

Legal Recognition of Significant Personal Relationships in Tasmania¹

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In 1999, the Tasmanian legislature enacted the *De Facto Relationships Act 1999*. This Act established a statutory regime enabling a court to alter the interests of de facto partners in their property and to make orders for the maintenance of one partner by the other. In enacting this legislation, Tasmania was influenced by the reform measures undertaken in other States and Territories of Australia affording recognition to de facto relationships. However, unlike some of its interstate counterparts, the Tasmanian Act virtually assimilated the rights of de facto partners with those of married couples as provided for under the *Family Law Act 1975* (Cth).²

A de facto partner was defined to mean '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'.³ This definition limited the application of this statutory regime to relationships closely resembling marriage and left a range of relationships beyond the scope of the reforms, including same-sex relationships and other non-marriage-like relationships. The Tasmanian legislature

¹ This article is intended as a primarily descriptive review of the current Tasmanian position in relation to significant personal relationships law reform. For critical analysis of the schemes already operating in other jurisdictions see: D Sandor, 'Legislating in Australia for Love Outside of Marriage' (Paper presented at the Miller Du Toit and The Law Faculty of the University of Western Cape Family Law Conference, Cape Town, 25 March 2002); J Millbank and K Sant, 'A Bride in Her Every-day Clothes: Same Sex Relationship Recognition in NSW' (2000) 22 *Sydney Law Review* 181; J Millbank, 'Domestic Rifts: Who is Using the Domestic Relationships Act 1994 (ACT)?' (2000) 14 *Australian Journal of Family Law* 163; J Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would It See?' (1998) 12 *Australian Journal of Family Law* 99; K Walker, 'Same-sex Relationships and the Law' (1997) 22 *Alternative Law Journal* 293. It is noteworthy that the 2002 December issue of the *Australian Journal of Family Law* (vol 16) will be a special issue featuring articles on family law and same-sex relationships. This article states the law as it stands at 10 August 2002.

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² See S Middleton, 'De Facto Relationships Bill (Tas) 1999' (1999) 13 *Australian Journal of Family Law* 194.

³ *De Facto Relationships Act 1999* (Tas) s 3.

did not attempt to justify the exclusion of these other categories of relationship. Instead, it stressed the need for immediate de facto relationships reform and left the issue of wider recognition of 'significant personal relationships' for future consideration.

In May 2001, a Joint Standing Committee on Community Development, with equal membership from both Houses of Parliament, was given a reference by the Attorney-General to inquire into 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*. The Committee's deliberations were to include the legal status of significant personal relationships with respect to:

- 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.

The term 'significant personal relationship' was not defined for the purposes of the terms of reference. It is a term taken from the Significant Relationships Bill that was tabled in the Tasmanian Parliament by the Greens in 1998.⁴ The Bill referred 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'.⁵

⁴ See for discussion S Middleton and M Otlowski, 'De Facto and Other Significant Relationships – Possible Tasmanian Directions for Reform' (1998) 13(1) *Australian Family Lawyer* 25.

⁵ Significant Personal Relationships Bill 1998 (Tas) cl 5(1). While the term 'significant personal relationship' is wide enough to encompass heterosexual de facto relationships, in view of the legal recognition already afforded to these relationships, the Committee was concerned only with legal deficiencies relating to same-sex couples and other non-traditional significant personal relationships.

The Committee publicly advertised the inquiry and received 155 written public submissions. The Committee also took oral evidence from individuals and groups including the Anti-Discrimination Commissioner, the Law Society of Tasmania, the Retirement Benefits Fund, the Tasmanian Gay and Lesbian Rights Group, the Carers Association of Tasmania, the Tasmanian Trades and Labour Council and the Department of Justice. Most of the submissions focused on same-sex relationships; however, there were some submissions addressing the concerns of people in a broader range of relationships, including those between carers and patients.

On 19 December 2001 the Committee released its report.⁶ The Committee found that many aspects of Tasmanian law discriminate against people in non-traditional (or non-marriage-like) significant personal relationships. It recommended that there be statutory reform to redress this situation, and concluded that the most appropriate method for the implementation of such reform was by amending the *De Facto Relationships Act* to accommodate a broader range of relationships. Notwithstanding this recommendation, the Committee can be criticised for its failure to put forward a definition specifying the criteria upon which such extended recognition should be afforded. In this way, the Committee failed to tackle the central issue of exactly which relationships should come within the amended Act and thereby be afforded legal recognition.

The Committee's Findings

The Committee, in its report, makes various findings. For the purposes of the present discussion, the most relevant findings are as follows:

- Under Tasmanian law, significant personal relationships, other than marriage and de facto relationships between heterosexual partners, are not recognised.⁷
- Tasmanian statutes that regulate relationships generally do not extend to non-traditional relationships because the Acts only attach rights to people who fall within narrow definitions of 'spouse' and 'de facto partner'.⁸

⁶ Joint Standing Committee on Community Development, Parliament of Tasmania, *Report on the Legal Recognition of Significant Personal Relationships* (2001).

⁷ Ibid 9.

⁸ Ibid.

- This differential treatment seriously disadvantages people in non-recognised relationships as they share many of the difficulties faced by married and de facto couples without having the benefit of equivalent legal protection.⁹
- The denial of legal recognition to non-traditional relationships creates unjustifiable hardship and expense, as claims for entitlements that would automatically flow to married couples or de facto partners have to be fought for in court under the general law, with no certainty of outcome. Further, these actions often need to be taken in times of crisis, such as the death of a partner, or the breakdown of a relationship.¹⁰

Given the inequity caused by the current state of the law, and in view of increasing community acceptance of non-traditional relationships, the Committee perceived a clear need for legislative reform. The Committee's position was strengthened having regard to Australia's obligations under international law, human rights laws, the principle of equality before the law and anti-discrimination laws.

The particular areas identified as most in need of reform include property disputes, stamp duty, superannuation, employment, succession and intestacy, rights of next of kin and statutory compensation schemes. The current difficulties with each of these areas are briefly discussed below.

Property Disputes

The Committee noted that one of the most pressing needs for reform stems from the lack of a mechanism to provide a just and equitable settlement of property disputes between parties of non-traditional relationships.¹¹ In particular, a partner to a non-traditional relationship does not have the protection otherwise afforded to married and de facto couples under the *Family Law Act 1975* (Cth)¹² and the *De Facto Relationships Act 1999* (Tas)¹³ respectively. Instead, such partners

⁹ Ibid.

¹⁰ Ibid 6.

¹¹ Ibid 26.

¹² Section 79 of the *Family Law Act 1975* (Cth) gives the Family Court power to make orders altering the interests of 'parties to a marriage' in their property.

¹³ The *De Facto Relationships Act 1999* (Tas) enables a court to make an order adjusting the interests of partners to a 'de facto relationship' in their property. A de facto relationship is defined in s 3 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'.

can seek redress only through the general law, which can be time consuming, costly and unpredictable in outcome. Moreover, common law and equitable remedies treat the individuals concerned as if they were strangers and not parties to an intimate relationship. Accordingly, matters taken into account in determining the property entitlements of married or de facto couples, such as contributions to the welfare of the family and the respective future financial circumstances of the parties, are irrelevant.

Stamp Duty

The Committee identified that partners to non-traditional relationships do not have the stamp duty exemptions granted to 'parties to a marriage' and 'de facto partners' under the *Duties Act 2001* (Tas)¹⁴ on the transfer of property between them during their relationship.¹⁵ Moreover, unlike their married and de facto counterparts, partners to non-traditional relationships are not exempted from stamp duty if, by order of a court, property is transferred between them after the breakdown of their relationship.¹⁶

Superannuation

The Committee recognised that same-sex couples contribute to superannuation schemes in the same way as their heterosexual counterparts, but are discriminated against in the allocation of benefits.¹⁷ In particular, a same-sex partner, or partner to some other non-traditional relationship, does not have any legal right to a joint pen-

¹⁴ Sections 56 and 57. Section 3 of the Act defines a de facto relationship to mean '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'.

¹⁵ Parliament of Tasmania, above n 6, 28.

¹⁶ Cf *Family Law Act 1975* (Cth) s 90(1) and *De Facto Relationships Act 1999* (Cth) s 50.

¹⁷ Parliament of Tasmania, above n 6, 28-32. In Tasmania, those people employed by the State are entitled to superannuation and associated benefits pursuant to the superannuation schemes established by the following Acts: *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 people in Tasmania are subject to the Commonwealth superannuation regime, over which the State Parliament has no jurisdiction. See Human Rights and Equal Opportunity Commission, *Superannuation Entitlements of Same-Sex Couples, Report of Examination of Federal Legislation*, HRC Report No 7 (1999).

sion. Similarly, such a partner has no automatic entitlement to death benefits, even if he or she is the nominated beneficiary.¹⁸

Employment

The Committee identified a number of employment related benefits that are often provided to spouses in married and de facto relationships, but to which partners to non-traditional relationships do not have access.¹⁹ These include travel allowances for an accompanying spouse, removal costs upon transfer, health insurance and payment of school fees. Other general entitlements such as carer's, bereavement and parental leave may also be difficult to obtain by partners to non-traditional relationships.²⁰

For example, under the *State Service Regulations 2001* (Tas) an employee may be granted special leave of absence in the event of the serious illness of a relative of the employee. '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.

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 must be that of cohabitation. It would, however, be more appropriate for the status to be based on criteria relevant to the benefit being granted, such as a close emotional relationship. Moreover, as people who fit within the 'traditional' categories do not have to show the additional criteria of cohabitation, this results in discrimination against people in same-sex and other non-traditional significant personal relationships.

¹⁸ The relevant schemes generally provide for automatic payment of death benefits to a 'spouse'. The definition of spouse includes a de facto spouse. However, the definition of de facto spouse is limited to heterosexual relationships.

¹⁹ Parliament of Tasmania, above n 6, 17.

²⁰ The main employer with respect to whom the issues raised by the Inquiry are relevant is the Tasmanian State Service, governed by the *State Service Act 2000* (Tas).

The Tasmanian *Anti-Discrimination Act 1988* does not alleviate these kinds of difficulties in that, although it prohibits discrimination in employment, the provisions relating to discrimination based on marital status and family responsibilities only relate to heterosexual partners and traditional family members.²¹

Succession and Intestacy

The Committee reviewed the *Testator's Family Maintenance Act 1912* (Tas) and found that the Act excludes same sex partners as eligible claimants for family provision and in cases of intestacy.²² Instead, partners to non-traditional relationships are required to meet onerous evidentiary requirements to establish dependency, irrespective of their relationship with the deceased. The intestacy rules set out in the *Administration and Probate Act 1935* (Tas) similarly exclude same sex partners.²³

Rights of Next of Kin

The Committee expressed concern over the limitations imposed upon non-traditional partners in situations involving the illness or death of their partner.²⁴ Partners to non-traditional relationships may be denied visitation rights to their partner in times of medical emergencies because hospital policy generally restricts access to 'close family' and this is usually determined on the basis of marital or blood ties. Furthermore, partners to non-traditional relationships may not be given the right to make decisions for their incapacitated partner,

²¹ See the definitions of 'de facto spouse', 'family responsibilities' and 'immediate family member' in s 3 of the Act.

²² Section 3A defines eligible applicants as: the widow, children or parents of the deceased person; a person who was formerly married to the deceased person and who was being maintained by the deceased; and a person who was a de facto spouse of the deceased person. In s 2 'de facto spouse' is defined as a person:

(a) who cohabited with another person of the opposite sex as the spouse of the 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 death of that other person.

²³ Section 44 provides that estates valued at less than \$50,000 go to the deceased's children, husband or wife, de facto husband or wife, parents, brothers and sisters, grandparents, uncles and aunts and next of kin. Section 44(9) restricts the term 'de facto relationship' to that 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.

²⁴ Parliament of Tasmania, above n 6, 39-41.

and similarly may be excluded from the right to make decisions on behalf of a deceased partner in matters concerning organ donation and autopsies.²⁵ The Committee acknowledged that these difficulties could, to a certain extent, be avoided by a partner making specific provision for these kinds of events in documents, such as enduring guardianships and advanced medical directives. However, it concluded that the right to equal treatment should not be contingent upon such documents having been prepared in foresight.²⁶

Statutory Compensation Schemes

The Committee noted that statutory compensation schemes generally represent the community's interest in protecting families and dependents.²⁷ In Tasmania, the *Fatal Accidents Act 1934*,²⁸ the *Workers Rehabilitation and Compensation Act 1988*²⁹ and the *Motor Accidents (Liability and Compensation) Act 1973*³⁰ provide compensation to the spouse or de facto partner of a person who is killed or injured in their workplace or by other misadventure. Unlike their married or de facto counterparts, partners to non-traditional relationships have no automatic entitlement to such compensation. Instead, they are required to prove dependence, often through expensive litigation.

²⁵ There are a number of Tasmanian Acts relating to these issues, such as the *Guardianship and Administration Act 1995*, the *Mental Health Act 1963*, the *Alcohol and Drug Dependency Act 1968*, and the *Cremation Regulations 1999*. Generally, these Acts give decision-making rights to people in order of priority of their relationship on a 'next of kin' scale. The person with the highest priority is the spouse, and then other 'traditional' family members, followed by people in dependency or other close relationships. What this means is that same-sex partners, excluded from the definition of spouse or de facto, have to establish that they fall within another category such as 'a close friend', which may be lower on the priority list.

²⁶ Parliament of Tasmania, above n 6, 40.

²⁷ *Ibid* 41-3.

²⁸ Section 5 provides that actions may be taken by 'members of the family' of the person killed by accident. Section 3 defines a 'member of the family' to mean the deceased person's spouse, de facto spouse, parent, stepparent, grandparent, child, stepchild, grandchild, brother, sister, half-brother or half-sister. The term 'de facto spouse' is defined as a person of the 'opposite sex' to the deceased person.

²⁹ Definitions of family member and de facto spouse are found in ss 3 and 68A and are substantially the same as those in the *Fatal Accidents Act 1934*, see *ibid*.

³⁰ Sections 1 and 7 of Schedule 1 of the *Motor Accidents (Liabilities and Compensation) Regulations 2000* define 'de facto relationship' and 'de facto spouse' as being limited to partners of the opposite sex.

Options for Reform

In assessing the appropriate direction for legislative reform, the Committee considered three options: marriage for same-sex couples; registration of significant personal relationships; and presumptive recognition of significant personal relationships (based on the existing de facto relationships model).³¹ It is notable that all of these options contemplate legislative reform at the State level. Given that important issues such as superannuation and social security can only be resolved at the federal level, a national approach to legislation covering significant personal relationships might provide the most ideal model for reform.³² Yet the difficulties inherent in this mode of reform, which would first require all States to refer power to the Commonwealth (or to agree to enact uniform legislation) and would then require the development of a single united approach, makes this an unlikely prospect in the short term.

Marriage for Same-Sex Couples

This option for reform contemplates the extension of marriage laws to allow for same-sex marriage. Such reform would follow the lead set by overseas jurisdictions including the Netherlands and Denmark.³³

The Committee showed little hesitation in rejecting this option. The Report states:

The committee acknowledges the importance of marriage in our society and recognises the traditional and religious associations which give this relationship its pre-eminence. The Committee would not want to see

³¹ In this part of the report, the Committee substantially adopted and reproduced the comments made by the authors in their submission to the Inquiry. For further discussion of reform options see: New South Wales Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform, Inquiry into De Facto Relationships Legislation*, Report No 20 (1999); Victorian Attorney-General's Advisory Committee on Gay, Lesbian and Transgender Issues, *Reducing Discrimination Against Same Sex Couples*, Discussion Paper (2000); Victorian Equal Opportunity Commission, *Same Sex Relationships and the Law*, Report (1998).

³² A national model for reform is supported by the Family Law Section of the Law Council of Australia. See 'A Proposal of Model De Facto Relationships Legislation' (1998) 12(3) *Australian Family Lawyer* 6. See also Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, Parliament of the Commonwealth of Australia, *The Family Law Act 1975: Aspects of its Operation and Interpretation*, Report (1992).

³³ Submission to the Joint Standing Committee on Community Development, Tasmanian Parliament, Inquiry into the Legal Recognition of Significant Personal Relationships, 25 October 2000 (W Morgan).

any change to the institution of marriage or the rights and privileges it enjoys.³⁴

The Committee went on to note that this option for reform would have limited utility as it would only apply to same-sex relationships and that other non-traditional significant personal relationships would not benefit.³⁵

The Committee also took into account evidence 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.³⁶ Indeed, 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.³⁷

Finally, the Committee noted that, in any event, the Tasmanian Parliament has no authority to legislate in this area as, under the *Constitution*, the power to regulate marriage rests with the Commonwealth.³⁸

Registration of Significant Personal Relationships

This option for reform looks towards the establishment of a system whereby people in significant personal relationships could voluntarily choose to register their relationship as such. Once registered, certain legal rights and responsibilities would arise between the partners. This would be achieved by the amendment of State legislation, which confers rights and responsibilities on spouses and de facto partners, to encompass partners to registered relationships.

The Committee acknowledged that there are advantages to this type of system.³⁹ In the first place, 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, rather than having the law presume its significance based on arbitrary criteria such as two years cohabitation. There need be few, if any,

³⁴ Parliament of Tasmania, above n 6, 45.

³⁵ *Ibid.*

³⁶ Submission to the Joint Standing Committee on Community Development, Tasmanian Parliament, Inquiry into the Legal Recognition of Significant Personal Relationships, 4 May 2000 (Tasmanian Gay and Lesbian Rights Group).

³⁷ See for discussion, Gay and Lesbian Rights Lobby (NSW), *The Bride Wore Pink*, Discussion Paper (2nd ed, 1994).

³⁸ Section 51(xxi) of the *Australian Constitution* gives the Commonwealth Government power to legislate in respect of 'marriage'.

³⁹ Parliament of Tasmania, above n 6, 48.

prerequisites for registration. For example, there would be no need to limit those eligible for registration by virtue of their sexuality, gender, or living arrangements. A registration model could even encompass heterosexual de facto relationships, even though these relationships already have presumptive legal recognition under the *De Facto Relationships Act 1999*. Furthermore, a registration scheme 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 (although, in practice, it is likely that most people would nominate the same person as being significant for all areas).

The Committee also highlighted some potential problems with a registration system.⁴⁰ The most obvious problem is that couples may not register their relationships (whether through ignorance, complacency or choice). 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. Indeed, 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 recently been decriminalised.⁴¹

Weighing up the advantages against the disadvantages, the Committee concluded that the registration model would provide a straightforward way for people to prove the existence of their relationship,⁴² but that in itself the system was not enough to redress current inadequacies in the law. The Report states:

... whilst a registration system for relationship recognition has merit and may be appropriate in future reforms in this area, it is not vital for the delivery of equal recognition to non-traditional significant personal relationships and ... an approach which provides a 'safety net' which gives security and equality to all significant personal relationships is an appropriate starting point for reform.⁴³

⁴⁰ Ibid.

⁴¹ *Criminal Code Amendment Act 1997* (Tas).

⁴² Parliament of Tasmania, above n 6, 49.

⁴³ Ibid 50.

Presumptive Recognition (Based on the De Facto Model)

This option contemplates extending the existing scheme for the legal recognition of de facto partners to the wider category of significant personal relationships. Under this model, a significant personal relationship would be presumed to exist and accorded legal recognition when nominated criteria are satisfied. Accordingly, this model does not require couples to take any positive step, thus providing a 'safety-net', especially for economically vulnerable partners. Moreover, it avoids issues of legal discrimination by treating all non-traditional significant personal relationships in exactly the same way as de facto couples. It also avoids the privacy concerns inherent in a registration system.

For these reasons, the Committee favoured presumptive recognition as the appropriate option for reform. In particular, it noted that the existing de facto model could be used to recognise a broad range of non-marriage-like relationships without being seen as a challenge to the institution of marriage.⁴⁴

The Committee was mindful of the criticism that presumptive recognition can be over-inclusive, in that individuals may have deliberately chosen not to formalise their relationship and may find that by simply cohabiting for a specified period they attract certain rights and responsibilities that they did not intend.⁴⁵ However, the Committee felt that this concern could be mitigated, as it is in the context of de facto relationships, by allowing the parties to enter into binding cohabitation and separation agreements.⁴⁶ It is also notable that, as the law stands, parties to significant personal relationships are unable to formalise their relationship even if they want to.

The Committee also noted criticisms that presumptive recognition can be under-inclusive.⁴⁷ This occurs when the criteria for recognition are too narrow and so do not encompass some relationships. For example, a definition based on cohabitation would defeat the purpose of reform by excluding non-cohabiting sexual relationships. Equally, a definition based on a sexual association would exclude non-marriage-like relationships (such as carer-patient relationships and those based on kinship). The Committee considered, however, that with the use of appropriate criteria, legislative amendment could provide recogni-

⁴⁴ Ibid 46.

⁴⁵ Ibid.

⁴⁶ Ibid 47.

⁴⁷ Ibid 46.

tion for an extensive range of significant personal relationships without being restricted by traditional concepts such as cohabitation.⁴⁸

The Committee identified two ways in which reform of this type could be achieved. The first option would be to amend individually all pieces of Tasmanian legislation dealing with spouses and de facto heterosexual partners to incorporate, by definition, a broader range of relationships. The second option would be to implement reform across the board by one overarching statute.

Amending Individual Laws

In many regards, amending each statute individually to encompass non-traditional significant personal relationships 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. 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 who are financially interdependent).⁴⁹ 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, however, remove the convenience of being able to point simply 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 would be a slow and fragmented process, 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. In light of these concerns, the Committee expressed a clear preference for

⁴⁸ Ibid 48.

⁴⁹ An example of this approach can be found in the *Wills Act 1997* (Vic), which 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. See for discussion, N Hill, 'The Nature of Dependence and the Legal Recognition of Same-sex Relationships' (1999) 24 *Alternative Law Journal* 170.

comprehensive reform in the form of an overarching statute, rather than 'ad hoc' measures.⁵⁰

An Overarching Statute

In settling upon the need for comprehensive reform, the Committee pointed to the advantages of using the existing and tested model based on the *De Facto Relationships Act 1999*, rather than replacing it with a new Act, specifically drafted to cover significant personal relationships. In particular, it rejected the Significant Personal Relationships (No 2) Bill 1998 (Tas) as an option for reform.⁵¹

The Committee put forward two specific options for amending the *De Facto Relationships Act 1999*:

- i. extending the meaning of de facto relationship to cover same sex relationships, or
- ii. replacing the term 'de facto relationship' with an all-encompassing term such as 'domestic relationship' or 'significant personal relationship' to cover all relevant relationships.⁵²

It is somewhat peculiar that the first option only applies to same-sex couples. Presumably, this cannot have been what the Committee really intended, as the whole tenor of the Report is about the need for legal recognition of same-sex *and other* significant personal relationships. This is supported by the Committee's comment that:

... the extension of the *De Facto Relationship Act 1999* [sic] to include same sex and other significant relationships is the most appropriate approach to provide equal rights and obligations to significant personal relationships.⁵³

It can be speculated that what the Committee had in mind was changing the meaning of 'de facto partners' to cover same-sex partners and then adding another term into the legislation, such as 'domestic relationship', to cover all other relevant relationships.

The second option contemplates replacing the term 'de facto relationship' with an all-encompassing term such as 'domestic relationship' or 'significant personal relationship'. This would necessitate a renaming of the *De Facto Relationships Act* accordingly.

The Committee recognised that the *De Facto Relationships Act* is primarily concerned with property and maintenance entitlements and

⁵⁰ Parliament of Tasmania, above n 6, 20.

⁵¹ Ibid 49.

⁵² Ibid 8.

⁵³ Ibid 50.

therefore recommended that a catch-all provision be included in the Act to ensure that any change to the relationships recognised by it also be incorporated into other relevant Acts, including the *Anti-Discrimination Act 1998*, *Testator's Family Maintenance Act 1912*, *Administration and Probate Act 1935*, *Duties Act 2000* and statutory compensation Acts. The Committee also recommended that the Tasmanian Parliament legislate to ameliorate discrimination in Tasmanian public sector superannuation, after appropriate consultation with the Commonwealth.⁵⁴

Amending the *De Facto Relationships Act* – A Suitable Option for Reform?

The Report is welcomed as an important step towards much-needed reform in Tasmanian laws relating to significant personal relationships. In proposing these reforms, the Committee is following the lead taken by other States and Territories that have enacted legislation to redress similar inadequacies in those jurisdictions. Same-sex couples are now afforded varying degrees of legal recognition in New South Wales, Victoria, the Australian Capital Territory and Queensland. Broader ranges of significant personal relationships are also recognised for certain purposes in New South Wales, Victoria and the Australian Capital Territory.⁵⁵ It is evident that the law in this area is in a state of flux, with each jurisdiction gradually coming to the realisation that reform is required, but each implementing reform measures in a slightly different manner.⁵⁶

⁵⁴ Ibid 8, 32-4.

⁵⁵ Developments in these States and Territories are discussed below.

⁵⁶ It should be noted that Western Australia has recently legislated in respect of same-sex relationships after a report into the legal status of same-sex relationships recommended in favour of reform (Report of the Ministerial Committee, *Gay and Lesbian Law Reform* (2001)). The *Acts Amendment (Lesbian and Gay Law Reform) Act 2001* (WA) was passed on 17 March 2002 and is now awaiting proclamation. The purpose of this Act is 'to amend the Criminal Code and repeal the *Law Reform (Decriminalisation of Sodomy) Act 1989*, and to amend [other related Acts] in order to provide for the reform of the law relating to same sex relationships, access to artificial fertilisation procedures and for related purposes'. In South Australia, the Northern Territory and Tasmania, de facto relationships legislation has 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. It can be speculated that the Northern Territory and South Australia, like Tasmania, will eventually follow the lead set by the other States and Territories in legally recognising a wider range of relationships.

Generally speaking, the reforms so far implemented in the various jurisdictions are based on some kind of presumptive recognition. The Committee's proposed model for Tasmanian reform, based on presumptive recognition by extending the ambit of the *De Facto Relationships Act 1999*, follows this general trend and appears to be a suitable option. In this regard, the following comments can be made:

- Firstly, amending the *De Facto Relationships Act 1999*, rather than enacting new laws, would be less likely to create confusion and uncertainty for the public and the legal profession. This is particularly so given that the new de facto laws have been in place a relatively short time.
- Secondly, the *De Facto Relationships Act* 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 interstate counterparts, these being more restrictive in the entitlements conferred.⁵⁷ Bringing other significant personal relationships within the ambit of the Act would lead to a situation of equal legal protection for *all* partners in Tasmania.
- Thirdly, amending the *De Facto Relationships Act 1999* to give presumptive recognition to significant personal relationships is not inconsistent with a registration system. Indeed, a registration system could easily be incorporated into law, possibly at a later date, either by further amendment to the *De Facto Relationships Act 1999* or by enacting separate legislation. In recommending that future legislative reform in this area should consider the adoption of such a system,⁵⁸ the Committee noted that a combination of both the presumptive model of recognition and the registration model would provide 'maximum flexibility and protection to a wide variety of people and circumstances'.⁵⁹ While it would 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 *De Facto Relationships Act 1999* 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 is currently afforded to de facto partners.

⁵⁷ See for example, *De Facto Relationships Act 1996* (SA), *De Facto Relationships Act 1991* (NT).

⁵⁸ Parliament of Tasmania, above n 6, 8.

⁵⁹ *Ibid* 49.

- Fourthly, the adoption of a presumptive model is desirable in terms of consistency with approaches taken in other Australian jurisdictions.⁶⁰ While there are difficulties with some of the 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 such difficulties.

The Basis for Legal Recognition of Significant Personal Relationships

The most fundamental issue in amending the *De Facto Relationships Act 1999* to cover a more extensive range of relationships is the determination of the actual criteria upon which such recognition should be afforded. The manner in which relevant relationships are defined will determine which partners will be afforded legal recognition and protection and which will not. Too narrow a definition would defeat the purpose of reform. Although the Committee identified this important matter, stating that any definition should not necessarily be based on a sexual relationship, cohabitation or financial interdependence,⁶¹ they failed to put forward any possibilities for a suitable definition.

The difficulty in pinpointing any one basis for legal recognition of significant personal relationships (other than marriage or a 'marriage-like' relationship) is highlighted by the different approaches adopted in Australian States and Territories, 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.

New South Wales

In New South Wales, 'de facto partners' are defined as people, not married to one another or related by family, who live together as a couple (including a same-sex couple).⁶² Such couples are afforded legal recognition across a range of areas.⁶³ More limited legal recognition is afforded to partners in a 'close, personal relationship'. These

⁶⁰ Ibid 51.

⁶¹ Ibid 48, 51.

⁶² *Property (Relationships) Act 1984* (NSW) s 4.

⁶³ These include property and maintenance entitlements, family provision, intestacy, accident compensation, stamp duty and decision-making in illness and after death.

are relationships 'between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care'.⁶⁴ 'De facto' and 'close personal relationships' together are referred to as 'domestic relationships'.⁶⁵

Victoria

Until recently, a traditional definition of de facto partners was applied for the purposes of statutory entitlements in Victoria.⁶⁶ 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 for most purposes⁶⁷ more narrowly defined as 'the relationship between two people who, although not married to each other, are living together or have lived together as a couple on a genuine domestic basis (irrespective of gender)'.⁶⁸ For other purposes,⁶⁹ a wider definition applies, whereby a 'domestic partner' of a person means

an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof.⁷⁰

⁶⁴ *Property (Relationships) Act 1984* (NSW) s 5.

⁶⁵ The New South Wales Law Reform Commission is currently conducting a review of the *Property (Relationships) Act 1984* (NSW). See New South Wales Law Reform Commission, *Review of the Property (Relationships) Act 1984 NSW*, Discussion Paper No 44 (2002).

⁶⁶ The *Property Law Act 1958* (Vic) formerly defined 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).

⁶⁷ These purposes consist of property related benefits, compensation schemes, and superannuation.

⁶⁸ See schedule 1.

⁶⁹ These other purposes include health related legislation and consumer and business legislation.

⁷⁰ See schedule 4. A 'domestic partner' does not include a person who provides domestic support and personal care to the person – for fee or reward; or on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

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.⁷¹

Accordingly, unlike the New South Wales model, this model gives recognition to relationships on the basis of emotional and/or financial interdependence, rather than cohabitation or a sexual association, albeit over a less extensive range of areas.⁷²

Queensland

The Queensland Parliament has recently legislated in respect of 'de facto' relationships for the purposes of financial entitlements.⁷³ 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'.⁷⁴ 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'.⁷⁵ On this model, the crucial requirements of the relationship are cohabitation and a close emotional connection.

Discussion

Such diversity in approach to the legal recognition of significant personal relationships, as highlighted above, is hardly surprising given that relationships are themselves intricate and multi-dimensional and

⁷¹ *Domestic Relationships Act 1994* (ACT) s 3(1).

⁷² 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). The Australian Capital Territory legislation is currently being reviewed by Judy Harrison of the National Women's Justice Coalition.

⁷³ *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).

⁷⁴ *Property Law Act 1974* (Qld) s 260(1).

⁷⁵ *Property Law Act 1974* (Qld) s 260(2).

are rarely reducible by reference to just a financial, sexual or emotional aspect. The problem with some of these existing definitions, however, is that they are not broad enough in scope to encompass all significant personal relationships. For example, in New South Wales and Queensland, failure to cohabit with a partner will mean that the relationship is not afforded legal recognition. Moreover, in Victoria, failure to live in a marriage-like relationship would deny legal recognition for at least some purposes.

Clearly, a Tasmanian definition should be broad and not restricted by reference to matters such as cohabitation or a sexual relationship. Of the existing definitions, the Australian Capital Territory definition seems the most appropriate as it is best able to recognise a diversity of non-traditional relationships. The wider Victorian definition would also be acceptable. However, if possible, it would be more practical to have one definition for all purposes rather than two variations, as in the Victorian legislation. Another 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'.⁷⁶ This definition, subject to the amendment 'emotional *and/or* financial interdependence', appears workable.

What these definitions have in common is a specific link between the moral basis upon which significant personal partners would be claiming legal entitlements, and the legal benefit claimed. For example, where a party is seeking legal rights relating to property, maintenance, succession or intestacy, the relevant characteristic is the financial aspect of their relationship. In contrast, where a party is seeking a right afforded to next of kin, it is the emotional relationship between them that gives rise to their entitlement to this legal responsibility. Thus, adopting one of these existing definitions in the Tasmanian context would be appropriate and clearly preferable to the adoption of a more limited definition.

One definition that ought to be rejected, and which it is pertinent to consider in this context, is the original definition of the term 'significant personal relationship' as defined in the Significant Personal Relationships Bill (No 2) 1998 (Tas). Clause 5(1) of the Bill provided:

⁷⁶ De Facto Relationships Amendment Bill 1998 (NSW) sch 1, cl 4.

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.

The Bill 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, do not provide financial support to each other⁷⁷ and do not share a sexual relationship.⁷⁸

Significant personal relationships, under the Bill, are further categorised as either a 'domestic relationship' or a 'recognised relationship'. A recognised relationship is a significant personal relationship between two adults that has been formalised in the manner provided for in the Bill.⁷⁹ Of more relevance to this discussion is a domestic relationship, which is one that has not been formalised and exists between two adult persons who:

- (a) live together, or
- (b) if living apart:
 - 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.⁸⁰

In determining the existence of a domestic relationship, the court is directed to have regard to an extensive list of matters.⁸¹ None of these

⁷⁷ Clause (2)(a).

⁷⁸ Clause 5(2)(b). Excluded from the definition 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 (cl 5(3)).

⁷⁹ Clause 6.

⁸⁰ Clause 7(1).

⁸¹ Clause 25(1). These matters consist of: (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

matters are 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.⁸²

The reason for rejecting this definition as a suitable option for reform arises, not because it is under-inclusive but, instead, because it is too broad. To begin with, the very wide discretion given to the court in determining the existence of a domestic relationship, although allowing for the recognition of a diverse range of relationships, would be likely to be problematic in practice. The relevant considerations specified in the legislation are vague and would inevitably generate uncertainty for legal practitioners and members of the public. Furthermore, this definition has the potential to create unnecessary confusion, especially given that partners ultimately fall into one of two categories: a recognised significant personal relationship or a domestic significant personal relationship.⁸³ Moreover, the Committee rejected the option of implementing a registration system at this time.

Conclusion

The release of this report is long overdue. There is an obvious need for reform and a clear imperative for the recommendations of the Committee to be implemented in a timely fashion. This will bring Tasmania into line with recent legislative changes in the Australian Capital Territory, New South Wales, Queensland and Victoria, and in some areas will extend beyond the schemes in place in those jurisdictions. However, careful consideration needs to be given to the manner in which significant personal relationships are defined and the criteria upon which legal recognition will be based. The amendments need to ensure that recognition is given to a broad range of significant personal relationships and thus recognise the diversity of Australian families. This can be achieved by the adoption of a definition in the same or similar terms to the Australian Capital Territory definition of 'domestic relationship'.

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.

⁸² Clause 25(2).

⁸³ See Middleton and Otlowski, above n 4, 27.