

## Executive Summary

1. There is a need for reform in Tasmania in relation to the rights and responsibilities of people in significant personal relationships other than marriage.
2. Reform in other jurisdictions of Australia has been inconsistent, however Tasmania has the opportunity to take the best elements from the different schemes and to improve upon earlier reforms in other States and Territories.
3. The three main options for reform are:
  - (a) Marriage for same-sex couples;
  - (b) Registration of significant personal relationships (including heterosexual and same-sex de facto relationships and broader significant personal relationships);
  - (c) De facto (presumptive) recognition of same-sex and broader significant personal relationships (either by amending individual pieces of legislation, amending the *De Facto Relationships Act 2000* (Tas) or enacting a new piece of legislation covering all significant personal relationships).
4. Although we generally support the model for reform found in the Significant Personal Relationships (No.2) Bill 1998 (Tas), the Bill as it stands is not acceptable due to recent developments in the law and deficiencies in the drafting of the Bill.
5. In our opinion, amending the *De Facto Relationships Act 2000* (Tas) to include within its scope same-sex partners and non-marriage-like partners is the most appropriate option for significant personal relationships reform in Tasmania. This could be combined with a system of registration at the same time or at a later date.

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## 1 Introduction

In 1998 the Significant Personal Relationships (No.2) Bill 1998 (Tas) was tabled in Parliament by the Tasmanian Greens and subsequently referred to the House of Assembly Select Committee on Community Development. The Bill is substantially the same as the Bill introduced in the NSW Parliament by Clover Moore in 1997. The dissolution of Parliament prior to the last election curtailed this inquiry before its conclusion.

Under the new Parliament the House of Assembly Community Development Committee was re-established with all new membership. The Committee received a reference from the Attorney-General to inquire into the need for the legal recognition of significant personal relationships. The Significant Personal Relationships (No.2) Bill 1998 (Tas) was not the focus of this inquiry. The Bill was however forwarded to the Committee by the Tasmanian Greens as part of their submission.

The Committee did not complete its inquiry before it was dissolved once again. The dissolution of the Committee this time was as part of the on going reform of Parliament as recommended by the Joint Select Committee on the Working Arrangements of Parliament. In its place a Joint Standing Committee with equal membership from both Houses was established.

This Committee has recently received a new reference from the Attorney-General to continue the inquiry into the need for the legal recognition of significant personal relationships in Tasmania. The Committee is to investigate issues associated with the legal recognition of significant personal relationships, including but not limited to the inclusion of same sex relationships in the *De Facto Relationships Act 2000* (Tas). Deliberations are also to include, but not be limited to, the legal status of significant personal relationships with respect to their impact upon:

- Financial issues including property division and maintenance after relationship breakdown;

- Employment entitlements and benefits, for example:- Superannuation, Industrial awards, etc;
- Succession and intestacy legislation;
- Rights as next of kin including circumstances of illness or death;
- Statutory compensation schemes, for example:- *Fatal Accidents Act 1934* (Tas), *Workers Rehabilitation and Compensation Act 1988* (Tas), *Motor Accidents (Liability and Compensation) Act 1973* (Tas), etc; and
- Any other relevant matter.

## 2 The changing concept of relationships

The term 'significant personal relationship' is not defined for the purposes of the terms of reference. It is a term taken from draft legislation where it refers to a relationship, other than a marriage, 'in which the parties mutually acknowledge their emotional interdependency, or the fellowship and support that each provides to the other, or both, and believe that the relationship will continue and are mutually committed to the relationship continuing'.<sup>1</sup> It is, nonetheless, useful to begin by exploring the concept of significant personal relationships at a broader level.

The Australian Concise Oxford Dictionary defines the words:

- **Significant** as '*having a meaning*'; '*noteworthy, important consequential*'.
- **Personal** as '*referring to an individual's private life or concerns*'.
- **Relationship** as '*a connection or association*'; '*an emotional (esp. sexual) association between two people*'; '*kinship*'.

Interpreting the terms 'significant' and 'personal' is quite straightforward. The term 'significant' indicates that the connection between the two people concerned must be

more than simply incidental or circumstantial. It must have some meaning and importance to both people involved. The term 'personal' indicates that associations in the public sphere (such as employment, sporting groups and corporations) are not included. Yet interpreting the term 'relationship' is more complex. When we wish to legally recognise particular kinds of relationships, we need to decide the basis upon which recognition is given.<sup>2</sup>

Traditionally the only basis on which significant personal associations were deemed to be legally recognised relationships were those based on the traditional concept of family (meaning blood relatives) and marriage (involving a publicly declared, long-term, sexual association between a man and a woman who lived together, and in which the wife was financially dependent on the husband).

As society has changed, so have the criteria on which the law is prepared to recognise significant personal associations. Initially legal recognition was extended to the types of significant personal associations that largely reflected the traditional family and marriage relationships. The two most obvious examples are the recognition of the relationships between a step-parent and step-children (arising from the increasing phenomenon of divorce and re-marriage) and the partners to a de facto marriage (arising from the fact that couples were choosing to live as man and wife without participating in a formal marriage ceremony).

These changes necessarily gave rise to a change in the bases on which significant personal relationships were deemed to be legally recognised. The public declaration of the relationship and blood ties were no longer crucial as the basis of what constituted a family. For example, the original de facto relationship legislation in New South Wales (enacted in 1984 and dealing, primarily, with property and maintenance entitlements) required the following criteria:

- A relationship between a man and a woman

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<sup>1</sup> Significant Personal Relationships Bill 1998 (Tas), cl 5(1).

<sup>2</sup> See generally, J Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?' (1998) *Australian Journal of Family Law* 99 at 128.

- Living together as husband and wife on a 'bona fide domestic basis'
- Although not legally married to one another.<sup>3</sup>

Again, as society changed and gradually became more aware of (in fact it is probably more accurate to say became more tolerant of) the existence of different types of significant personal relationships, such as those between people of the same sex, the criteria was again broadened. In 1999, the New South Wales definition of a de facto relationship was changed to incorporate the following criteria:

- A relationship between two adult persons
- Living together 'as a couple'
- Although not legally married to one another or related by family.<sup>4</sup>

What living together 'as a couple' meant in the modern context needed to be clarified, given that relationships were no longer generally considered to be for life, did not necessarily involve a heterosexual association, and did not necessarily involve one party being financially dependent on the other. Accordingly, the amended New South Wales legislation suggested a broad range of criteria which a court could take into account in establishing whether or not the people were living together 'as a couple', including:

- 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,
- the reputation and public aspects of the relationship.<sup>5</sup>

Another category of relationships that needed some kind of legal recognition were relationships based on cohabitation without any marriage-like characteristics, instead characterised by features such as kinship, companionship, emotional dependency, financial dependency or physical dependency. To date, New South Wales only recognises relationships based on cohabitation that also meet the following criteria:

- the cohabitants have a 'close, personal relationship',
- the cohabitants are both adults, whether or not related by family, and
- at least one of them provides the other with 'domestic support and personal care'.<sup>6</sup>

Significant personal relationships that are *not* based on cohabitation are yet to be afforded similar legal recognition in New South Wales. For example, a heterosexual couple not living together but who are otherwise financially and/or emotionally interdependent, and a couple in the relationship of carer and patient where, although not living together, one provides care to the other on a daily basis over an extended period of time.<sup>7</sup> It is interesting to note that a 1998 reform Bill introduced into the Legislative Council by the Democrats, with the support of the Gay and Lesbian Rights Lobby, proposed that a wider definition be incorporated into the legislation, which would have included these types of

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<sup>3</sup> *De Facto Relationships Act* 1984 (NSW), s 3. The statutory entitlements conferred by the Act were generally only available if the relationship had existed for two years.

<sup>4</sup> *Property (Relationships) Act* 1984 (NSW), s 4(1).

<sup>5</sup> *Property (Relationships) Act* 1984 (NSW), s 4(2).

<sup>6</sup> *Property (Relationships) Act* 1984 (NSW), s 5(1). It is interesting to note that this section does not include a list of factors to take into account in determining whether or not the association was a close, personal one, apart from the fact that relationships in which support and care is provided for fee or reward, or on behalf of another person or an organisation are specifically excluded (s.5(2)).

<sup>7</sup> There have been calls for amendment to the *Property Relationships Act 1984* (NSW) to remove the requirement of cohabitation. See Standing Committee on Social Issues, Legislative Council, Parliament of NSW, *Domestic Relationships: Issues for Reform—Inquiry into De Facto Relationships Legislation*, Report No 20, 1999.

relationships. The suggested definition was: 'A relationship between two persons, whether or not they live together or share a sexual relationship, where there is emotional and financial interdependence, and which may or may not be a de facto relationship'.<sup>8</sup>

### **3 The basis for recognition of a 'relationship'?**

It is clear from the New South Wales experience that there are varying bases upon which one may choose to recognise significant personal relationships and that these bases may change over time in response to shifts in societal thinking.

We could legally recognise those relationships in which the parties choose to be recognised without making any enquiry as to the basis of the connection or association between them. Alternatively, we could specify that a legally recognised relationship exists only if it has certain defined characteristics. These could include some or all of the following: financial or emotional interdependence, a sexual association, cohabitation, or the existence of children. We could also specify that such criteria must have existed for a certain period of time. Moreover, it may be that the defining characteristic of a significant personal relationship will be different for different purposes. For example, the basis for recognition of a significant personal relationship in relation to property matters (which may relate to financial interdependency) may be somewhat different from the basis for recognition of such a relationship for the purposes of medical issues (emotional interdependency).

The difficulty in pinpointing any one basis for legal recognition of significant personal relationships (other than marriage) is shown by the various approaches adopted in Australian jurisdictions.<sup>9</sup> This diversity is hardly surprising given that relationships are themselves intricate and multi-dimensional and are rarely reducible by reference to just a financial, sexual or emotional aspect.

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<sup>8</sup> De Facto Relationships Amendment Bill 1998 (NSW), sch 1, cl 4.

<sup>9</sup> See discussion below.

### **3.1 New South Wales**

As seen, in New South Wales 'de facto partners' are defined as people who live together as a couple (including same sex couples) and such couples are afforded legal recognition across a range of areas.<sup>10</sup> More limited legal recognition is afforded to partners to a 'close, personal relationship' where one or each provides the other with domestic support and personal care. These relationships, together, are referred to as 'domestic relationships'.

### **3.2 Victoria**

Until recently, a traditional definition of de facto partners was applied for the purposes of statutory property entitlements in Victoria.<sup>11</sup> However, the *Statute Law Amendment (Relationships) Act 2001* (Vic) introduced the term 'domestic partner' into various Acts to recognise the rights and liabilities of partners in domestic relationships. In contrast to the New South Wales definition, the term 'domestic relationship' is more narrowly defined as '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)'.

### **3.3 Australian Capital Territory**

In the Australian Capital Territory, 'domestic relationships' have been legally recognised since enactment of the *Domestic Relationships Act 1994* (ACT). A domestic relationship is defined as 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'.<sup>12</sup> Accordingly, unlike the New South Wales model, this model gives recognition to relationships on the

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<sup>10</sup> Including property and maintenance entitlements, family provision, intestacy, accident compensation, stamp duty and decision-making in illness and after death.

<sup>11</sup> The *Property Law Act 1958* (Vic) defines a de facto relationship as 'the relationship between de facto partners of living or having lived together as if they were husband and wife although not married to each other' (s 275).

<sup>12</sup> *Domestic Relationships Act 1994* (ACT), s 3(1).

basis of emotional and financial interdependence, rather than cohabitation or a sexual association, albeit over a less extensive range of areas.<sup>13</sup>

### **3.4 Queensland**

The Queensland Parliament has recently legislated in respect of 'de facto' relationships for the purposes of financial entitlements.<sup>14</sup> A de facto spouse is defined as: 'either one of two persons, whether of the same or the opposite sex, who are living or have lived together as a couple'.<sup>15</sup> Two persons are a couple 'if they live together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment to each other'.<sup>16</sup> On this model, the crucial requirements of the relationship are cohabitation and a close emotional connection.

### **3.5 Other jurisdictions**

In South Australia, the Northern Territory and Tasmania, de facto relationships legislation has similarly been enacted (providing statutory entitlements to property adjustment and maintenance), but de facto spouses are defined to include only heterosexual couples living together on a genuine domestic basis.<sup>17</sup>

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<sup>13</sup> The *Domestic Relationships Act 1994* (ACT) confers statutory entitlements to property division and maintenance. Since 1994, other legislative amendments have been made in the Australian Capital Territory in keeping with the spirit of the *Domestic Relationships Act 1994* (ACT). See for example, *Administration and Probate (Amendment) Act 1996* (ACT); *Family Provision (Amendment) Act 1996* (ACT); *Duties Act 1999* (ACT).

<sup>14</sup> *Property Law Act 1974* (QLD), pt 19, as amended by the *Property Law (Amendment) Act 1999* (QLD). There have also been subsequent amendments to industrial relations legislation and domestic violence legislation. See *Industrial Relationships Act 1999* (QLD); *Domestic Violence (Family Protection) Amendment Bill 1999* (QLD).

<sup>15</sup> *Property Law Act 1974* (QLD), s 260(1).

<sup>16</sup> *Property Law Act 1974* (QLD), s 260(2).

<sup>17</sup> The *De Facto Relationships Act 1996* (SA) and the *De Facto Relationships Act 1999* (Tas) both define a de facto relationship as the 'relationship between a man and a woman, who although not legally married to each other, live together on a genuine domestic basis as husband and wife' (s 3). The *De Facto Relationships Act 1991* (NT) defines a de facto relationship as 'the relationship between de facto partners, namely the relationship of living together as husband and wife on a bona fide domestic basis although not married to each other' (s 3(1)).

Conversely, Western Australia is yet to enact de facto or domestic relationships legislation, thus affording only limited, incidental recognition to significant personal relationships other than marriage.

It should, however, be noted that Western Australia, like Tasmania, is currently examining the need for greater recognition of significant personal relationships.<sup>18</sup> Moreover, it can be speculated that the Northern Territory and South Australia will follow suit in the foreseeable future. It is inevitable that in a Federation like Australia, developments in one jurisdiction will have an impact upon subsequent developments in others.

Indeed, it is evident that the law in this area is in a state of flux at the moment with each jurisdiction gradually coming to the realisation that reform is required, but each implementing reform measures in a slightly different manner. Thus there is no uniform Australia model for the recognition of significant personal relationships, especially those that do not resemble marriage.

Thus the question for Tasmania is not whether to implement reform but how?

#### **4 Current regulation of relationships in Tasmania**

It is possible to categorise four types of relationship under the broad umbrella of the term 'significant personal relationship'.<sup>19</sup> These consist of marital relationships, heterosexual de facto relationships, same-sex de facto relationships, and non-marriage-like relationships (including relationships based on blood-ties).

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<sup>18</sup> In late April 2001, the Western Australian Attorney General announced that the government was proposing to introduce into Parliament new legislation which would ensure that de facto couples would be able to resolve property disputes through the State Family Court. The proposed legislation would bring the property rights of de facto couples in line with the property rights of married couples and would extend to apply to same sex couples.

<sup>19</sup> See "2. The changing concept of relationships" above.

In exploring the need for legal recognition of significant personal relationships in Tasmania, it is necessary first to distinguish between each of these groups in order to identify areas of deficiency in the law.

#### **4.1 Marriage**

Marriage in our society is understood to involve 'the union of one man and one woman for life voluntarily to the exclusion of all others'.<sup>20</sup> Under the Constitution the Commonwealth has the power to legislate with respect to 'marriage' and 'divorce and matrimonial causes'.<sup>21</sup> The Commonwealth has exercised these powers by enacting the *Marriage Act 1961* (Cth) which regulates marriage, and the *Family Law Act 1975* (Cth) which regulates the financial rights and obligations of spouses upon marriage breakdown as well as their rights and obligations in relation to any children. However, the marriage power does not give the Commonwealth the right to legislate in respect of parties to a marriage per se.<sup>22</sup> Accordingly, a variety of other Federal and State laws regulate the rights and obligations of spouses across a diverse range of areas.

Indisputably, marriage is the most recognised and protected of all significant personal relationships both in Tasmania and in Australia. Parties to a marriage are also easily able to prove the existence of their relationship. Thus, married couples are not in need of legal recognition in Tasmania and are clearly not what was intended by the term 'significant personal relationships' for the purposes of the inquiry.

#### **4.2 Heterosexual de facto relationships**

Heterosexual de facto relationships are those in which a man and woman live together as if they were married, although they are not. In other words the couple meets all the criteria for marriage but have chosen not to undertake the formal marriage ceremony. While the Commonwealth has power to legislate with respect to 'marriage', it has no

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<sup>20</sup> *Marriage Act 1961* (Cth), s 46. See also *Hyde v Hyde* (1866) LR 11 & D 130.

<sup>21</sup> The Australia Constitution ss 51(xxi) and (xxii) respectively.

<sup>22</sup> See *Attorney-General for Victoria v Commonwealth* (1962) 107 CLR 529.

general power to legislate in respect of other relationships. Accordingly, matters affecting de facto relationships fall within the residual power of the States.

De facto relationships have been legally recognised in Tasmania for various purposes for some time now.<sup>23</sup> Indeed, in many areas de facto couples are afforded the same legal rights and obligations as their married counterparts. For instance, de facto couples have recently been afforded virtually the same financial rights as married couples upon the breakdown of the relationship.<sup>24</sup> Although Tasmania followed other States in implementing such reform, at the time of its enactment the *De Facto Relationships Act 2000* (Tas) went further than any other in Australia towards the assimilation of de facto and marital financial rights and obligations.<sup>25</sup>

It is fair to say that heterosexual de facto relationships are already afforded legal recognition and protection in Tasmania and are not the main focus of the current inquiry, although some of the possible models for significant personal relationships reform would have an impact on people in de facto relationships.<sup>26</sup>

### **4.3 Same sex relationships**

Same-sex couples cannot be legally married, so they are most likely to be classed as same-sex de facto couples. However it is important to note that the term de facto couple is often defined to reflect in substance a traditional marriage-like relationship. Many same-sex relationships (and also many heterosexual relationships) do not fit the traditional 'marriage-like' mould.<sup>27</sup>

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<sup>23</sup> Tasmania appears to have been the first common law country in the world to give legal recognition to de facto relationships when it introduced an Act of Council in 1837 enabling a de facto wife to claim maintenance from her de facto husband (8 Will IV No 9). See S Middleton, 'Cruelty Against Concubines: Maintenance for De Facto Wives in Tasmania' (1999) 13 *Australian Journal of Family Law* 140.

<sup>24</sup> *De Facto Relationships Act 1999* (Tas).

<sup>25</sup> See S Middleton, 'De Facto Relationships Bill 1999 (Tas)', (1999) 13 *Australian Journal of Family Law* 194.

<sup>26</sup> See below.

<sup>27</sup> See for discussion, N Hill, 'The Nature of Dependence and the Legal Recognition of Same-sex Relationships' (1999) 24 *Alternative Law Journal* 170.

Almost 300 same sex couples in Tasmania registered their relationship in the last census, but the Tasmania Gay and Lesbian community estimate that there are in fact between 2000 and 4000 Tasmanians living in same sex de facto relationships.<sup>28</sup> This under-representation of the number of same-sex couples in Tasmania is reinforced by information provided by the Legal Information Access Centre, which estimates that at least 10% of the adult population is gay or lesbian.<sup>29</sup>

Given that it was not until 1997 that the Tasmanian legislature repealed the laws that had criminalised all consensual sex acts between men,<sup>30</sup> it is not surprising that there has been little legal recognition of same-sex relationships to date. So far, legislative reform has been achieved on a piecemeal basis. In 1993 Tasmania enacted the *HIV/AIDS Preventative Measures Act 1993* (Tas) which was one of the first pieces of legislation in Australia to include same-sex partners within the definition of 'spouse'. In 2000, the Bacon Labor Government changed the regulations governing the State Retirements Benefits Fund to explicitly recognise same sex relationships.

There has also been some non-legislative reform. For example, following the Port Arthur massacre compensation was paid to the bereaved male partner of one of the men killed by Martin Bryant. The sum was equivalent to that received by bereaved heterosexual partners. The rights of same-sex partners in cases of bereavement was further extended by a recent decision of the Tasmanian Industrial Commission allowing some health

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<sup>28</sup> Tasmanian Gay and Lesbian Rights Group, *The Legal Recognition of Same Sex Relationships and Other Significant Personal Relationships*, Submission to the Community Development Committee of the Tasmanian Parliament, Hobart, 2000.

<sup>29</sup> Legal Information Access Centre, Hot Topics, [http://138.25.65.50/au/other/liac/hot\\_topic/24/ch2.html](http://138.25.65.50/au/other/liac/hot_topic/24/ch2.html) (28.9.2001). See Jenni Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?', (1998) 12 *Australian Journal of Family Law* 99. A 1995 survey conducted by Lesbians on the Loose (LOTL), a magazine published in Sydney, indicated that up to 68% of the lesbians who responded were in relationships and that 66% of those couples lived together. Nineteen percent of those surveyed had or lived with children and a further 14.5% planned to have children in the next five years. In 1996, a survey of homosexually active men in Sydney, Newcastle and Woollongong was published which found that 33% of the men surveyed lived with a partner and 19% had children.

<sup>30</sup> The International Lesbian and Gay Association, World Legal Survey, [http://www.ilga.org/Information/Legal\\_survey/ilga\\_world\\_legal\\_survey%20introduction.htm](http://www.ilga.org/Information/Legal_survey/ilga_world_legal_survey%20introduction.htm) (3/10/01).

workers take leave upon the death of a same-sex partner, family member of a de facto couple or a close member of the same household.<sup>31</sup>

Nonetheless, despite these developments, in most areas of law, same-sex couples are not afforded the legal protection of their opposite-sex counterparts. The general lack of legal recognition for same-sex relationships is one of the main problems that the proposed Significant Personal Relationships (No.2) Bill 1998 (Tas) seeks to remedy and a focal point of the current inquiry.

#### ***4.4 Non-marriage-like relationships***

'Non-marriage-like relationships' are those which involve a significant personal relationship between two people who are not married or in a de facto relationship. It could, for example, cover cohabiting but non-sexual partners. Alternatively it could cover sexual partners who are not cohabiting. It can encompass relationships without cohabitation or a sexual component, such as the relationship between a long term carer and patient. It can also encompass relationships between family members (although the blood-link is not what makes the relationship significant).

Currently, non-marriage-like relationships are only recognised for a few purposes, and usually require proof that one party is financially dependent on the other (for example in intestacy and family provision law). Family members in a non-marriage-like relationship are often provided incidental recognition based on the blood connection, so the main area of concern is for people with no blood-ties involved in non-marriage-like relationships. There is very little protection for parties to these relationships when the relationship breaks down or one party becomes ill or dies. Clearly, these relationships are another focal point of the current inquiry.

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<sup>31</sup> However, this extended right is limited in scope in that it covers only private hospitals, medical diagnostic services, medical practitioners and dentists' surgeries in Tasmania. In 1999 the Tasmanian Education Department amended its Teacher Transfer Policy to include a gender neutral definition of partner for the purposes of relocation and transfer benefits and allowances.

## **5 Specific areas of concern in Tasmania**

There are many Tasmanian Acts that legally recognise various types of significant personal relationships.<sup>32</sup> The most common type of relationship covered is that of 'spouse' which is usually defined to include only married or heterosexual de facto couples. Other relationships commonly recognised are 'relatives' or 'next of kin'. The statutory definitions of these terms are generally inclusive of blood-relatives and spouses. Thus, legislative definitions and interpretations of terms such as these are a common way in which people in same sex relationships and non-marriage-like relationships (not based on a blood-link) are excluded from benefits.

The following sub-sections of this submission discuss Tasmanian laws that discriminate in this manner, with regard to the Committee's terms of reference.

### **5.1 Financial issues after relationship breakdown**

#### **5.1.1 Property division and maintenance**

When a marriage relationship breaks down the financial rights and liabilities of the parties are governed at a Federal level by the *Family Law Act 1975* (Cth). Among other things, the Family Court may make orders for spousal maintenance and orders altering the interests of parties to a marriage in their property.<sup>33</sup> In exercising its discretion to make orders for spousal maintenance, the Family Court must consider whether the applicant is unable to adequately support himself or herself, and, if so, the ability of the respondent to afford maintenance. In making orders for property alteration, the Court must take into account the direct and indirect contributions of the parties to their property and to the welfare of the family as well as their respective future financial circumstances.

Since 2000, the *De Facto Relationships Act 2000* (Tas) has afforded de facto partners broadly the same rights in relation to property and spousal maintenance as those available to married couples. However, for the purposes of the Act, a 'de facto relationship' is

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<sup>32</sup> See Appendix A "Table of Selected Tasmanian Legislation" for examples.

<sup>33</sup> *Family Law Act 1975* (Cth), ss 72 and 79.

defined as 'the relationship between a man and a woman who, although not legally married to each other, live together on a genuine domestic basis as husband and wife'. Accordingly, same sex relationships and non-marriage-like relationships are not covered by the Act. If these types of relationships break down, such couples are forced to pursue property entitlements on the basis of common law or equitable doctrines.<sup>34</sup> The laws to be applied are those governing disputes between strangers, which take no account of the intimate relationship between the parties. Bringing property claims based on these laws often involves the application of complex equitable principles such as resulting or constructive trusts, unjust enrichment, promissory estoppel or equitable lien. This means that the process is expensive and outcomes are often unpredictable. The general law has also been criticised for failing to alleviate unnecessary financial hardship caused by the breakdown of significant personal relationships where the financial need of one party arises from and is attributable to the relationship and the other party is in a position to provide assistance of a financial nature. Financial hardship is especially likely to occur in relationships where one party takes on the primary role of homemaker and the other partner is primarily the income-earner.

These difficulties provided the impetus for de facto relationships law reform in Tasmania in 2000. Comments made at the time in relation to heterosexual couples apply equally to the significant personal relationships remaining outside the scope of the *De Facto Relationships Act 2000* (Tas) as it stands today. Peter Patmore, the Attorney-General at the time, stated:

The general law ... has thus proved to be manifestly defective. It has produced results which are consistently neither just nor equitable. It has placed de facto partners whose relationship has broken down into a class of citizens dealt with unequally by the law in terms of just resolution of their disputes. In attempting to deal with such issues as if they arose between parties in arm's length commercial dealings, it has ignored the reality of personal relationships in which people have lived.

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<sup>34</sup> There is no common law obligation on a partner to one of these relationships to maintain the other.

### 5.1.2 Stamp duty

Under the *Family Law Act 1975* (Cth) and the *De Facto Relationships Act 2000* (Tas), married and de facto partners are exempted from paying stamp duty on the transfer of property between them. No similar provision applies in relation to the transfer of property between partners to other significant personal relationships.

## 5.2 Employment entitlements and benefits

### 5.2.1 General

Terms of employment are generally a matter to be negotiated as between the individual employer and employee. However legislation and industrial awards and agreements also regulate their contents. The most relevant piece of legislation in Tasmania is the *Anti-Discrimination Act 1998* (Tas). The Act prohibits, among other things, discrimination in employment. The Act also prohibits discrimination on the basis of a person's attributes. Relevant attributes include marital status and family responsibilities.

The Act defines 'de facto spouse' as a person who lives with another person of the **opposite sex** as the spouse of that other person although not legally married to that other person. It is ironic that an Act aimed at preventing discrimination on the basis of sexual orientation itself discriminates between heterosexual and same-sex relationships.

The Act also defines 'family responsibilities' as responsibilities to care for or support:

- (a) a child who is wholly or substantially dependent; or
- (b) any other immediate family member who is in need of that care or support.

'Immediate family member' includes:

- (a) a spouse; and
- (b) an adult offspring, a child, parent, grandparent, grandchild or sibling of the person or of a spouse of the person.

Given the definition of spouse, the Act implies that members of same-sex relationships will not have 'family responsibilities' with respect to their partner.

### 5.2.2 Superannuation

Persons employed by the State are entitled to receive superannuation and associated benefits pursuant to the superannuation schemes established by the following Acts:<sup>35</sup>

- *Governor of Tasmania Act 1982* (Tas);
- *Judges' Contributory Pensions Act 1968* (Tas);
- *Parliamentary Retiring Benefits Act 1985* (Tas);
- *Parliamentary Superannuation Act 1973* (Tas);
- *Parliamentary Salaries, Superannuation and Allowances Act 1973* (Tas)
- *Retirement Benefits Act 1993* (Tas); and
- *Solicitor-General Act 1983* (Tas).

All other persons in Tasmania are subject to the Commonwealth superannuation regime.<sup>36</sup>

Each of the superannuation schemes established by the foregoing Acts generally provide for the payment of a benefit upon the death of a superannuation scheme member to either the deceased member's personal legal representative or a spouse.<sup>37</sup> In each instance, the term spouse is taken to include de facto spouses.<sup>38</sup> However, a de facto spouse is expressly limited to a member of the opposite sex.

To the extent that the provisions of the foregoing superannuation schemes direct that death benefits are to be paid out to the deceased member's personal legal representative, the issue of provision for partners of same-sex relationships and other non-marriage relationships is, at least in the context of superannuation, circumvented. Death benefits

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<sup>35</sup> For an overview of each Act see Appendix B, "2.2 The Tasmanian Superannuation Legislative Schemes".

<sup>36</sup> As to the Commonwealth superannuation regime see Appendix B, "2.1 The General Regulation of Superannuation".

<sup>37</sup> For the specific detail of each scheme and the relevant legislative provisions see Appendix B, "4. Death Benefits".

<sup>38</sup> The term "spouse" is used in a general context and is taken for these purposes to also encompass the terms "widow" and "widower".

will be distributed according to the terms of the will, or in the absence of a will, on intestacy. As a consequence, members prior to death can make provision in their will for a partner. Failing this, the issue of provision for partners is one relating to the rules of intestacy.<sup>39</sup> However, where the benefit is designated by the superannuation scheme for payment to a spouse, clearly same-sex partners and partners from other non-marriage relationships have been expressly excluded.

By way of comparison, the Commonwealth<sup>40</sup> approach is slightly more flexible. Access to death benefits under the *Superannuation Industry (Supervision) Act 1993* (Cth) ('SIS Act') is limited to legal personal representatives or dependants.<sup>41</sup> The word *dependant* is expressly defined to include a spouse and children.<sup>42</sup> Like the State approach the definition for *spouse* whilst inclusive of de facto heterosexual relationships excludes same-sex relationships.<sup>43</sup> However, a partner of a same-sex couple or any other person who satisfies the requisite test of dependency may nevertheless be eligible for a death benefit distribution. It is important to note, however, that dependency is generally assessed in terms of financial dependency.<sup>44</sup>

The exclusion of same-sex couples from accessing death benefits has been the subject of criticism and is currently under review at the Commonwealth level. The Human Rights and Equal Opportunity Commission has expressed the view that the exclusion of same-sex couples in the context of death benefits discriminates against such couples and is therefore in violation of the *International Covenant on Civil and Political Rights* and the *ILO Discrimination (Employment and Occupation) Convention*.<sup>45</sup> Also, as early as 1995,

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<sup>39</sup> As to the rules of intestacy see "5.3.2 Intestacy" below.

<sup>40</sup> For an explanation of the legislative background for superannuation as well as Commonwealth and State relations in this context see Appendix B, "2.1 The General Regulation of Superannuation".

<sup>41</sup> *Superannuation Industry (Supervision) Act 1993* (Cth), ss 62(1)(a)(iv), 62(1)(a)(v); *Superannuation Industry (Supervision) Regulations 1994* (Cth), reg 6.22.

<sup>42</sup> *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1).

<sup>43</sup> *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1).

<sup>44</sup> Liondis, "Benefits for Same-Sex Couples" (1999) 29 *International Pension Lawyer* 7 at 9.

<sup>45</sup> Human Rights and Equal Opportunity Commission, *Superannuation Entitlements of Same Sex Couples: Report of Examination of Federal Legislation*, HRC Report No 7, 1999. Although the report does not specifically examine the SIS Act, but rather the *Superannuation Act 1976* (Cth) and *Defence Force Retirement and Death Benefits Act 1973* (Cth), the conclusions are equally applicable.

the Senate Select Committee on Superannuation in its report on *Super and Broken Work Patterns* recommended:<sup>46</sup>

‘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.’

In 1998 a Private Member’s Bill entitled the Superannuation (Entitlement of Same Sex Couples) Bill 1998 (Cth) was introduced into the Commonwealth Parliament. The Bill sought to amend the SIS Act to allow for the inclusion of same-sex couples within the definition of de facto partner.<sup>47</sup> Subsequently, the same Bill was introduced into the Senate in February 2000 as a private Senator’s Bill (Superannuation (Entitlement of Same Sex Couples) Bill 2000 (Cth)) and the provisions of the Bill were then referred to the Senate Select Committee on Superannuation and Financial Services (the ‘Committee’) for inquiry and report.

Following public consultation and inquiry into the terms of the Bill, the Committee concluded that ‘discrimination against same-sex couples can no longer be tolerated’.<sup>48</sup> The Committee recommended that advice be sought from the relevant stakeholders (including the superannuation industry) ‘on how to best draft appropriate amendments to the Bill to avoid the possibility of unintended consequences and that the Bill then be passed’.<sup>49</sup> Following this recommendation, a further Private Member’s Bill (in exact terms as the foregoing Bills) was introduced again into the House of Representatives. The Bill was read for a first time on 25 June 2001. The second reading of the Bill is order of the day for the next sitting.

Reform has been achieved in respect of same-sex couples at the State level. In 2000, the New South Wales Parliament enacted the *Superannuation Legislation Amendment (Same*

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<sup>46</sup> Commonwealth of Australia, Senate Select Committee on Superannuation, *Super and Broken Work Patterns*, Seventeenth Report, 1995 at 152.

<sup>47</sup> The Bill did not progress as the Government did not bring it forward for debate. See generally Kirby, "Same Sex Relationships - Some Australian Legal Developments" (1999) 19 *Australian Bar Review* 4.

<sup>48</sup> Commonwealth of Australia, Senate Select Committee on Superannuation and Financial Services, *Report on the Provisions of the Superannuation (Entitlements of Same Sex Couples) Bill 2000*, 2000 at 6.1.

<sup>49</sup> At 6.24.

*Sex Partners) Act 2000* (NSW). This Act extends the rights and entitlements of spouses to same-sex partners in all New South Wales public sector superannuation schemes.<sup>50</sup>

It is important to note that the foregoing reforms are in respect of same-sex couples only. In the context of superannuation, reform in other jurisdictions is not currently contemplated in respect of non-marriage-like relationships.

### **5.2.3 Industrial awards**

State industrial awards are legally binding documents made under the *Industrial Relations Act 1984* (Tas) that regulate minimum entitlements of employees. There are a number of Tasmanian Industrial awards regulating the employment conditions of employees in various industries. However the main employer with respect to whom the issues raised by this Inquiry are relevant is the Tasmanian State Service.

The *State Service Act 2000* (Tas) sets out a list of principles for the State Service workplace, including the principle that it is free from discrimination and recognises and utilises the diversity of the community it serves. The principles also provide that the State Service provides a fair, flexible, safe and rewarding workplace and promotes equity in employment. These principles are supported by a Code of Conduct that provides that employees must treat everyone with respect and without harassment, victimisation or discrimination.

Under the State Service Regulations, an employee may be granted special leave of absence in the event of the serious illness of a relative of the employee. This grant is made at the discretion of the heads of the State Service agencies. 'Relative' is defined as:

- (a) the husband or wife of the employee; and
- (b) a person with whom the employee has cohabited for substantially the whole of the period of 12 months immediately preceding that person's illness or death; and
- (c) the parent or step-parent of the employee; and
- (d) the father-in-law or mother-in-law of the employee; and
- (e) a child or stepchild of the employee; and
- (f) a brother or sister, or stepbrother or stepsister, of the employee; and
- (g) a grandparent of the employee;

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<sup>50</sup> See further Appendix B, "4. Death Benefits".

It is rather strange that, if the person who is seriously ill does not fit within one of the categories of 'traditional' family members, the criteria on which the status of relative is granted is that of cohabitation.<sup>51</sup> It seems more appropriate that the status be based on criteria more relevant to the benefit being granted, such as a close emotional relationship. It is also noted that people who fit within the specified relationships do not have to show the additional criteria of cohabitation, which is discriminatory.

The State Service Commissioner states that these provisions are wide enough to be applied in a non-discriminatory manner based upon the State Service Principles and Code of Conduct.<sup>52</sup> However, the discretionary basis of the grant of leave and the fact that other types of significant personal relationships are not specifically listed does leave this somewhat less than a certainty.

The Regulations also provide for displacement and relocation allowances covering the employee and his or her dependants. 'Dependant' is defined to mean:

- (a) in the case of a relative of the employee, a person who normally resides with the employee; and
- (b) in any other case, a person who has resided with the employee for a period of at least 12 months –  
and who is wholly or substantially dependent on the employee for financial support.

This definition extends the need for cohabitation to all people included in the definition of 'relative' which is fair.

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<sup>51</sup> There is also provision in the ministerial direction for an employee to apply for leave to care for an ill person who is a member of the employee's immediate family or household.

<sup>52</sup> In his oral submission to the Parliamentary Committee on 15 August 2001.

### 5.3 Succession and intestacy legislation

#### 5.3.1 Succession and family provision

Simply put, a will is a document in which a person specifies how they want their property to be distributed after their death. Generally speaking, a person can choose to distribute their property to anyone at all. However, the court does have the power to vary the distribution of a deceased's estate as set out in the person's will when the person has failed to make adequate financial provision for certain categories of dependants. Under the *Testator's Family Maintenance Act 1912* (Tas) eligible applicants are:

- (a) The widow of the deceased person;
- (b) The children of the deceased person;
- (c) The parents of the deceased person, if the deceased person dies without leaving a widow or any children;
- (d) A person whose marriage to the deceased person has been dissolved or annulled and who at the date of the death of the deceased person was receiving or entitled to receive maintenance from the deceased person whether pursuant to an order of a court, or to an agreement or otherwise; and
- (e) A person who was a de facto spouse of the deceased person at the date of the deceased person's death.<sup>53</sup>

In this Act 'de facto spouse' means a person -

- (a) who cohabited with another person of the opposite sex as the spouse of that other person, although not legally married to that other person, for at least 3 years immediately before the death of that other person; and
- (b) who was principally dependent on that other person for financial support at the time of the death of that other person.<sup>54</sup>

This section also does not make any provision for same-sex relationships, nor does it take account of other kinds of significant personal relationships not already covered by an underlying family (blood) relationship. It also has the effect that it is easier for biological relatives to contest a will in which a same sex partner is a named beneficiary than a will in which an opposite sex partner is named.

The categories of persons eligible to claim family provision differ in other jurisdictions. Generally the list of eligible applicants is divided into two groups. The first includes

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<sup>53</sup> s.3A *Testator's Family Maintenance Act 1912*.

members of the deceased's family (in the traditional sense of the word, including spouse<sup>55</sup> and children). The second includes those who can show some kind of dependency on or maintenance by the deceased at the date of death.

In all jurisdictions de facto spouses are eligible applicants, however the definition of de facto spouse varies.<sup>56</sup> In Queensland and Tasmania de facto spouses have to prove dependency. In New South Wales and the Northern Territory a de facto spouse has to show that the deceased maintained them at the date of death. Western Australia has similar requirements, but also requires there to be some moral responsibility to make provision. There are also time periods that must be met, ranging from five years in the six years before the date of death (Queensland and South Australia) to two years in the ACT. In the ACT and New South Wales the definition of spouse has been also extended to include domestic partners. Domestic partners are defined as anyone, whether or not of the same gender as the deceased, who lived with the deceased at any time as a member of a couple on a genuine domestic basis. New South Wales also makes provision for a claim by a child of a domestic partner.

It is important to note that although the Courts have always interpreted family provision legislation in light of prevailing community attitudes<sup>57</sup> they cannot go beyond the actual scope of the legislation.

### 5.3.2 Intestacy

If someone does not make a will before they die, their property is distributed in accordance with the rules of intestacy. In Tasmania, these rules are set out in s.44 of the *Administration and Probate Act 1935* (Tas).<sup>58</sup> In summary, the rules are that:

- (a) If the value of the estate is less than \$50,000 and the deceased person had no children, the estate goes to the person's husband or wife.

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<sup>54</sup> s.2 *Testator's Family Maintenance Act 1912*.

<sup>55</sup> Generally includes a divorced spouse.

<sup>56</sup> s.40 *Succession Act 1981* (Qld); s.2(1) and s.3A(e) *Testator's Family Maintenance Act 1912* (Tas); s.6(1)(a) *Family Provision Act 1982* (NSW); s.4(1) and s.7(1)(g) *Family Provision Act 1970* (NT); s.4 and s.6 *Inheritance (Family Provision) Act 1972* (SA); s.91 *Administration and Probate Act 1958* (Vic).

<sup>57</sup> *Re Wilson* [1973] 2 NZLR 359, McCarthy P at 362.

<sup>58</sup> This Act was amended in 1999 to allow for the newly enacted *De Facto Relationships Act 1999*.

- (b) If the value of the estate is more than \$50,000 and the deceased person has children:
  - \$50,000 plus one-third of the balance goes to the person's husband or wife;
  - the remaining two-thirds goes to the person's children.
- (c) If the deceased person lived with a de facto husband or de facto wife for a continuous period of 2 years or more immediately before their death, they are entitled as the husband or wife mentioned in (a) and (b) above.
- (d) If the deceased person lived with a de facto husband or de facto wife for a period of less than 2 years or more, or a period not immediately before their death,
  - And there is an existing husband or wife, they are entitled as the husband or wife mentioned in (a) and (b) above.
  - And there are children, they are entitled to the whole of the estate.
  - And there is no existing husband or wife and no children, the de facto husband or wife is entitled to the whole of the estate.
- (e) If there is no husband or wife, or de facto husband or de facto wife, and no children, the following people are entitled to the estate in this order:
  - Parents
  - Brothers and sisters
  - Grandparents
  - Uncles and Aunts
  - Next-of-kin

The term 'de facto relationship' in this section is defined as the relationship between a **man and a woman** who, although not legally married to each other, live together as husband and wife on a genuine domestic basis. Accordingly, this section does not make any provision for same-sex relationships, nor does it take account of other kinds of significant personal relationships.

#### **5.4 Rights as next of kin**

The rights as next of kin are important in situations of illness and death. Many of the rights of next of kin are not specified in legislation, but are based on policies of institutions involved, such as hospitals. This leads to some uncertainty in identifying the rights of parties to significant personal relationships in these situations.

Some of the uncertainty can be avoided if the parties to the relationship prepare for these kinds of events in advance, by legal documents such as Enduring Powers of Attorney, Advance Medical Directives (sometimes called Living Wills) and Enduring Guardianships. Generally speaking these documents allow parties to make advance provision about who controls their legal, financial and medical affairs after they become

incapacitated. However these arrangements will not cover every situation which might arise and there is an additional burden on those not protected by default provisions. Many people do not have the knowledge or foresight to prepare the necessary legal documents to ensure that their interests are protected in the manner and by whom they choose.

#### **5.4.1 Illness**

One important element of many significant personal relationships is the support and care that one party can provide the other when they are ill or incapacitated.

##### Visitation rights in hospital

In some cases hospitals will restrict visitation rights to patients based on a policy that only 'close relatives' be permitted to visit. Generally speaking, immediate family will take precedence over friends and more distant relatives. There have been incidents when legally recognised 'family' members have denied same-sex partners access. Visitation rights are not covered by specific legislation.

##### Right to make medical decisions

Under the *Guardianship and Administration Act 1995* (Tas) a person responsible for a person with a disability who is incapable of giving consent to the carrying out of medical or dental treatment may consent to the carrying out of medical or dental treatment if he or she is satisfied that the relevant person is incapable of giving consent and the medical or dental treatment would be in the best interests of that person.<sup>59</sup>

The term 'person responsible' is defined as:

- (a) where the other person is under 18 years and has a spouse, the spouse; or
- (b) where the other person is under 18 years and has no spouse, his or her parent; or
- (c) where the other person is of or over the age of 18 years, one of the following persons in order of priority:
  - (i) his or her guardian;
  - (ii) his or her spouse;
  - (iii) the person having the care of the other person;
  - (iv) a close friend or relative of the other person.

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<sup>59</sup> Section 43.

Similar provisions can be found in acts such as the *Mental Health Act 1963* (Tas) and the *Alcohol and Drug Dependency Act 1968* (Tas).

#### Management of financial affairs

If a person does not have an Enduring Power of Attorney at the time they become incapacitated, the Guardianship and Administration Board can appoint an Administrator to make legal and financial decisions on their behalf. An Administrator may be a relative, friend, solicitor or accountant or an appropriate organisation. The Board prefers to appoint an administrator, who is familiar with the person's values and beliefs, likes and dislikes and such a person does not necessarily have to be a blood relative or 'spouse'.

#### Management of personal affairs

If a person does not have an Enduring Guardianship at the time they become incapacitated, the Guardianship and Administration Board can appoint a Guardian to make personal and lifestyle decisions for the person. Usually the Guardian will be a relative or friend of the person. The Board takes into account the represented person's wishes (assuming that they have somehow already been made clear), any conflict of interest that may arise and the importance of maintaining existing family relationships.

### **5.4.2 Death**

In the absence of an express direction by the deceased, the traditionally defined 'next of kin' have control over organ donation, post mortems and autopsies. For example, the *Cremation Regulations 1999* define 'senior next of kin', in relation to a deceased person, as:

- (a) a person who, immediately before the death of the deceased person, was the spouse of that deceased person; or
- (b) if there is no spouse of the deceased person or if the spouse is not available, the deceased person's eldest son or eldest daughter of or over 18 years; or
- (c) if a person referred to in paragraph (a) or (b) is not available, the deceased person's next eldest son or next eldest daughter of or over 18 years; or
- (d) if a person referred to in paragraph (a) or (b), or any son or daughter of or over 18 years, is not available, the deceased person's parent; or
- (e) if a person referred to in paragraphs (a) to (d) is not available, the deceased person's eldest brother or eldest sister of or over 18 years; or
- (f) if a person referred to in paragraphs (a) to (e) is not available, the next eldest brother or next eldest sister of or over 18 years; or

- (g) if a person referred to in paragraphs (a) to (e), or any brother or sister of or over 18 years, is not available, an executor or the personal representative of the deceased person; or
- (h) if the person is an Aboriginal person, a person who, according to the customs and tradition of the community or group to which the person belongs, is an appropriate person;

'spouse' includes a person's de facto partner.

Accordingly, same sex partners do not legally have the right to make these kinds of decisions.

## **5.5 Statutory compensation schemes**

Statutory compensation schemes generally provide for the families and dependents of people who are injured or killed in certain circumstances. The three main Tasmanian schemes are found in the *Fatal Accidents Act 1934* (Tas), the *Workers Rehabilitation and Compensation Act 1988* (Tas) and the *Motor Accidents (Liability and Compensation) Act 1973* (Tas).

### **5.5.1 Fatal Accidents Act 1934**

The *Fatal Accidents Act 1934* (Tas) is expressed to be 'an Act to consolidate and amend the law as to compensating **families** of persons killed by accidents'. A 'member of the family' is defined to be the deceased person's:

- (a) spouse, de facto spouse, parent, stepparent, grandparent, child, stepchild or grandchild; or
- (b) brother, sister, half-brother or half-sister.

The term 'de facto spouse' is defined as a person:

- (a) who cohabited with another person **of the opposite sex as the spouse** of that other person, although not legally married to that other person, for at least 3 years immediately before the death of that other person; and
- (b) who was **principally dependent** on that other person for financial support at the time when a wrongful act, neglect or default occurred in respect of that other person.

Accordingly, the Act does not cover same-sex couples or members of other types of significant personal relationships (such as carers or other dependents). It also restricts the definition of de facto spouse to a spouse who was financially dependent on the deceased person.

### 5.5.2 Workers' Rehabilitation and Compensation Act 1988

The *Workers' Rehabilitation and Compensation Act 1988* (Tas) aims to provide rehabilitation and compensation for injured workers and their families and dependents.

The Act defines 'member of the family' as:

- (a) the wife or husband, de facto spouse, father, step-father, grandfather, mother, step-mother, grandmother, son, grandson, daughter, grand-daughter, step-son, step-daughter, brother, sister, half-brother and half-sister of that worker; or
- (b) a person to whom the worker stood in loco parentis.

'De facto spouse' is defined as a person **of the opposite sex** who cohabited with the worker **as the spouse** of that other person, although not legally married for at least 3 years immediately before the worker was injured or killed.

This Act does not cover same-sex couples or members of other types of significant personal relationships (such as carers or other dependents). Where the worker is killed as a result of his or her injuries, his or her dependants are deemed to be 'the worker' for the purpose of receiving the benefit of compensation. However, the term 'dependants' is limited to **members of the family** (given a restrictive definition) who were dependant upon the earnings of the worker.

### 5.5.3 Motor Accidents (Liability and Compensation) Act 1973.

The *Motor Accidents (Liabilities and Compensation) Regulations 2000* (Tas) provide a list of people to whom death benefits are payable under the Act. The recipients include a 'de facto spouse', defined as a person who:

- (a) has cohabited with another person of the opposite sex as the spouse of that other person although not legally married to that other person for at least 3 years immediately before the time of an accident; and
- (b) at the time of the accident, was wholly, mainly or partly dependent on that other person for financial support.

This Act does not cover same-sex couples or members of other types of significant personal relationships (such as carers or other dependents).

## **5.6 Any other relevant matter**

There are many other Tasmanian Acts that refer to various types of significant personal relationships for different purposes. A selection of these provisions can be found in the Table attached to this submission. It is interesting to note the different descriptions of the various types of relationships. For example, some of the terms used include ‘husband’ and ‘wife’, ‘de facto relationships’ (either with or without further definition), ‘relatives’, ‘family members’, ‘next of kin’ and ‘related persons’. The only Acts that covers same sex relationships is the *HIV/AIDS Preventative Measures Act 1993* (Tas). Most of the other Acts are discriminatory in their application to married and other *couples*.

## **6 Options for reform**

There is a need for reform of the law in Tasmania to give legal recognition to all significant personal relationships, and not simply marriage and heterosexual de facto relationships. This raises the question of the appropriate method for reform. There are 3 options to be considered: marriage for same-sex couples; registration of significant personal relationships; and de facto (or presumptive) recognition.

### **6.1 Marriage for same sex couples**

This option contemplates extending the concept of marriage to same sex couples. It is, however, problematic and can be dismissed as a viable option for reform of significant personal relationships reform in Tasmania. The main problem is practical and lies in the fact that under the Constitution only the Federal parliament has the power to legislate in respect of 'marriage'. If marriage laws are to be reformed this initiative must be taken at a Federal level. Moreover, marriage is understood to be 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.<sup>60</sup> Thus, it is beyond the legislative competence of the Federal Parliament to legislate for same-sex marriage without amendment to the Constitution.

There are further problems relating to ideology, in that the concept of marriage assumes a particular type of traditional relationship with religious and gendered overtones that same-sex couples may not relate with or want. Indeed, it seems that the Tasmanian gay and lesbian community is more concerned with the need to eliminate existing discrimination in the law than with the symbolism of marriage.<sup>61</sup> It can also be speculated that there might be strong political opposition to this type of reform given the emotional issues involved with the issue of same-sex marriage, particularly for people who view marriage as a fundamental part of their religious beliefs.

In any event, this model for reform would not resolve the issues that have been raised in the course of this inquiry relating to broader, non-marriage-like significant personal relationships.

## **6.2 Registration of significant personal relationships**

This option would involve the State setting up a system for the registration of significant personal relationships other than marriage.<sup>62</sup> Such a system would require a formal declaration of some kind, such as lodging a document which declares the status of the parties and thereby accords their relationship legal recognition.<sup>63</sup> Once registered, certain legal rights and responsibilities would arise between the partners, at least for areas of State concern.

There are many advantages to this type of system. Firstly, registration is voluntary. This allows people involved in significant personal relationships choice and empowers them to decide how their relationship is to be treated by law. Depending on how the system is implemented, there is also the possibility to avoid the need for people registering to have to categorise their relationship according to some objective standard. Indeed, there need

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<sup>60</sup> *Marriage Act 1961* (Cth), s 46(1).

<sup>61</sup> Tasmanian Gay and Lesbian Rights Group, *Submission to the Tasmanian Parliament*, received on 4 May 2000.

<sup>62</sup> For more information see Wayne Morgan, *Submissions to the Tasmanian Parliament*, 2000 and the discussion in the New South Wales Standing Committee on Social Issues, Report No.20, *Domestic Relationships: Issues for Reform, Inquiry into De Facto Relationships Legislation*, 2 December 1999.

<sup>63</sup> Jenni Millbank and Kathy Sant, 'A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW', (2000) 22 *Sydney Law Review* 181 at 182.

be few, if any, pre-requisites for registration. For example, there would be no need to limit those eligible for registration by virtue of their sexuality, gender, or living arrangements. Furthermore, a registration model could encompass heterosexual de facto relationships, even though these relationships are legally recognised, at any rate, by presumptive recognition. Secondly, a registration scheme also has potential for flexibility. People could nominate different significant persons for different purposes. For instance, one person might be nominated for medical purposes and another for superannuation purposes. However, in practice, it is likely that most people would nominate the same person as being significant for all areas. A further major benefit of this kind of system is that it would give people who registered their relationship an easy way to prove that relationship, without having to resort to particular and personal details about the nature of the relationship.

Nevertheless, there are also some potential problems with a registration system. The most obvious problem with a voluntary registration system is that people may not register. In particular, there is a risk that a party to a relationship may be denied legal protection if their partner is unwilling to register the relationship. This is one of the reasons why heterosexual couples who choose not to marry are treated as a 'de facto' couple by operation of the law. There are also privacy issues inherent in registration, particularly in terms of same-sex relationship registration. Some people may be reluctant to register if the system effectively acts as a means of 'outing' their relationship, particularly in Tasmania where sexual acts between consenting male adults have only, in recent years, been decriminalised.<sup>64</sup>

It seems, therefore, that while a lot can be said for the recognition of significant personal relationships by registration, this model is not enough in itself.

### **6.3 *De facto (presumptive) recognition***

This option contemplates giving recognition to significant personal relationships in the same way that de facto heterosexual relationships are currently recognised. Such a system

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<sup>64</sup> See “4.3 Same Sex Relationships”.

operates to recognise the relationship automatically when the parties have satisfied certain criteria, such as living together as a couple for a certain time.<sup>65</sup>

This type of reform could be effected by extending the legal definition of 'de facto relationship' to cover same-sex relationships.<sup>66</sup> In this case, other significant personal relationships could also be included in legislation by creating a new class of relationships (such as 'close personal relationships').<sup>67</sup> Alternatively, the term de facto relationship could be replaced by another, such as 'domestic relationship', that encompasses all significant personal relationships (other than marriage).<sup>68</sup>

The major issue in implementing this model of reform would be the basis on which to legally define such relationships. As seen earlier, Australian States and Territories have adopted different approaches to this issue with the key requirements in some jurisdictions being cohabitation and a sexual component, and the requirements in others relating to matters such as financial and/or emotional interdependence and commitment.<sup>69</sup>

There are many advantages to this kind of 'de facto' system in comparison to (or in conjunction with) a registration system. It uses an existing working model. Importantly, it does not require couples to take any positive step. This ensures that the scheme covers people who do not understand or do not know about registration requirements. It also protects people who might be discouraged from registration by their partner. Moreover, it avoids issues of legal discrimination because it treats same-sex couples in exactly the same way as non-married heterosexual couples and it does not have the privacy concerns that are inherent in a registration system. Not surprisingly, therefore, de facto recognition has been the most popular model for significant personal relationships reform in Australian States and Territories to date.

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<sup>65</sup> Jenni Millbank and Kathy Sant, 'A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW', (2000) 22 *Sydney Law Review* 181 at 182.

<sup>66</sup> This kind of system currently exists in the Netherlands, Hungary, Ontario, Quebec and Canada and a limited version in Norway and some Canadian jurisdictions.

<sup>67</sup> Such as in the New South Wales model, see "3. The basis for recognition of a 'relationship'".

<sup>68</sup> Such as in the ACT model, see "3. The basis for recognition of a relationship."

<sup>69</sup> See "3. The basis for recognition of a relationship".

This is not to deny that there might be some disadvantages. It has been argued that the system has the potential to be over-inclusive in that it would cover by default those people that do not want State intervention in their relationships. It should, however, be noted that this argument can equally be raised in relation to legal recognition of de facto relationships. Moreover, most existing schemes enable the parties to enter into binding agreements governing financial matters between them.

Conversely, concerns are often voiced that such a system may be under-inclusive if too narrow a definition of relevant relationships were adopted. A definition, for example, based on cohabitation or a sexual association would defeat the purpose of reform by excluding non-marriage-like relationships and non-cohabiting sexual relationships.

Yet, if a broad legislative definition were adopted, encompassing all significant personal relationships and thus recognising the diversity of Australian families, de facto recognition would provide an appropriate and effective model for reform. An example of the type of definition required can be found in a 1998 reform Bill that the Democrats introduced into the New South Wales Legislative Council. It referred to: 'a relationship between two persons, whether or not they live together or share a sexual relationship, where there is emotional and financial interdependence, and which may or may not be a de facto relationship'.<sup>70</sup>

### **6.3.1 Amend individual laws**

One of the options for the recognition of significant personal relationships by 'de facto' recognition is to amend all pieces of Tasmania legislation that deal with spouses and de facto heterosexual partners (including the *De Facto Relationships Act 2000* (Tas)) to incorporate a broader range of relationships. In many regards, this is a sensible option. In every instance, the purpose of the legislation could be considered as well as the criteria on which the right to the benefit of the legislation is based. This would avoid the need to come up with one definition of significant personal relationships for all purposes and allow consideration of the most appropriate form of recognition in each particular case.

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<sup>70</sup> De Facto Relationships Amendment Bill 1998 (NSW), sch 1, cl 4.

Using this approach, it would, in fact, be possible for reference to ‘categories’ of applicants/relationships to be removed altogether and access broadened to any constellation of people based on criteria tailored to each area (for example, in inheritance law to those financially interdependent).<sup>71</sup> Defining eligibility purely by reference to the underlying rationale of the legislation would see the removal of arbitrary factors such as the sex and marital status of the applicant. It would, at the same time, remove the convenience of being able to simply point to the existence of a particular relationship in order to establish eligibility.

The major difficulty with this model (at least as the sole means of reform), is that it could be slow and fragmented, especially given that there are over 120 Tasmanian Acts that make reference to parties to various relationships. There would also be a risk that some areas in need of reform could be overlooked thus generating inconsistency in the treatment of significant personal relationships.

### **6.3.2 Legislate for significant personal relationships in the one Act.**

A more convenient option for de facto recognition would be to amend the *De Facto Relationships Act 2000* (Tas) to cover a broader range of relationships. This could be done by including a provision in the Act stating that in all other Tasmanian Acts a reference to a ‘de facto’ partner is a reference to a ‘significant personal relationship’ (or what other relevant term might be adopted). Alternatively, the amending Act could make consequential amendments to each of the relevant Acts in question.

Another option would be to replace the current *De Facto Relationships Act 2000* (Tas) with a new Act, specifically drafted to cover significant personal relationships, and, again, with the necessary provisions to make the new relationship definition applicable across the range of legislation that deals with relationships. The Significant Personal Relationships (No.2) Bill 1998 (Tas) is an example of such a piece of legislation, albeit also combining a registration system.

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<sup>71</sup> The *Wills Act 1997* (Vic), for example, 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.

As the Committee seeks specific comment on extending the *De Facto Relationships Act 2000* (Tas) to include significant personal relationships and on the efficacy of enacting into law the Significant Personal Relationships (No.2) Bill 1998 (Tas), the remaining parts of this submission explore both options in greater depth.

## **7 The Significant Personal Relationships (No.2) Bill 1998 (Tas): An option for reform?**

### **7.1 History of the Bill**

In May 1998, Greens member Michael Foley MHA first introduced the Significant Personal Relationships Bill 1998 (Tas) as a private members Bill into the Tasmanian Parliament, closely modeled on a New South Wales Bill which had been put forward by independent member Clover Moore MP.

One month earlier the De Facto Relationships Bill 1998 had been introduced into the Tasmanian Parliament by ALP member Judy Jackson MHA.

Both bills were referred for review to the Community Development Committee of the Tasmanian Parliament, which initiated a public inquiry into their adequacy. This inquiry was unable to proceed because the subsequent dissolution of Parliament resulted in all references to the committee lapsing.

In December 1998, Greens member Peg Putt MHA introduced the Significant Personal Relationships (No.2) Bill 1998 (Tas) into Parliament.

Under the new Parliament, the House of Assembly Community Development Committee was re-established with all new membership, meeting for the first time in February 1999.

The Committee received a reference from the Attorney-General to inquire into the need for the legal recognition of significant personal relationships including possible inclusion of same-sex relationships in the proposed De Facto Relationships Bill 1998 (Tas). The Committee was, at the time, involved with another inquiry into the sex industry in Tasmania and had not looked at the Attorney's reference when he introduced the De

Facto Relationships Bill 1999 into the Parliament (proclaimed on 15 May 2000). The Committee concluded its inquiry into the sex industry and then inquired into proposed control of weapons legislation before starting the inquiry into significant personal relationships in December 1999.

The Committee did not complete its inquiry before it was dissolved once again. The dissolution of the Committee this time was as part of the ongoing reform of Parliament as recommended by the Joint Select Committee on the Working Arrangements of Parliament. In its place a Joint Standing Committee on Community Development with equal membership from both Houses was established.

In May 2001 the new Committee met for the first time and received a new reference from the Attorney-General asking it to continue the inquiry into the need for the legal recognition of significant personal relationships in Tasmania.

The Committee is directed to investigate issues associated with the legal recognition of significant personal relationships, including but not limited to the inclusion of same-sex relationships in the *De Facto Relationships Act 2000* (Tas). Whilst the Significant Personal Relationships (No.2) Bill 1998 (Tas) is not the focus of this inquiry, it is clearly relevant to the terms of reference.

## **7.2 Overview of the Bill**

### **7.2.1 The relationships**

The provisions of the Bill apply to 'significant personal relationships'. According to the definition contained in clause 5(1), a significant personal relationship exists where the partners to the relationship:

- (a) mutually acknowledge
  - (i) their emotional interdependency, or
  - (ii) the fellowship and support that each provides to the other,
- or both, and
- (b) believe that the relationship will continue and are mutually committed to the relationship continuing.

It is expressly provided that a significant personal relationship may exist even though the partners to the relationship are not members of the same household, do not intermingle their finances or do not provide financial support to each other.<sup>72</sup> Furthermore, the relationship need not be of a sexual nature.<sup>73</sup> Excluded from the definition of significant personal relationships are relationships of convenience, business or professional relationships, and relationships based only on the provision of a service, whether for fee or reward, on behalf of another person, or on behalf of a charitable organisation.<sup>74</sup>

Significant personal relationships are categorised as either a 'domestic relationship' or a 'recognised relationship'.

A *recognised relationship* is a significant personal relationship between two adults which has been formalised in the manner provided for in Division 2 of Part 2 of the Bill.<sup>75</sup> The parties must make a relationship declaration in writing before an authorised officer (a senior local court official, or a legal practitioner),<sup>76</sup> resulting in the issue of a recognised relationship certificate.<sup>77</sup> Persons may not enter into a recognised relationship if they are married, or already in another recognised relationship that has not been terminated,<sup>78</sup> or if they are not an Australian citizen or permanent resident.<sup>79</sup> Recognised relationships are terminated by the marriage of the partners to each other, or by the marriage of one of them to someone else.<sup>80</sup> The relationship can also be terminated by court order on application by either or both of the partners.<sup>81</sup>

A *domestic relationship* is one that has not been formalised and exists between two adult persons who:

- (a) live together, or
- (b) if living apart:

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<sup>72</sup> Cl 5(2)(a).

<sup>73</sup> Cl 5(2)(b).

<sup>74</sup> Cl 5(3).

<sup>75</sup> Cl 6.

<sup>76</sup> Cl 11.

<sup>77</sup> Cl 13.

<sup>78</sup> Cl 10(1).

<sup>79</sup> Cl 10(2).

<sup>80</sup> Cl 16.

<sup>81</sup> Cls 19 and 18 respectively.

- (i) do not live apart on a permanent basis, or
- (ii) share a common household or households for a significant period or periods, or
- (iii) otherwise share their lives.<sup>82</sup>

In determining the existence of a domestic relationship, the court is directed to have regard to an extensive list of matters.<sup>83</sup> These matters are:

- (a) the way or ways in which emotional interdependency or fellowship or both was expressed in the relationship;
- (b) the nature and extent of the support each of the partners provided to the other;
- (c) the way or ways in which the partners to the relationship share or shared their lives;
- (d) the duration of the relationship;
- (e) the living arrangements of the partners to the relationship;
- (f) the care and support of any children;
- (g) any testamentary disposition or power of attorney made by each party to the relationship;
- (h) financial arrangements;
- (i) material evidence supporting the existence of the relationship;
- (j) mutually shared interests or activities; and
- (k) mutually shared associations with other persons.

None of these matters is essential to establish the existence of a domestic relationship, and the court may use its discretion in determining what weight or significance (if any) is to be accorded to the presence or absence of these matters from the relationship under consideration.<sup>84</sup> A domestic relationship is terminated if either partner to the relationship marries another person, or the partners to the relationship marry each other.<sup>85</sup> A domestic relationship may also be terminated by the agreement of the partners or when one partner, by words or conduct, signifies to the other that the relationship has ended.<sup>86</sup>

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<sup>82</sup> CI 7(1).

<sup>83</sup> CI 25(1).

<sup>84</sup> CI 25(2).

<sup>85</sup> CI 26.

<sup>86</sup> CI 27.

### **7.2.2 The model**

The Significant Personal Relationships (No.2) Bill 1998 (Tas) provides a dual recognition model, combining a registration process with presumptive recognition of significant personal relationships.

The Bill provides that the rights and responsibilities currently available to people in de facto relationships shall be available to people in recognised and domestic relationships. These include rights and responsibilities concerning property, financial matters and maintenance (Part 6), and domestic violence and harassment (Part 7).

Generally, domestic relationships confer rights and benefits after 2 years.<sup>87</sup> However, if one partner dies before this time, the surviving partner is entitled to the relationship rights provided it can be established that a denial of such rights would result in the survivor experiencing substantial hardship; and but for the death of the other partner, the relationship would have continued; or a denial of these rights would be unconscionable.<sup>88</sup> A recognised relationship confers rights and benefits from the date of entry into the relationship.<sup>89</sup>

Resolution of disputes between partners is regulated by providing for conciliation, mediation and arbitration (Part 5) or court proceedings (Part 6).

### **7.2.3 Maintenance**

The maintenance provisions of the Bill are closely modeled on those contained in de facto relationships acts in force at the time the Bill was originally drafted in 1997.

While the Bill gives no general right to maintenance, it provides that the court may make orders for maintenance where the applicant's inability to be self-supporting arises from:

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<sup>87</sup> Cl 39(1). However Cl 39(2) provides that where there is a child of the partners to the relationship, the applicant has the care and control of a child of the respondent, or the applicant has made substantial contributions (financial, non-financial or homemaker) for which they would otherwise not be compensated, and where there would be serious injustice to the applicant, the court can make an order with respect to a relationship of less than two years.

<sup>88</sup> Cl 76(8)

<sup>89</sup> Cl 12.

- Having the care and control of a child of the partners or a child of the other partner (under the age of 12 years or 16 years in the case of a physically or mentally disabled child), or
- A loss of earning capacity occasioned by the circumstances of the relationship.

Where an applicant wishes to rely upon a loss of earning capacity, they must also show that an order for maintenance will increase their earning capacity by enabling him or her to undertake a course or program of training or education. It is also necessary to show that it is reasonable to make the order in the light of all the circumstances of the case.<sup>90</sup>

In exercising its power to award maintenance, a court must have regard to:

- The income, property and financial resources of each partner;
- The physical and mental capacity of each partner for appropriate gainful employment;
- The financial needs and obligations of each partner;
- Their responsibilities to support any other person; and
- The terms of any property or child maintenance orders.<sup>91</sup>

#### **7.2.4 Property**

Under the Bill the court must take into account the various direct and indirect contributions of the partners to their property and to the welfare of the family.<sup>92</sup> The court must also take into account:

- Whether the relationship is a recognised relationship or a domestic relationship;

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<sup>90</sup> CI 52(1).

<sup>91</sup> CI 52(2)

<sup>92</sup> CI 48(3).

- Any representations made by either partner to the other partner which is relied upon by that partner concerning his or her maintenance and support of the maintenance and support of a child of the partners; and
- The reasonable expectations of each partner with respect to the duration of the relationship, their standard of living and their entitlement to property, maintenance and support, for themselves (or a child of the partners) upon the termination of their relationship.<sup>93</sup>

The court may also take into account the conduct of the partners where that conduct has had a detrimental effect on the family, and must make orders 'compensatory of the harm done' to the other partner or a child of the partners.<sup>94</sup>

### **7.2.5 Relationship agreements**

Pursuant to the Bill, partners may enter into a relationship agreement.<sup>95</sup> Relationship agreements can provide for various matters associated with the relationship including the maintenance of either or both partners, the property of the partners or either of them and any other aspect, whether financial or non-financial, of the relationship.<sup>96</sup> A relationship agreement can be made in contemplation of the relationship, at its commencement, during its currency or upon its termination,<sup>97</sup> and must be in writing, signed by both partners and certified in accordance with cl 30.<sup>98</sup> Clause 30 requires each party to obtain a certificate by a legal practitioner to the effect that he or she has received independent legal advice concerning the effect of the agreement on the rights of the party, its advantages and whether it is fair and reasonable in the light of the circumstances.<sup>99</sup>

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<sup>93</sup> Cl 48(3)

<sup>94</sup> Cl 49

<sup>95</sup> De facto partners under the *De Facto Relationships Act 2000* can also enter into similar agreements.

<sup>96</sup> Cl 29(1).

<sup>97</sup> Cl 29(2).

<sup>98</sup> Cl 29(5).

<sup>99</sup> Cl 30(1).

### **7.2.6 Catch-all provision**

The effect of Part 9 of the Bill is to provide the same status in law to people who are married, in a recognised relationship or in a domestic relationship. Clause 76 provides that wherever an Act or any other law refers to:

- a husband and wife,
- a spouse,
- a de facto spouse,
- a man and woman living together as husband and wife, or in a genuine domestic relationship, although not legally married to each other,

these references are taken to include both de facto relationships and significant personal relationships (whether recognised or domestic). Any rights or obligations imposed on those categories of persons are also extended to partners to significant personal relationships.

## **7.3 Critical evaluation**

### **7.3.1 Advantageous features**

The Significant Personal Relationships (No.2) Bill 1998 (Tas) has the clear advantage of not adopting an 'either/or' approach to the appropriate model for recognition of significant personal relationships by combining a registration scheme with de facto (or presumptive) recognition.

The setting in place of a mechanism enabling partners who are unable or unwilling to marry to formalise their relationship is a welcome initiative. It would enable partners who have formalised their relationship under the legislation the opportunity to conclusively demonstrate the existence of a significant personal relationship by proof of the recognised relationship certificate. For those who choose not to register their relationship, protection is afforded by presumptive recognition of a 'domestic relationship'. Equally, however,

partners can, to a certain extent, 'opt out' of legislative provisions by making a relationship agreement.

As Wayne Morgan has argued in his submission forwarded to the Committee:

The Bill provides for maximum flexibility: a registration scheme, as well as allowing people to define their relationship through a relationship agreement as well as a 'safety net' protection governing issues relating to custody and property division upon breakdown of a relationship, even when no registration or agreement has been concluded.

There are other advantages to this Bill, including the fact that it extends to a wide variety of relationships, including same-sex couples, non-marriage-like partners, carers and their cared for, cultural relationships and religious relationships. For this reason it avoids many of the difficulties associated with more limited definitions contained in comparative legislative provisions in other States and Territories.<sup>100</sup>

### **7.3.2 Problems**

While the overall dual model proposed by the Significant Personal Relationships (No.2) Bill 1998 (Tas) is commendable, the Bill itself is problematic and would require substantial redrafting if it were to be implemented. Moreover, many of its provisions are now outdated in view of developments in the law that have occurred since its original drafting in 1997, including the implementation of the *De Facto Relationships Act 2000* (Tas).

It is also relevant to note that the New South Wales Gay and Lesbian Rights Lobby withdrew support for the equivalent Clover Moore Bill in favour of an amendment to the *De Facto Relationships Act 1984* (NSW).<sup>101</sup>

The most fundamental problems with the Bill are highlighted below.

#### Relationships

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<sup>100</sup> See "3. The basis for recognition of a relationship" above.

<sup>101</sup> "The Bride Wore Pink: Legal Recognition of Our Relationships, A Discussion Paper", Second Edition, February 1994, *Lesbian and Gay Legal Rights Service*.

The inclusion in the Bill of three separate definitions of relationships has the potential to create unnecessary confusion, especially given that partners ultimately fall into one of two categories for the purposes of the legislation: a recognised significant person relationship or a domestic significant personal relationship.

The very wide discretion given to the court in determining the existence of a domestic relationship is likely to be problematic in practice. The relevant considerations specified in the legislation are vague and will inevitably generate uncertainty for legal practitioners and members of the public.

### Maintenance

Eligibility for maintenance under the Bill is far more restrictive than under the provisions of the *Family Law Act 1975* (Cth) and the *De Facto Relationships Act 2000* (Tas). The principal difference is that a spouse or de facto need not show that his or her need resulted from the circumstances of the relationship. Furthermore, the Bill imposes restrictive time limits on the duration for which periodic maintenance can be ordered.<sup>102</sup> These differences clearly demonstrate an underlying policy not to equate partners in a significant personal relationship with married couples. This is contrary to developments culminating in the *De Facto Relationships Act 2000* (Tas), which virtually assimilates the rights of de facto and married couples. There can be no doubt that the implementation of these maintenance provisions would represent a regressive change in the law.

### Property

The property provisions of this Bill represent a departure from the provisions contained in the *Family Law Act 1975* (Cth) and indeed any other de facto or domestic relationships legislation in force in Australia.

The major concern with these provisions is that they omit any reference to the future financial needs and capacities of the partners. Instead they introduce a number of considerations that do not sit well with statutory property alteration as it otherwise operates in the context of married and de facto partners; not least the provisions relating

to 'representations' by the partners and their 'reasonable expectations'. These differences from comparative regimes mean that the provisions are untested. Moreover, there would be little practical guidance for judges, practitioners and the public on how these laws should be applied in practice. These provisions would inevitably generate confusion, uncertainty and ultimately expense for litigants.

The express inclusion of conduct is highly controversial (although interesting in light of the increasing recognition of the relevance of violence and abusive behaviour in making property orders under the *Family Law Act 1975* (Cth)).<sup>103</sup> It is likely to engender serious concerns about 'fault-based' concepts being taken into account in an area of law to which fault no longer has relevance. The requirement to make orders 'compensatory of the harm done' in the context of property settlement is particularly problematic owing to the lack of clarity as to which principles of compensation should be applied.

### Relationship agreements

Under the provisions of the Bill, the effect of a relationship agreement on proceedings under Part 6 (property and maintenance) is somewhat unclear. Clause 41(1) provides that:

[W]here the partners ... have made a relationship agreement in accordance with sections 29 and 30, the court must not (except as provided by sections 50 and 51) make an order under this Part that would be inconsistent with the terms of the agreement.

However, clauses 50 and 51 appear to have no relevance as exceptions (dealing instead with 'Death of partner-effect on proceedings' and 'No general right to maintenance'). This could be a drafting error – it seems that the reference should be to clause 60.

The difficulty in interpreting the provisions is compounded by the fact that notwithstanding cl 41(1), cl 41(3) provides:

[A] court may make orders at variance with the provisions of a relationship agreement, notwithstanding that it was made in accordance with sections 29 and 30, if the court is satisfied that there are compelling reasons to do so.

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<sup>102</sup> Cl 56.

<sup>103</sup> See S Middleton, 'Domestic Violence, Contributions and s 75(2) Considerations: An Analysis of Unreported Property Judgments' (2001) 15 *Australian Journal of Family Law* (forthcoming).

The two subsections are totally inconsistent. Moreover, cl 60(2) repeats the substance of cl 41(3), again suggestive of ill-considered and unworkable legislative drafting.

### The catch-all provision

The purpose of the catch-all provisions (Part 9) is to incorporate a reference to 'significant personal relationship' or a partner to a 'significant personal relationship' in any reference in Tasmanian legislation to a 'de facto relationship' or a 'de facto partner' respectively. While this is a good idea, and avoids the difficulties associated with trying to make consequential amendments to more than 120 pieces of legislation in the one Act, the drafting of the provisions is very poor making the provisions complex and difficult to understand.

### Superannuation

Two significant concerns arise in respect of the interaction of the Significant Personal Relationships (No.2) Bill 1998 (Tas) with State public sector superannuation schemes. These concerns are examined in detail in Appendix B. Also included in Appendix B is an overview of: (i) the general legislative regulation of superannuation; and (ii) the various superannuation regulated legislative instruments in Tasmania.

For the purposes of review a summary of each concern follows.

The *first* concern relates to the inclusion of superannuation in relationship agreements. The Significant Personal Relationships (No.2) Bill 1998 (Tas) specifically defines the term 'financial resources' to include superannuation interests. As such, a superannuation interest is a matter that the parties to a relationship agreement may make an agreement upon. The main difficulties that arise as result of this are:

- A superannuation interest does not become 'property' until the conditions specified by the relevant superannuation scheme for payment have been satisfied. As such, a superannuation interest that is not yet payable to a superannuation scheme member is not divisible. Consequently, although superannuation is a matter that may be considered by the parties to a relationship agreement, practically, the only options available to the parties are to: (i) offset the value of the superannuation asset against other assets or financial resources; or (ii) defer the operation of the agreement until

the benefit is payable. This is essentially the same difficulty experienced by the Family Court in respect of the division of matrimonial property upon the breakdown of a marriage relationship. The options of offsetting and deferral of the agreement have been widely criticised as unfair and uncertain.

- The inclusion of superannuation interests as a matter that may be considered and agreed upon by the parties necessitates the parties ascribing a value to the interest. It is very difficult to offset a superannuation entitlement against another asset if a value is not placed upon that interest. Given that superannuation interests are payable in the future there are inherent uncertainties as to the amount that will be paid. This is particularly the case with defined benefit funds. If superannuation is to be included in relationship agreements, guidance as to the valuation methods to be utilised by the parties is required.
- The Committee of Inquiry could investigate the possibility of instituting reform similar to that to be implemented by the Commonwealth Government through the *Family Law Legislation Amendment Superannuation Act 2001* (Cth). This Act, which is yet to commence, will amend the *Family Law Act 1975* (Cth) so as to make provision for superannuation interests to be divided upon marriage breakdown. However, similar reform in Tasmania in respect of relationship agreements, without Commonwealth support and agreement, is in breach of the Heads of Government Agreement entered into by the State with the Commonwealth in 1996. Contravention of this Agreement exposes the State public sector superannuation schemes to serious taxation and superannuation guarantee contribution implications.

The *second* concern that arises relates to the extension by the Significant Personal Relationships (No.2) Bill 1998 (Tas) of the definition of spouse and de facto, in all Tasmanian Acts, to include significant personal relationships. In the context of State public sector superannuation schemes, this will have the effect of requiring a superannuation trustee, in certain instances, to pay out a death benefit to a partner of a significant personal relationship. Currently, death benefits are paid out to either the deceased member's personal legal representative or spouse (including a de facto spouse). The difficulty that arises is that, in the context of the legislative enactments that establish

the Tasmanian public sector superannuation schemes, the extension of the definition of spouse or de facto to include partners of significant personal relationships is in breach of the Heads of Government Agreement described above. Consequently, without Commonwealth support and agreement for the amendments, the public sector superannuation schemes are again exposed to taxation and superannuation guarantee contribution implications.

In conclusion, it is recommended that, due to the special nature of superannuation, reform of public sector superannuation schemes so as to make provision for significant personal relationships be conducted separately to any other reform process. This would allow for consultation and negotiation with the Commonwealth as well as further examination of, and the making of provision for, the somewhat unique nature of superannuation interests.

## **8 Amending the *De Facto Relationships Act* as an option for reform**

In our opinion, amending the *De Facto Relationships Act 2000* (Tas) to include within its scope same-sex partners and non-marriage-like partners is the most appropriate option for significant personal relationships reform in Tasmania.

There are two possible methods for carrying out such an amendment. The definition of 'de facto relationship' could be extended to cover same-sex relationships. Another broader category of relationship could also be inserted into the legislation and defined to cover non-marriage-like relationships. Alternatively, the term 'de facto relationship' could be replaced with an all-encompassing term such as 'domestic relationship' or even 'significant personal relationship' to cover all relevant relationships. Whichever approach were adopted, the definition would need to be broad and not restricted by reference to matters such as cohabitation or a sexual relationship. It would also be desirable to change the name of the *De Facto Relationships Act 2000* (Tas) accordingly.

There are several arguments in favour of this model for reform.

1. The *De Facto Relationships Act 2000* (Tas) virtually assimilates the financial rights and obligations of de facto partners with those of married spouses. In this regard, the Act goes further than a number of its mainland counterparts, these being far more restrictive in the entitlements conferred. Bringing other significant personal relationships within the ambit of the Act would confer similar rights and obligations and thus afford equal legal protection for all partners.
2. Amending the *De Facto Relationships Act 2000* (Tas), rather than enacting new laws, would be less likely to create confusion and uncertainty for the public and legal profession. This is particularly so given that the new de facto laws have only been in place a relatively short time and are generous in the entitlements that they confer.
3. The *De Facto Relationships Act 2000* (Tas) is currently concerned mainly with property and maintenance entitlements. However, a catch-all provision could be inserted into the legislation such that any reference in existing legislation to a 'de facto relationship' would be taken to include reference to the wider category of relationships as defined in the amended Act.
4. Amending the *De Facto Relationships Act 2000* (Tas) is not inconsistent with a registration system. Indeed, a registration system could easily be incorporated into law, possibly at a later date, either by amendment to the *De Facto Relationships Act 2000* (Tas) or by enacting separate legislation. While it would, in theory, be preferable to make all reforms in this area at once, any reform involving registration is likely to provoke lively public discussion and debate. In the meantime, amending the existing Act to include a wider range of relationships would ensure that partners to same-sex relationships and non-marriage-like relationships are afforded the same legal protection that currently is afforded to de facto partners.
5. De facto (or presumptive) recognition is the dominant and preferred model for the recognition of significant personal relationships in Australia to date. While there are difficulties with the various Acts in other States and Territories, particularly in terms of being under-inclusive by virtue of the definitions they employ, the Tasmanian

Parliament would have the advantage of being able to identify and avoid these difficulties.