This is author version of article published as:
Willmott, Lindy and Mathews, Benjamin P. and Shoebridge, Greg (2003) Defacto Relationships Property Adjustment Law - A National Direction. *Australian Journal of Family Law* 17(1):pp. 37-61.

De Facto Relationships Property Adjustment Law – A National Direction?

Willmott, Mathews and Shoebridge•

The *Family Law Act 1975* (Cth) governs a range of issues including divorce and property distribution on the breakdown of marriage. The legislation applies to all married couples in Australia, and most matters are administered by the same Commonwealth court systems.[1] Divorcing parties who require property distribution orders are benefitted by the scheme's parity of treatment, and by the range of factors considered by the courts. To secure justifiable economic outcomes, these factors include the parties' financial and non-financial contributions to the relationship, and their present and future economic needs.[2]

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1 In Western Australia, however, a State Family Court was created to administer the *Family Law Act 1975* (Cth). Notwithstanding it is a State Court, it is very similar to the Family Court of Australia in terms of the training and experience of its judges as well as the counselling and conciliation facilities available: A Dickey, *Family Law*, 4th ed, Lawbook Co, 2002, 98-99.

2 The *Family Law Act 1975* (Cth) s79 gives the court wide discretion to make such order as it deems appropriate to alter the parties' interests in property. The prospective component, accommodated under s79(4), considers financial and non-financial contributions, and present and future needs. Some commentators have observed a tendency to underrate non-financial contributions to marriages so that unequal weight is given to non-financial contributions in the context of property distribution. Bailey-Harris notes that cases such as *Ferraro v Ferraro* (1992) 16 Fam LR 1, 47, *Waters v Jurek* (1995) 20 Fam LR 190, 200, and *McLay v McLay* (1995) 20 Fam LR 239 gave greater (acceptable) weight to nonfinancial contributions, but that these cases are not the rule: R Bailey-Harris, 'Equality or Inequality within the Family? Ideology, Reality and the Law's Response' in J Eekelaar and T Nhlapo (eds) *The Changing Family: International Perspectives On The Family And Family Law*, 1998, Hart, Oxford, 251, 255.

Yet increasing numbers of couples are living together on a permanent basis without becoming married. By 1997 there were 756 500 people in de facto relationships in Australia, an increase from 710 800 in 1992, constituting 9.1% of all persons living as couples (an increase from 8.5% in 1992).[3] As at 1998, it was estimated that 826 300 people lived in de facto relationships.[4] For many, the decision not to marry is motivated by personal choice based on religious or other opinion. Other couples are unable to marry regardless of their desire to do so, due to their homosexuality. In 2001, there were 19 594 gay couples living together throughout Australia, double the number in 1996.[5]

Due to constitutional limits on the Commonwealth's legislative power, the property distribution provisions of the *Family Law Act* do not apply to those in de facto relationships.[6] Property distribution on the breakdown of a de facto relationship is a

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3 Australian Bureau of Statistics, Australia Now, Population: Marriages and divorces, 2002: <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/b95347a43cc81fffca256b350010b3fb!OpenDocument>.

4 Australian Bureau of Statistics, Australia Now, Population, Special Article – Marriage and Divorce in Australia, 1998: <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/bf1fa897acbaea06ca2569de002139bb!OpenDocument>. It is not claimed that all these relationships would qualify as legally-defined de facto couples for the purposes of property distribution since a significant number of these would be nascent relationships and so would not meet time qualifications, and others would result in marriage. However, tens of thousands of qualifying de facto relationships would not be excluded by these considerations, and would be subject to the current legal positions.
See also Australian Bureau of Statistics, 3310.0 Marriages and Divorces, Australia, reporting on 22 August 2002 that marriage numbers and rates are declining, the trend towards older age at marriage continues, and that the proportion of men and women cohabiting before marriage continues to rise. In 2001, 72% of couples indicated that they had cohabited before marriage, compared with 31% in 1981: <http://www.abs.gov.au/ausstats/abs%40.nsf/b06660592430724fca2568b5007b8619/893c1288678fd232ca2568a90013939c!OpenDocument>.

5 N Bita, 'Out, proud and parents', *The Australian*, 16 July 2002, 9, reporting unpublished data from the Australian Bureau of Statistics 2001 census.

6 The Commonwealth has power to legislate with respect to 'marriage' and 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants': *Commonwealth of Australia Constitution Act* s51(xxi) and (xxii) respectively: hereafter referred to as the Constitution. Although not definitively determined by the High Court, the prevailing view is that the marriage power is not wide enough to empower the Commonwealth to legislate regarding property rights of de facto couples on the breakdown of a relationship. The ambit of the term 'marriage' is considered in A Dickey, *Family Law*, 4th ed, Lawbook Co, 2002, 37-41. While the author concludes that the meaning of this term as used in the Constitution remains uncertain, dicta from High Court Justices suggests a restrictive interpretation of the term. In contrast, Moens and Trone interpret the dicta of McHugh J in *Re Wakim; Ex parte McNally* (1999) 163 ALR 270 as suggesting that the power would now extend to the recognition of same sex marriages. If such a wide interpretation is correct, the term would also be broad enough to embrace de facto relationships: G Moens and J Trone (2001) *Lumb and Moens' The Constitution*

matter for State legislation, and legislation has been passed in all Australian jurisdictions,[7] led by New South Wales in 1984,[8] and most recently in Western Australia in December 2002. However, in contrast to the neatness and justice of the *Family Law Act* provisions, these eight statutes are marked by two significant thematic inconsistencies: the first regarding the matters that may be considered by the courts in exercising its discretion to distribute property, and the second regarding the types of de facto relationship protected by the statute. These inconsistencies produce injustice, since different jurisdictions protect different economic interests, and since some classes of individual are protected in some jurisdictions but not in others.

Questions arise as to the most justifiable legal response to these problems. The Australian States and Territories desire a uniform scheme for all de facto couples implemented through Commonwealth legislation, but to date the Commonwealth has not acted on or accepted this consensus, being particularly reluctant to extend a new regime to homosexual couples.[9] This article first outlines the different Australian positions, and argues that this current inconsistent situation should be replaced by a uniform position that applies to all de facto couples. It is then argued that to protect the relevant economic interests, the uniform scheme for de facto couples should mirror the legal position applying to married couples. The major issue then becomes whether such a uniform scheme should apply to homosexual as well as heterosexual de facto couples. An argument for including homosexual relationships in the regime is made by referring to fundamental principles of liberal democracy, international human rights law, and

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Of The Commonwealth Of Australia: Annotated, 6th ed, Chatswood, Butterworths, 126. The New South Wales Law Reform Commission in its Report 36, *Report on De Facto Relationships*, 1983, 31-32, also indicated that there was (in 1984) increasing support for a wider interpretation of the term. If this interpretation is correct, the term would be broad enough to embrace de facto relationships.

7 *Property (Relationships) Act 1984* (NSW); *Property Law Act 1958* (Vic); *De Facto Relationships Act 1991* (NT); *Domestic Relationships Act 1994* (ACT); *De Facto Relationships Act 1996* (SA); *De Facto Relationship Act 1999* (Tas); *Property Law Act 1974* (Qld); *Family Court Act 1997* (WA) as amended by *Family Court Amendment Bill 2001* (WA), which was assented to on 25 September 2002 and commenced on 1 December 2002. For the purpose of this article, these statutes are collectively referred to as 'de facto relationships legislation' although some of the statutes govern relationships in addition to de facto relationships.

8 *De Facto Relationships Act 1984* (NSW), now renamed *Property (Relationships) Act 1984* (NSW).

9 See below, n 21, 23.

comparative law. The final issue of whether the scheme should include domestic relationships falling short of de facto relationships is also addressed. In concluding, we make some recommendations about the features of a new regime.

1. Differences in Australian State and Territory positions

Factors considered when distributing property

Three different approaches are taken regarding the factors considered when adjusting property interests. The most justifiable design is adopted in statutes modelled on the *Family Law Act*, which considers the parties' present and future needs, and their financial and non-financial contributions to the relationship. This model has been adopted by the three jurisdictions most recently passing legislation: Queensland, Tasmania and Western Australia.[10] Qualifying de facto couples are placed on a similar legal footing as married couples. To qualify, the relationship must have existed for at least two years, have produced a child, or have had substantial specified contributions made to it.[11]

The second, more restrictive approach is taken by the first three jurisdictions to enact legislation in this context: New South Wales, Victoria and the Northern Territory. Here, the court is directed to consider only contributions made by the parties, not their future needs or other issues that impact on their financial positions.[12] Because the earlier legislation is narrower than the *Family Law Act*, in many respects the courts here have

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10 See for example *Property Law Act 1974* (Qld) ss291-292 regarding financial and non-financial contributions, and ss297-309 regarding future economic needs; *De Facto Relationship Act 1999* (Tas) s16(1)(a) and (c); *Family Law Amendment Bill 2001* (WA) s205ZG.

11 *Property Law Act 1974* (Qld) s287; *De Facto Relationship Act 1999* (Tas) s13; *Family Court Amendment Bill 2001* (WA) s205Z(1). In Queensland and Tasmania, de facto relationships legislation is administered by State courts, rather than the Family Court and the Federal Magistracy, which deal with matters under the *Family Law Act*.

12 In New South Wales, for example, the court must only consider financial and non-financial contributions to property and financial resources of the relationship (*Property (Relationships) Act 1984* (NSW) s20(1)(a)); and contributions including homemaking and parenting to the welfare of the family or to the other spouse, or to the relationship's children (s20(1)(b)). The reason for the legislation being so restricted is largely political. When New South Wales enacted legislation in 1984, it was groundbreaking reform, and the legislation proposed was highly controversial. If the proposed legislation resembled the *Family Law Act 1975* (Cth) by allowing the courts to consider a wider range of factors in making a property order, the legislation may have been seen to be equating de facto couples with married couples, and may have jeopardized the passage of legislation through Parliament.

been unable to rely on family law cases as precedents. As a result, property orders have been made which differ significantly from similar cases dealt with under the *Family Law Act*. Here again, a qualification as to duration or circumstance must be met to enliven the property adjustment provisions.[13]

The third method, adopted in the Australian Capital Territory and South Australia, falls between the first two. While these statutes do not mirror the *Family Law Act* to the same extent as Tasmania, Queensland and Western Australia, the courts consider a greater range of matters than can be considered under the earlier statutes. Both statutes direct the court to consider 'such other matters, if any, as the court considers relevant'[14] and 'other relevant matters'.[15] Again, duration and other conditions are imposed on qualification.[16]

Type of de facto relationship protected

In the Northern Territory, South Australia and Tasmania, only heterosexual relationships are covered. More recent statutes in Victoria, Western Australia and Queensland extend to heterosexual and homosexual relationships.[17] In the Australian Capital Territory and New South Wales, the position is even wider. In 1999, New South Wales amended its *De Facto Relationships Act 1984* – renaming it the *Property (Relationships) Act 1984* – and expanded its coverage beyond 'de facto relationships' to 'domestic relationships', defined as either a de facto relationship,[18] or 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

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13 See for example the *Property (Relationships) Act 1984* (NSW) s17.

14 *Domestic Relationships Act 1994* (ACT) s15(1)(e).

15 *De Facto Relationships Act 1996* (SA) s11(1)(d).

16 In South Australia the duration requirement is three years unless there is a child of the relationship: *De Facto Relationships Act 1996* (SA) s9(2)(c); and similarly in the Australian Capital Territory, it is two: *Domestic Relationships Act 1994* (ACT) s12.

17 *Property Law Act 1958* (Vic) s275(1). The Victorian position was amended in 1999 to extend its coverage to people living in a 'domestic relationship', which is defined to mean 'the relationship between two people who, although not married to each other, are living or have lived together as a couple on a genuine domestic basis (irrespective of gender).' Similarly, the Queensland legislation defines de facto spouse as 'either 1 of 2 persons, whether of the same or the opposite sex, who are living together as a couple': *Property Law Act 1974* (Qld) s260(1).

18 While not directly referring to couples of the same or opposite sex (or similar words), s4 defines 'de facto relationship' in words broad enough to encompass same sex couples.

support and personal care.[19] Similarly, the Australian Capital Territory statute defines domestic relationship as 'a personal relationship (other than a legal marriage) between 2 adults in which 1 provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a *de facto* marriage.'[20] As we will see later, it is significant that despite these two statutes applying to a wider class of claimant, cases involving claims by a person formerly in a domestic relationship are rare.

2. Why a uniform position for de factos throughout Australia is desirable

There are good reasons for having a uniform scheme that applies to de facto couples across Australia. Equity of treatment is secured, forum shopping is avoided, extra-territorial limits are overcome, and resources are not wasted on jurisdictional issues. These justifications have proved strong enough to motivate the States and Territories' Standing Committee of Attorneys-General to agree to refer their legislative power to the Commonwealth regarding heterosexual and homosexual de facto couples, enabling the Commonwealth to enact legislation over de facto couples.[21] The Commonwealth has indicated its acceptance of the referral regarding heterosexual de factos, so that uniformity regarding them can be achieved.[22] However, the Commonwealth Attorney-

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19 *Property (Relationships) Act 1984* (NSW), s5(1). Section 5(2) goes on to exclude some categories from the ambit of the definition.

20 *Domestic Relationships Act 1994* (ACT) s3(1). Unlike the New South Wales legislation, however, the statute does not define the term 'de facto marriage'.

21 At the November 2002 meeting of the Standing Committee, agreement was only reached in principle, because Victoria's government was in caretaker mode and could not approve the proposal. Formal agreement requires unanimous vote of State, Territory and Commonwealth governments: CCH Australia, 'De facto relationship law – States agree in principle to refer power to Commonwealth', 11 November 2002, <http://www.cch.com.au/fe_news.asp?document_id=28061&topic_code=2>.

22 Under the Commonwealth Constitution, the Commonwealth Parliament has power to legislate about matters on which States refer their legislative powers to the Commonwealth: s51(xxxvii). Either as individual States or as a coalition of States, States have in the past referred their legislative powers to the Commonwealth to secure consistency across jurisdictions in areas governed by legislation where consistency is desirable. Examples of referrals of State power include the referral of power in the family law domain, demonstrating the desirability of uniform legal regulation of family law. The States referred their legislative power regarding the maintenance, custody and guardianship of ex-nuptial children: *Commonwealth Powers (Family Law – Children) Act 1986* (NSW), with counterparts in 1986 (Vic), 1986 (SA), 1987 (Tas), 1990 (Qld). The Corporations Law is another example of jurisdictions acting together to ensure consistent legislation operating throughout Australia. Australian Law Reform Commissions are also currently reviewing succession laws with a view to enacting consistent regime.

General has so far rejected the States' referral regarding homosexual de facto couples.[23] Since agreement exists regarding heterosexual de facto couples, we will simply summarize the case for uniformity here, taking it as a point of departure for the argument concerning homosexual de facto couples.

Equity of treatment

There are no relevant jurisdiction-specific differences that justify different legislative provisions across States and Territories. The reason for this is that in this context, the major interests law must satisfy are the parties' economic interests. As well, the large number of breakdowns of de facto relationships means that the incidence of unjust results is not so small that it could be excused on grounds such as the logistical difficulty of changing the law. This is an overriding consideration of justice since there are now so many de facto couples, and because the number of couples is increasing (with a likely increase in the number of breakdowns).

Injustice is created by statutory inconsistencies, especially concerning whether prospective needs are considered. Different outcomes are produced for de facto couples in different jurisdictions. Particularly unjust results are created in cases where the party seeking an adjustment has been the homemaker who has left employment to raise children, has not contributed to the relationship directly in a financial sense, and whose partner has remained employed and accumulated assets in his or her name only. In Queensland, the court considers the same circumstances as if the homemaker were married, including the parties' respective financial positions, future needs and any other circumstances the court considers appropriate to take into account.[24] However, in New South Wales, future needs are not considered. The applicant would clearly receive a more favourable property settlement in Queensland.

Forum shopping

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23 A Hodge, 'Family court bias is 'homophobic' ', *Weekend Australian*, 27-28 July 2002, 7. A spokesperson for the Commonwealth Attorney-General is reported to have said that 'the Commonwealth regards same-sex couples as being in a different situation to heterosexual couples': 'Gay couples left out of court shift', *The Age*, 8 March 2002.

24 *Property Law Act 1974* (Qld) s306.

The product of inconsistent legal positions is not only the creation of economic injustice. In pursuing their economic interests, applicants may understandably attempt to bring proceedings in the most accommodating jurisdiction. It is not uncommon for couples to settle in more than one place during the course of their relationship. A former de facto partner therefore may be able to satisfy the relevant nexus requirements of more than one de facto relationships statute. Suppose a de facto couple live in New South Wales for 5 years, then move to Queensland for a further 5 year period. They separate, the de facto wife returning to New South Wales while the de facto husband remains in Queensland. The de facto wife wishes to apply for a property adjustment order. An application can be brought in New South Wales only if either or both parties lived in New South Wales on the day the application was made, and if both parties lived in New South Wales for a substantial period of their relationship,[25] or made substantial contributions of a specified kind.[26] In this example, the nexus requirements would be met.

Unlike most other jurisdictions, Queensland's statute does not contain an express nexus requirement. Therefore, the common law 'clearly inappropriate forum' test applies.[27] Here, it is likely that the de facto wife would also satisfy the common law test applicable in Queensland, so could commence proceedings there. Her legal advisor therefore would need to consider the likely outcomes in each jurisdiction, and predict which jurisdiction would offer the most favourable property order. If the de facto wife were the homemaker with substantial future financial needs, whose income earning capacity had been affected by the relationship, Queensland would be the preferred forum.

It is undesirable for litigants to forum shop in this manner. At the very least, it brings the legal system into disrepute in the eyes of the community. It defies principles of justice that an applicant should receive different treatment depending on the jurisdiction.

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25 'Substantial period' means a period equivalent to at least one-third of the duration of the relationship: *Property (Relationships) Act 1984* (NSW), s15(2).

26 *Property (Relationships) Act 1984* (NSW), s15(1).

27 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. This test has been applied in the family law context: *Henry v Henry* (1995) 185 CLR 571; *In Marriage of Gilmore* (1993) 16 Fam LR 285; *Ferrier-Watson and McElrath* (2000) 26 Fam LR 169.

Litigants should be entitled to receive comparable or consistent outcomes regardless of the jurisdiction.

Extra-territorial limitations of court powers

The powers conferred on courts under the various statutes are generally extensive.[28] However, difficulties may arise where the parties have real property outside the jurisdiction in which the application to adjust property interests is brought. In a case where a couple resides for substantial periods of their relationship in more than one jurisdiction, it is possible that real property has been acquired in each jurisdiction. If the application to adjust property interests is brought in Queensland, the court may want to order that both the New South Wales and Queensland properties be sold and the proceeds be divided between the parties in a specified way. While such an order will be binding on the parties themselves, if the party owning the real property in New South Wales fails to comply with the order, enforcing the order to sell is likely to be more complicated and therefore more costly for the enforcing party than if the real property were located in Queensland. These costs could be avoided if a uniform approach were taken to de facto relationships reform.

Resources wasted on jurisdictional issues

Where the laws of the States and Territories differ and there is scope for an application to be brought in more than one jurisdiction, establishing and enforcing property rights has the potential to be time-consuming, complex and costly. First, the legal practitioner will need to advise the client on the range of possible outcomes under the various legal regimes that could potentially govern the matter. Second, in the scenario suggested earlier, just as it may be more advantageous for the de facto wife to bring the application in Queensland, it may be in the de facto husband's interest for the matter to be determined in New South Wales. If the nexus requirements of the New South Wales legislation are met, the respondent may wish to challenge the Queensland Court's

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[28] *Property (Relationships) Act 1984* (NSW), s38; *Property Law Act 1958* (Vic), s291; *De Facto Relationships Act 1991* (NT), s37; *Domestic Relationships Act 1994* (ACT), s25; *De Facto Relationships Act 1996* (SA), s10; *De Facto Relationship Act 1999* (Tas), s30; *Property Law Act 1974* (Qld), s333.

jurisdiction and contend that New South Wales is the appropriate forum in which to bring the application. Third, depending on the facts of the case, there may be legal argument about which law the court should or is able to apply, and the extent of its power should assets be located out of the jurisdiction. Determination of such jurisdictional issues incurs cost to both parties, which would be avoided under a uniform system where the place of commencing proceedings is immaterial. Finally, if the order relates to assets outside the jurisdiction, additional expense in registering that judgment elsewhere may, in some cases, need to be incurred.

Arguments for a uniform legal framework are compelling, and the existing regime cannot be supported because it does not deliver consistent and just results. Agreement to the referral of legislative power by the States and Territories demonstrates this. Debate should now focus on the model designed to replace the current situation.

3. Why the legal protection of married couples' economic interests on relationship breakdown should be extended to de factos

We argue that the uniform scheme should adequately protect economic interests and should therefore replicate the *Family Law Act* provisions, which already operate in three States. The recognition of nonfinancial contributions and the consideration of future economic needs are necessary elements of a justifiable scheme for de factos, for the same reasons as they are required components of the scheme applying to married couples. For relevant purposes in this context – the protection of economic interests, and the promotion of justice – individuals in de facto relationships possess interests identical to married couples. The same point applies in diverse legal areas such as insurance, taxation, social security, and succession. Law's task is, wherever possible, to treat the legal, social and economic interests of individuals in de facto relationships with the same justice as it treats the interests of individuals in marriages. Law must be able to provide justifiable economic outcomes for the parties on the breakdown of their relationship, including the provision of justifiable adjustments to property interests.

There may be some opposition to this stance. It is recognized that there are arguments for maintaining a general legal distinction between the treatment of de facto couples and married couples. There is an argument that marriage should be protected as a socially beneficial institution, that to treat de facto relationships equally would endorse them as being of equal merit to marriages, and that law should promote marriage for society's benefit.[29] We disagree with this position. First, religious views about the formalization of a relationship should not be imposed on citizens because to do so infringes the individual's freedom of religion. Second, marriage does not necessarily confer maximum benefits on either the individuals in it, their children (if any), or society. It is the substance of a relationship that matters rather than its form. We agree with other commentators that the quality and durability of a relationship and of any parent-child relationships that may spring from it (noting that more and more couples are not having children now),[30] are a product of the individuals' qualities and the qualities of their relationship, not whether their commitment has been solemnized in a marriage ceremony.[31] Evidence from the Australian community indicates that the majority of people agree with this view.[32] Rather than relying on the imagined advantages of a marriage ceremony to secure strong, satisfying, durable relationships, far more could be achieved to enhance the qualities of adult relationships and parent-child relationships by educating children and adults about them and encouraging the development of personal and emotional attributes that contribute to high quality relationships. Third, it is the law's function to remedy injustices suffered by individuals, and these remedies should not be withheld from those who choose not to accept a particular religious value. The interests

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29 See for example, New South Wales Law Reform Commission, Report 36, *De Facto Relationships*, 1983, [5.49-5.50]: http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R36CHP5. See also L Waite, 'Does marriage matter?' (1995) 32 *Demography*, 4, November, 483-507.

30 The fertility rate has declined from 1.91 children per female in 1991 to 1.75 in 2001: Australian Bureau of Statistics, *Australian Social Trends 2002 Family – National summary tables*, <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad4…/ea57eeffc3a6f5ebca256bcd008272e6!OpenDocument>.

31 See for example E Evatt, R Watson and D McKenzie, 'The Legal and Social Aspects of Cohabitation and The Reconstituted Family as Social Problems' in J Eekelaar and S Katz (eds) Marriage and Cohabitation in Contemporary Societies, 1980, 399, cited in the New South Wales Law Reform Commission, Report 36, *De Facto Relationships*, [5.44].

32 D De Vaus, 'Family Values in the Nineties', (1997) 48 *Family Matters*, Spring/Summer, 5, 7.

protected by the law's remedies here are not dependent on religious affiliation but on economic and personal circumstance.[33]

There is an argument that de facto couples might not want the *Family Law Act* scheme applied to them, it being predicated on a somewhat different image of a relationship. This is the freedom of choice argument: that it is not just to force the laws of marriage on those who have not chosen them.[34] However, this objection is easily accommodated. Any de facto couple who want to determine their own distribution of property on relationship breakdown are free to do so. The legislation does not automatically apply to determine the distribution of property, but is merely an avenue of relief when a disadvantaged party is denied a just outcome. The purpose is to remedy particular injustices and hardships; in this context, to parties in relationships marked by role division whose economic interests are jeopardized, and to parties whose contributions to the relationship may not be adequately recognized. The legislation is not intended to equate de facto couples with married couples for all purposes. Moreover, three jurisdictions already have seen fit to adopt the *Family Law Act* scheme. A defendant who is the subject of a property adjustment order in any of the three current jurisdictions, or under the envisaged scheme, may well be disgruntled with the rights of the weaker party being protected, but this is not a reason to deny justice to those in need of it.

Finally, we accept that there do tend to be some sociological differences between the two relationships. Evidence suggests that de facto relationships are less stable than marriages, that couples are less likely to pool financial resources, and that de factos are more likely to have egalitarian views of gender roles and division of labour.[35] However, these differences do not merit denying redress to de facto individuals who need it. The argument remains that in this context it is the primacy of economic interests and the interests of justice that are the relevant interests law must respond to. For relevant

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33 New South Wales Law Reform Commission, Report 36, *De Facto Relationships*, above n 29, [5.45-5.47].

34 Ibid [5.51-5.55]. It is doubtful whether marrying couples 'choose' the laws applying to them, in any case: see R Parker, 'How partners in long-term relationships view marriage', (2000) 55 *Family Matters*, Autumn, 74, 80.

35 H Glezer, 'Cohabitation and Marriage Relationships in the 1990s', (1997) 47 *Family Matters*, Winter, 5, 6-8.

purposes, the sociological differences in some de facto relationships from the archetypal marriage do not detract from this argument for uniformity. Qualifying *de facto* couples are in *fact* a couple, one of whom in particular will sometimes possess identical interests and circumstances to those activating the *Family Law Act* provisions. True, the de facto relationship will lack the *de jure* formal status of marriage that comes from participation in a ceremony, but the relevant substantial interests are the same. Moreover, there are undoubtedly many de facto relationships that more closely conform to the image of a 'marriage' than do many marriages. The fact that some de facto relationships, of whatever sexuality, have different features of role division and dependency to that envisaged of a 'traditional' marriage does not detract from the argument that some individuals in these de facto relationships need to have their economic interests protected by law.[36] The interests of those without this need are not unjustifiably affected.

For these reasons we conclude that on this issue, the scheme for de factos should mirror that applying to married couples, since the relevant interests of the disadvantaged parties are the same as their married counterparts' interests. The next major issue that arises is whether the new scheme should apply to homosexual de facto relationships.

4. Should the new uniform regime apply to homosexual de facto couples?

The referrals of legislative power demonstrate that the States and Territories agree the most justifiable approach is to create uniform treatment for all de facto couples. Furthermore, legislation in Victoria, New South Wales, Queensland, Western Australia and the Australian Capital Territory already places homosexual de facto relationships on equal terms with heterosexual de facto relationships.

By excluding homosexuals from the scheme, the Commonwealth promotes a divisive position, which creates economic injustice and inequality, as well as potentially

[36] Other commentators have noted this point: see for example J Millbank, 'The De Facto Relationships Amendment Bill 1998 (NSW): The Rationale for Law Reform, (1999) 8 *Australasian Gay and Lesbian Law Journal*, 1, 11; S Boyd, 'Expanding the "Family" in Family Law: Recent Ontario Proposals on Same Sex Relationships', (1994) 7 *CJWL/RFD*, 545, 552.

contributing to anti-homosexual sentiment. The Commonwealth has not justified its position, except to say that different considerations apply to same-sex couples (without explaining why).[37] This silence may be explicable because, beyond being motivated by bias against homosexuality, it is difficult to produce good reasons for granting justice to one group of de facto couples, but not to another, purely on the basis of their sexuality. The silence of the Australian Government about its preference for heterosexuals and its disparate treatment of homosexuals is all the more confronting when compared with the recent New Zealand legislative initiatives in this context. The *Property (Relationships) Act 1976* (NZ), from 1 February 2002, puts all de facto couples, whether heterosexual or homosexual, in the same position as married couples for the purposes of property distribution on the breakdown of a relationship.[38] The decision of the New Zealand Parliament to include de facto couples (of whatever sexuality) in the property division regime was achieved by a slender majority of four votes. Significantly, after that decision, the vote to include homosexual de facto couples in the regime was achieved by an overwhelming majority of 41.[39]

This development in New Zealand continues a trend that is emerging both overseas and in Australian States and Territories. In many European countries, the economic interests of de facto couples are protected, with no discrimination based on sexuality.[40] In the

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37 See above, n 23.

38 The definition of de facto couples expressly includes both heterosexual and homosexual couples: s2D(1). New Zealand's position promotes a starting point of equality: save specified exceptions, the *Property (Relationships) Act 1976* provides that spouses share equally in the matrimonial home and family chattels on the breakdown of the marriage. The stated purpose of the legislation is to recognize the equal contribution of husband and wife to the marriage, and of the de facto partners to the de facto relationship; and to provide for a just division of the relationship property when the relationship ends by separation: *Property (Relationships) Act 1976* (NZ) s1M. Section 1N defines the principles guiding the achievement of these purposes: men and women have equal status, and their equality should be maintained and enhanced; all forms of contribution to the marriage partnership, or the de facto relationship partnership, are treated as equal; a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or de facto partners arising from their marriage or de facto relationship or from the ending of their marriage or de facto relationship; and questions about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

39 See B Atkin, 'Property Changes in New Zealand', (2001) 15 *Australian Journal of Family Law*, 90, 90-91.

40 Many European countries have a statutory regime to protect economic interests, under which couples may choose to register their relationship, including Denmark, Norway, Iceland, Finland, Germany, Luxembourg, the Netherlands, France, Belgium, Sweden and Hungary: see L Wardle,

United Kingdom, two Private Members Bills have recently been introduced, both providing for the registration of heterosexual and homosexual non-married relationships, with attendant legal rights and obligations.[41] In Canada, a recent Nova Scotia Court of Appeal decision held that legislation excluding unmarried couples from statutory rights to division of family property on relationship breakdown violated the Canadian Charter of Rights and Freedoms because it discriminated against de facto couples on the basis of marital status.[42] As well, there are numerous other examples of legislation in Australian States that recognize homosexual de facto relationships and treat the individuals in them in the same way that individuals in heterosexual de facto relationships are treated.[43]

'Same-Sex Marriage and the limits of Legal Pluralism', in J Eekelaar and T Nhlapo (eds) *The Changing Family: International Perspectives On The Family And Family Law*, 1998, Hart, Oxford, 381, 386-387; see also generally I Lund-Andersen, 'Cohabitation and Registered Partnership in Scandinavia: The Legal Position of Homosexuals', in J Eekelaar and T Nhlapo (eds) *The Changing Family: International Perspectives On The Family And Family Law*, 1998, Hart, Oxford, 397. In most of these countries, the legislation regulates property distribution should the relationship end, with the statutes differing in the extent to which the provisions reflect the legal position for married couples. Consequences of registration attach only if the couple chooses to register, so a partner in an unregistered relationship will not enjoy the same property rights. This optional model preserves the autonomy of the couple to choose how it wishes to be treated - as a married couple, registered couple, or unregistered couple. A defect is that those in unregistered relationships may suffer injustice on the relationship breakdown.

41 The *Relationships (Civil Registration) Bill*) and the *Civil Partnerships Bill* respectively. For a summary of the current position in the United Kingdom and a discussion of reform options, see House of Commons Research Paper 02/17, 'The *Relationships (Civil Registration) Bill* and the *Civil Partnerships Bill*', 19 March 2002. The Law Society has also proposed reform, advocating a two-tier system: couples of any sexual orientation who register are conferred with rights and obligations akin to married couples: 'Cohabitation: The case for clear law; Proposals for Reform', July 2002. Under the Society's proposals, non-registering couples would also be entitled to obtain an adjustment of property and financial rights on the breakdown of their relationship, although not to the same degree as if their relationship were registered. The Solicitors Family Law Association also urges legislation conferring rights on couples on relationship breakdown: Solicitors Family Law Association Fact Sheets, 'Reforming the law on cohabitation': <http://www.sfla.co.uk/factsheetdisplay>.

42 *Walsh v Bona* (2000) 186 DLR (4th) 50. This decision has been appealed and the decision is pending. If the decision is upheld, then presumably family law statutes will need to be amended to extend property rights to heterosexual and same sex de facto couples. Although this point has never before been tested in the Supreme Court, two earlier decisions of the Court suggest that the appeal may not succeed. In 1995, the Court held in *Miron v Trudel* [1995] 2 SCR 418 that insurance legislation in Ontario that required insurers to extend automobile accident benefits to husbands and wives of insured persons but not de facto couples violated the constitutional prohibition on discrimination on the basis of marital status. In 1999 in *M v H* [1999] 2 SCR 3, considering entitlement to spousal support under the Ontario *Family Law Act*, the Court held that the term 'de facto relationship' could not exclude same sex couples as this also breached the Canadian Charter. As a result, the Ontario legislation was amended to include same-sex couples.

43 See, for example, *Interpretation Act 1984* (WA) (new s13A(3)); *Statute Law Amendment (Relationships) Act 2001* (Vic); *Industrial Relations Act 1999* (Qld); *Domestic Violence (Family Protection) Act 1989* (Qld); *Victims Compensation Act 1996* (NSW); *Administration and Probate*

Underpinning these developments regarding the property rights of homosexuals is a core legislative commitment to individuals' equality before the law. State legislation in all Australian jurisdictions prohibits discrimination against individuals on the basis of their lawful sexual activity or sexual orientation.[44] It is no longer acceptable to discriminate purely on grounds of sexuality without other compelling justification. All these recent legislative positions are motivated by recognizing empirical evidence of the incidence of homosexual de facto relationships, and by accepting the responsibility to make justifiable legislative provision for those individuals' interests.

Because of their acceptance of the need to provide legal equality wherever possible to homosexual people, the States have condemned the Commonwealth's position.[45] Victoria's Attorney-General, Rob Hulls, attacked the Commonwealth position as promoting prejudice against homosexuals in the face of State efforts to eradicate discrimination, citing Victoria's extensive legislation (over 40 statutes) ending discrimination on grounds of sexuality. Queensland's Attorney-General, Rod Welford, thought the Commonwealth's position created manifest discrimination and injustice: 'to deny the existence of same-sex couples in permanent domestic relationships is a nonsense and grossly unjust.'[46]

Act 1929 (ACT). The *Acts Amendment (Lesbian and Gay Law Reform) Act 2001* (WA) (assented to on 17 April 2002, to commence on proclamation) amended the following statutes in Western Australia: *Interpretation Act 1984* (the new s13A provides that for all Western Australian statutes, 'de facto relationship' includes couples of the same sex); *Administration Act 1903*; *Adoption Act 1994*; *Artificial Conception Act 1985*; *Births, Deaths and Marriages Act 1998*; *Cremation Act 1*929; *Equal Opportunity Act 1984*; *Family Court Act 1997*; *Guardianship and Administration Act 1990*; *Human Reproductive Technology Act 1991*; *Human Tissue and Transplant Act 1982*; *Inheritance (Family and Dependants Provision) Act 1972*; *Law Reform (Decriminalisation of Sodomy) Act 1989*; *Members of Parliament (Financial Interests) Act 1992*; *Parliamentary Superannuation Act 1970*; *Public Trustee Act 1941*; *State Superannuation Act 2000*.

44 *Equal Opportunity Act 1995* (Vic) s6(d) and (l); *Anti-Discrimination Act 1991* (Qld) s7(l); *Anti-Discrimination Act 1977* (NSW) s49ZG; *Equal Opportunity Act 1984* (SA) s29(3); *Anti-Discrimination Act 1998* (Tas) s16(c) and (d); *Anti-Discrimination Act 1992* (NT) s19(c); *Discrimination Act 1991* (ACT) s7(1)(b). The *Equal Opportunity Act 1984* (WA) has recently been amended by the *Acts Amendment (Lesbian and Gay Law Reform) Act 2001* (WA) to have a similar effect: see, for example, s35O.

45 Hodge, above n 23.

46 Ibid.

The Commonwealth is caught in a trap. Its willingness to extend the current position for married couples to heterosexual de facto couples is a forced concession, motivated not just by pressure from the States, but also by the lack of good reasons not to provide a just and equal system for heterosexual individuals in de facto relationships. If legislation is not extended to heterosexual de facto couples, the Commonwealth is permitting discrimination against people on the basis of their marital status to produce manifest injustice, with no substantive or defensible advantage.[47] So, the Commonwealth accepts that it is justifiable and desirable to treat heterosexual de facto couples in the same way as it treats married couples to protect individuals' economic interests on the dissolution of a relationship.

Once this position is reached, the Commonwealth has no defensible position excluding homosexual individuals from the regime. Extending the system for married couples to heterosexual de facto couples implicitly accepts that it is unjust that de facto couples be treated in a way differently from married couples when that system creates injustice. It also accepts that the function of the law here is to promote just economic outcomes when relationships break down, and that this function should be extended to all couples in relationships of a certain quality and duration, regardless of their marital status. The consequence of this position is that if it is just to place heterosexual de facto couples in the same position as married couples for this purpose, then it is also just to place homosexual de facto couples in that position. The reason for this is that the sexuality of the two people in the de facto relationship is irrelevant to their economic needs and justifiable entitlements under a just legal scheme when their relationship breaks down. If the Commonwealth restricts the legislation's application to heterosexual de facto couples, then it is making an irrelevant discriminatory distinction based solely on lawful sexual activity. It would be just as unjustifiable for the Commonwealth to restrict the regime to individuals in de facto relationships who are left-handed.

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[47] Section 6 of the *Sex Discrimination Act 1984* (Cth) prohibits discrimination against people on the basis of their marital status; although due to its plenary legislative power the Commonwealth is entitled to enact legislation that is inconsistent with earlier legislation, the Commonwealth would be offending the spirit of its own anti-discrimination legislation.

Such a discriminatory distinction produces injustice because the economic interests of parties on the breakdown of a relationship are identical regardless of their sexuality. The purpose of the law in this context is to provide an equitable regime for property distribution and adjustment on the breakdown of relationships. If people in a particular group are excluded from a justifiable regime and are left to suffer inappropriate outcomes in contrast to their counterparts because of the irrelevant consideration of different sexuality, then the law is unjust. Such a legal position would fail crucial tests of a law's justifiability, which is to promote social welfare, and to provide consistency amongst like individual cases.[48]

A rights-based argument for extending the scheme to homosexuals

To safeguard the economic interests of vulnerable parties, to simplify the application of law, and to achieve further legislative and community acceptance of homosexuality are themselves sufficiently important reasons for extending the regime to homosexuals. However, there is an even stronger, more fundamental reason for doing so. As the guardians of a liberal democracy, the Australian Government claims to promote liberal ideals such as justice, freedom, individual rights, and equality before the law. It has a responsibility to uphold these ideals in its legislation and policies unless there is a competing interest or obligation that can justifiably be preferred. If a fundamental right such as the right to be treated as an equal is to be interfered with, then that interference must be demonstrably justifiable. Here, the Commonwealth's preferred approach involves an unjustifiable incursion on the fundamental rights of some economically vulnerable individuals in a liberal society; that is, those in homosexual de facto relationships who may suffer unjust economic outcomes, in contrast to their heterosexual or married counterparts.[49]

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[48] Other commentators have also noted this point: see, for example, R Bailey-Harris, above n 15, 263. Bailey-Harris thinks that the same model of property division should apply to all cohabitation relationships whether married or de facto, because of the core need the law must address: justifiable economic outcomes in light of the characteristics of the relationship, the contributions made by the parties to it, and their relative positions at its end. See too R Bailey-Harris, 'Financial Rights in Relationships outside Marriage: A Decade of Reforms in Australia' (1995) 9 *International Journal of Law and the Family* 233, 240-253.

[49] When the New South Wales legislation was being discussed in 1999, the Attorney-General Jeff Shaw said 'In an open and liberal society there is no excuse for discrimination against individuals in our community based on their sexual preference. To deny couples in intimate and ongoing

A central tenet of liberalism is that all individuals have rights, including the right to be treated as political equals. For Ronald Dworkin, the prominent liberal scholar, the essential characteristic of political institutions that claim to respect individuals' rights is that they accept the human dignity and political equality of all individuals.[50] For Dworkin, respecting human dignity presupposes that it is unjust to treat someone as less than a full member of the human community. To achieve this respect for human dignity and political equality, Dworkin emphasizes every individual's fundamental right to be treated with equal concern and respect.[51] Taking these rights as a starting point, in this context we can draw some strong conclusions about what position a liberal government can and cannot justifiably assume.

The right to be treated with concern means that the State must treat its citizens as human beings who are capable of suffering and frustration.[52] The right to be treated with equal concern means that the State must not distribute goods or opportunities unequally on the basis that some citizens are entitled to more of something because they are worthy of more concern. The State must not treat people unequally purely on the ground that one conception of the good life is superior to another.[53]

Related with this right to equal concern is the right to be treated with respect. This embodies the liberal promise that the individual's private life and private choices are best decided by the individual. The right to be treated with respect means that the State must

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relationships within the gay and lesbian community the same rights as heterosexual de facto couples is clearly anomalous': cited in Hon Justice M Kirby, 'Same Sex Relationships – Some Australian Legal Developments', (1999) 19 *Australian Bar Review* 4, 10.

50 R Dworkin (1977) *Taking Rights Seriously*, Duckworth, London, 198-199. See also R Dworkin (1985) *A Matter of Principle*, Harvard University Press, Cambridge, 187-192, 359-372.

51 Since this argument, Dworkin has framed the right as being the right to equal concern: see, for example, R Dworkin (1986) *Law's Empire*, Belknap, Cambridge, 200-201; and more recently, R Dworkin (2002) *Sovereign Equality*, Harvard University Press, Cambridge, 1-2, 6-7. This rephrasing makes no substantive difference to our argument. In *Sovereign Equality*, Dworkin argues that the right to equal concern is respected if government adopts laws and policies that ensure that citizens' fates are insensitive to who they otherwise are (homosexual, for example), as far as possible; and, if government attempts, as far as possible, to make citizens' fates sensitive to their choices: 6.

52 Dworkin, *Taking Rights Seriously*, 272.

53 Of course, some inequalities in goods and opportunities are necessary in a liberal state, but only when justified by some reason beyond individual difference in private life.

treat its citizens as human beings who are capable of forming and acting on intelligent conceptions of how to live their lives.[54]

As liberal theorists accept, coexisting with these objects is the necessity when justified for governments to create and permit inequalities in goods and opportunities and liberties.[55] Dworkin makes the useful distinction between two rights that could be viewed as part of the right to equal concern and respect. The right to equal concern and respect must include the fundamental right to be treated as a political equal, and it may also include the subsidiary right to equal treatment. These are two different rights, and the fact that homosexual individuals in this context possess both rights is significant.

In this context, individuals in homosexual de facto relationships have the right to be treated as political equals. This fundamental right of the individual to be treated as an equal is the right to be treated by the State with the same respect and concern as anyone else when the State is making a decision about how goods and opportunities are to be distributed. When a political decision is being made, those whose interests will be affected have the right that their interests will be considered, and their prospective loss be taken into account, in the process of deciding if the general interest is best served by the proposed position.[56]

Homosexual individuals have the right to be treated by the Commonwealth Government with equal concern and respect when it considers whether to extend the regime to them. Because of the right to be treated with equal concern, the Commonwealth must recognize and consider these individuals' capacity for economic and other suffering that will flow from an unfavourable decision. Because of the right to be treated with equal respect, homosexual individuals should not (without justifiable reasons) be excluded from receiving the benefits or opportunities made available to others simply because of their lifestyle. The Commonwealth Government must respect the self-regarding private lifestyle and choices made by these individuals; it cannot justifiably exclude homosexuals

54 Dworkin, *Taking Rights Seriously*, 272.
55 See, for example, *Taking Rights Seriously*, 273.
56 Ibid 273.

from the scheme due to this fundamental right of homosexuals to treatment as equals in this decision-making process.

As a right that may sometimes be derived from this fundamental right to be treated as political equals in the decision making process, the right to equal treatment is the right in a particular case to an equal distribution of an opportunity, resource or burden: for example, the right of every individual to one vote of equal value.[57] This right only crystallizes in some circumstances. For example, individuals do not have the right to actual equal treatment in the allocation of places in medical school; nobody can simply assert the right to receive a place in medical school.[58]

Here, we argue that homosexual individuals are entitled to actual equal treatment to that given to heterosexuals in the application of a legal scheme designed to protect economic interests. The argument for extending the scheme is all the stronger when one considers that the right to be treated with equal concern and respect here embraces the right to equal treatment as well as the primary right of treatment as a political equal. Consider two de facto couples of differing sexual orientation whose relationships have broken down. In each relationship, an economically disadvantaged party has identical economic interests and needs arising from an identical dispute. Treatment as political equals is achieved if, when designing the law that applies to each couple, the decision makers consider all the individuals who will be affected by the law with equal concern and respect. Equal treatment is achieved if both individuals have made available to them the same mechanisms and entitlements for resolving the dispute and securing their economic interests and needs. Here, the Australian Government is not treating its citizens with equal concern and respect. The Commonwealth is unjustifiably offending the right of individuals to treatment as political equals, and the right of individuals to equal treatment.

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57 Ibid 227.

58 The authors adapt this example from Dworkin's: see *Taking Rights Seriously*, 227.

Utility

Can the Commonwealth support its position by arguing that another reason overrides the defence of individual rights to equal concern and respect? The importance of individual rights in liberal society is that they overcome political decisions that are made without sufficient reason. Individual rights as political trumps[59] can only be justifiably interfered with when there is a collective community goal of sufficiently compelling urgency to deny the individual what their right demands (a justification of policy), or when a competing individual right can justifiably be preferred (a justification of principle).[60]

There is no competing individual right worthy of priority. Nor in this context is there a collective community goal sufficient to override the upholding of individual rights. If there was such an argument of policy, it would still have to be of sufficiently compelling weight to interfere with the individual's right to equality. Furthermore, because individual rights to political equality are being interfered with, having economic and social consequences, then the Commonwealth would be obliged to give reasons for its decision. Here, the Commonwealth has not explained its position; the only motive we can assume is that the Commonwealth holds what Dworkin terms an external preference. This preference is that homosexual individuals do not deserve equality in this context, but deserve to be treated in a less than equal manner, and so do not deserve to be included in the scheme.

A utilitarian basis for a policy may rely on the majority of individuals considering that a policy creates beneficial consequences for them personally. This self-regarding preference for a policy is motivated by the majority of individuals calculating the outcome of the policy for *themselves*; a personal preference.[61] If the majority's personal preference is about a matter of compelling urgency, that collective personal preference may be sufficient to justifiably override the right of an individual or group of individuals.

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59 Ibid xi.

60 Ibid 274.

61 On personal and external preferences, see *Taking Rights Seriously*, 234-238. The personal preference in effect says 'I myself want this for me. The external preference says 'I myself do not want those other people to have that.'

However, such a justifiable interference in the rights of individuals may not emanate from an external preference. An external preference is an individual's calculation about what benefits and outcomes flow from the policy to certain *others*.[62] Utilitarian arguments informed by external preferences, even the external preferences of the majority, do not justify policy because they treat individuals in the 'other' group with less than equal concern and respect. The external preference and the preferred policy is motivated not by a policy's direct impact on the individuals themselves, but because the alternative offends their view of others and their perception of another's way of life. In doing this, there is a breach of equal concern and respect for others.

Here, the Commonwealth's external preference appears to be being given weight, adversely affecting homosexuals because their personal lives are viewed with less respect by parties whose own personal interests are not directly engaged. To anyone holding the Commonwealth's view, it makes no personal difference if homosexuals in de facto relationships are able to resolve the economic issues on the breakdown of their relationship in the same way as do those in a heterosexual relationship. It merely offends their view of a desirable type of relationship if people in those relationships are treated in a certain way. By counting external preferences, the utilitarian argument for justified policy fails, because by counting irrelevant additional considerations it is not simply counting personal interests.

The Australian Government bears the onus of defending its position. Differential treatment requires compelling justification if it produces inequality. Rather than being a product of liberal ideals of equality before the law, the Commonwealth's position appears to be motivated by bias against the perceived inferiority of a minority group; by external preferences. This particular external preference against homosexuals has long been a hallmark of legal principle that, although diminishing with society's acceptance that homosexuality is a normal variant of human sexuality, still influences lawmakers.[63]

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62 Ibid 275.

63 See, for example, the discussion in M Thornton (1990) *The Liberal Promise*, Oxford University Press, Melbourne, 83-87.

Australia's obligations under international law

A final argument for the inclusion of same-sex de facto couples in the regime stems from international law's recognition of the unacceptability of bias against homosexuals. The Australian Government has obligations under international law to prevent such discrimination and injustice. The *International Convention on Civil and Political Rights* (ICCPR) promotes equality under the law and demands all individuals' equal entitlement to legal protection.[64] The ICCPR states in article 26 that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Article 2(1) secures the ICCPR's rights to all individuals without distinction of any kind.

A legislative scheme for property distribution applying to heterosexual de facto couples, but excluding homosexual de facto couples, is incompatible with the ICCPR because it creates unequal treatment solely on the basis of sexuality. The ICCPR contains no explicit prohibition on discrimination on the basis of sexual orientation.[65] However, there is judicial authority that the ICCPR's prohibition on the grounds of sex includes a prohibition on the grounds of sexuality. The 1994 decision of the United Nations Human Rights Committee (HRC), determining the application of Nicholas Toonen, an Australian citizen, held that the reference to 'sex' in articles 2(1) and 26 includes a reference to sexual orientation.[66]

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64 *International Convention on Civil and Political Rights*, done at New York, 19 December 1966, entry into force 23 March 1976, entry into force for Australia 13 November 1980. The ICCPR is appended to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) in Schedule 2. The *Universal Declaration of Human Rights*, adopted and proclaimed on 10 December 1948, promotes this same right in art 7.

65 However, there is a strong argument that the fundamental international instruments prohibiting discrimination on such grounds as race, colour, gender and religion are intended to prohibit discrimination on other grounds including sexual orientation. The reason for this is that these grounds in art 26 of the ICCPR are biological or genetic; as is sexual orientation – this reasoning was used by Wennergren in his individual opinion in *Toonen's Case*, cited below: Individual opinion, Bertil Wennergren, Appendix to Communication 488/1992. In fact, the grounds in art 26 are not all biological, as some are matters of individual preference, such as political opinion and religion. Only some of the listed characteristics are biological or genetic: race, colour, sex, national or social origin, birth.

66 Communication No 488/1992: Australia, CCPR/C/50/D/488/1992, paragraph 8.7. The Committee preferred this position to characterizing sexuality as falling within an 'other status' for the purposes of arts 2 and 26. The HRC did not consider whether art 26 had been breached here, as it

The applicant in *Toonen* sought a determination that relevant provisions of the Tasmanian Criminal Code that criminalized private homosexual activity between males contravened international instruments, and made him a victim of unlawful interference with his privacy and discriminated against his right to equal protection of the law. The ultimate purpose of gaining such a determination by the HRC was to pressure the Tasmanian and Commonwealth governments to repeal the legislation and guarantee the right to privacy in sexual activity. The HRC held that the right to privacy in art 2(1) had been interfered with. The Committee further held that adult consensual sexual activity in private falls within the concept of privacy, and that the applicant's privacy had been interfered with by Tasmanian legislation prohibiting private homosexual acts, despite the failure to enforce the legislation. In response to this decision, the Commonwealth enacted the *Human Rights (Sexual Conduct) Act 1994*, for the sole purpose of implementing Australia's obligations under the ICCPR art 17. Section 4 states that sexual conduct between consenting adults in private is not to be the subject of arbitrary legislative interference.

Other provisions of international law also inform an argument against the exclusion of homosexuals from the scheme. Article 5 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) provides that States must take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary practices that are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women.[67] In Australia in 2002, it is undeniable that the

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found a breach of arts 2(1) and 17(1) – these breaches entitled the applicant to a remedy – the effective remedy would be repeal of the relevant provisions; cf individual opinion of Wennergren.

[67] *Convention on the Elimination of All Forms of Discrimination against Women*, done at New York, 18 December 1979, entry into force 3 September 1981, entered into force in Australia 27 August 1983, art 5(a). This international legal instrument does possess domestic authority in Australian law as CEDAW has been incorporated into Australian law by being scheduled to the *Sex Discrimination Act 1984* (Cth). It should be noted, and the Commonwealth Attorney-General might claim, that this anti-discrimination legislation is not intended to extend to discrimination on the basis of lawful sexual activity. Indeed, the term 'de facto spouse' is defined in the *Sex Discrimination Act 1984* s4 in terms limiting the meaning to a heterosexual de facto couple. Yet even if art 5 of CEDAW is not intended to be directly incorporated into the *Sex Discrimination Act*

traditional custom of marriage as the dominant form of union of two adults has been eroded. In Australia's contemporary pluralistic society, it is neither appropriate nor morally justifiable for the State to confine legislative schemes intended to assist adults from dissolved relationships to stereotyped images of male and female in a traditional marriage unit. Any considered opinion about the diversity of adult relationships must accept that it is not the sexual preferences of the individuals that creates an intimate domestic relationship, nor their marital status. As property adjustment legislation demonstrates, it is the qualitative substance of the relationship that is the crucial factor.

5. Should the new uniform regime apply to other domestic relationships?

Different considerations are relevant in deciding whether uniform legislation should extend to relationships besides de facto couples. As we have seen, 'domestic relationships' are already regulated in the Australian Capital Territory and New South Wales. Other Australian jurisdictions, New Zealand and the European countries that have regulated in this area, limit their focus to de facto relationships. To assess whether a unified regime should govern this broader category of relationship, consideration should be given to what currently falls within the ambit of the existing models. It is helpful to focus on some hypothetical examples.

> A sister and brother have been living together for 40 years in a house that is in the name of the brother only. Both have been in paid employment all of their lives. The siblings have always combined their income and provided personal support to each other, although the sister had always assumed a much greater portion of the homemaking duties.

It is likely that this relationship would fall within the ambit of both the Australian Capital Territory and New South Wales statutes. There has clearly been domestic support and personal care provided by one or each of them, satisfying the New South Wales

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1984, it still has an impact in Australia under the common law. High Court authority has established that the ratification of an international instrument by Australia's executive government confers a legitimate expectation that the provisions of the instrument will be complied with; and furthermore, ratification gives a right of procedural fairness to parties who would be affected by an administrative decision contrary to the provision, namely, a right to argue against such a decision: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

legislation, and one has clearly provided the other with personal or financial commitment and support of a domestic nature for the material benefit of the other, satisfying the Australian Capital Territory legislation. If this relationship broke down and the sister were asked to leave the house, it is likely that the sister would be eligible to claim an order for an interest in the brother's property under either of these statutes. Indeed, due to the pooling of income and the greater performance of home duties, the sister may have a strong moral claim to an interest in the property.

Other cases can arise that are not as compelling. Suppose that every week, a woman visits her elderly next door neighbour to give him his weekly shopping and to clean his house. She has been doing this free of charge for 5 years. For many years prior to this, the man had mowed the woman's lawn, again without payment. In New South Wales, the woman would not be eligible to claim a property interest because there has been no cohabitation; ironically, if the elderly man invited her to share his house so that she could avoid rent payments, she would qualify despite them not living together as a couple. In contrast, as the Australian Capital Territory definition does not require cohabitation, it could be argued that this situation qualifies there as a domestic relationship. The woman has been providing material benefit to her elderly neighbour by personal commitment and domestic support. If the relationship breaks down, the woman may be eligible to claim an interest in the neighbour's property.

It is debatable if there are compelling social justice arguments to support the latter claim. The woman may have been motivated by different reasons: genuine concern, reciprocation of his kind deeds, or perhaps to be remembered in his will. Regardless of the woman's motivation and of whether her claim would be successful, it is questionable whether someone who passively accepts what he or she perceives as acts of kindness should later be subject to a property claim.

When considering new legislation, it is important to consider whether the initiatives of previous enactments, such as broadening the category of relationship regulated, have been successful. When amendments to the *De Facto Relationships Act 1984* (NSW)

were introduced into Parliament in 1999, there was little explanation about why the scope of the legislation needed to be broadened. It was not suggested that there was a particular class of relationship that was suffering injustice. The Attorney-General commented that the extension of the legislation to cover a 'broad range of intimate relationships' was 'necessary and desirable',[68] but gave no particulars of the relationships that were being subjected to hardship.

One indicator of whether the legislation needed to be broadened to encompass domestic relationships is the extent to which applications are brought by such people. Since the New South Wales legislation was amended in 1999, only one application to adjust property interests has been reported by a person claiming to be in one of these close personal relationships.[69] In the Australian Capital Territory, no applications have been made. While this may be explained on a number of grounds, for example, reluctance to bring an action because of uncertainty surrounding interpretation, or lack of knowledge of the law, it could also be that people in these relationships are not being disadvantaged.

When considering reform options in this area, the Queensland Law Reform Commission canvassed the possibility of legislation extending to 'sharers', a definition suggested by the Commission being 'persons who are sharing or who have shared property, including de facto partners, not being persons married to each other, who live or reside or have lived or resided together under the one roof, at least one of whom has made contributions of the kind referred to.'[70] Even at the early stages of its review, the Commission accepted that legislation was needed to remedy injustice in the context of those in de facto relationships. However, it was also concerned that people in other relationships could be disadvantaged in terms of property distribution on the breakdown of their relationship. The Commission gave an example of a situation in which it could be argued that the common law did not provide sufficient protection. A spinster daughter lives with and cares for her ageing and sick mother for 20 years in the mother's house. The daughter

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68 New South Wales Legislative Council Hansard, Second Reading Speech, Hon JW Shaw, 13 May 1999.

69 *Jurd v Public Trustee* [2001] NSWSC 632.

70 Queensland Law Reform Commission, Discussion Paper No 36, *Shared Property*, 1991, 26.

performs all domestic functions for her mother during that time. In the last 5 years, the mother's health deteriorates and the daughter gives up her job to care for her mother full-time. The mother turns against her daughter and orders her to leave the house.[71] The daughter would be defined as a sharer, and probably would satisfy the definitions in the Australian Capital Territory and New South Wales statutes.

In the Commission's later publications on de facto relationships reform, however, it recommended that legislation be limited to heterosexual and same sex de facto couples. The Commission's reasons included the already adequate legal remedies for non-de facto sharers, the fact that inherent differences between the de facto relationship and other sharing relationships warranted different regulation, and the view that it was doubtful whether the legislation would provide a logical jurisdictional basis for relief for non-de facto sharers; the Commission queried whether it was logical to limit relief to situations where the parties lived together.[72] The Queensland Parliament accepted these recommendations and embodied them in its amendment of the *Property Law Act 1974*.

The Law Commission of Canada took a different approach in its recent report, 'Beyond Conjugality',[73] preferring the view that the law should recognize and support a range of diverse adult relationships. The Commission concluded that while the law had been expanding to recognize non-married couples, there had been insufficient focus on other close personal relationships. It recommended a new approach when assessing existing or proposed laws that affect personal relationships. In the context of property distribution after relationship breakdown, the need for regulation or protection should not turn on the couple-like nature of the relationship; it would be too narrow to legislate to protect only conjugal or couple-like relationships. Academic commentators have also noted that there may be good reasons for the legal recognition of some non-conjugal relationships in certain cases, in particular, when the functional attributes of the relationship merit legal

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71 Ibid 14.

72 Queensland Law Reform Commission, Working Paper No 40, De Facto Relationships, 1992, 5-8.

73 Law Commission of Canada, 'Beyond Conjugality – Recognizing and supporting close personal relationships', December 2001.

protection. These functional attributes include co-residence, relationship duration, emotional interdependence and economic interdependence.[74]

This functional attribute argument is similar to our argument for extending the property adjustment scheme in the *Family Law Act* to de factos. We have argued that because in both marriages and de facto relationships the relevant substantive interest is identical (the economic interest of the weaker party), the law should apply equally to both types of relationship. Consistent with this argument, we also conclude that the authors of a new legislative scheme should at least consider the types of other domestic relationship that may exhibit identical functional attributes to qualifying de facto relationships, and which may therefore merit the same protection. Although domestic relationships with these attributes will be numerically fewer than de facto relationships, a clear argument can be made that some longstanding non-de facto domestic relationships may feature substantial economic and emotional contribution and interdependence. Whether cohabitation is required or not is an issue that would need to be considered; but the argument stands that if such a relationship possessed identical substantive interests to those protected in qualifying de facto relationships, the absence of conjugality and perhaps even of cohabitation should not preclude relief.

Conclusion: The Way Forward

The fact that de facto couples of any sexual orientation should be struggling to be treated in the same way as their married counterparts is itself a demonstration of the malleability of society's institutions. Until barely a decade ago, the common law in Australia and England entitled a husband to rape his wife.[75] Before that overdue advance, evolved individuals in de facto relationships would hardly have been clamouring to have the same position applied to them.

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74 See for example B Cossman and B Ryder (2001) 'What is Marriage-Like Like? The Irrelevance of Conjugality', 18 *Canadian Journal of Family Law* 269, 315-320.

75 The common law position set down in Sir Matthew Hale's *Pleas of the Crown* (1736) Volume 1, 629, reaffirmed as late as 1949 in *R v Clarke* (1949) 33 Cr App R 216 and in 1954 in *R v Miller* [1954] 2 QB 282, 291-292, was finally overturned in Australia in *R v L* (1991) 174 CLR 379, and in England in *R v R* [1992] 1 AC 599.

However, law has developed to recognize marriage as entitling its parties to certain rights within the relationship and when it breaks down. The substance of those entitlements is a matter for ongoing debate and refinement in the interests of justice to both parties. The extension of entitlements to parties to marriage needs to be placed in the context of the plasticity of our institutions, so that justice can be extended to individuals wherever appropriate. Given the reduced importance now placed on marriage, and because of its inherent limitations, epitomized by its restriction to heterosexual individuals, law must adapt to changing societal conditions in the same way that institutions like marriage have changed to accommodate increased awareness of women's rights.

There is no reason why law should protect the economic interests of parties to marriage, and deny that protection to individuals in de facto relationships who also possess those interests. The relevant interests of the parties are identical, and the law must respond to the economic substance of those interests, not to the form in which the parties have declared their relationship. It is unjust to make irrelevant distinctions based on the formality of the marriage ceremony, especially when such discrimination results produces injustice. For similar reasons, it is unjust not to protect the economic interests of those in homosexual de facto relationships. Australian States and Territories agree that a uniform regime should apply to de facto couples regardless of sexual orientation. The Commonwealth should accept this referral and legislate accordingly.

Other necessary features of an appropriate regime then follow. First, the legal framework must deliver certainty. With property matters under the *Family Law Act*, practitioners can advise their clients about a likely range of outcomes with a reasonable degree of confidence. This can be contrasted with the position that existed for many years under the New South Wales legislation. Predictability increases the likelihood of resolving the matter by way of negotiation. As well, if outcomes are predictable, less time should be spent in dispute and legal fees should be minimized.

Second, a regime should provide outcomes at minimum expense. The rules and procedures are pivotal to the regime's success. Different practices operate in the State, Federal and Family Court systems. Each set of rules is designed to streamline the passage of matters through the respective systems. Practices appropriate for resolution of one kind of dispute may not promote speedy resolution of other kinds of matters. Also, matters must be dealt with in the court best equipped to handle disputes.[76]

Third, the legal positions must deliver a just outcome to parties in all qualifying de facto relationships without distinction based on sexual orientation. Consideration should be given to other domestic relationships that also may warrant legal protection because of the presence of these interests. The legislation must allow courts to consider all relevant economic interests, including a prospective component. Caution should be drawn from the New South Wales legislation, which restricts the matters the court may consider. Despite persistent and creative judicial attempts to interpret the legislation in a liberal fashion,[77] the restrictive effect has prevailed.[78]

A regime that promotes these objects of certainty, economy and just outcomes is one that satisfies fundamental tests of law's justifiability. Moreover, a regime that applies to all individuals in qualifying de facto relationships, regardless of their sexual orientation, ensures that individuals are treated as political equals. These advances would safeguard

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[76] Again, we can learn from the New South Wales experience. In the early cases decided under the then *De Facto Relationships Act 1984*, for example, the New South Wales Supreme Court took a substantially different approach to valuing the homemaking contribution than that taken by the Family Court, a court specializing in personal disputes of this kind: see, for example, *Wilcock v Sain* (1986) 11 Fam LR 302 per Young J at 309 and 311; *Vichidovongsa v Camerson* (1987) DFC 95-055 at 75,619-75,620; *Brown v Byrne* (1987) 12 Fam LR 35. Compare the current approach of the New South Wales Supreme Court under which reliance can be placed on family law decisions: *Black v Black* (1991) 15 Fam LR 109 at 114; *Linich v Gatland* (1992) 15 Fam LR 596 at 609-610.

[77] See, for example, *Black v Black* (1991) 15 Fam LR 109 per Clarke JA of the New South Wales Supreme Court who suggested at 113-114 that '[b]eing remedial legislation it is to be accorded a beneficial construction'. The high water mark of liberal interpretation was that taken by Handley JA (with whom Priestley JA agreed) of the New South Wales Supreme Court in *Dwyer v Kaljo* (1992) Fam LR 645 where he suggested that the focus of the court should be to make a property adjustment order that was 'just and equitable' and, to do so, reliance and expectation interests of the party were relevant.

[78] In 1997, a specially constituted New South Wales Court of Appeal in *Evans v Marmont* (1997) 21 Fam LR 760 held (by a 3:2 majority) that a narrow interpretation of the legislation should be adopted, and that it was inappropriate to look at the injustice that an applicant may suffer because of his or her reliance on or expectations from the relationship.

the economic interests of a large and growing number of people, and they would embody and promote political equality for homosexual individuals. The Commonwealth Government has the opportunity to enact legislation that secures multiple economic and political benefits. It should accept this opportunity.