFR Act 1984 improved the rights of de facto couples by introducing a number of principles defining the property rights of de facto partners. These rights were similar to those of married couples under the FLA 1975, but certain significant differences remained, including:

- A number of statutory provisions relating to the breakdown of marital relationships are not found in Acts governing de facto relationships with the effect that de facto partners seeking redress have to commence proceedings at common law and equity, which is much more expensive, complex and unpredictable.

- The Family Court has jurisdiction under the FLA 1975 to settle property and maintenance matters between the parties to a marriage or former marriage. Former de facto couples may only have a property dispute determined by the Family Court when they are also disputing the care of the children.

- Property adjustment orders under the DFR Act 1984 were confined to compensation for past contributions to the property and welfare of the family, whereas under the FLA 1975, the Court can consider the circumstances of the parties in the future and the differences in the parties' financial positions on the breakdown of their relationship.

20 Ibid, p2000.
21 Ibid, p2001.

- Maintenance under the DFR Act 1984 was ordered in much more limited circumstances than under the FLA 1975. A de facto partner could only get an order for maintenance in certain limited circumstances, and this order could be varied if and when the financial circumstances of either de facto spouse changed. No spouse maintenance from a former de facto partner would be ordered when a person was in a new de facto or marriage relationship.

- Enforceable financial agreements [22] between de facto couples were permissible under the DFR Act 1984 but similar agreements between married partners are not recognised under the FLA 1975.

As the substantive provisions of the DFR Act 1984 have been retained in the *Property (Relationships) Act 1984*, these differences still exist.

The Committee is aware that when the NSW LRC examined the need for legislative reform to recognise those in de facto relationships, it concluded that any equation with marriage should be avoided. This approach was taken, so as not to be seen as undermining the institution of marriage in our society on the one hand, while on the other, not imposing legal requirements on those who may have deliberately chosen to avoid them.

However, this distinction has led to a disparity of legal treatment between married couples and de facto couples, with de facto couples often being in a much worse position than their married counterparts. In considering whether current legislation concerning domestic relationships remains relevant, the Committee recognises the changing nature of Australian society.

Growth of De Facto Relationships: Statistical and Other Evidence

At present, the majority of families are constituted as a married couple. However an increasing proportion of families involve de facto couples with and without children, single parent families and same sex couples with and without children. At the time the NSW LRC conducted its Inquiry into de facto relationships, the incidence of such relationships was estimated at 2.2% of all Australian families containing spouses. [23] In 1984 when the De Facto Relationships Bill was introduced, the figures had risen to 4.7%. The Australian Bureau of Statistics figures showed that the proportion in NSW was identical, amounting to 116,200 people. [24]

In 1986 Census data indicated de facto couples made up 5.8% of all couples living in Australia. By 1991 this figure had risen to 8.1% and 1996 Census data put the figure at 10.1%. While the 1986 and 1991 data applied only to heterosexual couples, information on same sex couples was included in the 1996 Census, and it was estimated that the figure for NSW was approximately 4,635 same sex couples.[25]

The Committee notes the observations made in the 1998 House of Representatives' Report regarding trends relevant to Australian society as we approach the next millenium. Namely: [26]

---

22 These agreements were formerly known as 'cohabitation' and 'separation' agreements. They have been renamed 'domestic relationship' agreements and 'termination' agreements under the recent amendments.
23 NSW LRC Issues Paper, op cit, p16.
24 Hon P Landa, Attorney General, *NSWPD*, Legislative Assembly, 17 October 1984, p2001.
25 B Bolger, 'Census consensus', *Sydney Star Observer*, 4 September 1997, pp11-13.
26 *To have and to hold: Strategies to strengthen marriage and relationships*, House of Representatives Standing Committee on Legal and Constitutional Affairs, June 1998, Chapter 2 – Marriage and Family in Australia, p9.

- People are marrying less;
- Those couples who marry do so at an older age;
- More couples cohabit before marriage;
- More people remain unmarried; and
- There has been a dramatic increase in divorce.

Changing Attitudes

The movements in society discussed above have led to changes in attitudes and the significant modification of societal mores. In a number of submissions it received the Committee's attention was drawn to the shift in community attitudes to relationships outside marriage and to non-traditional domestic relationships.

The Aids Council of New South Wales (referred to hereafter as ACON) stated that:

> Legal status for same sex relationships has not arisen in a vacuum. There is increased community acceptance for greater diversity in the types of relationships which are recognised in law. Legal recognition of de facto heterosexual relationships in 1984 reflects the fact that society's norms are constantly changing and laws ought to reflect these shifts in society. [27]

Ms Catherine Deakin said:

> The introduction of the DFR Act in 1984 recognised that adults form stable, committed interpersonal relationships which share many characteristics with marriage. Extending the DFR Act to homosexual couples would merely recognise the indisputable fact that such couples exist, and that they are as financially, emotionally and socially interdependent as their heterosexual counterparts. There is no sound practical or policy reason to suppose that such factors vary merely because both the parties to the relationship are of the same sex. [28]

In the introduction of the PRLA Bill 1999 the Attorney General said:

> The PRLA Bill recognises that contemporary society has developed to a point where laws that regulate the division of property on the failure of a broad range of intimate relationships are necessary and desirable … In New South Wales, partners without the protection of living in a de facto relationship as currently defined by statute, and interpreted by the courts, must rely on the vagaries of the common law relating to constructive trusts and the like … such reliance is costly, time consuming and, at times, unfair. [29]

Fundamental Rights and International Conventions

The elimination of discrimination and the notion of equality of all before the law are fundamental reasons for extending legal protection to those in non-traditional domestic relationships. Australia is a signatory to the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights (ICCPR), and Australian governments are obliged to respect their provisions. The relevant provisions of these international instruments are:

---

27 Submission No 29.
28 Submission No 100.
29 *NSWPD*, Legislative Council, 13 May 1999, p228.

Article 7 of the Universal Declaration of Human Rights, which states: 'all are equal before the law and are entitled without any discrimination to equal protection of the law.'

Article 2.1 of the ICCPR which reads:

> Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

And Article 26 of the ICCPR which provides that:

> All persons are equal before the law, and entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against any discrimination on any ground.

Although 'sexual preference', 'sexual orientation' or 'homosexuality' are not explicitly mentioned in the above Articles, it has been held that they apply equally to discrimination on these grounds. [30]

The Committee emphasises that any changes it recommends in relation to the legal protection of various interdependent personal relationships are in keeping with the above principles and made to ensure that those in such relationships are afforded equal rights, not special rights. This fundamental principle was referred to in a number of submissions.

Ms Jill Davidson, President of the New South Wales Branch of the Australian Association of Social Workers (AASW), said:

> The DFRA Bill is … not about creating different or special rights for lesbians and gays in NSW but about creating equal rights with those enjoyed by people in heterosexual de facto relationships … the AASW supports the proposed DFRA Bill 1998 as an important mechanism to address social justice for lesbians and gay men in NSW, and to recognise that such relationships are genuine and true. The impact of legal recognition of same sex partnerships will be felt in the improved quality of life of gay men and lesbians as well as in their sense of self and dignity and ultimately a socially supportive environment for all. [31]

Ms Kirsty Campbell, Assistant Secretary of the NSW Branch of the Finance Sector Union of Australia, wrote:

> The gay and lesbian community contribute every day to this State through their labour, expenditure and community activities. They should be afforded the same rights as every other member of our community through recognition of their relationships. This union is not advocating the creation of

30 In the Toonen case, the United Nations Human Rights Committee noted that 'in its view the reference to 'sex' in Articles 2.1 and 26 is to be taken as including sexual orientation'. *Toonen v Australia*, Communication 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1992, paragraph 8.7.

31 Submission No 8.

> special rights for one section of our community, we merely support the immediate extension of existing rights and obligations of the heterosexual section of our community to gays and lesbians. [32]

Mr Michael Crozier, Principal Solicitor with the Blue Mountains Community Legal Centre, observed:

> I am also aware of the view held in some quarters that by legislating to remove discrimination against same sex couples, there is an attempt to give such people 'special rights' or even undermine the 'status of marriage'. However, the truth of the matter is, that what is sought is to remove legal and systematic discrimination against same sex partners and essentially give them the same status as any de facto couple and to recognise that same sex partners put as much into a relationship as any other couple and there is no logical or legal rationale for treating them differently. [33]

Mr Mark Orr noted:

> The statutory recognition of same sex relationships should not be seen as the people in these relationships asking for 'special rights' as some would suggest. Such recognition is only seeking to ensure that if they so choose, two people of the same sex in NSW can enter into a domestic relationship in the same way as a heterosexual couple and have conferred on them the same rights and responsibilities as a heterosexual couple in this situation. Time has come for parliament to make a clear statement that tax paying, law abiding citizens of NSW who seek to enter into a same sex relationship are able to do so with the recognition of the State, with the benefits, safeguards and protections that confers upon such relationships. [34]

2.4 Review of Domestic Relationships Law by the NSW Law Reform Commission

In 1994 the Gay and Lesbian Rights Lobby called for a review of the domestic relationships legislative regime. It recommended that the Government:

> Allocate funds to an appropriate agency (such as the Law Reform Commission) to consider the questions of relationships generally, including:
>
> (i) the appropriateness or otherwise of bestowing entitlements on the basis of relationships,
>
> (ii) the focussing on monogamy, exclusivity and blood relations,
>
> (iii) the need to replace the *De Facto Relationships Act 1984* with an Act which bestows rights and entitlements on a broader concept of 'relationships', and
>
> (iv) the need to ensure that all people with disputes which are based on rights and obligations arising from relationships have access to an inexpensive and accessible forum for the resolution of these disputes, and to that extent, extending cross-vesting arrangements to enable same sex partners to access the Family Court in all circumstances. [35]

32 Submission No 37.
33 Submission No 74.
34 Submission No 107.
35 The Gay and Lesbian Rights Lobby, *The Bride Work Pink*, 2nd Edition, February 1994, p4.

The Committee notes that similar calls for a wide-ranging review were made in many submissions and by numerous witnesses in the course of this current Inquiry. One of the Co-Convenors of the Gay and Lesbian Rights Lobby, Mr Alan Kirkland, stated:

> It is probably timely to review that mechanism, which would be a very complex task and would require some fairly strong legal minds, which we do not claim to be. We would see it as something that would be properly dealt with by a body such as the Law Reform Commission. [36]

Ms Vedna Jivan, a solicitor from the Kingsford Legal Centre, commented:

> We hope that the Committee will make a referral to either another form of inquiry, be it a standing committee or whatever in Parliament, or, preferably, refer it to the New South Wales Law Reform Commission, because there are all sorts of constitutional issues. [37]

Ms Stevie Clayton, Deputy Executive Officer with ACON, told the Committee:

> … That is the sort of inquiry that needs to be undertaken by the New South Wales Law Reform Commission over a period of time. It should have a broader brief than simply looking at the way that the law now looks at same sex relationships. It should say, 'Having put same sex relationships into that regime with heterosexual relationships, now let us look generally at how the law looks at relationships.' [38]

The NSW LRC received a reference from the Attorney General on 6 September 1999 to review the *Property (Relationships) Act 1984*. The Terms of Reference require the Commission to: [39]

> Inquire into and report on the operation of the *Property (Relationships) Act 1984*, with particular regard to:
>
> - The financial adjustment provisions of the Act and in particular:
> (i) the effectiveness of section 20 in bringing about just and equitable adjustments of the parties' respective interests; and
> (ii) whether the current legislation is able to take into account superannuation entitlements effectively
> - the process of decision-making or determination of rights
> - the Commission's Report No 36 *De Facto Relationships* (1983)
> - the 1999 amendments incorporating the *Property (Relationships) Legislation Amendment Act 1999*, and the matters referred to the Legislative Council's Standing Committee on Social Issues regarding the rights and obligations of persons in interdependent personal relationships; and
> - any related matter.

The Committee welcomes this reference to the NSW LRC as many of the technical and legal issues which need addressing in relation to reform of domestic relationships law are beyond the Committee's expertise. Having met with members of the Commission to discuss the scope of their Terms of Reference, the Committee is confident that a valuable report will be produced. Nevertheless the

36 Evidence, 4 August 1999.
37 Evidence, 4 August 1999.
38 Evidence, 5 August 1999.
39 Information obtained from the NSW Law Reform Commission's Internet site at www.lawlink.nsw.gov.au/nswlrc.nsf/pages/refpr accessed on 24 November 1999.

Committee believes that the recommendations made by it in this Report should be acted upon without undue delay, and without awaiting the report of the NSW LRC.

2.5 Summary

It is evident that different legal consequences arise when a relationship has been formally recognised (marriage) and when it has not (de facto relationship). While the historical rationale for this distinction is understood, changing societal attitudes have given rise to a call for increased equality of legal treatment not just in relation to opposite sex de facto couples, but also in relation to a variety of non-traditional domestic relationships such as same sex couples.

Chapter 3 - Models for Achieving Legal Recognition of Non-Traditional Relationships [40]

When the *De Facto Relationships Act 1984* was introduced it was seen by many as a significant step forward in the area of domestic relationships law, and as an acknowledgement of changing social practices and mores. As the community developed broader attitudes to personal relationships, calls were made for reform in the area of gay and lesbian relationships. Although homosexuality had been decriminalised and the *Anti-Discrimination Act 1977* had been amended to make discrimination on the basis of homosexuality unlawful, same sex relationships were not legally recognised and were not covered by the *De Facto Relationships Act 1984*. Organisations such as the Gay and Lesbian Rights Lobby began making submissions on this issue to the New South Wales Government in the early 1990's. Legislation recognising a wider range of domestic relationships was passed in the ACT in 1994 and gave further impetus to those proposing change in this State.

The Committee examined five models for achieving legislative change to encompass a wider range of interdependent personal relationships.

3.1 Adjust Individual Laws

One means of achieving recognition of non-traditional domestic relationships would be the identification and amendment by Parliament of individual legislative provisions which have any discriminatory effect. Such discriminatory effects arise where provisions confer a benefit on parties to a heterosexual relationship but do not make the same benefits available to people in non-traditional interdependent personal relationships such as same sex couples.

There are a number of Acts where, on an ad hoc basis, amendments have already been made which recognise same sex relationships. In 1996 the *Victims Compensation Act* was amended to explicitly include same sex partners in the class of people who can apply for compensation when a 'relative' is a victim of crime, and the *Criminal Procedure Act 1986* was similarly amended to include same sex partners within the definition of 'relative' for the purpose of giving relatives of a victim of crime the opportunity to make a statement at the sentencing stage in criminal proceedings. And in the Protection of the Environment Administration (Disclosure by Board Members) Regulations 1992, Regulation 3 defined 'relative' to mean spouse 'including a de facto heterosexual or homosexual partner'.

Although this option has the advantages of allowing consideration of the most appropriate form of recognition in each particular instance, it would be a slow and fragmented process. It could result in some areas remaining untouched and might give rise to inconsistency. The Committee does not support such a piecemeal approach being used as the sole means of achieving legislative change. However, it notes that the *Property (Relationships Legislation) Amendment Act 1999* has made a number of consequential amendments to various Acts to ensure that those in same sex relationships are not treated differently to those in opposite sex relationships. The Committee supports the amendment of individual pieces of legislation to achieve this outcome.

40 Information in Chapters 3, 4, and 5 is taken from the NSW Parliamentary Library Research Service *Briefing Paper*, 'Legal recognition of same sex relationships', No 12/99 by R Simpson and M Swain.

3.2 Amend Discrimination Laws

It would also be possible to recognise same sex relationships by utilising anti-discrimination laws which prohibit discrimination on the basis of sexuality. This model has been proposed at the Commonwealth level, and more recently in Western Australia in 1997. However, as the Senate Legal and Constitutional References Committee pointed out in its *Inquiry into Sexuality Discrimination*, [41] anti-discrimination legislation does not, in itself, provide sufficient recognition of same sex couples. Given that most Australian anti-discrimination legislation, including the NSW *Anti-Discrimination Act 1977*, provides an exception for discrimination authorised or necessitated by other statutory requirements, all conflicting legislation would have to be duly amended. This issue was raised in a number of submissions, and the Committee notes that there was much support for the repeal of section 54(a) and (b), the relevant provision in the NSW ADA 1977. The Committee's attention was also drawn to the continuing appropriateness of the provision related to discrimination on the grounds of marital status. These two aspects are discussed in detail below.

Shortcomings of the Anti-Discrimination Model

It is important to clarify the protection offered by the *Anti-Discrimination Act 1977* as the legal concept of discrimination is quite specific. Under the Act 'discrimination' means treating people unfairly because they happen to belong to one of the particular groups of people protected by it, and this unfair treatment has to occur in places or circumstances specified in the Act before a complaint of unlawful discrimination can be made out. The Act is arranged by category and in each, the places and circumstances in which the Act will apply and where exceptions are allowed, are detailed. As there is no uniform set of places and circumstances which apply to all the groups, not all are covered in the same fashion. Broadly the Act covers discrimination on the grounds of race; sex; marital status; disability; homosexuality; and age if this occurs in the context of employment; State education; the provision of goods and services; accommodation or registered clubs.

It has been put to the Committee that the ADA 1977 requires amendment in two main areas to ensure consistency with the spirit of the *Property (Relationships Legislation) Amendment Act 1999*. The first relates to the definition of 'marital status', and the second to the general exceptions provided under section 54.

i) Marital status

The ADA 1977 is arguably of limited use to people in same sex relationships because these relationships are not covered by the Act. Mr David Stone, President of ACON said:

> As I understand it, there is a degree of difference among lawyers as to whether the protection against discrimination on the grounds of marital status applies to same-sex couples. Our view, following the Qantas decision, is that it does not. It is necessary to amend the *Anti-Discrimination Act* to insert a ground of protection on the basis of relationship status or a similar sort of term. [42]

While it is unlawful to discriminate against homosexuals or lesbians who are single, the Act does not apply to discrimination against homosexuals or lesbians as couples. 'Marital status' is defined in section 4 of the ADA 1977 as:

41 Senate Legal and Consitutional References Committee, *Inquiry into Sexuality Discrimination*, December 1997.
42 Evidence, 5 August 1999.

> the status or condition of being: single; married; married but living separately and apart from one's spouse; divorced; widowed; or in cohabitation, otherwise than in marriage, with a person of the opposite sex.

It would appear that while it is unlawful to treat an individual unfavourably on the ground of that person's homosexuality, there is no parallel protection for ensuring a homosexual or lesbian couple receives treatment equal to that enjoyed by heterosexual couples. This point is best illustrated by the case of *Wilson v Qantas Airways Ltd 1985*, [43] where two homosexual airline stewards, who were in a relationship and cohabiting, lodged a complaint of discrimination on the ground of marital status because they were not permitted the privilege of being rostered together. This privilege was, however, granted to heterosexual couples employed by the company. In handing down its decision in the matter, the Equal Opportunity Tribunal held that the couple was more comparable to 'golfing buddies' than to married heterosexual couples. [44] In a more recent Supreme Court case, [45] Justice McInerney rejected that decision: 'It was precisely because the complainants were homosexual that they could not be legal or de facto spouses … the Tribunal in that case undertook a wrong comparison ... I consider the reasoning (in *Wilson*) … to be incorrect'.

Some have argued that same sex couples may already be covered on the basis that a characteristic of an individual homosexual is that he or she will have relationships with other homosexual people.

Mr Chris Puplick, the President of the Anti-Discrimination Board (hereafter referred to as the ADB), told the Committee:

> … It is an artificial construct to try to protect people in their relationship by going through the tortuous process of arguing that it is a characteristic of a homosexual person to enter into a relationship with another homosexual person. [46]

To put it beyond doubt, however, the Act requires specific amendment to its 'marital status' definition, which is inconsistent with the protections offered to same sex couples under the PRLA Act 1999.

In his original submission Mr Puplick made mention of cases which the Anti-Discrmination Board had to decline due to lack of jurisdiction:

> Although the Board has dealt with quite a number of these complaints under its homosexual discrimination provisions, as President I have had to decline many others where there is a statutory basis for entitlements, benefits, rights and privileges attached to the marital status of a couple, but those benefits do not flow on to people in same sex relationships. [47]

In the DFRA Bill 1998, it was proposed to omit the current paragraph relating to de facto relationships under the 'marital status' ground in the ADA 1977, and insert in its place 'in a de facto relationship within the meaning of the De Facto and Domestic Relationships Act 1984'. A similar effect could be achieved by deleting the current reference to a 'de facto relationship', and inserting in its place 'a

43 (1985) EOC ¶92-141.
44 NSW LRC, Discussion Paper No 30, *Review of the Anti-Discrimination Act 1977 (NSW)*, February 1993, p98.
45 *NIB Health Funds Ltd v Hope & Anor* (1996), NSW LEXIS, p3962.
46 Evidence, 5 August 1999.
47 Ibid.

domestic relationship within the meaning of the *Property (Relationships) Legislation Amendment Act 1999*'. Using the term 'domestic relationship' would extend coverage to those in close personal relationships as well as those in de facto relationships. If such an amendment were to be made, the Committee considers that it would be appropriate to rename the ground provided for in section 39, 'relationship status'.

The ADB commented on the failure of the PRLA Act 1999 to amend the ADA 1977 in its supplementary submission:

> The PRLA Act does not amend the ADA 1977 to extend the definitions of 'marital status', 'near relative' and 'relative' to be consistent with the definitions within the *Property (Relationships) Act 1984* … By failing to amend the ADA in this way, the implied message is that the primary law that deals with discrimination in NSW is not worthy of including definitions which recognises unequivocally the rights of same sex couples. [48]

The Committee notes that in the ADA 1977 as it currently stands, 'relative' of a person means: 'any person to whom this person is related by blood, marriage, affinity or adoption', and 'near relative' in relation to a person means: 'the spouse, parent, child, grandparent, grandchild, brother or sister of the person'. These definitions are not wide enough to cover those in the non-traditional domestic relationships provided for in the *Property (Relationships) Legislation Amendment Act 1999*. The Committee is of the view that this inconsistency should be removed.

Mr Kirkland described the limitations with the current definition of marital status in the ADA 1977 and added:

> We would propose a change to the definition of 'marital status' to include all de facto relationships, including gay and lesbian relationships, as de facto relationships are now defined in New South Wales law. [49]

Reverend Ann Wansbrough, the Research and Liaison Officer, Church and Society Committee of the Board for Social Responsibility, Uniting Church in Australia, NSW Synod, commented:

> There are some remaining areas where the law recognises spouses but not yet equivalent parties in the lives of those who are not married. And those that stand out - and this is not intended as an exhaustive list - are anti-discrimination, where being in a homosexual relationship is not covered by marital status. [50]

ii) General exception provisions

The Committee has heard arguments for the repeal of section 54, which provides for acts done under statutory authority to be exempted from the operation of the ADA 1977. The practical effect of this provision is that if discriminatory conduct is authorised under another piece of legislation, the ADA 1977 will be overridden. When the Act was introduced, it was intended that section 54 be read in conjunction with section 121, which gives the ADB the power to review all NSW legislation for

48 Submission No 132 – Supplementary.
49 Evidence, 4 August 1999.
50 Evidence, 5 August 1999.

discriminatory provisions. The intention was that over time provisions inconsistent with the principles outlined in the ADA 1977 would be amended and brought into line. In this way conflicting duties would be removed, and the section 54 exception would no longer be necessary.

The exception applies equally to requirements of Acts passed before or after the ADA 1977, [51] which makes the provision unusual in that it is not in keeping with general legal principles of interpretation whereby the supremacy of legislation is arranged hierarchically. As a general rule, Acts of Parliament override regulations and a law which deals specifically and comprehensively with a subject overrides a law that refers to the subject only in passing. In addition a more recent Act prevails over earlier legislation. In contrast section 54 means that regulations can override the ADA 1977, other general laws can override its specific provisions, and laws made after it do not need to recognise or reflect its provisions.

The question of reform to the marital status provision and the repeal of section 54(a) and (b), have been but two of the issues under consideration by the NSW LRC as part of its comprehensive review of the *Anti-Discrimination Act 1977*. In December 1991 the Commission received a reference from the then Attorney General, the Hon P Collins QC MP, 'to inquire into and report on the current scope and operation of the *Anti-Discrimination Act 1977* (NSW) and any related issues.' An extensive Discussion Paper calling for public submissions on the 273 questions posed in the document was released in February 1993. [52] The Committee is aware that the NSW LRC review has been finalised, and that it is anticipated that the Final Report will be tabled soon.

In its original submission the ADB said:

> The Board is in agreement with extending the definition of 'marital status' within the ADA to reflect the definition of the DFRA Bill 1998 by amending the definitions of 'marital status', 'relative' and 'spouse' where appropriate … Such an amendment would be extremely significant for people in same sex relationships because it would mean that any rights afforded to married or de facto couples would also have to be afforded to homosexual couples.
>
> However, because of the operation of section 54 … only statutory changes which have been identified in Schedule 2 of the DFRA Bill will be affected. Those which have not been identified or any future Acts or Regulations of the NSW Parliament which may have a discriminatory impact on certain groups may not be subject to the ADA. As such, to give full equality before the law to people in a de facto relationship or a domestic relationship, sub-sections 54(a) and (b) of the ADA need to be repealed or amended so as not to apply to legislation which requires different treatment for people in same sex relationships. [53]

This is consistent with the approach taken by the ADB in its 1994 submission to the NSW LRC review, when it indicated its support for the view that all State legislation should be consistent with the ADA 1977 unless an exemption could be justified on policy grounds. [54]

---

51 Section 54(a).

52 New South Wales Law Reform Commission, Discussion Paper No 30, *Review of the Anti-Discrimination Act 1977 (NSW)*, February 1993.

53 Submission No 132.

54 Anti-Discrimination Board, *Balancing the Act: A Submission to the NSW LRC's Review of the ADA 1977 (NSW)*, May 1994, p111.

When he appeared before the Committee, Mr Puplick said:

> We would love to see section 54 of the legislation repealed. Effectively section 54 says that it shall not discriminate on the grounds provided for under the Act, unless another Act of Parliament allows you to discriminate. It would be ideal if all legislation in New South Wales were tested against the principles of the *Anti-Discrimination Act*, and where it is necessary to discriminate then those provisions of the Anti-Discrimination Act should be set aside. In other words, if you want to establish a voting age at 18 you can set aside age discrimination to provide that people under the age of 18 do not have the right to vote. But at the moment we have a whole series of laws, a lot of which were enacted before anti-discrimination law came into effect. Anti-discrimination law comes into effect, but the prior existing legislation that allowed discriminatory behaviour remains on foot and takes precedence over anti-discrimination law.
>
> Queensland and Victoria have gone through the process of identifying laws that are otherwise contrary to anti-discrimination law and consciously decided which ones should remain on the books and which ones should be altered. At the moment New South Wales is in the process of trying to identify discriminatory provisions in industrial awards and enterprise agreements so that we can bring them to the attention of the Industrial Relations Commission with the hope that they will be removed progressively. The Parliament should require a revisitation of those laws that contain discriminatory provisions and decide whether it wants to retain them and make a positive decision about that, rather than rely upon their mere existence and overturn, in those areas, the beneficial effects of anti-discrimination legislation. [55]

Specific exemption provisions

The Committee notes the concern expressed by the Catholic Commission for Employment Relations in relation to any amendments to the ADA 1977 which would affect the ability of church-related organisations to employ people meeting their specific requirements. Mr McDonald, the Executive Director, said:

> What we would ask is no more than what we already have in place in the *Anti-Discrimination Act*, that is, a recognition that the employer, being the Church, has a right to engage staff and not be found to be discriminating because of our doctrines, tenets and beliefs … We want to be able to make a decision at the point of employment as to whether or not we want to employ a de facto relationship person or a married person. We want to be able to make that decision knowing that if we choose a married person the law is not going to be turned around to bite us simply because we are adhering to our doctrines, tenets and beliefs. [56]

The Committee acknowledges the right to religious liberty and the right of parents to educate their children in accordance with their moral and religious convictions, although exemptions such as these appear inconsistent with the principles enunciated in the *Property (Relationships) Legislation Amendment Act 1999*. The question of removing specific exemptions in these areas is outside the Committee's Terms of Reference.

55 Evidence, 5 August 1999.
56 Evidence, 4 August 1999.

The Committee recognises that while amendments to the ADA 1977 would extend protection against discrimination to homosexuals and lesbians as couples, it is only useful in certain specified circumstances. To ensure more comprehensive non-discriminatory legal treatment, it is necessary to amend a number of pieces of other important legislation. This view was expressed by Mr Peter Collard in his submission:

> This Act [ADA] declares that it is not lawful to treat these people differently. It is notable that this law binds the Crown, but that the major discrimination comes from the Crown, entrenched in other laws. The Parliament, and now society in general clearly accept that discriminatory treatment is not acceptable. It is past time when the Crown should honour the spirit of the ADA and alter those laws which still enforce discrimination against homosexuals. [57]

Recognition

For some, the legal recognition of those in same sex relationships is, of itself, extremely important. This point was made in a submission by the Human Rights and Equal Opportunity Commission (referred to hereafter as HREOC) to the Senate Legal and Constitutional References Committee on the need to protect Australian citizens against discrimination and vilification on the grounds of their sexuality. It wrote:

> If the law is to afford freedom of expression and identity in private life, individuals who wish to have their relationships recognised should be entitled to obtain that recognition without discrimination. [58]

The Committee concludes that the provisions of the *Anti-Discrimination Act 1977* need to reflect the changes made by the *Property (Relationships) Legislation Amendment Act 1999*. Discrimination currently occurs as a result of people being in same sex relationships, and as the legislation currently stands legal redress under the ADA 1977 appears limited. To rectify this situation the Act could be amended to cover such situations, and the reference to ‘marital status’ renamed 'relationship status’.

The Committee recognises that while the general exception provisions in section 54(a) and (b) are allowed to stand, actions and behaviour which might otherwise be seen as discriminatory under the Act are permitted. The Committee is aware that amendment to section 54 would not affect specific exceptions provided for under other sections of the ADA 1977 which relate, for instance, to private educational authorities.

57 Submission No 7.
58 HREOC, *Human Rights for Australia’s Gays and Lesbians*, Occasional Paper No 5, February 1997, p23.

Recommendations:

1. That the *Anti-Discrimination Act 1977* be amended to prohibit discrimination against people on the basis of their domestic relationships as defined in the *Property (Relationships) Legislation Amendment Act 1999.*

2. That the ground of discrimination be described as 'relationship status' in place of 'marital status' where it now exists in the *Anti-Discrimination Act 1977*.

3. That the terms 'relative', and 'near relative' in the *Anti-Discrimination Act 1977* be amended to reflect the definitions used in the *Property (Relationships) Legislation Amendment Act 1999*. The current definitions in the *Anti-Discrimination Act 1977* are not wide enough to cover those in the non-traditional domestic relationships provided for in the *Property (Relationships) Legislation Amendment Act 1999.*

4. That the general exception provisions in section 54(a) and (b) of the *Anti-Discrimination Act 1977* be repealed. These provisions were included in the *Anti-Discrimination Act 1977* to exempt acts done under statutory authority, with the expectation that over time all legislation would be made consistent with the *Anti-Discrimination Act 1977*.

3.3 Broaden the Definition of De Facto Partner

This option takes an existing relationship model and applies it to same sex relationships. It also treats same sex unmarried relationships in the same way as unmarried heterosexual relationships. This model recognises the rights of partners in other types of relationships without challenging the traditional concept of marriage. Further, this model does not require same sex partners who want recognition of their relationship to take any step other than asserting their relationship. If the criteria are satisfied, the relationship will be recognised. This may be desirable for people who do not wish to make a public statement of their sexuality, but who wish to have legal protection in certain situations such as death or relationship breakdown. This model is also seen as helpful to those who may not understand the consequences of failing to register their relationship if such a system operated.

A criticism of de facto recognition is that it is liable to be both under and over-inclusive. It encompasses those couples who do not want State intervention in their relationships, which is a criticism of the current de facto regime as it applies to heterosexual couples, and yet does not embrace those couples who do not live together, or have shared finances, or exhibit traditional interdependency. The fact that the de facto model is based on a heterosexual relationship model has been seen as objectionable by some people in same sex relationships. Additionally, because it may be necessary to go to Court to prove the existence of a de facto relationship, it has been argued that it may unnecessarily force some people to reveal their sexuality in order to claim the benefits of the changes.

The Committee notes that the *Property (Relationships) Legislation Amendment Act 1999* has extended the definition of a de facto relationship to cover those in same sex relationships, and supports this approach.

3.4 Establish a Register of Domestic Partnerships

The domestic partnership model operates by providing a means of relationship recognition through registration. Although voluntary, once a couple has registered as a domestic partnership, certain legal rights and responsibilities are established. Unlike the marriage or de facto model, members of domestic partnerships need not be living together or be in a sexual relationship - the parties must simply wish to provide mutual support and security to one another. Registered partnerships have been introduced in many northern European countries, a number of US States and municipalities and certain Canadian provinces.

A suggested benefit of the domestic partnership model is its voluntary nature, which overcomes some of the objections to the de facto model. It would also enable a more open model of relationship recognition since there would be few pre-requisites for recognition. Legal consequences arise solely from a choice to nominate a particular relationship as significant. It is not relevant whether the relationship is heterosexual or homosexual, whether the parties live together, or whether the relationship is a sexual one.

It is possible with this model for a person to nominate more than one person as significant for different purposes, for example one person for the purposes of medical issues, and another for superannuation benefits. However, it is unlikely that this model would develop in this way in practice, as most people would nominate the same person as being significant for all areas.

Disadvantages of the registration model include the possibility that some people will not register, and that registration of same sex relationships may lead to the perception that these other relationships are second-class. Another potential difficulty arises from the voluntary nature of registration. In some relationships, the weaker partner, who may be the one in most need of protection and assistance, will be disadvantaged if the stronger party decides not to register the relationship.

Legislation to create domestic partnerships could be introduced by a State government in the same way as the *De Facto Relationships Act* 1984, but if such a scheme were implemented, it would not extend recognition of such relationships for the purposes of Commonwealth legislation. In important areas such as immigration, social security, workers compensation for Commonwealth employees, veterans' affairs, defence, superannuation or taxation, the Commonwealth would have to enact its own legislation to recognise domestic partnerships.

The Committee recognises that registration was identified in some submissions as the preferred model. Mr Richard Buckdale, the President of Mature Age Gays (MAG), stated that his organisation preferred the models offered under the SPR Bill 1997, particularly the option to register relationships. [59]

In his appearance before the Committee Mr Buckdale added:

> First, the DFRA Bill 1998 makes it quite difficult for a number of couples to be able to prove that they are in a de facto relationship. The Bill, which I believe is now an Act, has a requirement that members, a couple or an item, must be living together. In many cases with mature age gays this does not always apply, even in cases where there may be a 15- or 20-year-old relationship, a

59 Approximately 170 men attended a MAG meeting on 11 July 1998 where the content of the SPR Bill 1997 and the DFRA Bill 1998 was discussed. According to Mr Buckdale, the vast majority of the audience preferred the SPR Bill 1997 and the recognised relationships model. Submission 59.

> relationship that they consider, although it is not validated in law, to be like a marriage. From a personal viewpoint they perceive it in that way, yet in some cases they are not actually living together on a day-to-day basis. [60]

Dr Lee Andresen was concerned that under the *Property (Relationships) Legislation Amendment Act 1999* the process of proving the existence of a de facto relationship would still be costly and time consuming. He contrasted the current approach with the registered relationship system proposed under the SPR Bill 1997.

> It is the 'recognised relationship' option, in which a couple who have completed the necessary legal conditions to have their relationship recognised, can officially register the relationship for the purposes of benefitting under the Act. [61]

Mr Ken Clarke said:

> I support the DFRA Bill even though I believe it to be a less than perfect instrument to achieve the goal of defining rights and obligations to men and women in interdependent and same sex relationships … it would be far simpler for many couples to have a form of registration of relationships (of any type) that defines basic obligations and rights and provides corresponding legal protection to those rights. [62]

It should be pointed out that currently there are no registration requirements imposed on those in heterosexual de facto relationships. At the time the 1984 legislation was enacted, it was thought inappropriate to subject people to the same formal legal requirements as those entering into marriage.

Those **in favour** of a system of relationship registration argue that: [63]

- The legal rights and responsibilities conferred upon heterosexual de facto couples would be extended to homosexual couples, and thus, a major form of discrimination against same sex couples would be eliminated.
- People in same sex relationships would have the same access to financial, legal and social benefits as heterosexual de facto couples during their relationship. Such provision could also apply to other relationships involving financial dependence.
- Registration provides an open model of recognition as there is no need for set criteria for recognition, legal consequences flow, simply, from the choice to nominate a particular relationship as significant.

60 Evidence, 4 August 1999.
61 Submission No 21 – Supplementary.
62 Submission No 116.
63 Although this information is taken from the Equal Opportunity Commission Victoria Report *Same Sex Relationships and the Law*, March 1998, p55, similar concerns were raised in various submissions received by the Committee.

- A relationship register offers a straightforward way for people to prove their relationship, without having to resort to intrusive and perhaps difficult issues of evidence in relation to financial connections. Such a register could be established under the *Births, Deaths and Marriages Registration Act 1995*, and maintained by the Registrar-General.

- The law would be clear and accessible in the event of relationship breakdown.

- The law would offer protection to the economically weaker partner of a same sex relationship upon the ending of the relationship.

- Registration could entitle same sex partners to all the official rights and responsibilities conferred upon married couples, as opposed to recognition of de facto relationships which does not confer the same rights as marriage.

- A registration system would entitle same sex couples to official validation of their relationships, which is important for some lesbians and gay men.

- A relationship register could be available to heterosexual couples who do not wish to marry.

Those **opposed** to relationship registration say it has the following disadvantages:

- It is not consistent with the call for equal treatment before the law.

- A registration system confined to same sex couples could create a hierarchy of acceptable relationships – marriage, de facto relationships and then registered relationships – in which same sex couples had the least value.

- Discrimination against same sex couples would not be fully eliminated as heterosexual couples can choose between the opt-in model, marriage and the presumptive model, de facto recognition.

- Few people would avail themselves of the facility. Heterosexual couples who decide not to get married are unlikely to enter into a different type of formal arrangement, with the result that 'registered relationships' would become a category applicable only to same sex couples. Given that the system would require (or at the very least implies) a declaration of sexuality from people still discriminated against on the basis of that sexuality, it may mean that the system is only used by a privileged and confident few and, thus, actually reinforces or increases the disadvantage experienced by same sex couples.

- Unless made compulsory the existence of such a scheme would be of no assistance if people do not register. It may also lead to a situation where those unregistered relationships are given even less significance because they had the choice of registering and did not.

- Registered relationships would only have limited legal recognition as they are a creature of State law, not Commonwealth law.

- It might be unconstitutional.

While the Committee appreciates the importance attached to a registration system by some people, it does not support this model. The Committee is not persuaded that such a system would achieve much more than the new regime introduced by the *Property (Relationships) Legislation Amendment Act 1999*. The ramifications of introducing such a system are potentially huge, and so a detailed examination of such a proposal would need to be undertaken, and the community at large consulted before any such action were implemented.

Recommendation:

5. That a registration system should not be introduced as a mechanism for relationship recognition.

3.5 Permit Same Sex Marriages

Under this model all legislative provisions conferring benefits on a 'spouse' would apply to same sex partners. This option lacks political and community support, and in any event state Parliaments have no power in relation to marriage and divorce laws. This fact was re-stated by the Attorney General in the Second Reading speech to the Property (Relationships) Legislation Amendment Bill 1999: 'The Bill does not attempt to provide for any form of marriage, this being a matter, by virtue of the Commonwealth Constitution, on which a State may not validly make laws.' [64]

Moreover, gay and lesbian rights organisations gave evidence which, with some exceptions, opposed the adoption of a marriage model. The Committee notes that adopting such a model would not solve problems for those choosing to be in a relationship but who do not want to be married. Currently opposite sex couples can choose marriage or a de facto relationship, and both are legally recognised.

The Committee does not support a model based on marriage as an appropriate means of recognising same sex relationships.

3.6 Summary

In this Chapter various ways of recognising relationships of those in non-traditional domestic relationships have been examined. The Committee agrees in large measure with the definitions which have been used in the *Property (Relationships) Legislation Amendment Act 1999*. Extending the notion of a de facto relationship to cover those in same sex relationships gives people in such relationships a degree of legal protection not otherwise available, without introducing a more radical and controversial approach.

The Committee is not persuaded that a system of relationship registration should be introduced at this time. The issue of relationship registration would be an appropriate matter for the NSW Law Reform Commission to consider as part of its current Inquiry.

The Committee is also strongly of the view that marriage cannot, and should not, be re-defined to include other non-traditional domestic relationships.

64 *NSWPD*, Legislative Council, 13 May 1999, p229.

The Committee recommends that amendments be made to the *Anti-Discrimination Act 1977* to ensure the spirit and intention of that Act are given effect in protecting people in relationships, other than marriage, from discrimination. Similarly the Committee feels that amendments should be made to individual pieces of legislation which discriminate against those in same sex relationships, although it does not endorse the general use of a piecemeal approach to achieve legislative change. The need to make consequential amendments to ensure parity between those in opposite sex relationships and those in same sex relationships is discussed in Chapter Seven below.

Chapter 4 – Recognition of Non-Traditional Relationships in Other Jurisdictions

4.1 Australia

Prior to the passage of the New South Wales *Property (Relationships) Legislation Amendment Act 1999*, the most significant reform within Australia to extend legal protection to those in non-traditional interdependent personal relationships, was enacted in the ACT (the *Domestic Relationships Act 1994*). The Committee also notes that certain initiatives were embarked upon in Queensland, Western Australia and Victoria, but to date their implementation has been somewhat limited. The situation in New South Wales is discussed separately in Chapter 5.

(a) Australian Capital Territory

The *Domestic Relationships Act* 1994, replaces the concept of a 'de facto relationship' with that of a 'domestic relationship', and a mechanism for the division of property on the breakdown of domestic relationships is established. A 'domestic relationship' is defined in Section 3 to mean: 'a personal relationship (other than a legal marriage) between two adults, in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other and includes a de facto marriage.' It is apparent from this definition that for a 'domestic relationship' to be found to exist, it is irrelevant whether the parties are of the opposite sex or whether there is a sexual dimension present.

Upon breakdown of a relationship, the legislation enables a person who has lived in a domestic relationship for two years, and who has spent at least a third of the period of the relationship as a resident in the ACT, to apply to the Court for adjustment of property rights on the basis of the applicant's contribution to that property. One or both of the parties must be resident in the ACT on the date the application is made. The Act also provides for an application to the Court for a maintenance order.

Since the enactment of the *Domestic Relationships Act 1994*, other legislative amendments have been made in the ACT in keeping with the spirit of this earlier legislation:

1) In 1996 the *Administration and Probate (Amendment) Act* was introduced which amended the earlier 1929 legislation by incorporating in the definition of 'eligible partner' in relation to intestacy:

> a person other than the intestate's legal spouse who:
>
> (a) whether or not of the same gender as the intestate, was living with the intestate immediately prior to the death of the intestate as a member of a couple on a genuine domestic basis; and
>
> (b) either:
>
> (i) had lived with the intestate in that manner for two or more years continuously prior to the death of the intestate; or
>
> (ii) is the parent of a child of the intestate who had not attained the age of 18 years at the date of death of the intestate.

'Spouse' is defined to be either the legal spouse (husband or wife of the intestate immediately prior to death), or the eligible partner of the intestate. For the purposes of distributing an intestate's property, following this amendment no distinction is made between married or unmarried partners, or partners of the same or different sex. The Act also makes provisions for the distribution of the intestate's property where the intestate is survived by both an eligible partner and a spouse.

2) In 1996 the *Family Provision (Amendment) Act*, which is also concerned with the distribution of a deceased person's estate, was amended to include the same definition of 'eligible partner' as in the *Administration and Probate (Amendment) Act 1996*, and the definitions of 'domestic relationship' and 'domestic partner' taken from the *Domestic Relationships Act 1994*. The *Family Provision (Amendment) Act* provides that, in addition to eligible partners, a domestic partner may make an application for provision from the estate of the deceased.

3) Under the *Duties Act 1999*, the same duty is charged for transfers of property made pursuant to a domestic relationship agreement or a termination agreement made under the *Domestic Relationships Act 1994* as those made pursuant to a court order under the *Family Law Act 1975* (Cwlth) or the *Married Persons' Property Act 1986* (ACT). This ends any differences between married spouses and partners in a domestic relationship for the purposes of stamp duty.

(b) Queensland

The Queensland Law Reform Commission recommended legislation similar to the NSW *De Facto Relationships Act* 1984 to provide a mechanism for resolving property and financial disputes after the breakdown of an opposite sex relationship where the parties are not legally married, and are therefore unable to use the Commonwealth *Family Law Act*. [65]

In its Report the Queensland Law Reform Commission also recommended that the definition of a 'de facto relationship' be expanded to include same sex partners. The definition contained in clause 5 of the draft *De Facto Relationships Bill 1993* reflects this approach and defines a 'de facto relationship' as: 'the relationship between two persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.'

A similar recommendation was made by the Queensland Law Reform Commission in relation to damages claims by surviving de facto partners for wrongful death of their partners and in its Report on Intestacy Rules. [66] The definition it proposes for de facto partner in this context is: [67]

> An intestate's de facto partner is a person, whether or not of the same gender as the intestate, who at the intestate's death:
>
> (a) lived with the intestate as a member of a couple on a genuine domestic basis and either
>
> (i) In the six years before the intestate's death, lived with the intestate as a member of a couple on a genuine domestic basis for a period of, or periods totalling, at least five years; or
>
> (ii) Is the parent of a child of the intestate who is less than 18 years old; but

65 Queensland Law Reform Commission, *De Facto Relationships*, Report 44, June 1993.
66 Queensland Law Reform Commission, *Intestacy Rules*, Report 42, June 1993.
67 Ibid.

(b) was not legally married to the intestate.

In June 1999 the *Industrial Relations Act* (Qld) was amended to extend the right to parental, family and bereavement leave to same sex couples. Any State awards or State based workplace agreements which include provisions for employees' partners or families will extend the same rights to same sex couples.

The Committee notes that the Queensland Government has recently proposed a widening of the definition of 'spouse' under its Domestic Violence (Family Protection) Amendment Bill to cover those in same sex relationships who may be experiencing domestic violence, [68] and that it has introduced the Property Law Amendment Bill on 23 November 1999 to achieve similar reforms to those made in New South Wales with the passage of the PRLA Act 1999. [69]

(c) Western Australia

In Western Australia there has been little change in legislation concerning discrimination. The Acts Amendment (Sexuality Discrimination) Bill 1997 was introduced into the Legislative Council in September 1997, and later referred to that House's Standing Committee on Legislation on 19 November 1997. [70] Amongst other things, the Bill proposed an amendment to the *Equal Opportunity Act 1984* to include a same sex de facto relationship as a form of marital status for the purposes of Part II of the *Equal Opportunity Act 1984*, which inter alia prohibits discrimination on the grounds of marital status. [71] Whether or not this amendment amounted to legislative recognition of same sex relationships was discussed at length in the Second Reading debate. However, the Standing Committee on Legislation noted that this Bill did not propose to make an overall amendment to the law's treatment of same sex relationships, as existing differences between heterosexual and homosexual relationships would remain except for the purposes of the *Equal Opportunity Act 1984*. [72] At the time of writing, the Bill has not been debated further in Parliament.

(d) Victoria

Victoria has made only minimal changes to legislation in respect of discrimination. The Victorian Equal Opportunity Commission conducted an inquiry into the law's treatment of people in same sex relationships compared to people in heterosexual relationships, and found that there are many areas where discrimination exists. In its report, released in March 1998,[73] the Commission recommended comprehensive law reform to ensure that those in same sex relationships received the same protection as heterosexuals.

The Wills Act 1997 introduced a number of changes in relation to inheritance. This Act allows family provision orders to be made for the proper maintenance and support of any person for whom the deceased had responsibility to make provision. Eligibility is defined, therefore, purely by reference to the underlying rationale of family provision legislation, which is to provide for those for whom the

68 'Opposition united in fury over gay law', *Courier Mail*, 13 November 1999.
69 'Coalition wrong to oppose rights Bill', *Courier Mail*, 24 November 1999.
70 Parliament was prorogued on 7 August 1998, and the Bill and the referral to the Committee lapsed. The Bill was restored to the Notice Paper in August 1998 and again referred to the Committee in September that year.
71 Standing Committee on Legislation, *Report in Relation to the Acts Amendment (Sexuality Discrimination) Bill 1997*, Report No 45, pp51-53.
72 Ibid, p53.
73 Equal Opportunity Commission Victoria, *Same sex relationships and the law*, March 1998.

deceased had a responsibility and who might otherwise be left without means of support. The Court looks at such factors as nature and length of the relationship, and any contributions made by the applicant. The focus of this change is to ensure that the legislation operates in a way which is tied to its purpose, and leaves out irrelevant factors such as the sex and marital status of the applicant.

(e) Commonwealth

The Commonwealth Parliament has made no legislative changes in this area. On 29 November 1995, then Australian Democrat Senator Sid Spindler introduced a private member's Bill, the Sexuality Discrimination Bill, into the Senate. This Bill prohibited discrimination on the grounds of sexuality or transgender identity, and provided for relationship recognition by granting same sex couples the same rights as de facto heterosexual couples. It also provided for a review of all Commonwealth laws to identify and amend provisions that discriminate on the basis of sexuality. The Bill was referred to the Senate Legal and Constitutional References Committee on 30 May 1996, which tabled its Report on 2 December 1997. [74] In this Report, the References Committee recommended, inter alia, legal recognition at Commonwealth level of all couples or personal partnerships, and that a working group be established to review all Commonwealth legislation, with priority being given to legislation affecting social security, taxation, superannuation, health and family programs and services and family law matters. The Bill was re-introduced on 28 May 1998 following the Federal election, and the Second Reading Debate has commenced.

4.2 Overseas

The Committee understands that non-traditional interdependent personal relationships have been recognised in a number of countries. Recognition through a system of registration or other partnership laws are the most common forms.

(a) Registered Partnerships

In 1989 Denmark became the first country to introduce registered partnerships, and many northern European countries have since followed. Norway recognised domestic partnerships in 1993, Sweden in 1995, Spain, Iceland and Hungary in 1996 and the Netherlands in 1998. In Denmark registered partnerships are only available to couples of the same sex, whether or not the parties are living together, or in a sexual relationship. The key issue is that they each wish to provide the other with mutual security. There are various conditions for registration including age (18 years), and a partner cannot be married or in another partnership.

Registration carries the same legal consequences as marriage, and where Danish law refers to 'marriage' or 'spouse' such references automatically include registered partnerships and partners. Rights previously restricted to married couples such as those related to inheritance, insurance, pensions, social security benefits, and income tax deductions are now available to registered partners. Registered partners may also be responsible for alimony payments if they divorce. There are exceptions provided by the Act, for example, registered partnerships are not recognised for custody or adoption purposes, nor can partners receive free artificial reproductive technology services. In late 1995, a Danish

74 Senate Legal and Constitutional References Committee, *Inquiry into Sexuality Discrimination*, December 1997.

newspaper reported that there had been about 1,449 gay and 634 lesbian registered partnerships registered under the law, since then 23% of the lesbians and 14% of the gay couples had divorced.

Similarly domestic partnership legislation exists in many US States and municipalities and some Canadian provinces. This legislation extends benefits and protections available to legally married heterosexual couples to 'domestic partners' who are defined as unmarried couples, whether of the same sex or opposite sex, who live together and seek economic and non-economic benefits granted their married counterparts. In the United States, most of the municipalities which have domestic partnership legislation require parties to sign and file an 'Affidavit of Domestic Partnership' certifying that the parties are each other's sole domestic partner; intend to remain so indefinitely; are responsible for 'our common welfare'; are not married; are not barred from marriage by blood ties; are 18 years of age and competent to contract. Parties are required to pay a filing fee, and if the relationship ends, to terminate the partnership by filing a 'Statement of Termination of Domestic Partnership'.

(b) Unsuccessful Attempts to Recognise Same Sex Marriage

The Committee is aware that in some overseas jurisdictions, members of same sex couples have begun to apply to courts to be allowed to marry. For instance, in 1991 three same sex couples joined to sue for marriage in the Hawaiian Supreme Court, based on the proposal that the State's refusal to issue a marriage license presumptuously violated Hawaii's Equal Rights Amendment which prohibits discrimination on the basis of sex. [75] A Circuit Court dismissed the suit, ruling that Hawaiian law did not provide them with a right to recovery (Hawaiian marriage law refers to the man and woman being married, and it was on this grounds that the license was refused).

The couples appealed to the Supreme Court which found in their favour on the basis of the couples' right to equal protection by the law. The Hawaiian constitution prohibits state sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex. The case was returned to the lower court where the State was required to show a 'compelling state interest' if it was to continue denying marriage licenses to same sex couples. The State failed to do so, and the Court found that the Hawaiian marriage law was unconstitutional and the State could not deny marriage licenses to same sex couples solely because of their sex. The State appealed to the Supreme Court.

While this appeal was being heard, the Hawaiian legislature passed a Bill granting couples unable to marry certain rights. It creates the status of 'reciprocal beneficiaries'. This is an example of the 'domestic partnership' model. In November 1998, a referendum was overwhelmingly passed which approved a constitutional amendment giving the Hawaiian legislature the power to limit marriage to heterosexual couples. This followed action by other North American States which had passed statutes

75 Similarly, couples in Vermont and Alaska have applied to the courts for recognition of the right to marry. All these cases, like the Hawaiian case, are based on anti-discrimination grounds, and are in the appeals courts awaiting decisions. Three lesbian couples in New Zealand appealed to that country's High Court after they were denied the right to marry. The High Court also refused their application, one judge stating that 'to give marriage a meaning which the plaintiffs seek would require me to interpret the law in a way which I do not perceive Parliament to intend ...'. This is despite the New Zealand Bill of Rights which prohibits discrimination based on sexual orientation.

banning same sex marriages, and the passage of the Federal *Defense of Marriage Act* 1996 which denies recognition of same sex marriages at the federal level.

(c) More Recent Initiatives

The Committee notes that the New Zealand Ministry of Justice released a discussion paper on same sex couples and the law in late August 1999. Assessments of the consistency between the *Human Rights Act* 1993 (NZ) and other legislation had revealed a number of situations in which various laws treated same sex couples differently from opposite sex couples. Issues covered in the paper include those associated with domestic partnerships, children, entitlements, relationship breakdown, and death. The deadline for public submissions is 31 March 2000, and once the Ministry has analysed the public's submissions, the findings will be passed on to Government to consider possible options. [76]

Canada is also currently reviewing its laws and policies in response to the diversity of family forms, with the Law Commission of Canada playing a prominent role in the proposal of appropriate law reform.

4.3 Summary

This Chapter has presented examples of varying forms of legal recognition of non-traditional domestic relationships in some jurisdictions. In Australia comparable measures have only been introduced in the ACT and New South Wales. The situation in New South Wales is outlined in the next Chapter.

[76] Information located on the Internet at: http://www.justice.govt.nz/pubs/releases/text/media.same sex.html.

Chapter 5 – Historical Overview of Recognition of Non-Traditional Domestic Relationships in New South Wales

Many of the issues facing the Committee at the time the original submissions were received have been resolved with the passage of the *Property (Relationships) Legislation Amendment Act 1999*, and to a certain extent no longer need to be considered. However, the Committee considers it useful to provide an overview of the earlier Bills and the PRLA Act 1999 to put in context those issues brought to its attention in the supplementary submissions and by witnesses appearing before it.

The Committee points out that a degree of care should be taken as although similar or like terms have been used in the Significant Personal Relationships Bill 1997, the De Facto Relationships Amendment Bill 1998 and the *Property (Relationships) Legislation Amendment Act 1999*, their meanings and use are often quite different. The comparative definitions are illustrated in the Table at 5.2 below. As stated earlier, attention also needs to be paid to the fact that the *De Facto Relationships Act 1984* has been re-named the *Property Relationships Act 1984* and incorporates many of the changes made by the PRLA Act 1999. All references in this Report to the *De Facto Relationships Act 1984* reflect the state of the law prior to the end of June 1999, when the bulk of the PRLA Act 1999 commenced.

5.1 Property (Relationships) Legislation Amendment Act 1999

The Government's Property (Relationships) Legislation Amendment Bill was introduced into the Legislative Council on 13 May 1999 and passed on 1 June. With the passage of this legislation many of the rights and responsibilities identified in the DFRA Bill 1998 were extended to those in non-traditional interdependent personal relationships. The main points in relation to the PRLA Act are: [77]

- The creation of an umbrella term 'domestic relationship' to cover two kinds of relationship. The first is a 'de facto relationship' which has been re-defined to describe a relationship in which the two people involved live together as a couple and are not married to one another (this would cover both heterosexual and homosexual relationships) or related by family. The second is a 'close personal relationship' in which the parties live together, and one or each of the parties to the relationship provides the other with domestic support and personal care. An example of this second relationship would be a daughter or son who cares for an aged parent in his or her own home.

  De facto relationship: Further guidance is given as to the factors to be taken into account in determining whether a de facto relationship exists between the parties. It provides that all the circumstances of the relationship are to be taken into account and a non-exhaustive check list of matters to be considered is included. It is important to note that it is open to a Court to decide that a de facto relationship in the redefined sense exists even if some of the factors contained in the check list are not present in a particular relationship.

  Close personal relationship: In determining whether a 'close personal relationship' exists, regard should be had to the domestic support and personal care that the parties provide, one or both for the other. Such support and care will commonly be of a frequent and ongoing nature. For example,

77 Hon J Shaw QC MLC, *NSWPD*, Legislative Council, 13 May 1999, p229.

domestic support services will consist of attending to the household shopping, cleaning, laundry and like activities. Personal care services may commonly consist of assistance with mobility, personal hygiene and generally ensuring the physical and emotional comfort of one or both parties for the other.

- The Act does not attempt to provide for any form of marriage, and it does not create rights and obligations between people who merely share accommodation, or where one person is providing care to another by way of employment or in the course of acting on behalf of a charitable organisation.

- To ensure that the welfare of children being cared for in the domestic relationships contemplated by the Act is considered if the domestic relationship breaks down, the definition of 'child' has been extended to include 'a child for whose long term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*)'.

- It will require the parties in a domestic relationship to conform to the requirements currently imposed on de facto couples under the *De Facto Relationships Act* before they may exercise the rights conferred on them by the *Property (Relationships) Legislation Amendment Act*. Accordingly, the relationship must have been in existence for a period of two years, or there must be a child of the relationship, or other special circumstances before the provisions of the Act entitling them to seek redress from the Court for a division of property, or an order for maintenance in certain circumstances, may be utilised.

- *Consequential amendments*: The *Property (Relationships) Legislation Amendment Act 1999* makes consequential amendments to a number of pieces of legislation containing provisions which confer rights or privileges, afford concessions or impose obligations with respect to married persons or those in a de facto relationship, to extend their application to the parties in a domestic relationship as defined above. These include amendment to:

    - the *Family Provision Act* to ensure parties to all domestic relationships are included as eligible persons for the purposes of making an application under that Act for a share of a deceased party's estate;
    - the *Wills, Probate and Administration Act* to the effect that when a de facto partner, as redefined, dies intestate, his or her partner will be entitled to a share of the estate, including the house in which they lived. In order to qualify for such entitlements the de facto partner will be required to prove that the relationship was of at least two years duration;
    - the *Duties Act* to facilitate the sharing of property between de facto partners, in the redefined sense, and to provide for stamp duty exemptions for transactions arising out of redistribution of property following the breakdown of a domestic relationship, as defined;

- legislation such as the *Motor Accidents Act* and the *Law Reform (Miscellaneous Provisions) Act* to ensure rights flowing to a dependant partner, when the dependency may be emotional or financial, on the incapacity or death of a providing partner, will be extended to all de facto partners in the redefined sense.;
- give competent partners the right to advocate and make decisions on behalf of incapacitated partners pursuant to the *Guardianship Act*, the *Mental Health Act* and the *Inebriates Act* will be extended to all de facto partners in the redefined sense;
- the *Anatomy Act* and the *Human Tissue Act* to permit the surviving de facto partner, in the redefined sense, to make decisions as to the treatment of body parts of the deceased. The *Coroners Act* will also be amended to permit a de facto partner, in the redefined sense, to participate in any inquest.

- Further amendments of a consequential nature which flow from the expanded definitions already mentioned, and other amendments which are designed to preserve the status quo in relation to existing statutory obligations based on the current definition of 'de facto relationship' will also be required. It also re-names the amended *De Facto Relationships Act 1984* as the *Property (Relationships) Act 1984.*

5.2 Comparative Summary of the Different Legislative Proposals

Significant Personal Relationships Bill 1997

Significant Personal Relationship: the umbrella term to cover both 'recognised relationships' and 'domestic relationships'. For such a relationship to exist two key elements must be present, namely mutuality and commitment. Aspects such as cohabitation, sexual intimacy, or sharing financial resources may be present but are not necessary.	
Recognised Relationship: a significant personal relationship which has been formally recognised by a clearly defined legal process.	*Domestic Relationship:* a significant personal relationship which has not been formally recognised by a clearly defined legal process.

De Facto Relationships Amendment Bill 1998

Domestic Relationship: the umbrella term used to describe a relationship where there is interdependence, which may or may not be a de facto relationship, and where the parties may or may not live together or share a sexual relationship.	*De Facto Relationship:* a relationship between two people who live together as a couple on a bona fide domestic basis. This would cover both heterosexual and homosexual relationships.

Property (Relationships) Legislation Amendment Act 1999

Domestic Relationship: the umbrella term which covers both 'de facto relationships' as redefined and 'close personal relationships' – s5(1).	
De Facto Relationship: a relationship in which the two adults involved live together as a couple and are not married or related by family. This definition covers both heterosexual and homosexual relationships – s4(1).	*Close Personal Relationship:* a relationship between two adults, whether or not related by family, who are living together, where one or each of whom provides the other with domestic support and personal care – s5(1)(b).

The Significant Personal Relationships Bill was introduced by Ms C Moore MP on 25 September 1997. Although the range of options in the SPR Bill 1997 offered a wide choice as to how personal relationships could be recognised, it did not have the full support of the Gay and Lesbian Rights Lobby. On the other hand, some submissions to the Committee supported the approach taken by the SPR Bill 1997, which was not debated, and was not reintroduced in the new Parliament.

The De Facto Relationships Amendment Bill was introduced by the Hon E Kirkby MLC on 24 June 1998, her last day as a Member of the Legislative Council. [78] Support for the DFRA Bill 1998 came from many quarters including the Gay and Lesbian Rights Lobby and the Law Society of New South Wales, who called on the Government and the Opposition to support the proposed legislation. The Committee notes that some submissions supported the approach taken in the DFRA Bill 1998 which was not debated, and was not reintroduced in the new Parliament.

Creation of New Relationship Categories as a Result of the Property (Relationships) Legislation Amendment Act 1999

The Committee acknowledges that while the majority of supplementary submissions and evidence supported the passage of the PRLA Act 1999, opposition and concern was expressed by some, particularly in relation to the creation of new categories of relationships. However, the Committee does not agree that such views justify the continuation of discriminatory treatment towards those in non-traditional domestic relationships. The Committee would also emphasise that the new legislative regime does not diminish the importance of marriage in our society.

Arguments of those opposed: It was claimed in some submissions that new relationship categories would be created and these would undermine or threaten the institution of marriage and the traditional famly following the passage of the PRLA Act 1999. The Committee notes that not dissimilar views were expressed when the NSW LRC conducted its Inquiry into de facto relationships back in the early 1980s. The community sentiment at that time led the NSW LRC to conclude that while there was a need for a legal framework for de facto relationships, it should not mirror the legislative regime available to married couples. The Committee feels this view is still appropriate today.

78 Following Mrs Kirkby's retirement from the NSW Parliament, the Bill was taken up by her successor, the Hon Dr A Chesterfield-Evans MLC.

For some, the fundamental issue in relation to the 1999 amendments is the creation of any new relationship category which may in some way compromise that of marriage. Others have difficulty with the legal recognition of same sex relationships. Both these areas of concern were addressed in the Hon the Reverend F Nile MLC's comments following the introduction of both the DFRA Bill 1998 and the PRLA Bill 1999.

In relation to the PRLA Bill he said:

> The Carr Government has no mandate for this controversial 'same sex' Bill, as it never stated its intention to voters of NSW … these same sex Bills are an important part of the homosexual agenda, as step by step they achieve their final objective of legal same sex marriages. This new same sex defacto Bill will make it more difficult for State and Federal governments to reject the homosexual demands for legal same sex marriages which would completely undermine the God-given sanctity of marriage. [79]

A number of submissions received by the Committee in its current Inquiry claimed that the recognition of these new relationship categories would have the effects outlined above.

Major General Phillips AO MC, National President of the Returned and Services League of Australia (RSL), maintained that the DFRA Bill 1998 would undermine the institution of marriage and the natural biological family. The RSL submission stated that:

> The Bill proposes, for the purposes of 52 Acts of Parliament, to equate homosexual relationships with marriage, and for the purposes of the *Family Provisions Act 1982* to equate homosexual relationships with natural biological families. Many Australians are likely to view these proposals as demeaning to the natural relationship of a man and woman in marriage … Even more disturbing, however, are provisions in the Bill which equate homosexual relationships with marriage [80]

In her supplementary submission, Mrs Marion Smith, the Convenor of the Presbyterian Women's Association of Australia, NSW Assembly, said:

> We do not believe the word 'spouse' should be used to define a domestic relationship. The word 'spouse' is understood culturally and historically as specifically referring to male and female sex [sic] in marriage or de facto marriage … Of great concern to us, is that under this Act, 'where more than one person would qualify as a spouse, means only the last person so to qualify'. This is unjust, especially where other longer term or married partners and family are involved. [81]

Mr Simon Fisher and Dr Michael Haines wrote:

> It is in the best interests of society that legal recognition be withheld from homosexual relationships because to give status to those kinds of relationships diminishes the value of the natural and fundamental group unit of society, the family. [82]

79 Media Release, the Hon the Rev F Nile MLC, 'ALP government gives first priority to 'same sex' homosexual Bill', 13 May 1999.
80 Submission No 32.
81 Submission No 72 – Supplementary.
82 Submission No 134.

Different positions on the proposed changes were put by the representatives of the various Churches. Reverend Peter Moore, the Convenor of the Church and Nation Committee of the General Assembly of the Presbyterian Church of Australia, NSW Assembly, raised a number of objections to the proposed changes in his initial submission on the DFRA Bill 1998. In his supplementary submission Reverend Moore stated that the passage of the PRLA Act 1999 did not adequately address the issues he originally raised. According to Reverend Moore:

> There are still ten Acts amended [in the PRLA Act 1999], and a number of them given this unsatisfactory definition whereby the rights of a married person must yield to a later de facto even if the marriage relationship has not been terminated by divorce, or even a separation taken place. [83]

In his appearance before the Committee Reverend Moore reiterated these concerns, adding:

> The new de facto relationship, with its lack of necessary intention, its lack of exclusivity, and a new possibility of same sex relationships, provides an inferior basis for human society and, in our humble opinion and experience, it is very unhelpful. [84]

The need to balance competing interests was evident in the original submission on the DFRA Bill 1998 from the Very Reverend Boak Jobbins, Chairman of the Social Issues Committee of the Anglican Diocese of Sydney. In his appearance before the Committee the Very Reverend Jobbins emphasised this dichotomy:

> The Standing Committee of the Synod has asked its Social Issues Committee (a) to continue to express the Diocese's opposition to any extension of the definition of de facto relationship to include same sex couples, and (b) to promote the concept of providing natural justice for all couples in a domestic relationship regardless of their sexual commitment in the various Acts being considered for amendment … For some members of the Church all de facto relationships, whoever is involved, are a departure from God's purpose and in that sense are sinful … On the other hand the Standing Committee acknowledges natural justice issues - not that it thinks they are easy to implement … It is a fine question how the Parliament might achieve part (b) of the Standing Committee's resolution concerning providing natural justice without expanding the scope of the definition of 'de facto relationships'. The Parliament has since passed the *Property (Relationships) Legislation Amendment Act 1999*. In the minds of some, that Act achieves justice for various relationships without specific regard to sexuality and as such may be seen to have achieved the Standing Committee's hopes. [85]

The Executive Director of the Catholic Commission for Employment Relations, Mr Michael McDonald, told the Committee:

> We believe in the institution of marriage. We believe that is an historical and legal position in our society. Therefore, it is an institution we believe should be encouraged and supported by all means possible within the society … With a male and female de facto relationship we certainly do not seek to deny people their legal rights on certain issues that need to exist between those two people … While we say they do not have the same position historically or legally as marriage, there should be a band of rights attached to those domestic relationships. In that band of domestic relationships

83 Submission No 73 – Supplementary.
84 Evidence, 4 August 1999.
85 Evidence, 4 August 1999.

> some of them may be same sex relationships. We would see a very clear distinction between marriage on the one hand and other domestic relationships on the other. [86]

Dr Warwick Neville, Head of the Research Department of the Australian Catholic Bishops Conference, said:

> … We would make a distinction as a matter of law between a de facto heterosexual relationship and a same sex relationship … we have major problems with the conflation between same sex relationships as a definition with the de facto relationship, as it has been quite commonly understood a de facto relationship is a relationship between a man and a woman. [87]

The *Property (Relationships) Legislation Amendment Act 1999* was not intended to impact on marriage, and this point was made clear by the Government. During the Debate on the Bill the Attorney General said:

> The definition makes it abundantly clear that the Bill cannot relate to relationships between married people; nor can it be interpreted as in any way attempting to create marriage relationships between couples. It seeks to provide a scheme for property redistribution and, in some cases, maintenance on the breakdown of intimate relationships where the parties cannot access the rights available to married partners precisely because they are not married. [88]

Arguments of those in support: The Committee also received many submissions which argued that extension of legal rights and protections to other non-traditional domestic relationships would not impinge on the institution of marriage or impact adversely on heterosexual de facto relationships. Mr Stone, President of ACON, said:

> Recognition of same sex relationships will not effect the legal status currently accorded to marriage or de facto heterosexual relationships. What these reforms do is simply provide gay men and lesbians with access to legal remedies to resolve legal problems such as division of property or make family provisions claims. [89]

Ms Lauren Finestone, a solicitor with the Inner City Legal Centre, wrote:

> Opponents of homosexual law reform have traditionally argued that extending rights to lesbians and gay men represents an attack on the institution of marriage. This is simply not the case. The DFRA Bill is State legislation and will therefore have no impact at all on marriage. [90]

Mr and Mrs Woulfe wrote:

> As people raised in the Christian tradition, and holding strong Christian values, we find it particularly shameful that many of the people who are actively opposing the DFRA Bill 1998 claim to be Christians. [91]

86 Evidence, 4 August 1999.
87 Evidence, 4 August 1999.
88 *NSWPD*, Legislative Council, 26 May 1999, p393.
89 Submission No 29.
90 Submission No 88.
91 Submission No 16.

Reverend Ann Wansbrough made the following points in her original submission about the recognition of non-traditional domestic relationships:

> We therefore believe that legislation recognising the rights and obligations of people in interdependent personal relationships other than those already defined in the *De Facto Relationships Act 1984* may well be appropriate in some circumstances. Such recognition does not in itself undermine marriage.[92]

Appearing before the Committee, Reverend Wansbrough restated these views:

> In our initial submission to the Inquiry we indicated that the New South Wales Synod of the Uniting Church recognises the value of all forms of non-exploitative relationships in which people effectively care for one another. We see no intrinsic problem in recognising the rights and responsibilities of people in interdependent relationships … Contrary to some critics of the proposed changes, we do not believe that the recognition of such relationships, including same sex relationships, undermines marriage or is contrary to Christianity … The rights, responsibilities and needs of people in marriage relationships overlap at many points with the rights, responsibilities and needs of people in other interdependent, caring relationships … Inheritance, the need for a recognised next of kin, the need for property settlement when a relationship breaks down, the need for protection against discrimination on the grounds of one's relationship are all matters where the needs of other forms of caring relationships overlap with marriage. [93]

5.3 Response to the *Passage of the Property (Relationships) Legislation Amendment Act 1999*

While the majority of supplementary submissions (11 out of 16 received) and witnesses were supportive of the changes made by the PRLA Act 1999, the Committee notes that although the Act was welcomed by many, it was seen as not going far enough and leaving certain issues unaddressed. A number of outstanding issues were identified and suggestions made as to how these could be addressed including: how the definitions of relationships could be further amended to provide more expansive coverage; which legislation should be amended to provide this larger group of relationships with protection in relation to property rights; and which other areas of the law should be amended to ensure equal treatment of people in various forms of interdependent personal relationships.

Dr Andresen commented:

> It is my belief that, good though the new legislation undoubtedly is in its own way, much more needs to be done before same sex relationships are on an equal footing with other sex relationships in this State. [94]

The Lesbian and Gay Legal Rights Service said:

> It was with great delight that we witnessed the passage of the PRLA Act 1999. This excitement was slightly overshadowed by what the Act left out … The Act covers the main areas of reform

92 Submission No 70.
93 Evidence, 5 August 1999.
94 Submission No 21 – Supplementary.

> addressed in the DFRA Bill, but fails to make changes to the ADA and some smaller pieces of legislation. [95]

Mr Puplick commented:

> The Board praises the primary purpose of the PRLA Act 1999 and acknowledges the need to amend a raft of NSW statutes which currently discriminate against people in same sex relationships. However, I believe that there are still a number of omissions which the PRLA Act does not address. [96]

The Gay and Lesbian Rights Lobby said:

> The PRLA Act 1999 changes NSW law to equalise property rights and address the discriminatory treatment of lesbian and gay relationships under a number of NSW Acts. It is limited in its effect and there are continuing anomalies and injustices … There are a number of critical areas where the intent of the legislation will not be given its full effect, and where it fails to address the reality of how individuals run their relationships and their lives. [97]

Ms Stevie Clayton raised the following issues:

> … The legislation was not as comprehensive as we probably would have liked. I guess there are six remaining areas that we think need some sort of attention … Some pieces of legislation have been amended to include the newly defined 'de facto relationship' but not to include the broader definition of 'domestic relationship'. There are a range of pieces of legislation that provide particular rights which were not amended, but which we think need to be tidied up. There are also a number of pieces of legislation that bestow obligations rather than rights … The two remaining areas that we want to cover are superannuation, which has been largely left out of the discussion in recent times, and the issue of registered partnerships or, more broadly than that, alternative ways that the law might view relationships. [98]

Mr Michael Costa, Secretary of the Labor Council of New South Wales, the peak trade union body in New South Wales, told the Committee:

> … We are concerned that it clearly is a limited solution to some of the problems that we have encountered in relation to same sex-relationships in the workplace … The issues in relation to superannuation, insurance and taxation related to employee entitlements are still not resolved by the legislation. [99]

5.4 Summary

In this Chapter the various legislative proposals which have been put forward in New South Wales to achieve recognition of non-traditional domestic relationships have been examined. The first was the Significant Personal Relationships Bill introduced by Ms C Moore MP in 1997. The second was the De Facto Relationships Amendment Bill introduced by the Hon E Kirkby MLC in 1998.

---

95 Submission No 36 – Supplementary.
96 Submission No 132 – Supplementary.
97 Submission No 135 – Supplementary.
98 Evidence, 5 August 1999.
99 Evidence, 5 August 1999.

The Government introduced its own legislation, the Property (Relationships) Legislation Amendment Bill in May 1999. This Bill has been passed and has amended various laws to recognise those in non-traditional domestic relationships. While the passage of the *Property (Relationships) Legislation Amendment Act 1999* was recognised as a significant event and welcomed by many, a number of issues were brought to the Committee's attention as still needing to be addressed. The Committee's views on these matters are presented in the Chapters which follow.

Chapter 6 – Issues in Defining Domestic Relationships

During the course of its Inquiry, the Committee received substantial evidence that although the categories of non-traditional domestic relationships under the *Property (Relationships) Legislation Amendment Act 1999* are appropriate, the definitions may need to be broadened to provide a greater degree of legal protection. The Committee recognises that the way in which relationships are defined directly affects the legal consequences which flow.

Under the definitions in the current legislation, 'domestic relationship' is divided into two categories. The first is a de facto relationship defined as: 'a relationship in which the two adults involved live together as a couple and are not married or related by family'. This definition covers both heterosexual and homosexual relationships. The second category of domestic relationship is the 'close personal relationship' defined as: 'a relationship between two adults, whether or not related by family, who are living together, where one or each of whom provides the other with domestic support and personal care'.

The Law Society of New South Wales drew the Committee's attention to the fact that as the PRLA Act 1999 refers to 'adults' in the relationship definitions, no protection is extended to those under the age of 18 who may be in a domestic relationship. Ms Margaret Hole, President of the Law Society, wrote:

> It is unrealistic to assume that young people under 18 will always be supported by their parents or guardians … Many young people under 18 enter de facto relationships (and, occasionally, other types of interdependent domestic relationships). I am sure the Standing Committee appreciates that young people are at risk of exploitation, especially upon breakdown of a relationship where the other party is older and more powerful … I would be grateful if the Standing Committee would give serious consideration to amending the Act so that children (at least those aged 16 and over) are recognised as parties to domestic relationships. [100]

The Committee appreciates the vulnerability of those under the age of 18, however a major difficulty in recommending the extension of the PRLA Act 1999 to this group is that a same sex relationship between males, where one of the parties is under 18, remains a criminal offence. A recent private member's Bill to change this situation by amending the *Crimes Act 1900* to equalise the age of consent was narrowly defeated. [101]

6.1 Previous Legal Position in New South Wales

Prior to the 1999 amending Act, a 'de facto partner' was defined as:

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

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

100 Correspondence, 13 August 1999.
101 *NSWPD* (Proof), Legislative Council, 18 November 1999, pp23-29.

And for the purposes of the earlier legislation, a 'de facto relationship' was: 'the relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other'.

Taken together these definitions made the Act only applicable to heterosexual relationships. People who did not comply with these definitions were excluded, such as:

- partners of the same sex;
- heterosexual couples who did not live together;
- people in close relationships who might not have lived together or shared a sexual relationship but may have been financially or emotionally interdependent, including 'carers'; and
- those relationships involving extended family or ties of kinship.

At times the length of the relationship was also an issue. Although the de facto relationship was deemed to commence when the couple began to live together on a bona fide domestic basis, and although there was no minimum period stipulated in the *De Facto Relationships Act 1984* as to when such a relationship would be recognised, many of the provisions under the Act only applied once a couple had been living together as de facto partners for at least two years (unless there was a child).

Over time the term 'de facto relationship' has been used colloquially to describe other relationships where couples share their lives, for example, those in same sex relationships. To date this usage of the term has had limited application in legislation. The Committee acknowledges that various attempts have been made to offer protection to those in such interdependent personal relationships through the use of a number of different definitions. For example:

- In Schedules 5 and 6 to the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998* (NSW) 'de facto relationship' means: 'the relationship between two unrelated adult persons: (a) who have a mutual commitment to a shared life; and (b) whose relationship is genuine and continuing, and (c) who live together and who are not married to one another.'

- Under section 3 of the *Domestic Relationships Act 1994* (ACT) a broader definition of interdependent personal relationships is given. 'Domestic relationship' means: 'a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage.'

- Under the Commonwealth *Migration Act 1958* there is provision for visas to be granted to a person who has 'an interdependency relationship' with either an Australian citizen or a permanent resident of Australia. Interdependency is a flexible concept and encompasses emotional and financial reliance upon one another in the context of a genuine, close, on-going relationship. To determine whether such a relationship exists, for the purposes of Clause 2, Regulation 1.09A of the Migration Regulations 1994, all of the circumstances of the relationship are examined, with specific reference to the nature of the persons' commitment to each other, the social aspects of the relationship, the nature of the household and the financial aspects of the relationship.

6.2 Current Definition of 'De Facto Relationship'

The Committee concludes from the supplementary submissions and evidence it received, that the majority of those favouring extension of rights to relationships other than those previously covered under the *De Facto Relationships Act 1984* are satisfied in the main with the new definition of 'de facto relationship' inserted by section 4 of the *Property (Relationships) Legislation Amendment Act 1999*, which defines a de facto relationship as: 'a relationship between two adult persons: who live together as a couple, and who are not married to one another or related by family.'

Mr Robert Benjamin, Chairman of the Family Law Section of the Law Society of New South Wales, commented: 'It seems to me to be a very good definition. Certainly under this Act it is much better than it was under the other Act.' [102]

However, various submissions pointed to examples of couples in de facto relationships who may still fail the legislative test imposed by the new Act; such as:

- a couple who although there is a relationship of emotional and financial interdependence choose not to cohabit. For example, one lives in the country and the other lives and works in the city but spends all weekends with his/her partner in the country.

- a couple who have lived together for 10 years, and one then accepts a job overseas or interstate for 2 or 3 years. The couple see each other regularly but are not cohabiting.

- a couple who although they may be able to demonstrate their commitment to an ongoing relationship (for example, through having a joint mortgage) have not yet lived together for the two years required for recognition of a de facto relationship in certain circumstances.

The Committee acknowledges that as the *Property (Relationships) Act 1984* currently stands, couples in these situations may not be covered. The difficulties for these relationships arise because of the cohabitation requirement and the provisions related to length of the relationship. Mr Larry Galbraith, who played an important role in drafting the SPR Bill 1997, told the Committee that:

> The most significant concern … is the fact that the definition does not recognise or acknowledge those relationships where couples, by choice or circumstance, are unable to live together in a common household … for a variety of circumstances, such as employment, family reasons and health, finding themselves not being able to live together, or finding that their relationship might be better sustained by not sharing a common household but by arranging their affairs so that they spend a lot of time together. [103]

Mr Puplick, recommended that: 'the definition of de facto relationship exclude the need for two persons to live together, and be based instead on a primary relationship of mutual emotional interdependency.' [104]

102 Evidence, 5 August 1999.
103 Evidence, 4 August 1999.
104 Submission 132.

According to Mr Puplick:

> This requirement is likely to have an adverse impact on many homosexual couples who do not live together or cohabit, but are in fact in a primary relationship of mutual emotional interdependency. [105]

Although Mr Puplick was commenting on the provision in the DFRA Bill 1998, he re-stated this view in relation to the cohabitation requirement for both the 'de facto relationship' and the 'close personal relationship' definitions under the PRLA Act 1999 in his supplementary submission. In addition he commented on the length of relationship requirement.

> … To exercise any rights enforceable by a Court under s17, a couple have to have lived together in a domestic relationship for a period of not less than 2 years … If a relationship meets the relevant criteria as identified in the definition of de facto and domestic relationship, the amount of time that relationship has been in existence is irrelevant … the effect of a person serving a prison sentence during that 2 year period is not clear. This is especially problematic in some of the amendments in Schedule 2, which refer to 'cohabitation for a continuous period of not less than 2 years' … If the 2 year requirement is not removed, the legislation should allow the requirement to be waived where one party to the relationship dies and the other partner is able to demonstrate that the relationship otherwise met the relevant criteria.[106]

Although he accepted that cohabitation was an appropriate indicator of a de facto relationship, Mr Benjamin noted that situations could arise where this may cause difficulty:

> … If a person is convicted and sent to gaol for a couple of years, he or she may still have a de facto relationship. They may still communicate by visits, telephone, exchanging presents, and still have that commitment to a continuing relationship. [107]

The Committee's research reveals that various studies have shown that there are indeed couples in committed relationships who do not cohabit. For example in 1996 the Australian Institute of Family Studies conducted a national random telephone survey of 1,964 Australian men and women aged between 25-50 years, or under 25 years and with primary parenting responsibility for a child, which showed:

- 64% of respondents were married;
- 9% were cohabiting;
- 6% stated they were in a relationship but not living together, and
- 21% were not in a relationship.

Of the 169 respondents who were cohabiting:

- around one-third had previously been married;
- of those partnered but not living together, just over half had never been married.

105 Ibid.
106 Submission No 132 – Supplementary.
107 Evidence, 5 August 1999.

Although these respondents stated they were in a relationship but not living together, a third spent one to two nights per week together, and another third between three to seven nights per week together. This indicates that many of these respondents were in what has previously been termed 'living apart together' relationships. [108]

The Committee is also aware that when it undertook its original investigation into de facto relationships, the NSW LRC felt that the requirement of a specified period of cohabitation would act as a safeguard against the possibility of unmeritorious claims reaching the courts. [109] The NSW LRC took the view that it was 'not considered desirable that a legal regime of rights and obligations comparable to that of marriage should be imposed upon people as soon as they enter into a de facto relationship.' [110]

The solution put forward in a number of submissions to the Committee was to broaden the definition of 'close personal relationship' so it could operate as a catch-all provision. In this way relationships where couples are in what would otherwise be described as a de facto relationship, but who do not live together or have not been together for two years, would be legally recognised as long as other relevant criteria could be demonstrated.

ACON was of the view that cohabitation was an acceptable criterion in relation to 'de facto relationships', but that it should not be stipulated in relation to other domestic relationships. Ms Clayton said:

> Our society, and therefore our legal system, should continue to recognise relationships that look like a marriage relationship but without the certificate and the ceremony, and cohabitation is an accepted part of that. But at the same time we are saying that in modern society people form another group of relationships that are of equal importance to them at that time, and they may want the law to enable them to provide for such people through their wills or for them to have some say in their ongoing care and support if they are unable to do that for themselves. [111]

Representatives of Kingsford Legal Centre told the Committee:

> We feel that because that definition has been limited basically to people who are cohabitating and who are personal carers, there are problems in that. [112]

Dr Sant told the Committee:

> For any number of reasons people may have close relationships over many, many years but they have not necessarily lived together … if they own property together and the relationship breaks down, they may require the same assistance to disentangle their finances that a couple who has lived together for two years would require … The law has not currently recognised that people can have those relationships of dependency and that because of those practical consequences practical problems arise which need to be addressed. [113]

108 H Glezer, 'Cohabitation and Marriage Relationships in the 1990s', *Family Matters*, No 47 Winter 1997, pp5-9.
109 NSW LRC, *Report on De Facto Relationships*, 1983.
110 Ibid.
111 Evidence, 5 August 1999.
112 Evidence, 4 August 1999.
113 Evidence, 4 August 1999.

The Committee believes that the current definition of a de facto relationship would in most likelihood describe the vast majority of such relationships. It accepts, however, that there are some situations that do not fit this description, which nonetheless deserve legal recognition. The Committee is of the view that the cohabitation requirement should remain within the definition of de facto relationship in section 4(1)(a) of the *Property (Relationships) Act 1984*, however, it should be removed from the 'close personal relationship' definition in section 5(1)(b). In this way couples who meet the de facto relationship test but for the fact that they do not cohabit would receive legal recognition. The issues surrounding the 'close personal relationship' definition are discussed in the section which follows.

6.3 Current Definition of 'Close Personal Relationship'

Dissatisfaction has been expressed with section 5(1)(b) of the *Property (Relationships) Act 1984*, which provides the definition of domestic relationship in the following terms:

> A close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

Most concern has been voiced in relation to the cohabitation requirement. The Committee recognises that those in a 'carer' relationship do not necessarily cohabit. Some provide care on a daily basis over an extended period of time, but do not live with the person for whom they provide care. A person who provides care for a parent, elderly relative or partner without living with him or her, would not come within the current definition of domestic relationship.

Ms Jane Sanders, Chair of the Human Rights Committee, NSW Young Lawyers, and Ms Monique Pirona, President, NSW Young Lawyers, wrote:

> The current definition is unacceptable because it is confined to the carer and the person receiving care if they cohabit … Accordingly the definition of domestic relationship must be amended to apply to two persons, whether or not they live together or share a sexual relationship, who share an emotional and financial interdependence. [114]

Ms Clayton, said:

> … We had hoped the categories of 'significant personal relationship' or 'close personal relationship' would pick up not just carer relationships, but the broader range of relationships that exist in society today where people are clearly in a long-term committed relationship. [115]

The proposed change to the 'close personal relationship' definition removes cohabitation as a threshold question, making it merely a factor to be considered by a Court as part of the general indicia to determine whether a particular domestic relationship exists. It has been suggested that the indicia set out in section 4(2) should be amended to apply an expanded definition to both categories of domestic relationship. The Court would then consider the general definitions on a case by case basis to determine whether a domestic relationship existed, and if so, what type of relationship it was.

114 Submission No 63 – Supplementary.
115 Evidence, 5 August 1999.

Section 4(2) of the *Property (Relationships) Act 1984*, which currently only applies to the determination of a de facto relationship, states that all the circumstances of the relationship are to be taken into account including such of the following matters as may be relevant in a particular case:

- the duration of the relationship;
- the nature and extent of common residence;
- whether or not a sexual relationship exists;
- the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life,;
- the care and support of children, the performance of household duties; and
- the reputation and public aspects of the relationship.

This is not an exhaustive list, and a Court determining whether a de facto relationship exists is to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to it in the circumstances of the case.

The Committee notes that the criteria proposed under Clause 13A of the DFRA Bill 1998 to be used by a Court in relation to the existence of either a de facto or domestic relationship, were more expansive than those set out in the current Act. Under the DFRA Bill the Court was to take into account all the circumstances of the relationship including (but without being limited to) the following matters:

(5)(A) The nature of the persons' commitment to each other, including:

(i) the duration of the relationship, and

(ii) the length of time during which the persons have lived together, and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons themselves see the relationship as a long-term one

(B) the social aspects of the relationship, including:

(i) the opinion of the persons' friends and acquaintances about the nature of the relationship, and

(ii) any basis on which the persons plan and undertake joint social activities, and

(iii) whether the persons represent themselves to other persons as being in an interdependent relationship; and

(C) the nature of the household, including

(i) any joint responsibility for care and support of children, if any, and

(ii) the persons' living arrangements, and

(iii) any sharing of responsibility for housework, and

(D) the financial aspects of the relationship, including

(i) any joint ownership of real estate or other major assets, and

(ii) any joint liabilities, and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments, and

(iv) whether one party to the relationship owes any legal obligation in respect of the other, and

(v) the basis of any sharing of day-to-day household expenses

Some submissions and witnesses expressed a preference for this broader set of indicia. Ms Karen McMahon wrote:

> These factors are not new. Nor do they constitute a loose 'test'. They are common indicators of interdependence in line with the law governing de facto relationships generally. They are used by the Supreme Court under the current DFR Act, by the Department of Immigration and Ethnic Affairs (to determine if a same sex interdependent relationship exists under Regulation 1.09A of the Commonwealth Migration Regulations) and by the Department of Social Security. They are also used by the Supreme Court (ACT) to determine the existence of a 'domestic relationship' for the purpose of the DRA 1994 (ACT) … So far as we are aware, there has been no problem with this test for whether a genuine de facto or interdependent relationship exists. [116]

The Gay and Lesbian Rights Lobby said:

> … The domestic relationship definition in the DFRA Bill 98 had practical advantages as financial interdependence is relatively easy to demonstrate in an objective manner, through evidence of shared leases, mortgages, bank accounts etc. Our definition also avoided the danger of putting too much emphasis on 'living together' which may, for example, lead to anomalies or confusion such as flatmates being recognised for the purposes of inheritance … Our community has very clearly told us that it needs close relationships (including those of couples who do not meet de facto criteria) recognised in some situations. In this sense, the recent reforms have failed to fully address the needs of our community. [117]

Ms Clayton, said:

> We are suggesting that the way to cover those broader range of relationships … is simply to use the same range of factors that are provided in the amending legislation for a Court to consider when determining de facto relationships with the exclusion of cohabitation … The legislation should leave it to the discretion of the Court to determine whether or not it is the sort of relationship that should be considered as a domestic relationship or a close personal relationship. [118]

116 Submission No 111.
117 Submission No 135 – Supplementary.
118 Evidence, 5 August 1999.

Although the ADB supported the concept of other domestic relationships being included in the DFRA Bill 1998, it had certain objections to the proposed definition:

> … The Board does not see the need for the definition to include both emotional and financial interdependency. For example, it is not uncommon for unmarried sisters to live together in a relationship which is one of intense emotional dependency but which may not involve financial interdependency … the sole concern should be emotional interdependency. [119]

The Committee is of the view that the more expansive indicia contained in the DFRA Bill 1998 would provide the Courts with greater flexibility to determine the existence and nature of a domestic relationship.

Exclusion of Certain Relationships

Some submissions expressed concern that the broad nature of the current definition of 'close personal relationship' would unintentionally extend coverage to other relationships such as those sharing a house or flat.

Mrs Smith wrote:

> In the case of accidental death, the possibility of spurious claims could create problems as very often now, people share homes for convenience and economy without any close caring aspect – young people are especially in this group. [120]

A number of submissions asserted that these concerns are not universally held. Ms McMahon said:

> … It is highly unlikely that persons will be deemed to be in a de facto or domestic relationship without intending this consequence. Flatmates will not be in a domestic relationship unless the court considers there is clear evidence of emotional and financial interdependence in the light of all the circumstances. [121]

Dr Sant told the Committee:

> It is quite clear that it is not people who happen to be sharing a house or who happen to be friends, but close relationships where, for instance, one person has been ill over a period of time and the other person has been looking after them on a daily basis. [122]

In his Second Reading speech on the PRLA Bill the Attorney General referred specifically to the intended coverage, saying:

> In view of factors such as those I have just outlined, it is clear that there is no intention to create rights and obligations between persons who are merely sharing accommodation as a matter of convenience, in the way that flatmates might. [123]

---

119 Submission 132.
120 Submission No 72 – Supplementary.
121 Submission No 111.
122 Evidence, 4 August 1999.
123 *NSWPD*, Legislative Council, 13 May 1999, p229.

Nonetheless, it was put to the Committee that to remove any possible confusion, the Act should be amended and a clause inserted which ensured relationships of convenience such as sharing a flat or house were excluded. Mr Gerard Gooden, one of the originators of the SPR Bill 1997, drew the Committee's attention to a clause contained in that Bill, which provided:

A significant personal relationship is not taken to exist where:

(a) the relationship exists principally as a matter of convenience (for example, between flatmates), or

(b) the sole basis or purpose of the relationship is to conduct a professional or business association or to engage in commerce or trade, or both, or

(c) the relationship between the persons exists only because one of the persons provides a service for the other:

(i) for fee or reward (including employer/employee relationships), or

(ii) on behalf of another person (including a government or body corporate), or

(iii) on behalf of an organisation the principal objects or purposes of which are charitable or benevolent.

The Committee is of the opinion that the first limb of 'domestic relationships' is appropriately defined. However, there are some de facto relationships which may not be covered by this definition. Accordingly the Committee recommends that the 'close personal relationship' category definition in section 5(1)(b) of the *Property (Relationships) Act 1984* be broadened by removing the cohabitation requirement. In addition the indicia currently stipulated to be met in relation to 'de facto relationships' should be applied to the 'close personal relationship' category as well.

The list of factors to be considered by a Court when determining whether a domestic relationship exists or existed should be amended and expanded, to take account of the wider range of relationships which may be brought within the expanded 'close personal relationship' category.

The Committee also believes it would be beneficial to include a provision in the Act which specifically rules out those relationships not intended to be covered. Notwithstanding the statements on this point made by the Attorney General in the Second Reading speech, the Committee is of the view that a clear reference in the Act would give certainty in the event of dispute.

The Committee considers it would be appropriate for the NSW LRC to examine the definitional issues discussed above in the course of its current Inquiry.

Recommendations:

6. That the definition of 'de facto relationship' in section 4(1) of the *Property (Relationships) Act 1984* should not be amended.

7. That the 'close personal relationship' definition in section 5(1)(b) of the *Property (Relationships) Act 1984* be broadened to encompass a wider range of interdependent personal relationships.

8. That the *Property (Relationships) Act 1984* be amended to expand the definitions in section 4(2), which determine the existence of a de facto relationship, and to provide that these new criteria apply to all domestic relationships.

9. That the *Property (Relationships) 1984* be amended to delineate the types of relationships which are covered.

6.4 Summary

The majority of submissions and witnesses did not support changing the definition of a de facto relationship. However, a view was strongly expressed that the 'close personal relationship' definition should be widened to capture a broader range of interdependent personal relationships. The new definition should be flexible and recognise a de facto relationship between two people who do not cohabit, or have lived together less than two years, and carers who live elsewhere.

The Committee believes that it would be preferable to provide the Courts with an expanded checklist of factors to consider, rather than rely on prescriptive definitions to distinguish categories of relationship. The Court could then determine on the evidence presented in each case whether a 'domestic', 'de facto' or 'close personal' relationship existed.

Chapter 7 – Consistent Legislative Application of the Property (Relationships) Legislation Amendment Act 1999 Principles

The *Property (Relationships) Legislation Amendment Act 1999* made certain consequential amendments to various pieces of legislation. However the Committee was told that there are other areas of the law which still require change to ensure consistency with the principles contained in the PRLA Act 1999. The DFRA Bill 1998 would have amended over 50 pieces of legislation which had been identified as discriminatory. A substantial number of these changes were made by the PRLA Act 1999, but others which were not have been identified in submissions.

7.1 Legislative Amendments Necessary to Extend Coverage to those in 'De Facto Relationships' as Defined in Section 4(1) of the *Property (Relationships) Legislation Amendment Act 1999*

The Committee notes that not all legislation permitting differential treatment of those in non-traditional domestic relationships was intended to be amended under the earlier legislative proposals. Under both the SPR Bill 1997 and the DFRA Bill 1998, the *Adoption of Children Act 1965* and various Acts related to State superannuation schemes were excluded from amendment, although as the legislation currently stands, same sex couples are not eligible to adopt a child, and surviving same sex partners are not considered dependants for superannuation purposes. The issues surrounding children in non-traditional domestic relationships are discussed in Chapter 9 of this Report, and those relating to superannuation are presented in Chapter 10.

The Committee has grouped legislation which still does not apply equally to those in same sex relationships into two main categories: that which relates to employment conditions and entitlements, and that which imposes responsibilities and obligations on parties to a relationship. There is also a third miscellaneous group of Acts which treat those in non-traditional domestic relationships differently.

A number of submissions and witnesses stated that amending only selected pieces of legislation to take account of the PRLA Act 1999 definition of de facto relationship means that same sex couples will continue to receive unequal treatment in a number of areas.

Dr Andresen wrote:

> … I am given to understand that possibly 30 or more NSW statutes still remain without explicit recognition of same sex relationships. These are the 'grey areas'. No same sex couple should have to front up with the expense of taking a test case to have the courts decide on matters which the Government (through your Committee in this instance) ought to have foreseen and dealt with in legislation. It will be interesting to observe what the Committee eventually has to say to the Government regarding identification of all these, and legislating appropriate amendments to them, if this is the case. [124]

124 Submission No 21 – Supplementary.

Representatives from Kingsford Legal Centre told the Committee:

> Of the 52 Acts that were proposed to be amended only 25 have actually been amended. We cannot see any particular logic for many of the amendments, why some have been left out and others included, but the fact is that many of the changes are to remove the gender bias in those definitions. [125]

Mr Costa said:

> There are some specific pieces of legislation that we believe need to be amended … All those Acts have provisions within them … [that] put people in a same sex relationship at a disadvantage, or in a discriminatory position, against those that are in de facto relationships or in a married relationship. It is our view that those pieces of legislation must be amended, first, to make them consistent with the intentions of the *Property (Relationships) Legislation Amendment Act* but, more broadly, to pick up a broader definition of 'de facto relationship' which would then go towards addressing issues of discrimination across a gamut of legislative instruments within the State environment. [126]

(a) Amendments to Legislation Relating to Employment Conditions and Benefits

In relation to employment conditions and entitlements, Mr Costa noted:

> In many instances same sex partners miss out on the entitlements automatically applying to heterosexual couples. The lack of access to these entitlements, which can range from relocation costs to concessions on housing loans and bank accounts, comes because these relationships are not recognised as bona fide de facto relationships. [127]

The Committee notes, however, that non-traditional domestic relationships have been granted legal recognition in some situations. For example, in May 1995 the NSW Industrial Relations Commission conferred family status on same sex couples and extended families, in its decision on the State family leave case (granting leave to workers for the purpose of caring for sick family members). Under its Order, an employee who is responsible for the care and support of someone who is (inter alia) 'a same sex partner who lives with the employee as a de facto partner of that employee on a bona fide basis' will be entitled to this leave.

The concept of family status used by the Commission also recognises the cultural diversity of families from non-English speaking backgrounds by including a broader and more radical definition of family ties as well as cultural definitions under the term 'affinity'. 'Affinity' was defined by the Commission to include 'a relationship that one spouse because of marriage has to blood relatives of the other'. Affinity is recognised to exist in Aboriginal and many non-English speaking cultures as an important family bond.

The Committee is aware of a number of areas where benefits and entitlements available to opposite sex couples are still not available to other domestic relationships. Increasingly in many areas of employment, employees no longer receive just a salary. They receive an employment package, which comprises base salary, superannuation, additional benefits such as staff discounts, travel entitlements

125 Evidence, 4 August 1999.
126 Evidence, 5 August 1999.
127 Submission No 57.

and the like. Added to this are the various provisions for leave: holiday leave, sick leave and compassionate leave. In many instances the criteria for entitlement to these benefits involve being married or in a de facto relationship. Accordingly, employees may receive packages of lesser value than their colleagues because they are not in such a relationship, either because they are single or because they are in a same sex relationship. For example:

- some packages include travel for employees and 'spouses';
- some employers grant compassionate or carer's leave to employees to care for 'family members';
- some employers offer bereavement leave to employees in the event of death of a 'family member'; and
- some employers offer employees participation in a health insurance scheme to employees and their 'spouses' or 'dependent spouses'.

The Committee considers it unlikely that the *Anti-Discrimination Act 1977* as it currently stands would be of much use to couples experiencing such discriminatory treatment. As discussed in Chapter 3, while it is unlawful to discriminate against homosexuals or lesbians who are single, the Act does not apply to discrimination against homosexuals or lesbians as couples. It would therefore most probably be argued by employers in cases such as those referred to above, that any difference in treatment is not linked to the sexual orientation of the employee but to the fact that he or she is not in a legally recognised relationship. In reality the withholding of such entitlements and benefits is intrinsically linked to the homosexuality of the employee. The Committee restates its view that this situation should no longer be tolerated.

While some awards may still contain discriminatory provisions, submissions from trade unions suggested the situation in relation to entitlements may be more precarious when employment conditions are negotiated outside the award system. These submissions referred to instances where union members in same sex relationships had received different entitlements to their colleagues in opposite sex relationships.

In relation to parental leave, Ms Michel Hryce, Secretary of the Media, Entertainment and Arts Alliance, NSW Branch, wrote that:

> Biological and adoptive mothers and fathers may take a total of 12 months of unpaid leave between them and are able to return to their previous employment. However, there is no provision for a situation where the other parent is not a biological parent and is also unable to adopt his/her child. When a lesbian has a child she is able to have 12 months unpaid leave. However, her partner is not entitled to any leave and the unpaid leave cannot be shared. The range of parenting options is thus decreased for lesbian couples. If the non-biological parent takes time off work to care for the child, she is likely to lose her job – the very situation that the provision of parenting leave was designed to avoid. [128]

The Committee is aware that the DFRA Bill 1998 proposed to amend the parental leave provisions to extend their operation to those in same sex relationships, and that no such change has been made by the PRLA Act 1999.

128 Submission No 28.

Many employees receive benefits for their spouse or other family members as part of their employment package. In many cases these 'benefits' merely recognise the impact that work can have on family life. For example, where an employee is required to relocate by his/her work or to travel a great deal, other members of the immediate family may be able to accompany him/her. The categories of family members who are able to benefit varies but invariably include opposite sex partners and usually children. However, these benefits are not always available to lesbians and gay men and their families. In 1996 two cases were lodged with the Human Rights and Equal Opportunity Commission concerning benefits not being extended to same sex partners of Commonwealth public servants, which were paid to those in married or heterosexual de facto relationships. HREOC found that the failure of the Commonwealth Government Departments to pay these benefits amounted to discrimination on the basis of sexual orientation. The Departments appealed the decision, and both were subsequently overturned by the Federal Court, which found that the homosexual partners were not entitled to receive government partner allowances as such benefits were only applicable to partners in heterosexual relationships. [129]

In other cases benefits take the form of discounts to family members or family health insurance and may be seen to form part of the employment package. In these cases gays and lesbians are not being paid the same as their heterosexual colleagues although they are doing the same work.

Mr Anthony Beck, the National Secretary of the Finance Sector Union of Australia, said:

> The union movement and our members cannot be expected to try and resolve these issues simply on the basis of negotiation with individual employers. These rights of recognition should be afforded to all members of our community not only those people who are fortunate enough to work in well unionised workplaces where employers are progressive enough to understand the requirement for change. [130]

Moreover, the Committee understands that when a member of an opposite sex couple dies, under certain legislation their partner has the right to inherit the unpaid balance of the deceased partner's unpaid long service leave. [131] Other legislation extends the provision of death or injury benefit to the employee's or insured's partner. [132]

Mr Kirkland told the Committee:

> There are Acts dealing with issues such as unused long service leave paid out to a partner or widow or widower when a person dies and death and injury benefits under specific Acts, such as the *Police Service Act*. Those are the sorts of situations in employment-related Acts that, independent of the *Anti-Discrimination Act*, need to be amended. It is partly in the interests of consistency with the principles of the *Anti-Discrimination Act*, but it is also in the interests of consistency with the rest of the [PRLA Act] changes. There are substantial inconsistencies at the moment in relation to employment, just because these Acts have been left out. [133]

---

129 *Commonwealth of Australia v HREOC & Muller*, (unreported Federal Court, Moore J, 27 February 1998), and *Commonwealth of Australia v HREOC & Kelland* (unreported Federal Court, Moore J, 27 February 1998.)

130 Submission No 37.

131 *Electricity (Pacific Power) Act 1950; Public Sector Management Act 1988; Sydney Cove Redevelopment Authority Act 1968; Teaching Services Act 1980; Transport Administration Act 1988; and Waste Recycling and Processing Service Act 1970.*

132 *Police Service Act 1990; and Sporting Injuries Insurance Act 1978.*

133 Evidence, 4 August 1999.

The Committee notes that amendments to extend the various employment related provisions to those in same sex relationships were foreshadowed under the DFRA Bill 1998, however in the main they have not been included in the PRLA Act.

Dr Andresen identified this difference in his supplementary submission.

> It would appear to me that the new legislation fails to deal adequately or at all with the following areas of continuing substantial and grievous inequality between same sex de facto relationships and opposite sex relationships: the guaranteed right to have unpaid long service leave paid out to the same sex partner on the death of the employee in whose name the leave entitlement subsists. This is an aspect of employment law which appears to have been overlooked. It will be important for the Committee to scrupulously inspect all aspects of current employment law and possibly locate additional gaps to this one. [134]

The need for such legislative amendments is not universally held. In her article Sullivan says:

> The same social values apply in relation to relocation and family travel allowances. This provision is a recognition of society's obligation to the family, and the need to support the marital relationship on behalf of the welfare of the children. But society has no reason to offer special support to homosexual partnerships, which are only self-serving. If homosexual couples are given these benefits then why should not a single heterosexual or homosexual person be allowed them on behalf of a close friend of either sex ? [135]

The Committee was told that Australia also has obligations under the International Labour Organisation Discrimination (Employment and Occupation) Convention 1958 (ILO 111), to which it is a signatory, to take steps to ensure equal opportunity and non-discrimination in employment and occupation on specified and declared grounds which include sexual preference.

(b) Amendments to Legislation Relating to Duties and Obligations

The Committee's attention has been drawn to a number of Acts which require office holders to declare the interests of their spouse, and the fact that the DFRA Bill 1998 proposed to amend many, if not all, of these to ensure that those in same sex relationships complied with these provisions. [136] These changes have not been made by the PRLA Act 1999, and the relevant legislation remains unamended. The Committee has heard arguments that if changes are going to be made to our legal system to extend rights to those in same sex relationships, then compliance with obligations should also be required. However, the point was also made to the Committee that extension of spouse disclosure obligations to same sex couples could have negative consequences as people in prominent positions may be required to reveal their sexual orientation, possibly exposing themselves to prejudice.

In favour of extending such obligations to those in same sex relationships is Mr Galbraith, who commented:

---

134 Submission No 21 – Supplementary.

135 L Sullivan, 'Homosexual superannuation entitlements: there is no discrimination', *News Weekly*, January 30, 1993, p10.

136 *Albury-Wodonga Development Act 1974; Co-operatives Act 1992; Financial Institutions Commission Act 1992; Friendly Societies (NSW) Act 1997; Growth Centres (Development Corporations) Act 1974; Local Government Act 1993; and Sydney Cricket and Sports Ground Act 1978.*

> The principle we have taken in our Bill is that rights and obligations go together. If there is going to be true equity and beneficial rights are accepted then the obligations of relationships must also be accepted as part and parcel of being in a relationship … With regard to the kinds of questions regarding local councils and public disclosure, we believe that it is in the public interest that if there are genuine issues of pecuniary interests that they be disclosed. [137]

Mr Stone said:

> We wanted to talk about obligations. The recent amendments to the legislation grant wide-ranging rights to same sex couples, but a conscious decision has been made to exclude same sex relationships in some instances in which obligations are imposed on people. We accept, as a matter of principle, that with rights come responsibilities, and that legislative reform should be designed to ensure equal recognition of relationships before the law. If obligations are not imposed on same sex couples we run the risk of being accused of having special rights, and there may be some truth to that, but it also leaves our relationships at second-tier relationships rather than equal relationships, and that is what we want, equality across the board.
>
> We accept that in some instances, particularly in the recent amendments that are largely about people declaring the interests of the same sex partner, any concerns about people being 'outed' can be dealt with through proper regimes of confidentiality. If parliamentarians, for example, are to declare the interests of the spouse, there is no reason why the interests of a same sex partner should be treated in any way differently than the interests of an opposite sex partner. Although that may cause some concern, we see those concerns can be dealt with by proper confidentiality regimes. [138]

However, a different approach was taken by the Gay and Lesbian Rights Lobby. Mr Kirkland told the Committee:

> We have concerns about the practical implications. We separate our theoretical position from our appreciation of the practical situation. In theory we certainly accept that with rights come obligations, and that is what was proposed in the DFRA Bill 1998. However, we must recognise that community views and society, at least in some places, particular pockets here and there, sometimes lag behind the law. Forcing people to disclose relationships can amount effectively to publicising a relationship, which in places where there is a reasonable amount of discrimination against people on the basis of sexuality could have a substantial impact on the lives of the parties to a relationship … If the Acts which impose obligations to disclose are extended to gay and lesbian relationships, some measures should be taken to protect the privacy of the people involved. If you are talking about disclosing interests in an employment or a board of directors situation you might impose measures to restrict who in the organisation has access to that information. We still have concerns about how that would work practically … We are worried about whether any measures you took to try to protect people's privacy would be effective at this stage. [139]

Having weighed up both sides of the argument the Committee is of the opinion that legislation imposing responsibilities and obligations should be amended to require those in same sex relationships to comply in a similar fashion as those in opposite sex relationships, but only if adequate mechanisms to protect the privacy of those making disclosures regarding their same sex relationship can be put in place.

137 Evidence, 4 August 1999.
138 Evidence, 5 August 1999.
139 Evidence, 4 August 1999.

(c) Amendments to Miscellaneous Legislation

The Committee notes other Acts, where being in a relationship has legal consequences, which have not been amended. Some of these Acts do not recognise de facto partners, whether opposite sex or same sex, other Acts recognise de facto partners but have not been amended to apply the PRLA Act 1999 definition, which means those in same sex relationships are not covered. This list of Acts is not exhaustive but includes:

- the *Rural Lands Protection Act 1989*: when any land is sold by a rural lands protection board for payment of unpaid rates, it cannot be sold to a relative (including the spouse) of a board member. This Act does not appear to apply to de facto partners, whether opposite sex or same sex.

- the *Credit Act 1984*: spouses are excluded from being guarantors in certain situations. This Act does not appear to apply to de facto partners, whether opposite sex or same sex.

- the *Defamation Act 1974*: a person does not have the right of refusal to answer questions that might incriminate oneself or one's spouse. This Act does not appear to apply to de facto partners, whether opposite sex or same sex.

- the *Trustees Companies Act 1964*: certain people can apply to the Supreme Court for an order directing a trustee company that holds property in which the applicant is interested, to render a proper account. Wives and husbands are among those mentioned as possible applicants, however, the definition does not extend to de facto partners, whether opposite sex or same sex.

- the *Local Courts (Civil Claims) Act 1970*: a spouse has the right to appear before a Local Court. The Act does not appear to extend to de facto partners, opposite sex or same sex.

- the *Door to Door Sales Act 1967*: certain credit purchase agreements may be terminated by the spouse of the purchaser. The Act does not appear to extend to de facto partners, opposite sex or same sex.

- the *Health Insurance Levies Act 1982*: spouses with children are given access to the family rate of contribution. It is not clear whether this Act applies to opposite sex de facto partners but it does not apply to same sex de facto partners. [140]

- the *Pre-Trial Diversion of Offenders Act 1985*: applies to sexual offences committed by a person with or upon the person's child or a child of the person's spouse or de facto partner. It has not been amended to include same sex partners.

- the *Evidence Act 1898*: as a general rule, a husband or wife or de facto partner cannot be compelled to give evidence in relation to communications between spouses. This privilege does not extend to same sex partners.

---

140 It should be pointed out that although the claimants in *Hope v NIB* were found to have been disciminated against on the basis of sexuality when they were denied the 'family rate' of health insurance, it is important to note that the policy in question was based on contributor and 'dependants'. It is likely that the case would have been decided differently if the policy had been restricted to 'spouses'.

- the *Liquor Act 1982*: an opposite sex partner is allowed to carry on business for one month after the death of the licensee or apply for a licence if the licensee is disqualified. This provision has not been amended to apply to a same sex partner in similar circumstances.

- the *Adoption Information Act 1990*: an opposite sex partner has the right to apply for access to adoption records after the death of an adopted person or birth parent. This provision has not been amended to apply to a same sex partner in similar circumstances.

- the *Landlord and Tenant Act 1899* and the *Retirement Villages Act 1989*: a lease can be extended to a remaining opposite sex partner if a tenant quits residential premises or to a partner who is resident in a retirement home. This provision was not amended by the PRLA Act 1999 to apply to a same sex partner in similar circumstances.

Although certain amendments were made to the *Retirement Villages Act 1989* by the PRLA Act 1999, these did not extend the definition of a de facto partner to include same sex partners. A number of Acts were amended to incorporate the new definition of de facto relationship and/or domestic relationship, however, in other cases, these definitions were not changed to recognise same sex relationships. This point was referred to by the ADB in its supplementary submission.

> The Acts, in particular, which were amended in order to put in place 'consequential amendments' to preserve the substance of the affected provisions, but which do not apply to same sex couples are the *Dentists Act 1989; Legal Aid Commission Act 1979; Legal Profession Act 1987; Local Government Act 1993*; and the *Retirement Villages Act 1989*. The Board recommends that these Acts be amended to reflect the definition of de facto relationship in the PRLA Act 1999. [141]

The Committee notes that since the passage of the PRLA Act 1999 the Retirement Villages Bill 1999 has been introduced and passed, and this legislation amends the definition of de facto relationship to be consistent with that used in the PRA 1984.

A number of submissions or witnesses remarked on the need for consistency, arguing that if the definition of de facto was going to be re-defined for some purposes, it should be re-defined for all. A consequence of this would be that wherever reference was made to 'a spouse' or 'a de facto partner' in any New South Wales legislation, these terms should be amended to include same sex partners. It was considered illogical by some that the re-defined term could be used selectively.

In its submission the Labor Council indicated its support for inclusion of the revised definition in all New South Wales legislation where reference is made to de facto relationships. [142]

The ADB wrote:

> As a general principle, the Board believes that all NSW legislation should be amended to reflect the new definition of 'de facto'. It is clear that the Government have characterised the major purpose of the PRLA Act as limited to correcting discrimination against same sex couples in property redistribution. As such many of the amendments as tabled in Schedule 2 are supported by the

141 Submission No 132 – Supplementary.
142 Submission No 57.

> Board. However, there are some problems with the changes suggested and also, several pieces of NSW legislation which potentially should be amended as part of Schedule 2 are notable by their absence. [143]

The Gay and Lesbian Rights Lobby said:

> The DFRA Bill provides a measure of clarity and consistency by extending the same criteria of recognition across most NSW law. Recognising partners of the opposite but not the same sex also leads to inconsistency and confusion. The basis of the rule of law and our legal system is that like cases be treated alike. Under the current system, heterosexual and homosexual couples in similar circumstances are governed by completely different law. In other words, like cases are treated differently. This would be rectified by the DFRA Bill. [144]

7.2 Legislative Amendments Necessary to Extend Coverage to those in 'Close Personal Relationships' as Defined in Section 5(1)(b) of the *Property (Relationships) Legislation Amendment Act 1999*

The Committee understands that the PRLA Act 1999 has extended coverage to those in 'close personal relationships' in only three of the seven Acts indicated in the DFRA Bill 1998 as requiring amendment to give legal protection to the second limb of the domestic relationship category. The effect of making amendments to the seven Acts referred to in the DFRA Bill 1998 would have:

- included a domestic partner under the *De Facto Relationship Act 1984* and the *District Court Act 1973* as someone who may make a claim to property, based on contribution;
- given a domestic partner the right to apply under the *Adoption Information Act 1990* for access to adoption records after the death of an adopted person or birth parent;
- included a domestic partner as someone whose interests should be considered when a person in custody applies for bail under the *Bail Act 1978*;
- made a surviving domestic partner eligible to claim part of a domestic partner's estate under the *Family Provision Act 1982*;
- provided under the *Wills, Probate and Administration Act 1898* for automatic inheritance on the death of the domestic partner who had no will (but only where s/he left no spouse, no children and no parents); and
- extended eligibility for provision of death or injury benefits paid to an employee's domestic partner under the *Workers Compensation Act 1987*.

The Committee notes that the *DFR Act 1984*; the *Bail Act 1978*; and the *Family Provision Act 1982* have been amended by the PRLA Act 1999 to achieve these outcomes. It is the Committee's view that the other four Acts referred to above should also be amended.

The Committee has been told that the *Wills, Probate and Administration Act 1898*, and the *Workers Compensation Act 1987*, in particular, require amendment.

143 Submission No 132 – Supplementary.
144 Submission No 135.

The Gay and Lesbian Rights Lobby wrote:

> We submit that domestic relationships should be recognised in the *Wills, Probate and Administration Act 1898*. Currently, domestic relationships, other than de facto relationships have only been recognised in the context of the *Family Provisions Act 1982*. This allows a person to bring a claim in quite limited circumstances and this requires an expensive legal process, usually involving the Supreme Court. The *Wills, Probate and Administration Act 1898*, on the other hand, provides for automatic inheritance to specific individuals where a person dies intestate. This hierarchy usually entitles the spouse to receive the assets, then children, parents, siblings and other types of blood relatives. Partners are the only non-blood relatives currently included.
>
> Domestic relationships should be recognised for the purposes of the *Wills, Probate and Administration Act 1898*. Otherwise, the legislation allows many potential injustices. For example, a sibling of the deceased who has been a carer over a number of years has no greater rights than a sibling who has had no contact with the deceased. A carer who is not a sibling has no claim at all under this Act and even an aunt or uncle or more remote blood relative who has not seen the deceased for many years would have greater rights than a carer who is not a relative of the deceased. [145]

Ms Clayton told the Committee:

> … The broader definition of domestic relationship, not just de facto relationship, should be in other legislation … We are suggesting that two other areas that need to be covered are workers compensation and wills, probate and administration. We are talking about the situation in which an individual and the person responsible for his care have financial and emotional interdependence there is an expectation that one should provide for and look after the other, yet by having only the narrower definition of de facto definition in wills, probate and administration we are not providing for that sort of relationship in which one of the parties dies intestate. [146]

The Committee observes that if such a step were taken in relation to the *Wills, Probate and Administration Act 1898*, consideration needs to be given as to where in the hierarchy of inheritance a party to such a relationship should be placed. When a person dies without leaving a will, the estate is distributed according to the order set out in Division 2A of the *Wills, Probate and Administration Act 1898*. The nine classes in order of distribution are:

- Spouse or de facto spouse and no children
- Spouse or de facto spouse and children
- Children only
- Parents
- Siblings – whole blood
- Sibilings – half blood
- Grandparents
- Uncles and Aunts – whole blood
- Uncles and Aunts – half blood

145 Submission No 135 – Supplementary.
146 Evidence, 5 August 1999.

When asked where in this hierarchy those in a 'close personal relationship' should be placed Dr Sant said:

> It is actually a difficult question. Clearly partners and children need to remain at the top of the hierarchy and probably there would not be too much argument about that, given the types of financial relationships between those people when they are alive and how close the relationship is. Our discussions centred around where they should come in relation to parents and siblings, and we thought between the two. There is probably room for slightly different views on that. But I think that there would probably be consensus that they should come after children and above more remote relatives, such as grandparents, aunts and uncles. We thought probably between parents and siblings. [147]

The Committee believes that if amendments were made to the 'close personal relationship' definition, so that relationships which would be described as 'de facto relationships' except for the cohabitation and length of relationship requirements come with this second limb, then for the purposes of the intestacy legislation, they would be treated the same as other de facto partners. Other types of 'close personal relationships' including carers should occupy a different rung in the hierarchy.

The Committee notes that while only three of the seven Acts identified by the DFRA Bill 1998 were amended, two other Acts have also been amended by the PRLA Act 1999 to extend coverage to those in 'close personal relationships'. These are the *Coroners Act 1980* and the *Duties Act 1997*.

The Committee supports the application of analogous legal principles to all domestic relationships to ensure that inequities do not arise. Consequently, all relevant legislation including those Acts identified above should be amended to ensure the principles contained within the PRLA Act 1999 are consistently applied.

147 Evidence, 4 August 1999.

Recommendations:

10. That the Government review and amend all legislation and awards conferring employment benefits and entitlements, where a different application of the law is currently evident between married couples and those in other domestic relationships, to achieve consistency with the *Property (Relationships) Legislation Amendment Act 1999*.

11. That the Government review and amend all legislation imposing responsibilities and obligations to require similar compliance by those in same sex relationships as those in opposite sex relationships, but adequate mechanisms to protect the privacy of those making disclosures regarding their same sex relationship must be put in place.

12. That the Government undertake an examination of all NSW legislation to determine whether amendments need to be made to ensure a consistent application of the new definition of 'de facto' as contained in the *Property (Relationships) Legislation Amendment Act 1999*.

13. That a general drafting instruction be issued to the Parliamentary Counsel's Office that in all new legislation any reference to a 'de facto relationship' is to be consistent with the definition used in the *Property (Relationships) Legislation Amendment Act 1999*.

14. That the *District Court Act 1973*, the *Adoption Information Act 1990*, the *Wills, Probate and Administration Act 1898* and the *Workers Compensation Act 1987* be amended to ensure that those in 'close personal relationships' are adequately provided for.

15. That the Government undertake an examination of all NSW legislation to identify any other Acts apart from those referred to in Recommendation (xiv), which may need amending to cover those in 'close personal relationships'.

7.3 Summary

The Committee is of the view that if certain domestic relationships have been recognised for the purposes of the *Property (Relationships) Legislation Amendment Act 1999*, it is only logical that these same relationships should receive equal legislative protection in other areas where inequities remain. The Committee has been told that there is a raft of legislation where couples in non-traditional domestic relationships continue to be treated differently despite the changes introduced by the PRLA Act 1999. To rectify this situation the Committee feels that the simplest approach would be for these other pieces of legislation to adopt the definitions used in the PRLA Act 1999, where appropriate.

Chapter 8 - Technical and Procedural Issues Arising from the New Legislation

The Committee's attention was drawn to technical and procedural aspects of the new legislation. These can be summarised as concerns about:

- the jurisdiction of the District Court;
- the adequacy of section 20, which deals with future needs;
- the need for alternatives to litigation;
- the appropriateness of section 29, which deals with maintenance;
- and the need for a review clause.

The Committee was told by a number of legally qualified witnesses that, as with any new legislation, litigation is to be expected as people try to avail themselves of the Act's protection. Greater concern was expressed in relation to the 'close personal relationship' category, which it was suggested could give rise to property adjustment disputes between parents and children, and people who although unrelated share a household in circumstances where one supplies domestic or personal care services for the other. Mr Gooden, a lawyer with 20 years experience in the family law area, said that he was aware of lawyers already pursuing such cases. [148]

Mr Benjamin, Chairman of the Family Law Committee of the Law Society of New South Wales, said:

> It will be interesting to see how the Act operates with same sex couples and the personal relationship type claims in that second leg, and whether they take over from these other pieces of legislation … One of the concerns I had when I read the legislation was the need for double litigation … It may well be that the close personal relationship claim may mean that a son-in-law or daughter-in-law may look at suing his or her parents-in-law under the legislation before going to the *Family Law Act* to settle up the property. [149]

The Committee heard that aspects which could be challenged relate primarily to whether or not a particular relationship comes within the relevant category. A non-exhaustive check list of factors is provided in relation to de facto relationships, but these do not apply to 'close personal relationships', which may mean there is more scope for litigants to argue that they come within that definition.

In the DFRA Bill 1998 the phrase 'bona fide domestic basis' was used in relation to determining the existence of a domestic relationship. In the PRLA Act 1999 this phrase does not appear, but rather the terms 'domestic support' and 'personal care' are used in relation to 'close personal relationships'. These terms are not defined in the Act, and according to some submissions and witnesses, could be left up to the Courts to clarify. The Committee notes, however, that in the Second Reading speech to the PRLA Bill the Attorney General said:

148 Evidence, 4 August 1999.
149 Evidence, 5 August 1999.

> In establishing whether a relationship comes within the definition of a close personal relationship for the purposes of this Bill, regard should be had to the requirements that the parties provide, one or both for the other, domestic support and personal care. Such support and care will commonly be of a frequent and ongoing nature. For example, domestic support services will consist of attending to the household shopping, cleaning and laundry and like activities. Personal care services may commonly consist of assistance with mobility, personal hygiene and generally ensuring the physical and emotional comfort of one or both parties for the other. [150]

Nonetheless, representatives from Kingsford Legal Centre felt that:

> … There are significant problems because as we see it the two criteria that are going to be relied upon - the personal care and domestic services - are untried definitions that have only been defined in a Second Reading speech and then only very broadly. So there is no case law by which that can be interpreted and this just adds to the uncertainty and also to the limitation behind that definition.[151]

8.1 Potential Areas of Concern

The following technical and procedural issues were flagged by witnesses before the Committee as potential areas of concern.

(a) The Jurisdiction of the District Court

At the time the DFRA 1984 was introduced it was envisaged that the District Court would be given jurisdiction following the successful establishment and review of a procedure to adjust property rights and settle maintenance claims in the Supreme and Local Courts. [152] Although the *District Court Act* was amended in 1987 to give it jurisdiction to deal with such matters, it is limited to making orders in its equity division for financial adjustment not exceeding $250,000 for matters brought under the PRA 1984. [153] While the Supreme Court has unlimited jurisdiction, it is more complex, expensive and time consuming than the other jurisdictions. Proceedings in the Local Court are quicker and less expensive, but it has a limited jurisdiction of $40,000.

The SPR Bill 1997 proposed that in addition to its current powers, the District Court would have unlimited jurisdiction to hear and determine proceedings under the PRA 1984 of whatever value or amount if the parties were in agreement and the Court thought it appropriate.

Mr Gooden brought certain other jurisdictional issues to the attention of the Committee:

> For instance, the District Court does not have prima facie injunctive power as it is not provided under the current Act. A classic case that happens all the time is that one partner deliberately defaults under the mortgage to force the bank to sell the property because the other partner is in the property and is not going to vacate. We deal with this problem in the Supreme Court by getting an injunction against the other party, ordering that party to pay the mortgage, and everything is resolved. At this stage the District Court does not have that power and is not given the power

150 *NSWPD*, Legislative Council, 13 May 1999, p229.
151 Evidence, 4 August 1999.
152 *NSWPD*, Legislative Assembly, 17 October 1984, p2004
153 Section 134(1)(g) and (3), *District Court Act 1973*

> under this Act. At this stage I am not able to lodge a caveat to stop the sale of a property in a de facto relationship pending proceedings because there are cases that say that the right under section 20 for a property adjustment order is not a caveatable interest … I do not think that there has been enough thought given to the standard problems that we have in the conduct of these cases now that the District Court is dealing with them. [154]

Mr Benjamin agreed that the District Court may be limited in its ability to grant injunctions, and that amending the *District Court Act 1973* to ensure this issue was addressed would be a sensible measure. According to Mr Benjamin it is important to:

> … Give the judges the power to deal with all of the issues that arise before them. If there is going to be a fight - and hopefully there will not be - there is only one fight in one Court at one time rather than a series of litigation. [155]

Another suggestion made by Mr Benjamin was to create a specialist panel of magistrates to deal with matters brought under the PRA 1984 in the Local Courts. [156]

The Committee acknowledges that it lacks the technical and legal expertise to analyse in detail the *District Court Act 1973*, and is therefore unable to comment conclusively on the above concerns. However, it recommends that a review of the legislation be carried out to ensure that any potential areas of difficulty are identified and removed. The Committee notes that while the District Court was given the jurisdiction to hear matters concerning property distribution of de facto couples under its own Act, no consequential amendment was made to the DFR Act 1984. The Committee recommends that when amendments are next made to the PRA 1984, reference to the jurisdiction of the District Court should be inserted.

Recommendations:

16. That the Attorney General examine the *District Court Act* 1973 to ensure all powers necessary for the District Court to deal with matters brought under the *Property (Relationships) Act 1984* are available.

17. That section 9 of the *Property (Relationships) Act 1984* be amended to include the District Court in the Courts which can hear matters brought under this legislation.

(b) The Adequacy of Section 20, Dealing with Future Needs

Various legal practitioners put to the Committee that the regime governing the settlement of de facto property disputes needs amending. Section 20 of the PRA 1984 deals with applications for adjustment as follows.

(1) On an application by a party to a domestic relationship for an order under this Part to adjust interests with respect to the property of the parties to the relationship or either of them, a Court may make such

154 Evidence, 4 August 1999.
155 Evidence, 5 August 1999.
156 Evidence, 5 August 1999.

order adjusting the interests of the parties in the property as to it seems just and equitable having regard to:

(a) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them, and

(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the parties to the relationship to the welfare of the other party to the relationship or to the welfare of the family constituted by the parties and one or more of the following, namely:

(i) a child of the parties,

(ii) a child accepted by the parties or either of them into the household of the parties, whether or not the child is a child of either of the parties.

(2) A court may make an order under subsection (1) in respect of property whether or not it has declared the title or rights of a party to a domestic relationship in respect of the property.

The Committee has been told that these provisions are less flexible than those available under the FLA 1975, which governs the settlement of property and maintenance matters between married couples. The Family Court may decide that even though there had been equal contribution in the past, the division of property should be in unequal amounts when the future needs of the parties are taken into account.

De facto couples may only have a property dispute determined by the Family Court when they are also disputing the care of the children. In general, property disputes between de factos are dealt with in the District Court, and the property distribution provisions are much less favourable as evidenced by the scope of section 20 of the PRA 1984.

Mr Gooden told the Committee:

> The other difference that has been pointed out in *Evans v Marmont* is that when making a property adjustment order under section 20 of the *De Facto Relationships Act 1984* what the Court can take into account is strictly limited to contribution, that is, what the parties have brought to the relationship. The Court is not entitled to take into account those matters that the Family Court can take into account under the *Family Law Act*. Section 75(2) of the *Family Law Act* lists a vast menu of matters that are taken into account which we call the 75(2) needs factors. They have been held to be inapplicable under the *De Facto Relationships Act*. So when a court makes a property adjustment order under the *De Facto Relationships Act* it does not take into account the future needs that the parties may have. [157]

In his submission, Mr Percival, a solicitor in private practice, stated:

> Section 20 does not … encompass same sex couples when separating. There appears to be no logical, ethical or philosophical reason why that should occur apart from the historical prejudice

157 Evidence, 4 August 1999.

> that same sex couples face. The outcome, of course, is that they do not have the certainty of process provided under the DFRA, nor do they have the rights provided under that Act to recognise the contributions that they may have made towards each other's property. [158]

When asked whether there was a case for reviewing the property adjustment provisions, Mr Benjamin said:

> I believe that would be appropriate, particularly in relation to the additional group of people who are now included under the *Property (Relationships) Act* in close personal relationships. That needs to be looked at in terms of how it applies to a whole raft of legislation. The Law Reform Commission should be able to look at that. [159]

When the NSW LRC examined the area of de facto relationships in the early 1980s, it was considered inappropriate to apply the same legislative requirements to those in other less formal relationships than marriage. However, the need to ensure that those in a variety of domestic relationships receive equal legal protection in relation to property rights has increased since that time. The Committee notes that section 19 of the *Domestic Relationships Act 1994* (ACT) makes specific provision for the Court to take account of prospective factors when determining distribution of property, which is in keeping with the approach taken by the Family Court under the FLA 1975.

It is the Committee's view that the ability to take into consideration the future needs of the parties should be made available to Courts determining matters brought under the PRA 1984 in New South Wales. Accordingly the Committee recommends that section 20 be amended to permit this.

Recommendation:

18. That section 20 of the *Property (Relationships) Act 1984* (applications for property adjustment) be amended to allow for future needs of de facto partners to be considered in a similar fashion to that provided for married couples under the *Family Law Act 1975*.

(c) *Provision of Alternatives to Litigation*

A number of submissions and witnesses emphasised the need for alternatives to litigation such as mediation, conciliation and counselling to resolve relationship disputes.

In particular Ms Anne Hollands, the Chief Executive Officer with the NSW Branch of Relationships Australia, strongly advocated dispute resolution facilities similar to those available under the FLA 1975:

> Our aim in writing is to raise concern that the proposed Bill does not appear to make any provision for the use, and the encouragement to use, primary dispute resolution as a process for resolving disputes occurring under this legislation. We believe that persons in interdependent relationships including those in de facto relationships have the right to be aware of primary dispute resolution procedures including mediation as an alternative to litigation. They should have the right to be assisted to work out for themselves how to divide their property and to resolve other matters in dispute. Compared to litigation, mediation is a process which is less stressful, less expensive and

158 Submission No 75.
159 Evidence, 5 August 1999.

> often more effective for the majority of parties … We therefore recommend that you consider an additonal amendment to the proposed legislation similar to Division III of the FLA that actively encourages the use of primary dispute resolution methods in the resolution of disputes under the DFRA 1984. [160]

The Committee was told that a major obstacle in introducing such a regime into the District Court is the resource implications. Mr Gooden remarked:

> At this stage, as far as we are aware, the District Court does not have a mediation facility. The District Court also has the problem that its Courts are right throughout New South Wales, so it will not be just the question of providing these facilities at Sydney or Parramatta but at Liverpool and right throughout the countryside. I do not think that enough thought has been given to providing those facilities. [161]

Mr Benjamin made the following comments:

> I do not think the District Court has the resources to deal with matters on a mediated or negotiated basis … We have identified that the State Court systems have a voluntary code of referral to mediations through the Courts. I think under the *Mediation and Evaluation Act*, the Courts can suggest that the parties go and have some mediation or negotiation but they cannot force that on the parties … The District Court does not have the facilities such as the Family Court, which are the mediation and counselling facilities. It does not have the processes in place yet which leads to resolution of dispute in a very positive way … Those processes have been operating fairly successfully in the Family Court for some time. Those processes are not available in the District Court, the Supreme Court and the Local Court. [162]

Other witnesses pointed out to the Committee that while alternatives to litigation may have certain benefits, there were also possible negatives. Mr Kirkland said:

> … There are always concerns around alternative dispute resolution, particularly in relation to personal relationships, around issues of power imbalances and whether it always produces fair outcomes when you sit down two people who may not be equal and try to encourage them to negotiate a solution. [163]

The Committee is of the view that providing alternative means to deal with disputes should be encouraged. It is mindful, however, that the implementation of such a measure has significant resource implications, and recommends that a full assessment be carried out of the means by which adequate and appropriate alternatives to litigation could be made available, with a view to making the necessary amendments to the *Property (Relationships) Act 1984*.

160 Submission No 34.
161 Evidence, 4 August 1999.
162 Evidence, 5 August 1999.
163 Evidence, 4 August 1999.

Recommendation:

19. That the Attorney General fully explore the means by which adequate and appropriate alternatives to litigation could be made available under the *Property Relationships Act 1984*, with a view to making the necessary legislative amendments in due course.

(d) The Adequacy of Section 29, Dealing with Orders for Spousal Maintenance

Maintenance is an amount of money paid by one party to a marriage or de facto relationship for the financial support of the other party or their children. The Committee understands that spouse maintenance and child maintenance are treated very differently. As a general rule, parents are expected to financially support their children regardless of who the children live with. (Issues related to child maintenance are discussed in Chapter 9.) However, a person will only be required to support a former spouse when a particular need can be shown. The Committee is aware that spousal maintenance is available under the FLA 1975, but that there is no general provision for maintenance under the *Property (Relationships) Act 1984*.

In the NSW LRC's Final Report on de facto relationships in 1983, it was submitted that a de facto partner should be able to claim maintenance in certain limited circumstances, and these should be more restrictively defined than those which justify a maintenance award under the FLA 1975. Thus the Court should have power to award maintenance if, and only if, the applicant is unable to support himself or herself adequately because: he or she has the care of young children of the relationship; or his or her earning capacity has been adversely affected by the relationship and some retraining is required.

The NSW LRC argued that a clear distinction should be drawn between the power of the Court in proceedings between married couples and those between de facto partners. It said:

> We accept the view that marriage involves a public commitment that is not a necessary part of a de facto relationship. That commitment may justify a continuing obligation on a married person to support his or her spouse, where the spouse is unable to earn an income. In particular, that obligation may arise even where the need for support is created by circumstances, such as chronic illness, which are not necessarily connected with the relationship. We think that any maintenance obligation associated with a de facto relationship should be confined to meeeting specific and narrowly defined categories of needs, which can be attributed to the relationship between the parties and for which the other party can fairly be said to share direct responsibility. This ensures than the basis on which maintenance can be awarded between de facto partners is significantly more restrictive that the basis on which maintenance can be awarded between married persons. [164]

The ADB told the Committee that it had concerns in relation to section 29 of the PRA 1984, which had also appeared in the original DFR Act 1984, and provides that:

> If the parties to a domestic relationship have ceased to live together, an application to a Court for an order ... for maintenance may not be made by a party to the relationship who, at the time at which the application is made, has entered into a domestic relationship with another person or who, at the time, has married or remarried.

164 NSW LRC Report, p154.

The ADB commented in both its original and supplementary submissions that it did not understand the basis of section 29, which in its view effectively strips a party of all opportunity to pursue their maintenance rights if they have entered into a subsequent relationship at the time of the application. The ADB noted that although this section was identical to that in the *De Facto Relationships Act* 1984:

> It is by no means clear that support from a subsequent relationship will fill the gap that denial of maintenance from a previous relationship may create. As a Court has the ultimate responsibility for making an award of maintenance, a deserving party who has since entered into a subsequent relationship should not be denied the opportunity to apply. [165]

In his appearance before the Committee Mr Puplick said:

> If you establish certain rights as a result of having been in a relationship then subsequently enter into another relationship you forfeit the right to establish or maintain things like maintenance payments and claims on property, which you would otherwise have had … There will be some circumstances in which it might be appropriate. I think it ought to be determined on a case-by-case basis, rather than a blanket estimate of a right that has otherwise existed. [166]

This view was not shared by other legal witnesses appearing before the Committee. Indeed Mr Benjamin said:

> I would assume that that would be a right to make a claim for, in essence, spousal maintenance under the Act … With regard to the power to get support from a former partner, if someone has entered into another relationship I can see no logical reason why that person would be entitled to continue to get, in essence, maintenance for his or her own support when he or she has made plans for himself or herself in the future. The *Family Law Act* simply provides that if I remarry, my right to maintenance from my former spouse comes to an end. I see no reason why that should differ in relation to this law. Children of the relationship are protected in any event by the child support legislation. [167]

Having considered the issues put before it, the Committee is not persuaded that section 29 needs amending at this time.

Recommendation:

20. That section 29 of the *Property (Relationships Act) 1984*, which deals with the effect of a subsequent relationship or marriage on claims for maintenance, not be amended.

(e) Need for Review

The Committee considers it important to assess the impact of the legislative amendments brought about by the *Property (Relationships) Legislation Amendment Act 1999*, and recommends such an initiative be taken. To give this legislative force, a review clause should be inserted into the Act.

165 Submission No 132 - Supplementary.
166 Evidence, 5 August 1999.
167 Evidence, 5 August 1999.

Recommendation:

21. That a review clause be inserted into the Act requiring the Attorney General to undertake a review of the *Property (Relationships) Legislation Amendment Act 1999*, three years from the date of assent of any amending legislation, and to provide a report of the review.

8.2 Summary

A number of technical and procedural issues relevant to the legislation governing domestic relationships was brought to the Committee's attention. The Committee agrees that any jurisdictional limitations need to be removed to ensure the District Court can adequately deal with de facto relationship matters. The Committee supports in principle the use of alternative means to litigation to resolve disputes between de facto partners, but acknowledges that there are significant resource implications involved in implementing such a scheme. A thorough examination of the practicalities of introducing such a scheme needs to be undertaken. The scope of the provision dealing with applications for property adjustment (section 20), is limited in how it treats de facto couples. The approach taken under this legislation is seen as inconsistent with approaches taken to resolve distribution of property between married couples. The Committee recommends that section 20 be amended to improve the position of de facto couples. However, the Committee does not have a similar concern in relation to the spousal maintenance provision in the *Property (Relationships) Act 1984* (section 29). As a means of ensuring the legislation overall remains appropriate, a review requiring a thorough assessment after the *Property (Relationships) Legislation Amendment Act 1999* has been in operation for some time should be undertaken.

Chapter 9 – Children

A number of submissions and witnesses brought to the Committee's attention that there are various areas where children are disadvantaged through the legal treatment of de facto relationships. The Committee was told that some of these issues have been resolved with the passage of the *Property (Relationships) Legislation Amendment Act 1999*, however others remain to be addressed.

9.1 Definition

Under section 5(3) of the *Property (Relationships) Act 1984* a 'child of the parties to a domestic relationship' means any of the following:

(a) a child born as a result of sexual relations between the parties,

(b) a child adopted by both parties,

(c) where the domestic relationship is a de facto relationship between a man and a woman, a child of the woman:

(i) of whom the man is the father, or

(ii) of whom the man is presumed, by virtue of the *Status of Children Act 1996*, to be the father, except where such a presumption is rebutted,

(d) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*).

This definition of 'a child of the parties to a domestic relationship' in section 5(3) is new, and the reference in paragraph (d) to a party having 'parental responsibility' within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* allows coverage to be extended to same sex co-parents. Section 3 of the *Children and Young Persons (Care and Protection) Act 1998* defines parental responsibility in relation to a child or young person, as meaning all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children. Under section 27 of the *Property (Relationships) Act 1984*, a party to a domestic relationship can apply for maintenance where there is a child.

9.2 The General Legal Position Relating to Lesbians and Gay Men as Parents[168]

Residence orders, contact orders and special issues orders available under the *Family Law Act 1975* may be made in favour of lesbians and gay men who separate from the other biological parent. The 'best interests of the child' is the basic principle underlying all decisions in relation to parenting orders. In the past, the Family Court has resisted granting custody (now known as residence orders) to lesbians or gay men because of their sexuality, or if custody was granted, discriminatory conditions were imposed on the lesbian or gay man and/or their partner. In Family Court cases, sexual preference has been considered when examining the 'moral, cultural or educational influences' the lesbian or gay parent may have on the child.

168 The information in this section is taken from *The Law Handbook: Your Practical Guide to the Law in New South Wales*, 6th edition, Redfern Legal Centre Publishing, 1997, pp1005-1007.

Factors considered by the Court have included:

- whether a child raised by a homosexual parent may themselves become homosexual;
- whether the child could be stigmatised by peer groups;
- whether the homosexual parent would show the same love and responsibility as a heterosexual parent; and
- whether homosexual parents would give a balanced sex education to the child.

Custody has been awarded to lesbian mothers and gay fathers in a number of cases, however the Court may still take into account the parent's sexual preference and consider that a parent's lesbian or gay relationship may be detrimental to the child's welfare.

Lesbian and gay co-parents (partners of the biological parent who have agreed to share in the responsibility of the child) do not have legally recognised relationships with the children of their partners. There is also no specific provision in the law for a co-parent to acquire rights and responsibilities in relation to the children. However, section 65C of the FLA 1975 provides that any person concerned with the care, welfare or development of the child may acquire a parenting order in relation to that child, which means a parenting order can be made in favour of a same sex co-parent.

Co-parents may be awarded residence orders in relation to their partner's biological child, but only under certain circumstances. It may be possible to do this through consent orders (ie with the agreement of relevant parties). When such orders are opposed by other relevant parties, lesbian or gay co-parents may still make an application. The Court will make a decision based on the child's best interests. A parenting order made by the Family Court in favour of a co-parent is a means of gaining some protection for the relationship between child and co-parent. As section 61DE of the FLA provides that parental rights can be spread across more than two people, a co-parent's rights may be recognised without a corresponding loss of rights on the part of another. Disputes can often arise between the co-parent and the biological parent and the former may be granted a residence order in relation to their child or children. In these circumstances, the Court will make whichever decision it feels is in the child's best interests.

Submissions

When asked whether the concerns of children in same sex relationships could be adequately dealt with by the Family Court, Mr Benjamin told the Committee:

> Yes, I believe they can because the Family Court's powers extend to giving residence and contact to anybody. This includes grandparents and a whole range of people - anybody, if he or she can show an interest in the child. If it is in the best interests of the child to reside with that person or for that person to have contact with the child, they have the power to do that. [169]

Ms McMahon wrote:

> … Under the current statutory regime the children of same sex relationships are being disadvantaged. For example, if a lesbian couple have a child and their relationship breaks down, there is no statutory scheme to ensure that maintenance is paid. [170]

169 Evidence, 5 August 1999.
170 Submission No 111.

Mr Jonathan Oliver, the Co-ordinator at the Campbelltown Legal Centre, wrote:

> … Non-biological parents have few rights regarding children and carer parents have no access to child support payments from a non-biological parent through the Tax Office or the Local or Family Law Courts. The Supreme Court can provide some common law remedies on these issues (implied, express, and constructive trusts, promissory estoppel etc) but a right to these remedies is neither easy to establish nor inexpensive to pursue.[171]

The Gay and Lesbian Rights Lobby said:

> If same sex parents separate, lack of access to the DFR Act 1984 for assistance with property division could leave the child worse off and maintenance for his or her care may not be available. If the primary earner dies, a partner or children may not inherit and will not be eligible for compensation. The children of lesbian and gay men are losing out financially at every turn under the current discriminatory system. The result can be poverty. [172]

9.3 Adoption

Two aspects relating to the adoption of children were brought to the attention of the Committee. First, the situation where one partner adopts the biological child of the other partner, the second situation being that of 'stranger' adoption, that is where the child is not known to either party.

Dr Sant told the Committee:

> As the Committee has probably picked up, one of the issues with parenting rights for gays and lesbians is where there are children who are the biological child of our partners, so we are the co-parents, but that child is not biologically related to us and, in most cases, is not recognised in law as being related to us … The fitness of the potential adoptee parents and the best interests of the child should be the only factors looked at. Irrelevant factors, such as sexuality, should be removed. Obviously, that would in no way preclude considering people's fitness, but sexuality is not part of that per se … Currently they do not have a legal relationship with that child … Again one of the areas this affects is in the case of death. A child will not inherit if his or her co-parent dies. Even if the child is financially independent or is entirely financially dependent on the co-parent, he or she will not automatically inherit … We are mainly talking about children missing out because of who their parents are, and the fact that their relationship with that parent is not recognised. That would be so even if the child has known that person as his or her parent throughout his or her life. [173]

Under section 19 of the *Adoption of Children Act 1965* (NSW) adoption orders may only be made 'in favour of a husband and wife jointly', except in exceptional circumstances where an order may be made in favour of a man and a woman who have lived together for not less than 3 years, or in favour of one person. [174] Although lesbians and gay men are eligible to apply to adopt a child as single persons, they are not eligible to adopt as a same sex couple. It has been argued that an outright prohibition on same sex couples adopting should be removed, and replaced with a method by which individual applications are judged on their merits, with the focus being on what is in the best interests of the child.

171 Submission No 21.
172 Submission No 135.
173 Evidence, 4 August 1999.
174 Section 19(1A) and (2)

The Committee notes that the Chief Justice of the Family Court, the Hon Justice Alistair Nicholson, has voiced his support for the recognition of lesbian and gay families on a number of occasions. He has observed that:

> This current state of the law smacks of society punishing otherwise law-abiding members for a sexual orientation that is, in and of itself, lawful. And to what gain? Legal denial and intolerance achieve nothing but an insult to the dignity of recognition that every family treasures and has the right to expect in a country which supposedly supports tolerance for peaceful differences among its members. To continue to ignore the rights of same sex individuals and their relationships is a pyrrhic achievement of which no government ought to be proud. Denying someone the right to be known as a committed partner to a relationship, simply on the basis of the gender of the partners, is no different to apartheid. [175]

The Committee is aware that the NSW LRC made recommendations for amendments to this provision in its 1997 Report, *Review of the Adoption of Children Act 1965*. The Commission said that the criteria for adoption should focus on the suitability of the applicants to look after the best interests of the child, rather than sexuality or marital status:

> There is no established connection, positive or negative, between people's sexual orientation and their suitability as adoptive parents. It follows that there is no good reason for the law to exclude people from seeking to adopt on the ground of their homosexual orientation or family arrangements. [176]

This view was reflected in Recommendation 58 which stated: 'The legislation should permit an adoption order to be made in favour of either a couple (whether married or living in a de facto heterosexual or homosexual relationship) or a single person.' [177] This recommendation was one of 110 recommendations resulting from the NSW LRC's four year review of the Act, which was the first review of the *Adoption of Children Act* in 32 years. Following the release of the 1997 Report, the then Community Services Minister, the Hon R Dyer MLC, said he had made a 'personal decision' not to consider the recommendation, and ruled out taking the proposal to Cabinet because he did not believe the community would accept it. The then Leader of the National Party, Mr I Armstrong MP, also criticised the proposal and said his party would never agree to support it in Parliament. [178]

The ADB suggested in its supplementary submission to this Inquiry, that the *Adoption of Children Act 1965* be amended to reflect the definition of de facto relationship in the PRLA Act 1999, which would allow same sex couples to be eligible to adopt. [179] In his appearance before the Committee Mr Puplick said:

> A number of jurisdictions around the world have recognised the right of same sex couples to adopt children. It is certainly the case in some of the Scandinavian countries, it is probably now the case in Canada following the recent determination by the Canadian Supreme Court and I know that legislation in the American State of Vermont specifically provides that gay couples are entitled to adopt … I think that the evidence about adoption that needs to be central is this: Is it in the

175 Hon Chief Justice A Nicholson, 'The Changing Concept of Family: The Significance of Recognition and Protection', *Australian Journal of Family Law*, 11(1), March 1997, pp3-22.
176 NSW LRC, *Review of the Adoption of Children Act 1965*, Report 81, 1997, paragraph 6.120.
177 Ibid.
178 'Minister rejects bid to let gays adopt', *Sydney Morning Herald*, 26 July 1997.
179 Submission 132 – Supplementary.

> potential interests of the child ? Should the potential adoptive parents simply be assessed as to whether they can provide a loving, stable, emotionally beneficial environment for a child to be adopted and grow up in ? If the answer to those questions is yes, I think it is profoundly unfair that, because of the nature of their sexuality, they should be prevented from having that opportunity and the child should be denied the right of that particular environment. [180]

Mr Benjamin stated:

> Again, from a personal point of view, I believe that if you have people who are caring and loving of the child, irrespective of gender, if they are able to provide a good home for those children, can look after them and can give them the things that one would need to offer in a modern society, why would we turn them away? That is a personal view, not a view of the Society. [181]

On the other hand, the Very Reverend Jobbins told the Committee:

> Speaking for the Diocese of Sydney, because we are more down on same sex relationships than different sex relationships, I am bound to say that we would be particularly opposed to the adoption of children by a same sex couple. [182]

The Committee is aware that of those submissions received by the NSW LRC which were opposed to the concept of homosexuals adopting a child, over half gave moral or religious reasons saying such a measure was 'immoral', 'not normal', 'unnatural', 'against God' and 'against the Bible'. Other submissions related to concerns about appropriate role models for children, the stigma of having homosexual parents and the fear that homosexuals would use adoption as a 'social experiment'. However, many submissions supported the Commission's view that in an assessment of who would make good parents, unfair assumptions about the parents' sexual orientation should be disregarded. The Committee understands that in custody disputes the Family Court has adopted the view that a parent's homosexuality is simply one factor to be taken into account. [183]

The Committee notes that the *Adoption of Children Act 1965* was excluded from proposed legislative amendments under both the SPR Bill 1997 and the DFRA Bill 1998, and the issue of same sex couples adopting a child under the PRLA Act 1999 is specifically ruled out in section 62 .

Having considered all the information put before it, the Committee is of the opinion that it is inappropriate to determine the question of adoption in this Inquiry. The Committee shares the view expressed by the Reverend Wansbrough that: 'the issue is not the right to a child, but the rights of the child to an appropriate family context.' [184]

The Committee has been told that there are children in situations of reliance on non-biological parents who may currently be at a disadvantage under certain statutes such as the *Workers Compensation Act 1987*; the *Guardianship Act1987*, and the *Wills, Probate and Administration Act 1898* because there is no legal recognition of the relationship. The Committee is of the view that the issue should be thoroughly examined to ensure that children in non-traditional domestic relationships are not disadvantaged. As

180 Evidence, 5 August 1999.
181 Evidence, 5 August 1999.
182 Evidence, 4 August 1999.
183 'Allow gay couples to adopt, study urges', *The Australian*, 26 July 1997.
184 Evidence, 5 August 1999.

this area is beyond the legal and technical expertise of the Committee, it would be appropriate for this matter to be referred to the NSW LRC for consideration in the course of its current Inquiry.

Recommendation:

22. That the issue of legal recognition of non-biological parents to ensure children of those in non-traditional domestic relationships are not disadvantaged be fully examined, with a view to amending appropriate legislation if necessary.

9.4 Child Support

The Committee is aware that on 1 October 1989, new Commonwealth laws (the *Child Support (Assessment) Act 1989*) became effective that provided a scheme for the assessment and collection of child maintenance which is kept separate from the Family Court. This scheme applies to all children in every State and Territory of Australia, and under it all parents are expected to contribute to the financial support of their children, whether they are married, live in a de facto relationship, or do not live together. The amount the non-residential parent must pay depends upon the income and financial situation of both parents.

The Committee understands that this legislative regime does not apply to same sex co-parents, and therefore there is no statutory obligation on co-parents to support children of their partners. However, in *W v G* [185] a woman was ordered to pay child support in relation to the biological children of her former same sex partner. The children had been born as a result of artificial insemination during the course of the relationship, and the Court made the order based on what it recognised as an implied promise, holding that it would be unconscionable for the co-partner not to pay maintenance in the circumstances.

Under the FLA 1975, the parents of a child have the primary responsibility to maintain the child. In some circumstances, a step-parent may have a duty to maintain the child, although this duty is secondary to the duty of the parents. The Committee notes that a same sex co-parent does not fit either category, and it is unclear whether a maintenance order could be made against such a person under the FLA 1975, even though it is clear that they will not be liable for administrative assessment under the Child Support Scheme.

Provision to claim maintenance where there are children involved exists under section 27 of the *Property (Relationships) Act 1984*, however, this involves court proceedings and a number of factors need to be established for an application to be successful.

On the question of child support Mr Benjamin told the Committee:

> Same sex couples may not be entitled to claim child support one against the other. We then almost have to go back to some of the State legislation … In the Queensland Family Court case of *Ryan v Ryan*, it was held that unless the person involved is a parent of the child or a step-parent of the child in a heterosexual relationship, he or she is not entitled to maintenance for that child. So there could be a gap in the law, particularly in relation to children of same sex couples… I am thinking of the Federal system of child support. For children who are born in a heterosexual relationship, under

185 (1996) 20 Fam LR 49.

> the child support legislation from 1989 both parents are liable to pay child support. In same sex relationships, the problem arises as to whether they can claim under the *Family Law Act*, if the *Child Support Act* does not apply … but the *Family Law Act* limits the people who are liable to a parent or a step-parent. The case [W v G] that you have referred to is obviously based on an equitable doctrine of some description. To get $100 or $200 a week at the cost of going to the Equity Division might be a little aimless for some people. But clearly, that needs to be looked at and it is worthwhile referring that to the Law Reform Commission. [186]

In relation to the decision in *W v G*, Millbank has written that while this case was the first instance where a lesbian co-mother was legally recognised as a parent:

> … Grace was recognised as a parent in that she had a responsibility to pay, but she had virtually no rights in connection with the children. In NSW and federal legislation, Grace's legal relationship with the children, in areas such as intestacy, guardianship, worker's compensation and superannuation simply doesn't exist. When the context of co-mother invisibility is taken into account, the recognition of a lesbian co-mother's financial liability in *W v G* seems a very mixed blessing indeed ! [187]

The Committee considers it imperative that children in non-traditional domestic relationships are not disadvantaged, and recommends that a full exploration of this issue be undertaken by the NSW LRC in its current Inquiry. Apart from any recommendations that body may make, the Committee urges the Minister for Community Services to make representations to her Federal counterpart to amend the child support legislation to ensure adequate provision is made for such children.

Recommendation:

23. That the NSW Minister for Community Services approach her Federal counterpart to request that the child support legislation be amended so that it applies to same sex co-parents in the same way as it currently applies to opposite sex parents and step-parents.

9.5 Summary

The Committee notes the arguments put forward in relation to the adoption of children, however it if of the view that such an issue deserves to be considered in a separate context to that of the property rights of adults. In the Committee's view any such consideration of the matter should have as its primary focus the best interests of the child. Those areas where it appears that children of non-traditional domestic relationships are at a comparative disadvantage to children in other relationships need to be examined, and such disparate treatment removed.

186 Evidence, 5 August 1999.

187 J Millbank, 'Which then would be 'the husband' and which 'the wife' ?: Some introductory thoughts on contesting 'the family' in Court', *E Law*, Murdoch University Electronic Journal of Law, Vol 3 No 3, September 1996.

Chapter 10 - The Administration and Regulation of Superannuation Schemes

10.1 Current Legal Position

The Committee has been advised that when a member of a superannuation fund who is in a same sex relationship dies, his or her partner may not be entitled to death benefits from the fund that an opposite sex partner would automatically receive. It appears that a surviving same sex partner will only receive a benefit if:

- There are no legal dependants (ie no legal or de facto spouse or children) and the trustee chooses to pay a death benefit to the surviving same sex partner; or
- Financial dependence upon the deceased is demonstrated to the fund trustee; or
- The benefit is paid to the deceased's estate and the same sex partner is named in the will (which is not contested).

The Committee understands that payment of the death benefit to the estate, rather than to the same sex partner as a dependant or spouse, results in different tax treatment of the death benefit. Death benefits received by a dependant are paid tax free up to a specified limit. As couples of the opposite sex, married or de facto, are automatically deemed dependants of each other, they automatically receive a tax benefit. Surviving same sex partners need to demonstrate financial dependence to receive tax free benefits. In addition, some trustees also discriminate against retiring members involved in same sex relationships by refusing to pay joint pensions in relation to the member and his or her same sex partner. Such payments are made to opposite sex partners.

The Committee has been told that as superannuation is an area of Commonwealth legislative responsibility, failure by superannuation funds to comply with relevant Commonwealth legislation could result not only in adverse taxation consequences for the funds, but also for members of such funds. It has been said that these restrictive interpretations apply to both private and public sector superannuation schemes operating in New South Wales, and as such, the New South Wales Government is unable to alter the rules governing payment of superannuation benefits to State Government employees without incurring significant taxation liabilities on behalf of the fund and exposing employees to similar taxation liabilities. Some witnesses appearing before the Committee were of the opinion that the New South Wales Government could act alone in relation to state run superannuation schemes. Ms Clayton said:

> I simply wanted to put the issue of superannuation back on the agenda because it may well be the case that the State does have power to amend that legislation irrespective of what the *Superannuation Industry Supervision Act* says. Even if it does not, the existence of that legislation does not absolve the State from itself lobbying the Federal Government to amend that legislation. If our State Government is to say that we are to recognise same sex relationships, part and parcel of that is

> being able to determine where one's superannuation goes. If the Federal Government is denying that, the State has an obligation to be pursuing that with the Federal Government as well. [188]

The Committee appreciates the fact that while it is theoretically possible for the State to take unilateral action, it would appear that this would not be possible without serious financial disadvantage being incurred by both the funds and the beneficiaries. To clarify the position, the Committee sought the Crown Solicitor's advice, and notes the following observations made in that advice:

> In summary therefore the following might be said:
>
> (i) An alteration to the rules of New South Wales public sector superannuation schemes which has the effect of entitling a person who is not a dependant or trustee or legal personal representative of the member to benefits, will place New South Wales in breach of the Heads of Government Agreement because such will not conform to the sole purpose test in section 62 of the SIS Act. The effect will be that the New South Wales public sector superannuation schemes will be susceptible to loss of their concessional taxation status with respect to income earned by them.
>
> (ii) Benefits which are paid to persons who are not dependants within the meaning of the *Income Tax Assessment Act* (ITAA) or the legal personal representatives of such will be taxed at a higher rate.
>
> (iii) Death benefits paid to partners or members who do not fall within the definition of spouses or dependants in the ITAA will also be taxed at higher rates.

The full text of the Crown Solicitor's advice can be found at Appendix 3.

The legislative basis upon which superannuation schemes rests is a Commonwealth responsibility. However, in view of the number of submissions and witnesses who referred to the ongoing disparity in this area, the Committee considers it appropriate to report on the main areas of concern and make certain recommendations.

Submissions and Evidence

A number of submissions drew attention to the discriminatory treatment in the area of superannuation entitlements. Ms Vidler was one who wrote that the passage of the *Property (Relationships) Legislation Amendment Act 1999* had not addressed the problems arising from the discriminatory definition of 'spouse' in the NSW *Superannuation Act 1916*. [189]

Ms Fox was another who made mention of superannuation, and in her supplementary submission she said:

> My paramount concern is that inequalible [sic] and unjust laws prevent my partner from accessing my superannuation benefits … my written preference that my superannuation be so distributed will not even be considered. [190]

188 Evidence, 5 August 1999.
189 Submission No 44 – Supplementary.
190 Submission No 50 – Supplementary.

Dr Andresen observed:

> It is a gross absurdity that under NSW law now, same sex partners can be given inheritance rights but not be made the beneficiaries of superannuation payments. [191]

ACON noted in its submission:

> Same sex partners often nominate their partner as the beneficiary under the scheme and/or make specific gifts of superannuation entitlements to their partner under their will. Despite popular opinion to the contrary, such expressed wishes are not legally binding and do not alter the fact that the trustees have absolute discretion to decide whether death benefits and contributions are payable to a same sex partner … the fact remains that superannuation payments to same sex partners attract tax liability in the hands of a same sex partner, where payment to a heterosexual spouse does not. This is an issue of particular concern to people living with HIV/AIDS and their partners. [192]

When Mr Costa appeared before the Committee he said:

> We have had advice that there is a significant problem in the area of defined benefit superannuation, particularly under the State superannuation scheme, where people in same sex relationships are severely discriminated against in relation to benefits received at various points in the superannuation cycle - be it at the point of superannuation becoming a benefit - and the ability to move to pension arrangements or, in the case of death, the disability components within the superannuation scheme. We would clearly like those issues addressed. [193]

10.2 Advocacy for Change

This Inquiry

The Labor Council stated in its submission that in conjunction with other unions, gay and lesbian groups, and superannuation industry organisations, it has been actively campaigning to amend superannuation laws. This activity has included the presentation of a petition to the Commonwealth Parliament. The Labor Council suggested to the Committee:

- that as part of its Inquiry, the Social Issues Committee make recommendations to the relevant federal counterparts on superannuation reform to consider amending the definitions and ensure tax free status for same sex beneficiaries;

- this action should include consideration of supporting the Commonwealth Superannuation (Entitlements of Same Sex Couples) Bill 1998, first introduced by Mr A Albanese MP in 1996. This Bill aims to amend the *Superannuation Industry (Supervision) Act 1993* to define de facto relationships as couples who live together on a genuine domestic basis, regardless of their sexuality and thus ensure that gay and lesbian partners receive the same superannuation entitlements as heterosexuals; and

191 Submission No 21 – Supplementary.
192 Submission No 29.
193 Evidence, 5 August 1999.

- that consideration should also be given to amending legislation covering State superannuation funds to re-define 'dependant' and 'spouse' so that same sex couples are recognised and receive equal tax treatment to those in opposite sex relationships. [194]

Submissions to Other Organisations

Calls for change to the relevant Commonwealth legislation impacting on superannuation schemes have already been made in other arenas.

During 1993 the Senate Select Committee on Superannuation inquired into the position of same sex couples in relation to superannuation. In its November 1995 Report, the Committee concluded that the current positive discrimination in favour of heterosexual couples could not be justified and that less advantageous treatment is applied to those who are classified as single, which can include those in same sex relationships. The Committee went on to recommend that the superannuation regulations be amended so that those in bona fide domestic relationships and single people are treated in the same manner as married and de facto superannuants. [195]

In 1995 the Gay and Lesbian Rights Lobby prepared a submission to the Commonwealth Government on superannuation and same sex relationships. [196] The review was prompted by a number of factors, namely:

- Compulsory superannuation for Australian workers;
- The increasing proportion of superannuation in the wage package;
- Denial of benefits to same sex partners;
- Differential taxation treatment of monies received by same sex partners as superannuation beneficiaries; and
- The decision of the Administrative Appeals Tribunal confirming the denial of death benefits to a same sex partner (Brown's case).

The Lobby noted in the submission that this discriminatory treatment is inconsistent with several pieces of Commonwealth and State legislation, breaches international undertakings, and is also socially unjust. It stated further that:

> Superannuation benefits allow heterosexual families to plan financially in the event of the death of a contributor – ensuring payment of mortgages and other joint living expenses from death benefit pensions and lump sums paid to the survivor. Lesbians and gay men in bona fide domestic relationships are often excluded even though they make the same superannuation contributions as heterosexual workers. They are obliged, if they are aware that their partners will not receive death benefits and (if they can afford it) to make additional arrangements at extra expense, such as insurance policies, to ensure that their partners are not financially disadvantaged upon their deaths.

194 Submission No 57.

195 17th Report of the Senate Select Committee on Superannuation, *Superannuation and Broken Work Patterns*, November 1995.

196 *Superannuation and Same Sex Relationships*, written by A Scahill and M Alexander on behalf of the Gay and Lesbian Rights Lobby, July 1995.

> The other side of this coin is that superannuation death benefits also provide protection for heterosexual families who do not plan financially. Lesbians and gay men who do not plan financially should be entitled to the same level of financial prudential protection as afforded to heterosexuals who do not plan financially.

The submission by the Gay and Lesbian Rights Lobby was revised in 1996 at which time it made the following proposals for legislative and policy reform: [197]

- That the SIS Act be amended by removing the real or perceived bar to trustees paying death and other benefits to same sex partners, and by inserting a general provision against discrimination on the basis of sexuality.

- That tax legislation be similarly amended to make superannuation payments to same sex partners free of tax, on the same basis as heterosexual spouses and de facto spouses.

- That the Acts governing the superannuation schemes of the Commonwealth be amended in relation to their definitions of 'spouse', 'marital relationship', 'dependant' and 'eligible child' to ensure that lesbians and gay men can provide benefits to their same sex partners and children in the same way that heterosexual workers can so provide.

- That State and Territory governments amend legislation governing superannuation schemes for government officers to ensure that lesbians and gay men can provide benefits to their same sex partners and children in the same way that heterosexual workers can so provide.

- That pending legislative change, the Insurance and Superannuation Council, and the Tax Commissioner should interpret their existing legislation more broadly, adopting the meaning of dependant outlined by the NSW EOT in *Hope & Brown v NIB Health Fund Ltd.*

In the Senate Legal and Constitutional References Committee Inquiry into Sexuality Discrimination in December 1997, the Committee recommended that all Commonwealth superannuation legislation, and any related legislation, directly or indirectly affecting payment to people on the grounds of their sexuality or their gender status, be reviewed and amended. It also recommended that the Senate Select Committee on Superannuation be given a reference to examine barriers facing superannuation contributors in relation to the nomination of beneficiaries. [198]

In its Report, the References Committee referred to the position of the ACTU which noted that the situation with respect to payment of benefits was discriminatory, and believed that superannuation should more clearly be seen as a work-related issue. The ACTU put the case that:

> Superannuation payments are now an integral part of wage, remuneration and conditions negotiated at the Australian industrial bargaining table. Superannuation is a form of enforced savings for the benefit of workers and their families. The families of lesbian and gay workers do

197 *Superannuation and Same Sex Relationships*, written by A Scahill and M Alexander on behalf of the Gay and Lesbian Rights Lobby, revised in June 1996.

198 Senate Legal and Constitutional References Committee, *Inquiry into Sexuality Discrimination*, December 1997, p227.

> not enjoy these benefits to the extent enjoyed by the families of heterosexual workers though they make the same superannuation contributions as their heterosexual workmates. [199]

In its March 1998 Report,[200] the Victorian Equal Opportunity Commission referred to the position adopted on this issue by the Association of Superannuation Funds of Australia Limited (ASFA), a non-profit, non-political, national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. ASFA had made representations to the Commonwealth Government to address the discriminatory treatment of same sex partners by appropriate amendments to the SIS Act, so as to allow trustees to pay benefits to same sex partners in the same manner as the legislation permits payment to partners of the opposite sex. It had also called upon the Commonwealth Government to amend tax legislation to resolve the discriminatory tax treatment of superannuation death benefits received by a surviving same sex partner, compared to a surviving opposite sex partner.

In April 1999, HREOC released Report No 7, *Superannuation Entitlements of Same Sex Couples*, which examined whether or not superannuation schemes established by Commonwealth legislation discriminate against members of same sex couples in the provision of benefits. The Human Rights Commissioner, Mr Chris Sidoti, said:

> In denying to surviving same sex partners of superannuation fund members an entitlement to benefit, these Acts contravene the prohibitions on sexual preference discrimination in the *International Covenant on Civil and Political Rights* and the International Labour Organisation *Discrimination (Employment and Occupation) Convention* (ILO 111), both of which are scheduled to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). I recommend that the legislation be amended to allow surviving same sex partners to benefit in Commonwealth superannuation schemes.

The Report reached the conclusion that the discriminatory superannuation provisions could well be in breach of the ILO 111, which requires signatories to eliminate:

> any discrimination, exclusion or preference made on the basis of [the listed grounds to which Australia has added 'sexual preference'] which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. [201]

The Committee notes that retirement, invalidity and death benefits, often collectively described as superannuation benefits, are benefits that arise through employment, and notwithstanding the future nature of the right to superannuation benefits, and that in some cases the employee will not be the beneficiary if he or she dies before retirement, the entitlement to these benefits is integrally linked to the employment relationship. Arguably the superannuation provisions are in breach of the ILO 111, as they have the effect of disadvantaging same sex couples as compared with opposite sex couples.

Mr Albanese MP first raised the issue of equal superannuation rights for same sex partners on 10 December 1996. Since then he has made many calls for such change, culminating in the introduction of a Private Member's Bill on 7 December 1998. Mr Albanese MP told the House that his decision to introduce the Superannuation (Entitlements of Same Sex Couples) Bill 1998 came after two years of

199 Ibid, p226.
200 Equal Opportunity Commission Victoria, *Same Sex Relationships and the Law*, March 1998, p25.
201 ILO 111, Articles 1.1(a) and 3(c).

unsuccessfully lobbying the Government to introduce amendments to the superannuation legislation. Mr Albanese MP outlined the different treatment same sex couples receive: [202]

- On retirement of the contributor: (i) there is a refusal to pay a joint pension for the contributor and his or her same sex partner; and (ii) a refusal to pay a lump sum benefit in respect of a same sex partner;

- On the death of the contributor: (i) there is a refusal to pay death benefits to a same sex partner, either by reversionary pension or lump sum benefit; (ii) there is a failure to investigate or acknowledge the claim to dependency of a child of a same sex couple when the contributor is not the biological parent of the child; and (iii) payment of death benefits to the estate of the contributor occurs rather than to the same sex partner as a dependant.

The Committee understands that the purpose of Mr Albanese's Bill is to amend the SIS legislation by extending the definition of 'de facto partner' to include partners in a same sex relationship who live together on a bona fide domestic basis, and to amend the definition of 'dependant' to have the effect of allowing a same sex partner to be considered automatically a dependant for the purposes of the SIS Act. The Bill was read a second time in June 1999, and debate has been adjourned. If this Bill were to pass, NSW would then be in a position to enact legislation extending superannuation entitlements to same sex partners as there would no longer be any conflict with the SIS Act.

The view that legislative amendment in this area is required is not universally held, with some arguing that those in same sex relationships can make provision for the distribution of their estate by leaving a valid will. Mr and Mrs Hazell wrote:

> The major reasons for their push for legal recognition, eg property division after de facto breakup, right to hospital visits etc, can all be resolved by individual statements of choice, personal wills or individual contracts. There really is no need to grant full legal status to homosexual relationships. [203]

Others claim that because the underlying reason for superannuation schemes is to make provision for self and dependants, and not to amass wealth which can be passed on, there is no reason for making it available to those in same sex relationships.

The Committee is of the view that while the inclusion of same sex partners could increase costs and burdens on the Commonwealth in meeting these entitlements, there is no reasonable and legitimate purpose in excluding the surviving partner of a same sex couple who, but for his or her sexual preference, meets all the criteria of a 'marital relationship'. The Committee agrees with the sentiment expressed in the HREOC Report on Superannuation:

> The purpose of superannuation is to provide income support to employees upon retirement and to their surviving dependants in the event of early death. In the case of early death, the beneficiaries are those the employee nominates or who benefit through the operation of law. Since one objective of the enactments is to provide income security to members' dependants, their provisions should fully address this purpose. The use of characteristics such as 'sex', 'marital status' and 'marriage' may have historically defined a relationship of dependency – such as one with a partner or children. But relationships in Australia today are more varied and complex. Opposite sex

202 *Parliamentary Debates*, House of Representatives, 7 December 1998, p1441.
203 Submission No 9.

> relationships are no longer characterised by dependency. And same sex relationships often reflect similar characteristics to opposite sex relationships. The family remains an important social institution, but the notion of family has changed. Marriage is no longer the defining characteristic of a family or of permanent domestic relationships. [204]

The Committee notes the Crown Solicitor's legal opinion and agrees that it would not be advantageous for New South Wales to act unilaterally in relation to its state run superannuation schemes. However, given that the provisions of the superannuation and taxation legislation are patently discriminatory in their treatment of those in same sex relationships, and do not comply with Australia's international obligations under the ICCPR and the ILO 111, the Committee urges the State Government to make representations to the Commonwealth Government on this matter.

Recommendation:

24. That the NSW Government approach the Commonwealth Government to urge amendments be made to the Commonwealth superannuation and taxation legislation to ensure Australia is complying with its obligations in relation to international human rights conventions.

10.3 Summary

The current regulation of superannuation results in different treatment of those in same sex relationships compared to those in opposite sex relationships, although lesbians and gay men contribute to superannuation funds in exactly the same manner as their heterosexual counterparts. There is no logical reason for this discriminatory treatment and various individuals and bodies have recommended that the legislation be amended to rectify the situation. To date no change has been made and surviving same sex partners continue to be denied benefits and to suffer taxation disadvantages. The Committee feels that this position needs to be addressed as a matter of urgency.

204 HREOC, *Superannuation Entitlements of Same Sex Couples: Report of Examination of Federal Legislation*, HRC Report No 7, April 1997, p16.

Chapter 11 - Conclusion

The purpose of this Inquiry has been to inquire into and report on the rights and obligations of persons in interdependent personal relationships other than those as defined in the *De Facto Relationships Act 1984*; and the extension of those rights in the De Facto Relationships Amendment Bill 1998 introduced into the Legislative Council on 24 June 1998.

The provisions of the *De Facto Relationships Act 1984* as it existed when the Committee received this reference applied only to heterosexual relationships. Other non-traditional domestic relationships such as those between partners of the same sex, heterosexual couples who did not live together, and people in close relationships who may not live together or share a sexual relationship but may be financially and emotionally interdependent were not recognised under this Act. Similarly those relationships involving extended family or ties of kinship were also excluded.

The De Facto Relationships Amendment Bill 1998 introduced by the Hon E Kirkby MLC would have amended the Act to give same sex couples a range of new, mostly financial rights, to match those available to heterosexual de facto couples. The Bill would also have amended the Act to cover persons of the same sex, who were in stable, committed and cohabiting relationships which were purely platonic.

Debate on the De Facto Relationships Amendment Bill 1998 ranged from strong support to resolute opposition, and on 15 October 1998 the Attorney General referred the issue to the Committee. In response to the call for public submissions, 138 were received. However, due to the prorogation of the Parliament prior to the March 1999 State election, the Inquiry lapsed. Following the election, and after the Committee was reconstituted on 25 May 1999, the matter was referred back to the Committee.

In the interim, the Government introduced the Property (Relationships) Legislation Amendment Bill, which was passed on 1 June 1999. This Act extended the provisions of the *De Facto Relationships Act 1984* so that they now apply to parties to relationships of a more widely-defined class, including those in same sex relationships and those in 'carer' relationships, and it amended other Acts whose provisions dealt with such rights, privileges, concessions or obligations so that those provisions would extend to apply to those in de facto relationships as redefined by the *Property (Relationships) Legislation Amendment Act 1999*.

While the passage of this legislation addressed many of the issues that were before the Committee, it was considered appropriate that all those who had made a submission relating to the De Facto Relationships Amendment Bill 1998 should be given the opportunity to comment on the new legislation, and indicate if there were any outstanding issues. A total of 16 supplementary submissions were received, and the Committee held two days of hearings, which were attended by 23 witnesses representing gay and lesbian organisations, legal centres, Church groups and interested members of the public. The vast majority of submissions and witnesses supported the changes introduced by the *Property (Relationships) Legislation Amendment Act 1999*.

The Committee has examined in detail a range of issues identified as still requiring attention. These include: amending the *Anti-Discrimination Act 1977* to make it available to those in relationships provided for by the *Property (Relationships) Legislation Amendment Act 1999*; amending the relationships definitions adopted by the *Property (Relationships) Legislation Amendment Act 1999* to ensure those intended to be covered are not inadvertently excluded; amending legislation to ensure a consistent application of the definitions used in the *Property (Relationships) Legislation Amendment Act 1999*; addressing technical and procedural issues arising from the new legislation; examining the effect, if any, of the legislative changes on children of those in non-traditional domestic relationships; and analysing the issues surrounding the discriminatory treatment of surviving same sex partners under existing superannuation and taxation legislation. The Committee is of the view that the recommendations made in this Report are not radical, but represent a logical continuation of the recently introduced legislative regime.

The Committee welcomes the reference given to the NSW Law Reform Commission in September 1999 to examine the *Property (Relationships) Act 1984*, as many of the technical and legal issues identified in this Report are beyond the Committee's expertise. The Committee believes that the NSW Law Reform Commission is well placed to examine in particular the following:

- the issues surrounding the introduction of a relationship registration system (discussed in Chapter 3);
- the definitional issues raised by the *Property (Relationships) Legislation Amendment Act 1999* (discussed in Chapter 6);
- the jurisdictional issues in relation to the District Court (discussed in Chapter 8);
- the adequacy of the provision dealing with property adjustment orders (discussed in Chapter 8);
- the inclusion of appropriate and adequate alternatives to litigation, and the practicalities involved (discussed in Chapter 8);
- the issue of legal recognition of non-biological parents to ensure children of those in non-traditional domestic relationships are not disadvantaged (discussed in Chapter 9); and
- the adequacy of the provision dealing with maintenance in relation to children (discussed in Chapter 9).

The Committee is confident that a valuable report will be produced by the NSW Law Reform Commission, but believes that the recommendations made in this Report should be acted upon by the Government without undue delay, and without awaiting the outcome of the NSW Law Reform Commission Inquiry.

In conclusion, the Committee makes the following recommendations:

Recommendations:

25. That the Government implement the recommendations made by the Committee in this Report as a matter of urgency

26. That the New South Wales Law Reform Commission be asked to examine the specific issues identified in this Report as requiring further investigation.

APPENDIX 1

LIST OF SUBMISSIONS

List of Submissions

No 1	Margitch Mr Pete
No 2	Hill Mr Scott
No 2	Woods Mr Phillip
No 3	Hogan-Doran Ms Dominique (President, Women Lawyers Association of New South Wales) + supplementary
No 4	Lormer Ms Lyn (Manager, Leichhardt Women's Community Health Centre Inc)
No 4	Todd-Miller Ms Sharon (Health Educator, Leichhardt Women's Community Health Centre Inc)
No 5	Millbank Ms Jenni (Lecturer, University of Sydney, Faculty of Law)
No 6	Northey Ms Jo
No 6	Worrallo Dr Jane
No 7	Collard Mr Peter
No 8	Davidson Ms Jill (President, Australian Association of Social Workers, NSW Branch)
No 9	Hazell Phillip and Christine
No 10	Tinker Robyn and Brian
No 11	Fuller Tony
No 12	Bradley Dr Melissa
No13	Gow Andrew
No 14	Bozza Julie
No 15	Sharp Ms Amber
No 16	Woulfe Mary and Tony
No 17	Angus J
No 18	Hall Ms Sand (Secretary, COAL – Australia)
No 19	Todhunter Ms S
No 20	Tilden Ms Blanche

No 21	Andresen Dr Lee + supplementary
No 22	Furness Mr Peter
No 22	Phillip Mr Theo
No 23	Harvey Ms Tonina
No 23	Try Ms Katy
No 24	Northey Ms Jo
No 25	Moore Mr Gary (Director, Council of Social Services of New South Wales – NCOSS)
No 26	Oliver Mr Jonathan (Co-ordinator, Campelltown Legal Centre Inc)
No 27	Baker Mr Steven (St Ursula's College)
No 28	Hryce Ms Michel (NSW Branch Secretary, Media, Entertainment and Arts Alliance)
No 29	Stone Mr David (President, AIDS Council of New South Wales Inc – ACON)
No 30	Poole Mr Jeff
No 31	Riley Mr John
No 32	Phillips AO MC Major General PR (National President,The Returned & Services League of Australia Limited)
No 33	Hennessy Mr John (General Secretary, NSW Teachers Federation)
No 34	Hollonds Ms Anne (Chief Executive Officer, Relationships Australia – NSW)
No 35	Sister Mary, Mary Quite Contrary
No 36	Sharp Ms Amber (Volunteer Solicitor, Lesbian and Gay Legal Rights Service) + supplementary
No 37	Beck Mr Anthony (National Secretary, Finance Sector Union of Australia)
No 37	Campbell Ms Kirsty (Assistant Secretary, NSW Branch, Finance Sector Union of Australia)
No 38	Cobby K (Lane & Lane Lawyers)
No 39	Squires Ms Jan (Co-ordinator, Hunter Community Legal Centre Inc)
No 40	Jansen Mr A

No 41	Pickworth Ms Julia (Alternative Law Collective, Sydney University)
No 42	Wilcox Mr Stephen
No 43	Walker Mrs F
No 44	Vidler Ms Olga + supplementary
No 45	Jobbins The Very Reverend Boak (Chairman, Social Issues Committee, Anglican Diocese of Sydney)
No 46	Wong Mr Andrew (Sydney University)
No 47	Sharp Mr and Mrs Ron and Lola
No 48	Mann Dr Jennifer
No 49	Davies SC Mr David
No 50	Fox Ms Catherine + supplementary
No 51	Borg Mr Aaron (Alternative Law Collective Sydney)
No 52	Lea Mr Mitchell
No 53	Lee Mr Walter
No 54	Flynn Mr Michael
No 55	Riley Ms Elizabeth (Co-ordinator,The Gender Centre Inc)
No 56	Cunningham Ms Mary (James Solicitors)
No 57	Costa Mr Michael (Secretary, Labor Council of New South Wales)
No 58	Jacques Ms Leonie (Combined Community Legal Centres Inc)
No 59	Buckdale Mr Richard (President, Mature Age Gays – MAG)
No 60	McLachlan Mr Murray + supplementary
No 61	Kane Mr Brian
No 62	Jeffrey Mr Shane
No 63	Sanders Ms Jane (Chair, Human Rights Committee, NSW Young Lawyers)
No 63	Pirona Ms Monique (President, NSW Young Lawyers) + supplementary
No 64	Bartier-Bayliss Mr Craig & Glen

No 65 Munro Ms Kate (Principal Solicitor, Macquarie Legal Centre)

No 66 Compton Mr Herbert

No 67 Brook Ms Heather (Australian National University)

No 68 Martin Ms Rachael (Wirringa Baiya Aboriginal Women's Legal Centre)

No 69 Lawson Mr Kent

No 69 Schembri Mr Anthony

No 70 Wansbrough Rev Ann (Research and Liaison Officer, Church and Society Committee of the Board for Social Responsibility, Uniting Church in Australia, NSW Synod)

No 71 Roberts Bill & Hanny

No 72 Smith Mrs Marion (Convener, Presbyterian Women's Association of Australia – NSW) + supplementary

No 73 Moore Reverend Peter (Church and Nation Committee of the General Assembly of NSW, Presbyterian Church of Australia) + supplementary

No 74 Crozier Mr Michael (Principal Solicitor, Blue Mountains Community Legal Centre)

No 75 Percival Mr D (Marsdens, The Attorneys, Solicitors & Barristers)

No 76 Peters Ms Judith

No 77 Ohm Mr Andreas

No 77 Woulfe Mr Jim

No 78 Loker Mr Shannon

No 79 Ellis Mr Colin

No 80 Ostling Mr Geoffrey

No 81 Morgan Jones D

No 82 Goldbaum Mr John

No 82 Wallace Mr John

No 83 Noy Mr Christopher

No 84 Holland Mr Nicholas

No 85 Weate Mr Luther

No 86 Palmer Mr Ben

No 87 Vieira Ms Jocelyn

No 88 Finestone Ms Lauren (Solicitor, Inner City Legal Centre)

No 89 Giachino Ms Karen

No 90 Burrell Mr Andrew + supplementary

No 91 Dwyer Mr Anthony

No 91 Hollywood – Dwyer Ms Aileen

No 92 Hampton Mr Gary

No 93 Evans Mr Bruce

No 94 Eder Mr Herbert

No 95 Power Ms Emma

No 96 Bennett Ms Denise

No 97 Gosnell Mr Simon

No 98 Levy Mr Sam

No 98 Sandoval Mr Sergio

No 99 Clarke Mr Brian + supplementary

No 100 Deakin Ms Catherine

No 101 Bishop Mr Roy (Executive Officer, Local Community Services Association Inc)

No 102 Stamp Mr Justin

No 103 Cowling Mr Martin

No 103 Dowling Mr Michael

No 104 McCrory Mr Matthew

No 104 Young Mr Tim

No 105 Davies Ms Gilda

No 105 Keen Ms Jane

No 106 Beck Mr Dolf

No 107 Orr Mr Mark

No 108 Collier Mr Henry (University of Wollongong) + supplementary

No 109 McLachlan Mr David (President, Sydney Gay & Lesbian Mardi Gras Ltd)

No 110 Braham Joni (Community Legal Education Worker, Illawarra Legal Centre Inc)

No 111 McMahon Ms Karen (Solicitor, Kingsford Legal Centre Inc)

No 112 Higgins Ms Nancy

No 113 Barrett Mr Korey

No 114 Lyon Mr Colin

No 114 Perko Mr Izzy

No 115 Syron Ms Liza Mare (NSW Lesbian and Gay Anti-violence project)

No 116 Clarke Mr Ken

No 117 Byrne Ms Penny (Victorian Gay and Lesbian Rights Lobby Inc)

No 118 Wilson Ms Andrea (Andrea Wilson & associates)

No 119 Notaristefano Mr Vito

No 119 Rasheed Mr Grant

No 120 Murphy Mr John

No 121 Hempel Mr Adrian

No 122 Roberts Mr Wayne (ABN National Co-ordinator, Australian Bisexual Network)

No 123 Forbes Ms Tricia (Hume Phoenix Incorporated)

No 124 Little JP Mr Paul

No 125 Barnes Mr Frank (Organiser, NSW Teachers Federation)

No 126 Powell Mr Anthony

No 127 Moore MP Ms Clover (Member for Bligh)

No 128 Buckdale Mr Richard

No 128 Johnstone Mr Murray

No 129 Galbraith Mr Larry (Advisor/researcher to Clover Moore MP)

No 129 Gooden Mr Gerard (Solicitor)

No 130 Snowden Mr Grant

No 131 Gaskin Mr Gerard (President, Australian Catholics' Information Service Inc) + supplementary

No 132 Puplick Mr Chris (President, Anti-Discrimination Board of New South Wales) + supplementary

No 133 Black Mr Peter (General Manager, Marrickville Council)

No 134 Fisher Mr Simon

No 134 Hains Dr Michael + supplementary

No 135 Kirkland Mr Alan (Co-Convenor, Gay & Lesbian Rights Lobby Inc) + supplementary

No 136 McDonald Mr Michael (Executive Director, Catholic Commission for Employment Relations)

No 137 Hole Ms Margaret (President, The Law Society of New South Wales)

No 138 Price Mr Dean

APPENDIX 2

LIST OF WITNESSES

APPENDIX 2 – List of Witnesses

Mr Robert Benjamin	Solicitor 5 August 1999
Mr Richard Buckdale	President, Mature Age Gays 4 August 1999
Ms Stevie Clayton	Deputy Executive Officer, Aids Council of New South Wales 5 August 1999
Mr Michael Costa	Secretary, Labor Council of New South Wales 5 August 1999
Mr Larry Galbraith	Research Officer 4 August 1999
Mr Gerard Gooden	Solicitor 4 August 1999
Mr Matthew Howard	Private Individual 5 August 1999
Ms Vedna Jivan	Solicitor, Kingsford Legal Centre 4 August 1999
Very Rev Boak Jobbins	Chairman, Social Issues Committee of the Anglican Diocese of Sydney 4 August 1999
Mr Murray Johnstone	Secretary, Mature Age Gays 4 August 1999
Mr Alan Kirkland	Co-Convenor, Gay and Lesbian Rights Lobby 4 August 1999
Mr Michael McDonald	Executive Director, Catholic Commission for Employment Relations 4 August 1999
Rev Peter Moore	Convener, Church and Nation Committee of the General Assembly of the Presbyterian Church of Australia in the State of New South Wales 4 August 1999
Mr Shaughn Morgan	Director, Practice and Community Services Division, Law Society of New South Wales 5 August 1999

Dr Warwick Neville	Head, Research Department, Australian Catholics Bishops Conference 4 August 1999
Mr Matthew Perry	Student Law Clerk, Kingsford Legal Centre 4 August 1999
Mr Chris Puplick	President, Anti-Discrimination Board of New South Wales 5 August 1999
Dr Kathy Sant	Co-Convenor, Gay and Lesbian Rights Lobby 4 August 1999
Mr David Stone	President, Aids Council of New South Wales 5 August 1999
Mr Warren Talbot	Community Services Manager, Uniting Church Synod of NSW 5 August 1999
Rev Ann Wansbrough	Research and Liaison Officer, Uniting Church Board for Social Responsibility 5 August 1999

APPENDIX 3

CROWN SOLICITOR'S ADVICE

Crown Solicitor's Office

NEW SOUTH WALES

Your ref:
My ref: LGC088.33
T5 Peter Anet

Tel: (02) 9224 5257
Fax: (02) 9224 5255

E-mail: crownsol@agd.nsw.gov.au

15 October 1999

Ms Lyn Lovelock
Deputy Clerk
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Lovelock

RE: SUPERANNUATION FOR SAME-SEX RELATIONSHIPS

1. Advice Sought and background.

1.1 You seek advice on behalf of the Chair of the Standing Committee on Social Issues as to the capacity of New South Wales to alter superannuation entitlements of people who are in same sex-relationships. The advice is sought in the context of an inquiry by the Standing Committee on Social Issues into the rights and obligations of persons in interdependant personal relationships other than those defined in the ***De facto Relationships Act 1984***, and the extension of those rights and obligations as proposed in the ***De facto Relationships Amendment Bill 1998*** introduced into the Legislative Council on 24 June 1998.

1.2 You ask four specific questions as follows:

> "1. Is the Parliament of New South Wales precluded from legislating to ensure that the superannuation entitlements of partners of New South Wales Government employees in same-sex relationships are the same as those in opposite-sex relationships by virtue of inconsistent Commonwealth law?
>
> 2. Would such action by the Parliament of New South Wales result in the loss of concessional taxation treatment currently received by State Government employee superannuation schemes in relation to:

- income earned by the superannuation fund

- benefits paid to fund members

- death benefits paid to partners of members?

3. Are there any other constitutional impediments that restrict the ability of the New South Wales Government to ensure that the superannuation entitlements of New South Wales Government employees in same sex-relationships are the same as those in opposite-sex relationships?

4. Would it be possible to launch an indirect discrimination case under either State or Federal law against a superannuation fund on the basis that those in same-sex relationships are treated differently to those in opposite-sex relationships?"

1.3 By way of background, you say that the Committee is aware that the Commonwealth legislation governing superannuation (***Superannuation Industry (Supervision) Act 1993*** (Cth) ("the ***SIS Act***")) requires trustees of superannuation funds to treat people in same-sex relationships differently to those in opposite-sex relationships or legal or de facto marriages. In this regard, you say that when a member of a superannuation fund who is in a same-sex relationship dies, the Committee has been advised that his or her partner may not be entitled to death benefits from the fund that an opposite-sex partner would automatically receive and that a surviving same-sex partner will only receive a benefit if:

(i) financial dependence upon the deceased member is demonstrated to the fund trustee; or

(ii) the benefit is paid to the deceased member's estate and the same-sex partner is named in the will; or

(iii) there are no legal dependants and the trustee chooses to pay a death benefit to the surviving same-sex partner.

1.4 Further, you say that the Committee understands that payment of a death benefit to the estate, rather than to the same-sex partner as a dependant or spouse, results in different tax

treatment of the death benefit. In this regard, it is noted that death benefits received by a dependant are paid tax free up to a specified limit and as couples of the opposite-sex, whether married or de facto, are automatically deemed to be dependants of each other, they automatically receive a tax benefit. Surviving same-sex partners need to demonstrate dependence in order to receive tax benefits. Further, it is noted that some trustees discriminate against retiring members involved in same-sex relationships by refusing to pay joint pensions in relation to a member or his or her same sex partner in situations where such payments are made to members who have opposite sex partners.

1.5 You have provided a copy of a letter of 3 September 1996 summarising the practice with respect to New South Wales public sector superannuation schemes. In essence, the practice is for those schemes to comply with the ***SIS Act*** in order to obtain beneficial taxation treatment under the ***Income Tax Assessment Act 1936*** (Cth) ("the ***ITAA***"). As such, you note that it may be that New South Wales is unable to alter the rules governing payment of superannuation benefits under the State public sector superannuation schemes without incurring significant taxation liabilities on behalf of the fund and exposing employees to significant taxation liabilities. It is noted, however, that it has been argued before the Committee that the State government may have power to determine superannuation entitlements of State government employees without reference to Commonwealth laws and, as a result, could extend the range of beneficiaries to include people in same-sex relationships.

2. Relevant legislation.

The *SIS Act*

2.1 The ***SIS Act*** is an Act which provides for the supervision of entities engaged in the superannuation industry. By s.350 the ***SIS Act*** is not to apply to the exclusion of the law of a State or a Territory to the extent that that law is capable of operating concurrently with the ***SIS Act***. However, the ***SIS Act*** is expressed to bind the Crown in all its capacities (s.9(1)). The ***SIS Act*** applies in different respects to superannuation funds according to whether such are regulated superannuation funds, approved deposit funds, pooled superannuation trusts or public sector superannuation schemes. Although a public sector superannuation scheme may become, for instance, a regulated superannuation fund, it need not. A regulated superannuation fund is defined in s.19 of the ***SIS Act***. For present purposes, the relevance of

this definition is that the rules made by the Australian Prudential Regulation Authority (APRA) under s.62 of the ***SIS Act*** and the ***Superannuation Industry (Supervision) Regulations 1994*** ("the ***SIS Regulations***") apply only to regulated superannuation funds. By s.19(1) of the ***SIS Act*** a regulated superannuation fund is a superannuation fund in respect of which subsec.(2) to (4) have been complied with. Section 19(2) provides that the superannuation fund must have a trustee. Section 19(3) provides that either the trustee of the fund must be a constitutional corporation pursuant to a requirement contained in the governing rules or the governing rules must provide that the sole or primary purpose of the fund is the provision of old-age pensions. Section 19(4) provides that the trustee or trustees must have given to APRA a written notice in the approved form signed by the trustee or each trustee electing that the ***SIS Act*** is to apply in relation to the fund.

2.2 A public sector superannuation scheme is not required to become a regulated superannuation fund (see s.19(7)).

2.3 I understand that the exempt public sector superannuation schemes in New South Wales are not regulated superannuation schemes and accordingly, are not subject to s.62 of the ***SIS Act*** as a matter of application of that provision. The exempt public sector superannuation schemes are listed in Sch.1AA to the ***SIS Regulations***. Those schemes encompass the defined benefit schemes (for instance, under the ***Superannuation Act 1916***) and the accumulated benefit schemes, such as that established under the ***First State Superannuation Act 1992***. In addition, the ***Judges' Pensions Act 1953*** is listed (this being the only scheme designated as a "constitutionally protected superannuation fund" for the State under the ***ITAA*** (see Sch.14 to the ***Income Tax Regulations 1936*** and reg.177). However, the Heads of Government Agreement (Tab D to your instructions) is also relevant to the application of the prudential standards in the ***SIS Act***. I will return to the Heads of Government Agreement below.

2.4 Concessional taxation treatment of superannuation funds depends upon whether or not such are complying superannuation funds (or constitutionally protected funds) under Pt.IX of the ***ITAA***. Complying superannuation funds are taxed under Pt.IX, in respect of standard component income, at the rate of 15%. Income from non complying funds is taxed at the top marginal rate (currently 47%). However, Pt.IX has no effect to the extent that it purports to impose a tax on property of the State (s.271 ***ITAA*** and s.114, ***Constitution***). Further, as noted, the ***ITAA*** exempts from tax income derived by a constitutionally protected fund

(s.271A). A constitutionally protected fund is defined in s.267(1) as meaning fund declared by the ***Regulations*** to be a constitutionally protected fund. As noted, the only fund in New South Wales so declared is the fund established under the ***Judges' Pension Act***.

2.5 A complying superannuation fund has the meaning given by s.45 of the ***SIS Act***. By s.45(1) of the ***SIS Act*** a fund is a complying superannuation fund for the purposes of Pt.IX of the ***ITAA*** if, and only if, APRA has given a notice to the trustee under s.40 stating that the fund is a complying superannuation fund in relation to the current year of income or APRA has given a notice to the trustee under s.40 stating that the fund is a complying superannuation fund in relation to a previous year of income and has not given a notice to the trustee under that section stating that the fund was not a complying superannuation fund in relation to the current year of income or a year of income that is later than the previous year of income and earlier than the current year of income. However, by s. 45(6), despite s. 45(1), if the fund was an exempt public sector superannuation scheme the fund is a complying superannuation funds for the purposes of Pt.IX of the ***ITAA***. By s.46 an exempt public sector superannuation scheme is taken to be a complying superannuation scheme for the purposes of the ***Superannuation Guarantee (Administration) Act 1992*** (Cth). As you will be aware, the ***Superannuation Guarantee (Administration) Act 1992*** requires an employer to make contributions to a superannuation fund in respect of salary paid to an employee. Contributions to a complying superannuation fund will reduce an employer's liability to the superannuation guarantee shortfall (see s.23 of the ***Superannuation Guarantee (Administration) Act***).

2.6 In general terms, the position with respect to taxation of benefits from superannuation funds is that if a benefit is an eligible termination payment it will be taxed at a concessional rate (either 15% or 20%). If however, it is a payment from a non complying superannuation fund or a non taxable fund (for instance, a constitutionally protected fund) it will be taxed at the usual marginal rate for the person receiving the benefit.

2.7 I again note that it appears that the relevant New South Wales public sector superannuation schemes are complying superannuation funds for the purposes of the ***ITAA*** and the ***Superannuation Guarantee (Administration) Act 1992*** and I shall proceed on that basis.

2.8 Before turning to s.62 of the ***SIS Act*** and the ***SIS Regulations***, it is necessary to refer to the Heads of Government Agreement to understand why s.62 of the ***SIS Act*** and the ***SIS Regulations*** are relevant to New South Wales public sector superannuation schemes. The Heads of Government Agreement recognises that in the circumstances "surrounding many public sector schemes, the Commonwealth agrees that certain State and Territory public sector schemes may appropriately be exempted from the" ***SIS Act*** and the ***Superannuation (Resolution of Complaints) Act 1993*** (Cth). The Agreement notes that the Commonwealth also agrees that the States and Territories may opt to allow members of an exempted public sector scheme to have access to the Superannuation Complaints Tribunal in preference to the existing appeal rights for the relevant scheme. The Agreement records that "the States and Territories undertake to ensure that the exempted schemes will conform with the principles of the Commonwealth's retirement incomes policy, as reflected in the attachment to this agreement and from to time in Commonwealth legislation".

2.9 The attachment to the Heads of Government Agreement sets out the principles of the Commonwealth's superannuation legislation. The attachment purports to summarise the principal elements of the Commonwealth's supervision of superannuation schemes. There is nothing in that summary (aside from the paragraph dealing with the "sole purpose" test) which deals with the question of to whom benefits may be paid. However, there is provision dealing with diversion of benefits but this is concerned principally with preventing diminution of the amount of funds held in a way which reduces benefits available for use in retirement. However, the fact that no provision is made in the attachment with respect to the payment of benefits in this context, does not mean that the Heads of Government Agreement does not otherwise incorporate the requirements of the ***SIS Act***. In this regard, the State has agreed that it will undertake to ensure that its schemes conform with the principles of the Commonwealth's retirement incomes policy from time to time in Commonwealth legislation. Accordingly, as a matter of that Agreement, New South Wales has undertaken that it will ensure that the relevant schemes conform with the ***SIS Act***, even though the trustees of the particular schemes are not bound by, for instance, s.62 of the ***SIS Act*** of its own force.

2.10 However, the Heads of Government Agreement does not, in my view, create any legally enforceable obligations to comply with the ***SIS Act*** and, in particular, s.62 thereof. The Heads of Government Agreement is a document of a political character, setting out the understandings as to how the Commonwealth and other governments will mutually conduct their affairs. In this regard, Mr J D Heydon QC has advised in another context that the Heads

of Government Agreement does not create an enforceable legal obligation to comply with s.62 (my ref. Opinions of Counsel Vol.27.842). The reasons for that opinion, with which I agree, might be summarised as follows:

(i) The form of the agreement points against there being any contract:- the language of the actual agreement in referring to recognition of needs, statements of substantial differences and summaries of existing controls is not in the form one would expect of a legally binding contract;

(ii) As noted, the language does not suggest contractual obligation:- they are undertakings as to principles pointing towards ideals or goals, not contractually enforceable obligations;

(iii) An undertaking that schemes will conform with principles as reflected from time to time in Commonwealth legislation is unlikely to be a contractual promise:- obligations can be varied unilaterally by the Commonwealth making changes to Commonwealth legislation;

(iv) There is "considerable unreality" in attempting to analyse the sanctions for breach of the Heads of Government Agreement in conventional contractual terms:- proving financial loss or persuading a court to grant specific performance would be difficult or impossible.

2.11 Accordingly, although there is no legal obligation that a particular public sector scheme comply with s.62 of the ***SIS Act*** there may be a considerable practical incentive to do so.

2.12 Section 62 itself is headed "sole purpose test". In summary, the provision requires that the trustee of a regulated superannuation fund must ensure the fund is maintained solely for particular purposes, which are called core purposes, and for one or more of other ancillary purposes. Among the core purposes, is a requirement that the fund be used for the provision of certain benefits. In this regard, s.62(1)(a)(iv)(B) provides that provision of benefits in respect of each member of the fund on or after the member's death are to be provided to the member's legal personal representative or to any or all of the member's dependants, or to both. A dependant is defined in s.10(1) of the ***SIS Act*** in relation to a person, to include the

spouse and any child of the person. "Spouse" is defined in s.10(1), in relation to a person as including another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person. Accordingly, unless a partner falls within the meaning of a spouse, such person will not automatically be regarded as a dependant for the purposes of the sole purpose test in s.62. The consequence may be that a same-sex partner who is not otherwise a dependant will not qualify for a benefit if a scheme is to satisfy the sole purpose test.

2.13 However, I note that it has recently been suggested by one High Court judge that arguably "marriage" now means, or in the future may mean, "a voluntary union for life between two people to the exclusion of others", rather than as meaning "a voluntary union for life between one man and one woman to the exclusion of all others". (McHugh J in ***Re Wakim; ex p. McNally*** [1999] HCA 27 at para.45). His Honour noted that if the traditional definition of marriage as it was understood in 1901 were accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages. Unlike constitutional terms, however, terms used in legislation must be construed at the date of the particular legislation and it would appear that the concept of "spouse" as at the date of the ***SIS Act*** does not include a same sex partner.

2.14 As noted, the requirements of the sole purpose test are reflected in the ***SIS Regulations*** which purport to prevent the cashing of benefits to persons other than the member, the member's legal personal representative or the member's dependants. By reg.6.22B, a member's benefits in a regulated superannuation fund can be cashed in favour of a person other than the member if the cashing is specially permitted by APRA in a written approval for the purposes of s.62(1)(b)(v) of the ***SIS Act*** and the benefits are cashed only to the extent of that approval.

2.15 I will deal further with the ***SIS Act*** and the ***ITAA*** below in answer to the specific questions raised.

3. Advice.

3.1 I turn now to your specific questions.

As to question 1: Is New South Wales precluded from legislating with respect to same-sex partners by inconsistent Commonwealth law?

3.2 The answer to this question is, strictly, no. However, if in so legislating New South Wales is unable to comply with the undertaking as contained in the Heads of Government Agreement, then the political undertakings in that Agreement may not prevent the Commonwealth from revoking the exemption for New South Wales public sector schemes from the requirement to be a regulated superannuation fund under the ***SIS Act***. Further, if New South Wales public sector superannuation schemes lose their status as complying superannuation schemes, they will be liable to be taxed at a greater rate and benefits paid to members may also be subject to higher rates of taxation.

3.3 There may be an argument with respect to some New South Wales public sector employees that the Commonwealth is incapable of legislating with respect to the terms and conditions of their employment, including entitlement to superannuation benefits. The legislative powers of the Commonwealth cannot be exercised to destroy or curtail the existence of the States or their continuing capacity to function as such (see ***Melbourne Corporation v The Commonwealth*** (1947) 74 CLR 31 at 56, 60, 66, 74 and 82). The restriction may have two elements: an element forbidding discriminatory treatment of States and an element forbidding laws which generally interfere with the capacity of a State's function.

3.4 Notwithstanding the principle referred to, it is clear that the States are subject to the Commonwealth Parliament's exercise of its taxation power and have no immunity from Commonwealth taxation (see the ***Payroll Tax Case*** (1971) 122 CLR 353***; State Chamber of Commerce and Industry v The Commonwealth (the Second Fringe Benefits Tax Case***) at 356; ***Re Australian Education Union*** ("***AEU***"), ***ex p. Victoria*** (1995) 184 CLR 188 at 228). In ***Re AEU*** however, the majority of the High Court suggested that the internal services of a State would be protected from Commonwealth legislative power. Those internal services were said to include policy formulation, reporting to Parliament, the collection and administration of government revenue and the provision of services to Parliament and the

Judiciary. In that case, the ability of the Commonwealth to legislate with respect to industrial disputes and so authorise the Industrial Commission to regulate remuneration and disputes about remuneration and other payments to employees, and also to prescribe employment qualifications, eligibility and termination proceedings, was restricted as to the latter matters because such would impair the integrity or autonomy of the State. Thus, according to the majority, it was critical to the State's capacity to function as a government that it had the ability not only to determine the number and identity of those whom it wished to engage at the higher levels of government, but also to determine the terms and conditions on which those persons should be engaged. Ministers, ministerial assistants and advisers, heads of departments at higher levels, statutory office holders, parliamentary officers and judges would be protected by this principle. The implied limitation would, according to the majority in ***Re AEU***, protect the States from the exercise by the Industrial Commission of a power to fix minimum wages and working conditions in respect to such persons (at 233).

3.5 Although there is nothing at present to prevent New South Wales from legislating in a way which entitles partners in same-sex relations to entitlements in relation to superannuation benefits on the same basis as those in opposite sex relationships, the consequence of so doing may well be that all members of the superannuation funds and the funds themselves receive adverse taxation treatment from the Commonwealth.

As to question 2: Taxation status

Taxation of superannuation funds.

3.6 The taxation of superannuation funds is dealt with under Pt.IX of the ***ITAA***. As noted, that Part deals with taxation of complying and non complying superannuation funds, complying and non complying approved deposit funds (ADFs) and pooled superannuation trusts (PSTs). Complying superannuation funds, complying ADFs and PSTs are subject to a concessional rate of tax on their taxable income. Non complying superannuation funds and non complying ADFs incur tax on taxable income at the highest individual marginal rate of tax (excluding Medicare levy). As noted, a complying superannuation fund for the purposes of Pt.IX has the meaning given under s.45 of the ***SIS Act***. The exception to the imposition of taxation on the taxable income of a fund will be where the fund is a constitutionally protected fund. In this case, the income of a constitutionally protected fund will be tax free, but benefits paid from such fund will be subject to a higher rate of tax as a consequence. It is

noted however that in order to be a "complying superannuation fund", an entity must be a resident regulated superannuation fund (see s.42(1)(a) of the ***SIS Act***). As noted, exempt public sector superannuation schemes are not regulated superannuation schemes but, as noted above, exempt public sector superannuation schemes are nonetheless entitled to complying superannuation fund status under the ***ITAA*** because of s. 45(6) of the ***SIS Act***.

3.7 Contributions made by an employer (whether deductable or not) are taxable and once included in a fund's assessable income, are taxed at the rate of 15% (in relation to complying superannuation funds and ADFs) or at 47% (in relation to non complying resident funds and ADFs). Member contributions, whether deductible or not, are also taxed in the same way.

Taxation of contributors and contributions

3.8 Generally, there is no deduction in relation to contributions to public sector superannuation schemes.

Reasonable benefit limits

3.9 Originally, reasonable benefit limits (RBLs) were significant both with respect to taxation of benefits and the calculation of contributions that a fund could receive. From 1 July 1994 member specific RBLs were phased out and the same lump sum and pension RBLs apply to every individual. However, there are transitional arrangements applicable to some individuals who are aged over 45 or persons with vested benefits at 1 July 1994 which exceeded the flat dollar limit otherwise applicable from that date. From 1 July 1994 there is a flat dollar limit applying to lump sum benefits of $400,000 (indexed) and a limit of $800,000 (indexed) in cases where the pension RBL is applicable (s.140ZD of the ***ITAA***).

Taxation of members and benefits.

3.10 Subdivision AA of Div.2 of Pt.III of the ***ITAA*** deals with taxation of, amongst other things, superannuation benefits, lump sum payments and pensions. As noted, where a lump sum amount exceeds the RBL it will be taxed at the top marginal individual rate. Where a pension or annuity exceeds the RBL, the proportion of each payment will be determined by the Commissioner to be non-rebateable. Tax instalments must be deducted from payments made under subdiv.AA. The superannuation trustee must make the PAYE deductions.

3.11 Subdivision AA also deals with death benefits. From 1 July 1994 death benefits paid directly or indirectly to dependants (which will be spouses, de facto spouses, former spouses and children under the age of 18) receive favourable tax treatment. All death benefit payments are measured against the deceased's RBL but the relevant RBL is the pension RBL (s.140ZF(5)). Thus, where a death benefit is an eligible termination payment within the RBL of the deceased it is exempt from tax where it is paid to the dependants of the deceased. Benefits paid to non dependants are taxed as ordinary eligible termination payments but post June 1983 components of such payments are taxed at a maximum rate of 15% (plus Medicare levy) if paid from a taxed source and 30% (plus Medicare levy) if paid from an untaxed source. Benefits in excess of the RBL of the deceased are taxed as an excessive component of an eligible termination payment in the hands of the recipient. Lump sum benefits arising as a result of the commutation of superannuation pensions or annuities that have commenced to be payable receive the same taxation treatment as death benefit eligible termination payments.

3.12 In summary therefore the following might be said:

(i) An alteration to the rules of New South Wales public sector superannuation schemes which has the effect of entitling a person who is not a dependant or trustee or legal personal representative of the member to benefits will place New South Wales in breach of the Heads of Government Agreement because such will not conform to the sole purpose test in s.62 of the ***SIS Act***. The effect will be that the New South Wales public sector superannuation schemes will be susceptible to loss of their concessional taxation status with respect to income earned by them.

(ii) Benefits which are paid to persons who are not dependants within the meaning of the ***ITAA*** or the legal personal representatives of such will be taxed at a higher rate.

(iii) Death benefits paid to partners of members who do not fall within the definition of spouses or dependants in the ***ITAA*** will also be taxed at higher rates.

3.13 It is convenient to note at this point that evidence of a same-sex relationship may give rise to dependence and may found a claim for an application under the ***Family Provision Act 1982*** - (see ***Ball v Newey*** (1988) 13 NSWLR489 at 492; s.57 of the ***Family Provision Act***).

3.14 As explained above, no inconsistency between laws of the State will arise because, as a matter of construction, the ***SIS Act*** does not apply to New South Wales public sector superannuation schemes. However, if s.62 did apply, a New South Wales statute which authorised payments from funds subject to s.62 contrary to the sole purpose test would be invalid because of inconsistency under s.109 of the ***Constitution***.

3.15 This result is supported by an analysis of the High Court's decision in ***Australian Mutual Providence Society v Goulden*** (1986) 160 CLR 330. The decision is a joint judgment of the court comprising Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.

3.16 Goulden, who had been totally blind since birth, had effected a policy with the AMP pursuant to which, in consideration of payment of an annual premium, it agreed to pay a stipulated sum immediately before his 61st birthday or upon his prior death "not being death by accident or specified sickness only". Goulden subsequently asked the AMP, for an extra premium, to add a "waiver of premium benefit" the effect of which would be that, upon "total disablement" each premium falling due "during the uninterrupted continuance of disablement" would be waived. The AMP refused to amend the policy to include this benefit, and Goulden initiated a complaint under the ***Anti-Discrimination Act 1977*** ("the ***ADA***"). In particular it appears that Goulden relied upon s.49K of the ***ADA*** which, as it was then in force, made it unlawful for a person providing goods or services to discriminate against a physically handicapped person on the ground of his impairment by refusing to provide him with goods or services or to discriminate as to the terms upon which he would provide such person with those goods and services. In this connection it is noted that the AMP's stated refusal to grant this additional benefit was on account of the insured's blindness (at 334.)

3.17 The AMP commenced proceedings in the original jurisdiction of the High Court contending that s.49K of the ***ADA*** was inconsistent with the ***Life Insurance Act 1945*** (Cth) ("the ***1945 Act***"). The AMP relied upon s.109 of the ***Constitution***, which provides that where a law of a State is inconsistent with a law of the Commonwealth, the law of the Commonwealth shall prevail and the State law shall, to the extent that the inconsistency, be invalid.

3.18 In considering the matter the judgment of the Court noted the following (at 335-336).

1. The ***1945 Act*** was framed on the basis that it would operate within the context of local laws of the States and Territories.

2. The ordinary laws of States and Territories are left to apply except to the extent that they are modified or excluded by provisions of the ***1945 Act*** dealing with particular subject matters.

3. The ***1945 Act*** does not establish a detailed and special code of contract or insurance law to apply to contracts of insurance written by registered life companies.

4. The ***1945 Act*** makes special provision with respect to statutory funds of life insurance companies, the actuarial investigation of their affairs, the rates of premium charged, and various aspects of life insurance policies.

5. The provisions referred to in 4 are directed towards ensuring adequate supervision and regulation of the insurance practices of life insurance companies to protect policyholders.

6. Central to the practices of life insurance companies which provisions of the Act were designed to regulate and control are the classification of risks and the setting of premiums: they are the essence of the insurance business.

7. The ***1945 Act*** proceeds on the underlying legislative assumption that, subject to qualifications for which it provides, the life insurance business of the company is more likely to prosper and the interests of policyholders are more likely to be protected if the company is permitted to classify risks and fixed premium rates in that business in accordance with its own judgment founded upon the advice of actuaries and the practices of prudent insurers.

8. On the basis of the assumptions referred to in 7, s.78 of the ***1945 Act*** imposes a number of stringent controls on life insurance companies.

3.19 In the light of the propositions referred to in the preceding paragraph, the Court held s.49K of the ***ADA*** to be inconsistent with the ***1945 Act***. In so doing it said (at 336-337).

"When the scheme of regulation established by the Act is considered in the light of the matters which we have mentioned, the Act should be understood as giving expression to a legislative policy that the protection of the interests of policyholders is to be achieved by allowing a registered life insurance company to classify risks and fix rates of premium in its life insurance business in accordance with its own judgment founded upon the advice of actuaries and the practice of prudent insurers. In the words of Dixon, J. in Victoria v. The Commonwealth, it `would alter, impair or detract from' the Commonwealth scheme of regulation established by the Act if a registered life insurance company was effectively precluded by the legislation of a State from classifying different risks differently, from setting different premiums for different risks or from refusing to insure risks which were outside the class of risks in

> respect of which it wished to offer insurance. In particular, State legislation which, either absolutely or subject to qualifications and exceptions, made it generally unlawful for a life insurance company to take account of physical impairment in determining whether it would or would not accept a particular proposal or the terms upon which it would grant insurance cover would be inconsistent with the general scheme of the provisions of the [1945] Act regulating the issue of policies and fixing of premiums. Indeed, such legislation would undermine and, to a significant extent, negate the legislative assumption of the underlying ability of a registered life insurance company to classify risks and fixed rates of premium in accordance with its own judgments based upon actuarial advice and prudent insurance practice upon which, as has been mentioned, the stringent controls and requirements which the [1945] Act imposes in respect of life insurance business of registered life insurance companies are predicated."

3.20 So far as the operation of s.49K of the ***ADA*** was concerned, their Honours continued: (at 337-338).

> "The operation of this section, if left unqualified, would effectively preclude a registered life insurance company from differentiating, in classifying risks or in fixing rates or conditions in its life insurance business, on the grounds of `physical impairment' of a physically handicapped proposer. In the context of the wide definition of `physical impairment' in s.4(1), such an unqualified provision would be quite inconsistent with the business practice of any prudent life insurance company and with accepted actuarial practice in relation to the classification of risks and determination of rates by such an insurer."

3.21 As noted, s.62 of the ***SIS Act*** applies the sole purpose test to regulated superannuation funds. If a public sector superannuation scheme were to become a regulated superannuation fund then, s.62 of the ***SIS Act*** would apply to it. It follows from the definitions in the ***SIS Act*** of dependant and spouse that s.62 of the ***SIS Act*** would preclude the making of payments to the surviving partner of a same-sex relationship as a "spouse" by a regulated superannuation fund.

3.22 That conclusion is subject to a qualification that the definition of "dependant" in s.10(1) of the ***SIS Act*** is not expressed in exclusive terms. The surviving partner of a same sex relationship may be able to establish dependancy in the financial or economic sense in which that concept was explained by the New South Wales Court of Appeal in ***Benney v Jones*** (1999) 23 NSWLR 559. However, it needs to be emphasised that the making out of dependancy in this sense and, possibly, entitlement to payment from a regulated superannuation fund is conditional upon the existence of dependancy and not upon the

existence of a same-sex relationship in the same manner as a different-sex relationship would found an entitlement to payment from a regulated superannuation fund.

3.23 The introduction of statutory prudential standards applicable to superannuation entities, as incorporated by s.62 of the ***SIS Act***, was intended to operate as a statutory code with respect to the application of standards. Apparently, underlining the imposition of such standards was a desire to protect the members of regulated superannuation funds and the like.

3.24 That underlining policy is further enforced when reference is made to Pt.29 of the ***SIS Act*** which deals with exemptions and modifications. That Part allows the Regulator to exempt particular persons or classes of persons from compliance with any or all of the modifiable provisions. The provisions of Pt.7 (in which s.62 appears) are "temporarily modifiable provisions". However, an exemption in relation to a temporarily modifiable provision does not have any effect after 30 June 1996 (see s.329). The result is that where a superannuation fund becomes a regulated superannuation fund for the purposes of the ***SIS Act***, s.62 is intended to operate as an exhaustive statement of the nature of payments which trustees of such funds are permitted to make. That this is so and that it is not possible to deviate from the payments permitted by s.62 is underscored by the presence of Pt.29 of the ***SIS Act***.

3.25 Accordingly, where New South Wales public sector superannuation schemes are regulated superannuation funds within the meaning of Pt.VII of the ***SIS Act*** (which they are presently not) a provision in a New South Wales statute which authorises payments from those funds which are not authorised payments for the purposes of s.62 of the ***SIS Act*** will be inconsistent with the ***SIS Act*** in the sense in which the concept of inconsistency within the meaning of s.109 of the ***Constitution*** is to be understood. To that extent, any such provisions in relevant State statutes would be invalid. Further, to the extent that a scheme ceased to be a regulated superannuation fund or a complying superannuation fund, the concessional tax status under the ***SIS Act***, the ***ITAA*** and the ***Superannuation (Administration) Guarantee Act*** will cease to be available.

3.26 It follows that (if a scheme is a regulated superannuation scheme) an attempt in State law to extend those persons entitled under the State public sector superannuation schemes to benefits to same-sex partners will produce an inconsistency and consequent invalidity of the relevant provision in New South Wales statute. Section 7 of the ***SIS Act*** provides that that

Act applies to a superannuation entity despite any provision that purports to substitute, or has the effect of substituting, the provision of the law of a State for all or any of the provisions of the ***SIS Act***. While s.350 of the ***SIS Act*** provides that the ***SIS Act*** is not to apply to the exclusion of the law of the State which is capable of operating concurrently with the ***SIS Act*** (that is where there is no direct inconsistency) the effect of a law of the State which provided for the provision of benefits other than is authorised by s.62 of the ***SIS Act*** by a regulated superannuation fund would be to purportedly substitute the State laws provisions for those of the ***SIS Act***. Alternatively, s.62 of the ***SIS Act*** is a penalty provision and, to the extent that State law purported to authorise a breach of the ***SIS Act*** which breach attracts both civil and criminal sanctions, it would be directly inconsistent with the ***SIS Act*** and invalid under s.109 of the ***Constitution***.

As to question 3: other constitutional impediments.

3.27 Aside from those mentioned above, I do not think there are other constitutional impediments in relation to providing superannuation benefits to employees in same-sex relationships.

As to question 4: discrimination.

3.28 Prohibited discrimination may arise because of a breach of the ***ADA*** or in, this context, the ***Sex Discrimination Act 1984*** (Cth).

3.29 So far as the ***ADA*** is concerned, it is not unlawful to discriminate on the ground of sex in the terms or conditions appertaining to a superannuation fund or scheme where the terms and conditions are based upon actuarial or statistical data on which it is reasonable to rely and are reasonable having regard to the data and any other relevant factors or, in the case where no such actuarial or statistical data is available and cannot reasonably be obtained, the terms or conditions are reasonable having regard to any other relevant factors (s.36 of the ***ADA***). Section 24 describes what constitutes discrimination on the ground of sex and s.33 renders it unlawful for a person who provides goods or services to discriminate against another person on the ground of sex in, amongst other things, the terms on which he or she provides the person with those goods or services.

3.30 It is also unlawful for a person to discriminate on the grounds of marital status in the provision of goods or services (see ss.39 and 47 of the ***ADA***. An exception to that prohibition in relation to superannuation is made by s.49 in the same terms as the exception appearing in s.36 of the ***ADA***.

3.31 Discrimination on the grounds of homosexuality is also prohibited under Pt.4C of the ***ADA***. Section 49ZG provides as follows:

> "(1) A person ("the perpetrator") discriminates against another person ("the aggrieved person") on the ground of homosexuality if, on the ground of the aggrieved person's homosexuality or the homosexuality of a relative or associate of the aggrieved person, the perpetrator:
>
> (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who he or she did not think was a homosexual person or who does not have such a relative or associate who he or she thinks was a homosexual person, or
>
> (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not homosexual persons, or who do not have such a relative or associate who is a homosexual person, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.
>
> (2) For the purposes of subsection (1) (a), something is done on the ground of a person's homosexuality if it is done on the ground of the person's homosexuality, a characteristic that appertains generally to homosexual persons or a characteristic that is generally imputed to homosexual persons."

3.32 By s.49ZP it is unlawful for a person who provides, for payment or not, goods or services to discriminate against another person on the grounds of homosexuality by refusing to provide the person with those goods or services or in the terms in which he or she provides the person with those goods or services.

3.33 Part 6 of the ***ADA*** contains general exceptions to the Act and s.54(1) provides as follows:

> "(1) Nothing in this Act renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with a requirement of:
>
> (a) any other Act, whether passed before or after this Act,

(b) any regulation, ordinance, by-law, rule or other instrument made under any such other Act,

(c) an order of the Tribunal,

(d) an order of any court, not including an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment, or

(e) (Repealed)"

3.34 The ***Sex Discrimination Act*** also renders discrimination on the grounds of sex unlawful in certain circumstances. However, that Act does not apply to prohibited discrimination on the grounds of sex in employment by an instrumentality of the State (see s.13). Sections 13 and 14(4) essentially remove members of State of New South Wales public sector superannuation funds from the ***Sex Discrimination Act***. Further, similar exceptions apply in relation to superannuation funds as apply in the ***ADA.*** Like the ***ADA***, the ***Sex Discrimination Act*** makes it unlawful for a person who provides goods and services to discriminate against any person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy in the terms or conditions on which the first person provides the other person with those goods or services. That provision binds the Crown in right of a State (s.22).

3.35 There are three potential obstacles to an assertion of a breach of the ***ADA***:

1. To the extent that such assertion complains of that which is required because the fund is a regulated superannuation fund and complies with s.62 of the ***SIS Act***, there can be no breach of the ***ADA*** because of the paramount operation of the ***SIS Act*** under s.109 of the ***Constitution*** as described above;

2. It would need to be shown that the difference in treatment afforded by the provider of the service (that is the superannuation fund) was in fact on the prohibited ground. In this regard, it might be argued that the ground for the difference of treatment is not the sex, marital status or homosexuality of the member or his or her partner, but arises because a "spouse" when used in the ***ITAA*** can only be a person of a different sex. However, it seems likely that, on its face, the difference in treatment will fall within s. 49ZG(1)(b) of the ***ADA***;

3. Section 54 of the ***ADA*** might be argued to provide an exception to any breach which was found. In this regard, I do not think that s.54 can be construed to give any protection where the compliance required is with a Commonwealth Act; the ***ADA*** will not apply because of inconsistency under s.109 of the ***Constitution*** in those circumstances. However, it may also be arguable that a provision such as s.16 of the ***First State Superannuation Act 1992***, which provides that the FTC (the FSS Trustee Corporation) must at all times ensure that the trust deed is consistent with any relevant Commonwealth legislation) incorporates as a requirement of State law the terms of s.62 of the ***SIS Act***. However, I think that the reference to relevant Commonwealth law (and the reference to "Superannuation Law" in the trust deed itself and the obligation in cl.4.1 of the trust deed) will be read as referring only to applicable Commonwealth law; in this regard, it is clear that s.62 does not apply to funds which are not regulated superannuation funds. Whilst the First State Superannuation Scheme may be a complying superannuation scheme, I understand that it is not a regulated superannuation fund.

3.36 The principal difficulty however, may be a practical one: even if it could be successfully shown that the provision of the superannuation service was discriminatory within the terms of the ***ADA***, an important aspect of the less favourable treatment afforded to payments made to a same-sex partner occurs through operation of the ***ITAA***, rather than any act or omission of the trustee of the State public sector superannuation scheme. It is apparent, I think, from what I have said above that State law cannot affect the way in which the Commonwealth law operates in this regard.

3.37 I would also note that whether or not discrimination within the ***ADA*** has taken place will depend upon the facts of each case and the examination of the particular circumstances. That examination would, in addition to the matters referred to above, require the particular statutory provisions including any rules or trust deeds applicable to a New South Wales public sector superannuation scheme to be examined and to identify the manner in which such had been administered.

3.38 Finally, for completeness I note the decision in ***Hope and Brown v NIB Health Funds Ltd*** in the Equal Opportunity Tribunal. ((195) EOC 92-716) The case concerned a complaint that a homosexual couple were denied access to family health insurance cover. Although the proceedings initially raised questions of inconsistency between the ***ADA*** and

Commonwealth law, the ultimate decision turns upon the availability of cover for "dependants" - the couple were able to show "dependence" in this context. However, the Tribunal did find unlawful discrimination on the ground of homosexuality in the rules of NIB and further found no constitutional inconsistency between the ***ADA*** and the Commonwealth law (***National Health Act 1953***).

4. Conclusions.

4.1 New South Wales is not precluded from legislating as to the superannuation entitlements of partners of New South Wales government employees in same-sex relationships in order that those persons enjoy the same entitlements as employees in opposite sex relationships.

4.2 However, to do so would fail to comply with the State's obligation under the Heads of Government Agreement that New South Wales public sector superannuation schemes would comply with Commonwealth legislation from time to time.

4.3 Although New South Wales public sector superannuation schemes are not subject to s.62 of the ***SIS Act*** as such, failure to comply with its terms will amount to a breach by New South Wales of its undertakings in the Heads of Government Agreement.

4.4 The consequences of such failure to comply with that undertaking may be the withdrawal of exempt status under the ***SIS Act*** and complying superannuation fund status under the ***ITAA***. The consequence of such would be that compulsory employer contributions could no longer be made to New South Wales public sector superannuation funds and those funds would cease to enjoy concessional taxation treatment with respect to their income.

4.5 Further, conferring an entitlement on a same-sex partner to benefits under a superannuation scheme under New South Wales law will not change the taxation treatment of benefits under the relevant Commonwealth law, for instance the ***ITAA***. In this regard, the ***ITAA*** will continue to treat certain benefits paid to spouses (defined to include different-sex partners and dependants, but not same-sex partners who are not dependants) more favourably than benefits paid to same-sex partners. New South Wales law cannot validly alter the effect of Commonwealth law, in particular, it cannot alter the imposition of Commonwealth taxation on benefits paid by a superannuation scheme. Nor can New South Wales law itself

purport to alter the taxation treatment of the income of a New South Wales public sector superannuation scheme.

4.6 Although much will depend on the facts of each case, there may be significant difficulties in successfully prosecuting a complaint under the ***ADA*** that there had been relevant discrimination. As noted, however, the difference in treatment on its face falls within s. 49ZG(1)(b) of the ***ADA***. In any event, if a complaint is made by a same-sex partner, part at least of such complaint will be concerned no doubt with the taxation treatment of benefits. The ***ADA***, as noted above, is incapable of rendering unlawful conduct or actions taken under the ***ITAA*** because of s.109 of the ***Constitution***.

4.7 I trust that the above satisfactorily addresses the issues you have raised. Please do not hesitate to contact me should you require clarification or elaboration of the above matters.

Yours faithfully

Peter Anet

Deputy Crown Solicitor

for Crown Solicitor