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Legal Recognition of De Facto Relationships

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I INTRODUCTION

The focus of this paper is the status (if any) the "de facto" relationship ought to be accorded in New Zealand law. Not only is it necessary to discuss which relationships merit legal recognition, but also why they merit it, the extent of that recognition and the means by which it should be implemented.

The first step in such an analysis is inevitably to examine the law at present. How is "de facto" defined and is this adequate in terms of both clarity and policy? Furthermore, how realistic is the treatment of these relationships once the label of "de facto" has been attached? Having laid the ground work of law, how does this interrelate with the Human Rights Commission Act 1977. The Human Rights Commission is at present working on a report clarifying the definition of "marital status" within the Act. Although no decision has as yet been released this paper will offer opinions as to the appropriate interpretation. Generally the ramifications of a decision to either include or exclude the de facto relationship will be discussed. The submissions to the select committee on the Bill shed some light in this area, while serving as an introduction to the general policy considerations that must be taken into account if conferring legal status on an extra-legal union. Finally, the area of reform warrants discussion. If legal cover is to be extended what is the most appropriate means by which to achieve it i.e. by statute or by judicial recognition? How far and into what areas should it extend?

Inevitably all inquiries form the one central issue. Should de facto relationships receive legal recognition at all? If so, which ones, in what areas, and by what means?

II DEFINITION AND TREATMENT OF THE DE FACTO RELATIONSHIP AT PRESENT

A. Definition

Such is the complexity of human relationships that it is extremely difficult to draw the line at any one point, marking it as the beginning of a "de facto" relationship. (It should be noted at this point that the paper precedes on the assumption that hetero-sexual unions are the only ones under consideration. While the status of homosexual relationships are worthy of consideration also, it is a topic in itself, and as such a deep study outside the scope of this paper). At the most vague there is the one night sexual encounter of two persons, a situation to which (in the absence of a paternity claim) no one would seriously attempt to attach legal rights. At the other end of the scale is the long term live-in relationship that bears all the traditional characteristics of marriage without the legal or religious solemnization, a clear de facto marriage. Meanwhile, in between, there could be a sexually intense union that involves lengthy periods of staying over but no joint home, or conversely a joint home run on virtual flatmate lines. There are also great variations in the length of relationships. It follows that if the non married couple is to be accorded some type of legal status a consistent definition is required. It is submitted that in the absence of such a definition couples are too much at the whim of individual decision makers. As always it is a matter of balancing the competing demands of certainty and flexibility.

Of the recognition that is at present implemented, what types of relationships are included? Firstly, the limited rights and obligations embodied in N.Z. statute (fully discussed in part B) provide some definition. For example, to collect Government Superannuation spouse includes "any man or woman, whom the Board, in its discretion, regards as being the wife or husband of that person immediately before the person's death".[1] In regard to national superannuation the Social Security Amendment Act 1978 defines spouse as the "husband or wife of an applicant or beneficiary as the context

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may require",[2] a particularly ambiguous piece of wording. To be deprived of a sickness or domestic purposes benefit under s.63(b) of the Social Security Act 1964 one must have "entered into a relationship in the nature of marriage although not legally married ...."[3] Originally the Human Rights Commission Act 1977 included, in its early stages, a definition of "marital status" that covered "de facto marriages" while the Matrimonial Property Bill 1975 in certain cases included de facto spouses if the parties had lived as husband and wife for not less than two years.[4]

In short statute seems to require a relationship similar to marriage, without specifying precisely what that entails. Therefore, in assessing what falls into this somewhat vague category it is not illogical that the courts tend to apply the traditional tests for formulated for marriage.[5] In adopting this "marriage like" test the N.Z. legislature is much in deeping with the overseas example. Some British statutory definitions are "two persons cohabiting as husband and wife",[6] "live with him as his wife",[7] "a man and woman who are living with each other in the same household as husband and wife".[8] One noticeable feature is that the British statutes place much more emphasis on the fact of cohabitation, a requirement that could prove far more rigid than the somewhat vague N.Z counterparts.

The courts are nevertheless called upon to adjudicate cases both pursuant to and independent of statute. As was previously pointed out, in interpreting a statutory test that requires "husband and wife" status. The court has to adopt a virtual test of marriage. A prime example of this is the well publicised case of Furmage v. S.S.C.[9] To establish what was "living together on a domestic basis" they adopted tests from a case where the couple were legally married[10] such as level of commitment, holding out, intention, external evidence of sharing life, sexual content etc. Inevitably that particular inclusion failed because "domestic basis" was held in the Supreme Court (after s.27a 1978 Amendment) to demand a common roof, but the fact remains that statute as upheld by common law requires a high as near as possible to marriage like standard.

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Is this standard then reflected in cases not arising out of a previously defined status? Not necessarily so. At the risk of being cynical, the courts can, if they wish, grant a remedy to any relationship they think worthy of it. However, that does not mean that there is not a framework of criteria in to which to fit individual circumstances. Zuckerman claims the courts assess "the understanding and common intention regarding mutual rights.[11] However as he points out, such a subjective test is notoriously slippery and thus weight must be put on objective factors such as the degree of integration of economic, domestic, and social affairs, mutual commitment, its sexual or platonic nature, the duration of the relationship, the presence of children etc. Zuckerman sums it up as "agreement and reliance". Still, it is an extremely wide test, very much capable of adaption to the piecemeal justice of the courts. One thing that does emerge from an examination of case law is the changing attitude of the courts over the years. Whereas in 1950 an English court held that a man who had lived with a woman for twenty years was not a member of the "family" for statutory tenancy purposes,[12] in 1975 James L.J. in Dysan Holdings Ltd v. Fox[13] said that relationship would now be encompassed in the word family. He was also careful to distinguish "relationships of a casual or intermittent character and those bearing indications of permanence.[14] It is fair to say that now a days an extra marital relationship, so long as it is of a high level of commitment will be deemed "de facto". In cases of judicial discretion there is obviously more scope to include relationships that would not normally be included in a statutory definition of marriage-like (or something similar) and this is evidenced by remedies in the "mistress" cases.[15] However, in general the courts are inclined to follow legislative example and demand that marriage lime commitment.

The final point is one of which standard is the correct one. It is fair, it is submitted, to generally require a level of commitment similar to marriage. It has commonly been said that if this is the requirement why is marriage itself not the acceptable criterion? Quite simply, there are many reasons why couples choose

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not to marry, and it is fallacious, it is submitted, to brand a relationship as having less commitment than marriage merely because it has not been legitimised. When marriage is made the criterion it is no longer commitment alone that is being gauged, but the expression of that commitment as determined by social background, marital and other personal circumstance et cetera. However, the fact remains that at the moment ther is no satisfactory means of testing relationships. Judicial discretion, while admitting deserving cases that might normally be excluded, provides too little certainty. A further problem is that while statutory definitions are vaguely worded the judiciary must decide those cases as well as those that arise independently out of common law and equitable actions (although that is not so much deciding whether a relationship has a certain label, but rather whether it warrants remedy or not). Yet another point is that depending on the area of law involved, justice may require a different standard i.e. in deciding whether to withdraw a benefit, it is suggested that more emphasis should be placed on the financial aspects of the relationship, than if one is deciding whether or not to grant a loan, where the permanence of the relationship might be a more appropriate focus of inquiry. (further discussion of this point is contained in chapter V when a draft definition is discussed)

In conclusion, therefore, the problem is one of providing certainty of inclusion and thus protection for those who wish it, without standardising the test to the extent that others will automatically be excluded. An obvious example of this would be to legislate a "de facto spouse" on the lines of the South Australian pntative spouse.[16] However, when time limits or a criterion such as the birth of childeren are introduced automatic exclusion becomes a great difficulty. Furthermore, how is the definition to be tailored to meet the needs of each separate area of law?

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B. Present Legal Recognition of De Facto Relationships

1. Statutory inclusion

Once it is assumed that a couple has already met the requirements of definition there are a limited number of statutes which grant rights or impose obligations available to married couples. The Law Reform (Testamentary Promises) Act 1949 provides for claims against an estate for services rendered where an express or implied promise for remuneration can be proved. One case[17] states that a de facto relationship will not defeat a claim, nor will services beyond normal be expected. Both superannuations recognise the de facto spouse when paying the married rate (which it might be added is less than two single grants), and a domestic purposes benefit will be withdrawn if a de facto relationship is proved.[18] Under Accident Compensation both earnings related compensation[19] and lump sums[20] are available to the dependent de facto spouse. Under the soon to be out-dated Domestic Proceedings Act 1968[21] and the new Family Proceedings Act 1980[22] the unmarried father must maintain his child. The Housing Corporation will also grant a loan to a de facto couple as part of a non-discriminatory policy.

On the other hand there is a long list of areas where the de facto couple/spouse are excluded. In the Family Proceedings Act 1980 the provisions for reconciliation and conciliation,[23] counselling,[24] mediation,[25] separation[26] only apply to married couples. A de facto couple cannot register their home as a joint family home, nor can they adopt children. A de facto spouse cannot inherit under the Administration Act 1955 nor claim under the Family Protection Act 1955. While child maintenance[27] is available under the Family Proceedings Act 1980 there is no provision for the personal and rehabilitative maintenance available to married/divorced couples.[28] Most importantly a de facto couple do not have their property divided on break up in accordance with the Matrimonial Property Act 1976.[29] Because of this silence as to

de facto property rights, a major area of law has evolved to deal with their disputes.

2. Property rights outside statute

There is no one approach to the resolution of de facto property disputes. Alternative legal concepts have been made available whenever a factual situation is vaguely suitable according to judicial assessment. In other words this means has been used to grant rights within the context of relationships already decided upon as deserving (for the purposes of this paper labelled "de facto" although, unless decided pursuant to a statutory definition, the court will not take a "label and apply remedy" approach).

(a) The trust

Originally the position was that a person had no more share in property than was equivalent to his/her financial contribution.[30] However, today, the party asking for a non-title interest must prove the property was acquired by joint efforts for joint purposes. The court considers contributions (finance and service) and may order the title holder to hold a certain share on trust (either constructive or resulting) for the other. The basic decision is Lord Denning's in Cooke v. Head.[31] In that case a couple pooled resources to buy a section. They bought materials out of joint resources and both assisted to build the house. Unfortunately both the property and the mortgage was in the man's name alone. Denning claimed to follow Pettit[32] and Gissing[33] when he stated that "wherever the parties by joint efforts acquire property to use for their joint benefit the courts may impose or impute a constructive or resulting trust."[34] He did not take party intention into account, and he valued contributions other than financial. The non-title holding woman, in this case, received a third share of sale proceeds.

The principle was developed in Eves v. Eves.[35] Although the de facto wife had made no financial contribution at all, her redecoration and housewifely labours were seen by Denning as enough to entitle her to a share. In N.Z. the cases have followed the Cooke v. Head reasoning. In Crossfield v. Lechtenberger[36] a man brought a claim for a share in his dead de facto spouse's estate. He received a half share because of joint efforts and some financial contribution. In Frazer v. Gough[37] the applicant contributed to the initial cost of properties and assisted in improving them. The de facto wife signed two documents acknowledging the man's half share. Later in court she claimed they were securities for money loaned. In the Supreme Court emphasis was placed on the joint efforts to acquire the property for joint use, rather than the intent behind the documents. Therefore, he received a third share on resulting trust. However, in the Court of Appeal the share was increased to a half as the Court claimed that a documentary share could not be altered. Because of this superior judgment one can no longer state that the case was decided on a Cooke v. Head principle, as the contract element confuses the trust issue.

In many cases Cooke v. Head and its line of cases[38] has been disputed outright. If it were commonly accepted that certain types of cohabitation automatically give rise to this type of co-ownership, the de facto couple would at least have some certainty of property division. However, because the principle is in dispute it leaves so much power in the hands of individual judges, often forcing one member of a de facto couple to attempt a claim in another area of equity, often to miss out altogether. One reason for the dispute is that while Lord Denning claimed to base his decision on principles in the earlier cases of Gissing and Pettit, such a base is questionable. Pettit actually stands for the proposition that there will be no claim by a spouse who expends money or does work on someone else's property in the absence of an agreement. Gissing requires a common intention and placed

heavy emphasis on financial contribution. Thus a line of cases in opposition to Cooke v. Head and claiming to follow the "true" Pettit and Gissing tests exist. Allen v. Snyder[39] states that a trust must be inferred from matter of fact, not Denning's imputed intention. In the N.Z. case of Gibson v. Gibson[40] the court outrightly refused to apply Cooke v. Head. If this sets a trend for further N.Z. cases, the position of the non-title holding de facto spouse will be severely threatened. While it is conceivable that some relationships will fall within the more stringent test of actual intention, it is fair to say that most will lack that degree of forethought and consequently fail. Of course, it is debatable whether the de facto couple should have their property dealings specially recognised by law at all (and this will be discussed in chapter IV) yet it is submitted that whatever one's view is, a degree of certainty over and above this haphazard approach is required. Even if New Zealand were to adopt the Cooke v. Head stand, the law would still be far from certain.

(b) Express contract

Some couples do think to regulate their property rights by contract. However there is no guarantee that the law will accept it. A significant authority in the area is the American case of Marvin v. Marvin.[41] In that case the woman was actually granted a share on the basis of some vague equitable remedy. However, the court in its first decision stated that an express contract would be valid unless it had "meretricious sexual services" as consideration or was contrary to public policy for some other reason. Of direct relevance is Frazer v. Gough. Although eventually the Court of Appeal upheld a half share on what appeared to be the basis of express contract, at Supreme Court level the terms had been varied in favour of an independent trust.

Therefore it seems that while express contracts may be upheld in some cases it is equally possible that they could be varied or struck down altogether at judicial whim. It is interesting

to note that clause 16 of the Matrimonial Property Bill 1975 (later struck out) stated that express cohabitant contracts would not be void or illegal as contrary to public policy (always a potential danger for the de facto relationship even in today's supposed permissive society)[42]. Prima facie de facto rights would have been upheld. Yet clause 16 was still subject to clause 49 (also struck out)which meant the court could make an order, if in their opinion it was "fair" to do so, which altered or struck down the contract. While it recognised that moral objections were misplaced in considering the validity of a contract the de facto couple (just as the married couple in section 21 of the Act) were not fully free to regulate their property rights because of potential inequality of bargaining power et cetera. For these reasons the ultimate power of the court to alter or strike down for reasons other than public policy was probably necessary. Unfortunately, the law as it stands has no such limitation. A court can strike down such a contract for public policy reasons as it thinks fit, thus robbing the de facto couple of certainty once more.[43] It may be asked why this move was taken. Both politicians and public feel a certain moral repugnance at de facto relationships being placed on the same level as the legal marriage.[44] For this reason, and the view that failure to marry implies a reluctance to shoulder the "obligations and incidents of marriage" it is not difficult to understand why clause 49 was removed from a matrimonial property regime. However it is more illogical to justify the striking out of clause 16. Some clue as to this is perhaps provided by the Angelo and Atkin submission to the Select Committee on the Matrimonial Property Bill 1975. They write that while "there may indeed be reason for the couples to have the freedom to regulate their affairs as they wish ... it is conceptually inappropriate for this provision to appear in this Act, particularly if the strains of marriage is one to which the state accords a special position".[45] This view of inappropriateness is not shared by the writer, but even so, the legislature has created a serious gap in law by removing an essentially sound provision without providing for its insertion in law elsewhere.

(c) Implied contract and estoppel

Various cases have used these as a vehicle to dispense justice. Marvin as a general rule of thumb, acknowledged the validity of implied contract as long as it was not against public policy. In Tanner v. Tanner[46] Denning implied a contractual licence for a woman to have accommodation as long as the children, who were fathered by the owner of the property, were of school age. Her consideration was the surrender of a rent control flat to live in her lover's accommodation and the bringing up of the children. Another successful contractual licence case was Chandler v. Kerly.[47] However, a notable failure in the area is Horrocks v. Foray.[48] A man had set up his long time mistress in an expensive flat. When he died the woman claimed it in competition with the estate which would be insolvent without it. The Court declined to imply a contract on the obvious policy ground regarding the competition of legal wife and lover. It serves to illustrate just how tenuous any of these common law remedies are. They are only available if the case is deemed deserving, legal principle being subservient to policy.

Another vehicle, closely related to implied contract is estoppel. In Williams v. Staite[49] and W v.W[50] this concept was used to prevent an owner denying the non-title holder rights. A classic example is Pascoe v. Turner[51] where a woman who had lived with a man in his house for nine years and to whom he had represented that the house was a gift succeeded in her action for ownership. The man was estopped from denying ownership on the basis that he had acquiesced and encouraged her in that belief. Zuckerman[52] also points out that cases such as Tanner could have been decided equally well on estoppel principles. He also points out that in some cases contract and estoppel overlap in that the undertaking to do or not to do something in the latter is often the same as if one had contractually bound oneself. However, he is adamant that one should always attempt to identify the correct legal

principle, based on behaviour intended to create obligation. He does not find it satisfactory to examine the relationship and then attach a convenient legal principle.

It is submitted that it is unsound to muddle principles and impute intentions, not only because of the mutation of the theoretical base that ensues, but because of the potential for imposition of individual justice that it offers the judiciary. While it is praiseworthy that individual members of the judiciary should attempt to alter what is often an inequitable situation , the necessity for this uncertain and arbitrary system of remedies would be removed if de facto relationships had their own legal regime. Its introduction would ensure that problems would be dealt with by a system that was tailored to meet de facto needs rather than forced into the basically unsuitable existing framework.

III. THE HUMAN RIGHTS COMMISSION ACT 1977

Throughout the Human Rights Commission Act 1977 there are numerous references to the fact that there shall be no discrimination on the grounds (among other things) of "marital status". However, in section 2 there is no definition of which relationships are included within this. This is in contrast to the 1976 Bill which included a definition of a "de facto marriage". What is one to conclude from this alteration and what would an inclusion or exclusion mean for de facto couples everywhere?

A. Semantics And Logic

The fact that the Bill included a definition encompassing de facto while the Act excludes any definition at all could be taken to indicate a change of mind i.e. that de facto was no longer intended to be included and only the obvious statuses remained i.e. single,married, divorced, separated. However, it is submitted, that would only have been the case had a new definition excluding

"de facto marriage" been inserted (i.e. it could just as well be said that none of the other statuses were meant to be included either. De facto is in no way singled out). What this appears to be is an abdication of responsiblity on the part of the legislature because of the very failure to further define. It has been left for further decision and thus the Human Rights Commission is now looking into the matter.

There are strong arguments for both interpretations. On the side of exclusion is the suggestion that one's marital status is not "de facto" but single, divorced, married or separated. In other words to allow de facto marriage to be a status in itself would be to give all those people two statuses, virtually robbing the others of meaning (unless they become single and not de facto, divorced and not de facto etc.). Arguments along these lines say that the word "marital" exclusively refers to the status of either being married or not being married, or having been married once. A de facto relationship is something entirely independent of this, just as being single but a homosexual relates to one's domestic arrangements rather than marital status. Of course, the extreme result of this point of view would be to claim "marital status" refers solely to the state of being married, thus providing legislation that prevents discrimination against married couples. However, it is submitted that both semantics and logic are against adoption of that most narrow interpretation. If this were so many application forms would have to alter by the addition of a question mark the usual inquiry, as to which marital status the applicant came within (i.e. "marital status"? meaning married or not). Apart from common usuage it seems inconsistent with the spirit of the Act to only protect married couples.

The argument for inclusion claims that "marital status" encompasses any living arrangement and that being party to a de facto marriage automatically excludes one from the single, divorced or separated and married category (countering the argument that one, in fact, has two statuses). In furtherance of this

view, suppose a woman applies for a position as a primary school teacher. However, when the Board of Governors discover that she, in fact, lives in a de facto marriage, they inform her that she is unsuitable to teach young children because of her "immorality". In that case one would clearly say that she had been discriminated against because of her "marital status" which they took to be "de facto" rather than single. There is no evidence of "immorality" other than that she is not married to the man with whom she lives. Surely if persons can suffer discrimination for no other reason than that they choose to live a certain way it should be a "marital status" within the meaning of the Act? It is out of touch with logic to deny status to a lifestyle that is so often subject to discrimination.

It is the opinion of the writer that the latter interpretation should prevail. While exclusion may have a stranger base semantically, logic and practice support the wider view. It might also be added that to deny protection to unmarried couples appears inconsistent with the spirit of the Act. The long title states, afterall that it is to"promote the advancement of human rights in New Zealand ...". The writer finds it hard to believe that de facto couples have no such rights.

B. The Overseas Example

Pursuant to statutory provisions in New South Wales,[53] Victoria,[54] South Australia[55] and pending in Tasmania,[56] it is illegal in certain circumstances to discriminate upon the basis of "marital status." In all except Victoria, which excludes a reference to unmarried cohabitation, the definition includes de facto relationships with wording very similar to the New South Wales Anti Discrimination Act 1977 which states "marital status" includes the "cohabitation, otherwise than in marriage, with a person of the opposite sex."[57]

At the other end of the interpretation scale, in Britain, the Sex Discrimination Act 1975 bans discrimination on the basis of "marital status" in some areas, but its definition [58] does not apply to the state of being unmarried. In other words it takes on the narrowest possible interpretation of preventing discrimination only against people whose injustice arises from the fact that they are married.

Finally in the United States "marital status" in certain cases is an illegal ground of discrimination in the Civil Rights Act 1964. However, like New Zealand the term is not defined in statute and the judiciary inevitably has to clear up the ambiguity. While there appears to be no direct authority for the proposition that unmarried cohabitation is included within "marital status" there are some indirect indications. Take for example, the area of employment, set out in Title VII to the Civil Rights Act 1964, in which it is not illegal to discriminate on the basis of "marital status" as such. As a result airlines have instituted a "no spouse" rule which means a married couple cannot work together on the same aeroplane. In one case[59] it was held that this restriction could also apply to unmarried couples. While this is a negative example, it is surely not unrealistic to expect that if "marital status" had been included as illegal, that some unmarried couple would have been within the protective definition? In other words the only factor that could legally disrupt their employment was their marital status, which in the case of the unmarried couple was deemed to be something other than single. Likewise in certain American states, it is still possible to dismiss teachers on the grounds of their "immoral" cohabitation alone.[60] If "marital status" is the only allowable ground for such a decision then the de facto relationship appears to have been indirectly labelled as such (i.e. if the only reason for dismissal is the fact of unmarried cohabitation it would be illegal if it were not for the fact that "marital status" is an allowed grounds for discrimination in the employment area. Does that not then make unmarried cohabitation a "marital status"?).

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Incidentally the U.S. courts in order to combat "marital status" discrimination tend to view it as an aspect of sex discrimination (outlawed) in that it allows disparate practices among men and women (i.e. it is usually the woman in such a relationship that is labelled immoral). It is this rationale that allowed the married stewardesses who used to be grounded on their marriage (a clear case of discrimination because of their married status) to claim sexual discrimination because male staff were not subject to the same rule.[61]

In conclusion, while U.S. law cannot provide a clear example of the de facto relationship included within the "marital status" definition (i.e. it has no such definition) it provides instances where discrimination on the grounds of a de facto relationship has been allowed in an area where the only possible legal justification for this is the grounds of "marital status".

C. The Ramifications of Definition

It is first of use to summarise where "marital status" is a prohibited ground of discrimination in New Zealand. In the Human Rights Commission Act 1977 the areas so covered are employment, partnerships, unions and trade associations, qualifying bodies, vocational training bodies, access to public places, provision of goods and services, accommodation, and education. (Contrast this with Tasmania which only extends this to employment and supply of goods,[62] New South Wales which includes these two plus accommodation,[63] and Victoria[64] and South Australia[65] which have these three plus education. In Britain this ground only extends to employment[66]) What becomes apparent is that a considerable area of New Zealand law is involved and thus de facto rights face either a corresponding setback or step forward.

If the Human Rights Commission decides that the "de facto" marriage is outside the term the position is obvious. In none of

the specified areas will the unmarried couple have any redress for discrimination. What is more the "spirit" of such exclusion cannot but help permeate other areas of life. For instance, on the strength of "marital status" being included in the Act, the Housing Corporation altered its policy so as to allow loans to unmarried couples.[67] Strictly speaking they did not have to (as marital status was not defined) but behaved in accordance with what they felt was the tenor of the Act. If the de facto marriage is to be publicly shunned, (which will be the case if the H.R.C. decides it is excluded from "marital status") perhaps other doors will close.

If the "de facto marriage" is included the main advantage, it is submitted, will be in granting some degree of respect to it. In practical terms it will not mean that the exclusion of de facto couples from the Matrimonial Property Act 1976 is illegal, nor will it be so to exclude the de facto spouse from the Administration Act 1968 and Family Protection Act 1955. However section 24 with its provision of goods and services includes "facilities by way of banking, insurance, grants, loans, credit and finance," which is a substantial breakthrough. Three other major areas are education, accommodation and employment. Yet on closer examination it can be seen that section 15(5) exempts "preferential treatment based on sex or marital status where the position requires a married couple." This could be the thorn in a few de facto sides.

Therefore, apart from obvious benefits it would be a matter of recognizing that persons living in a de facto union have the right to go through life without obvious barriers thrown in their paths. Presumably an inclusion in this central Act would open the way up for provision in other legislation — the first step in de stigmatization. It should be noted that as the Act stands with its absence of any definition, New Zealand has placed herself in the American situation. Each reference to marital status could presumably be defined separately according to the subject it related to. Such a haphazard process with its heavy reliance on judicial discretion is far from desirable, it is submitted.

D. Submissions On Definition

As an introduction to the next section (which deals with the broad policy overview of the legal recognition of de facto relationships) it is helpful to take a look at the public submissions on the Bill, which it should be noted, defined "marital status" so as to include "de facto marriage". The submissions fall into two main categories. Firstly those expressing an opinion as to the inclusion in general, and secondly those concerned with the omission of "de facto" from the term, in relation to accommodation in clause 23(5). These submissions are important as being representative of public opinion. It is submitted that a piece of law must have some relation to what "the people" want.

Statistically, of the twenty seven submissions on this point that the writer examined (there may possibly be a few brief references overlooked) only three expressed general abhorrence at the concept of the de facto status being granted legal status. The first was the society for the Protection of Community Standards. Another was a private citizen, who felt that "this state of immorality is given official sanction .... This represents a blow against the sanctity of marriage, the stability of the family, and hence of society." Patricia Borlett, as spokesperson for S.P.C.S. stated that Parliament was stating its approval of de facto relationships outside marriage. She connected these relationships with increasing marriage breakdown and concluded with this statement:

> It will be a decadent day for New Zealand if Government permits this definition to remain.

The third was a church group (the Gospel Radio Fellowship) who felt that a stable society rested on marriage ordained by God and thus contested the definition. It seems therefore, that only a small percentage of New Zealanders were prepared to admit to suffering moral outrage at the definition. Neither of the three,

it should be noted, challenged the inclusion on semantic grounds which the writer was informed was the real reason for the retraction.[68]

Of the four other groups who expressed some sort of disapproval, three were concerned with the preactical difficulties of administering benefits. The New Zealand Society of Actuaries queried how one was to define a de facto widow, for example, in paying a widow's benefit. The Association of Superannuation Funds of New Zealand Ltd pointed out the practical and financial difficulties in paying death and retirement benefits to these extra people. A combined religious group wanted housing loan preference to married couples. On the employment front the Presbyterian Social Services Association thought some jobs demanded a special type of person as reflected by their marital status. They were anxious to point out it was matter of integrity not morality. Basically all four only wanted special exemptions in their area of concern, and were not expressing general antagonism.

The twenty remaining submissions either expressly or implicitly (by criticism of clause 23(5) which exempted de factos from protection from discrimination in accommodation) lauded the definition. While there is much repetition of reasoning the following is a sample of each of the main policy arguments to emerge:

1. The New Zealand Maori Women's Welfare League and the Commission of Women both point out that certain minority groups in New Zealand (Maoris and presumably some Island groups) customarily live together without benefit of marriage and to exclude them from protection would be to seriously disadvantage a section of the New Zealand population.

2. Exclusion is inconsistent with current law, in letter and in spirit. The National Council of New Zealand Women point out that as the Cabinet Committee on Family define "family" to include "de facto", would an exclusion reflect a change in attitude? (This referred to clause 23(5) exclusion. The New Zealand Maori

Women's Welfare League query how one can justify an exclusion of de facto rights (clause 23(5)) in light of other areas that include them, particularly the denial of the domestic purposes benefit (i.e., why should recognition of de facto only work to their detriment?). Many other groups generally claimed that any limitation on de facto rights was inconsistent with the spirit of the entire bill i.e. to promote the advancement of human rights in New Zealand etc.

3. Several submissions pointed out that to discriminate or differentiate between the rights of married and unmarried couples was to unnecessarily prejudice the well being of the innocent children involved.[69]

4. The Christchurch Women's Electoral Lobby and the National Organisation of Women felt it wrong that people should indirectly be encouraged to seek proof of marriage.

5. A popular claim was that the law had an obligation to protect all people, not to legislate society's prejudices. Closely related was the idea that the law should move with modern trends i.e. de facto relationships existed and consequently must be recognized whatever one personally felt about them.

6. By far the majority of submissions expressed relief that at least people were free to live the way they wished and that any limitation (i.e. section 23 (5)) could be placed on this right. These are the emotive line of arguments. The Broadsheet Magazine and Auckland Women's Centre thought it unacceptable that "one person's ethical beliefs (in favour of marriage) have more validity than those of another...." They also raise the interesting point that if de facto marriage cannot fall within "marital status" it is still a breach of "ethical beliefs" protection to discriminate on that ground (i.e. someone's belief about the wisdom of marrying or not marrying is part of their inherent philosophy on life and as such is an ethical belief. Atheism, for instance, in a negative outlook that is also an ethical belief, so why is

not a non-belief in marriage accorded the same respect, in that it cannot be a cause of discrimination). The Halfway House submission (perhaps the most extreme on its side) claimed that it was "disgusting in the extreme" to punish those who reject "the crippling and oppressive institution of marriage". Last say, however, should go to the Women's Rights Policy Waking Group of the New Zealand, Values Party. In relation to the clause 23(5) exclusion they have this to say

> The English common law at the beginning of the century decided that even a prostitute should have a home.[70]

It becomes obvious after examining the submissions that the majority of those willing to submit their opinion favour the inclusion of "de facto marriage" within the definition, to a partial if not total extent. Of course, one could raise the question of just how representative these views are when most of those in favour are from women's/feminist groups. The answer to this is obvious. If only three groups feel strongly enough to oppose the move, then the rest of New Zealand either tacitly supports inclusion or more than likely does not care either way. If the latter is true, why should indifference be seen as a justification for denying those who do care and those who are directly affected? Quite simply, it should not!

E. The Parliamentary View

In an effort to divine further reactions to the proposed definition of "marital status" the writer perused the Hansard reports. In general it is fair to say that Parliamentarians presented no view on the matter that has not already been canvassed in the submissions or in chapter IV. The well worn theme (from Government M.P.'s) was that marriage as an institution must be elevated above un-married cohabitation in law. It was put that it should not be considered "that there is no more merit in a legal marriage than in

two persons living together."[71] The Opposition took a stand not all that different. One M.P. stated that de facto relationships "all be it sadly" must be recognised."[72] The main difference was that Opposition M.P.s claimed it was a "social phenomenon" that must be dealt with. The stance was basically one of reluctant practicality. Perhaps most enlightening, however, is the statement of the member for Hawkes Bay in presenting the report of the Committee. He says:

> Some members considered it inappropriate and contradictory to put a de facto on all fours with a legal marriage, so the term marital status will retain its long established meaning of being married or single.[73]

This statement leaves no doubt as to what was intended by the legislature when the Act finally emerged all definition of "marital status" struck out. Although it may be wondered why the definition was not retained with the reference to de facto alone struck out, there was a clear intention to exclude de facto from the meaning, and an intention equally clear to pass the ultimate buck of that definition to the Human Rights Commission.[74]

IV. THE POLICY OVERVIEW

As the arguments for both sides are so many and varied it is best to group them under major headings and thus examine the variations on each theme.

A. Pro Recognition

1. The outdated disincentive

One justification for the old basis of non-recognition was to provide a disincentive to illicit and "immoral" relationships. However, as Finlay points out[75] unmarried cohabitation is now accepted in many quarters and, at the least, tolerated in many

others. The rationale is that if you can no longer prevent something by judicial action why bother to go through the motions and inevitably harm some people in the process.

On the other hand it could be argued that even nominal disapproval of the extra legal relationship is important because there are still people who will avoid bringing down the stigma on their heads. Also, it might be claimed it is the duty of the law to be seen to disapprove institutions outside its bounds, even if the preventive effect is minimal. However, these counter claims do not override Finlay's basic point that de facto relationships are here to stay[76] and that no attitude the judiciary/legislature convey about them will cause their decline.

2. Moving with the times

A second justification closely related to the first is the need for the law to reflect the standards of the time. While it is fair to say that the legal shunning of de facto rights a hundred or even twenty years ago was in keeping with society's values, nowadays it is quite simply out of touch. Cretray[77] suggests that there is no adequate regime for what has become an institution, but is cautious to conclude that this is justification in itself for legal recognition. Finlay goes further in claiming that once the buffer of public immorality has vanished the law is obliged to move with it. Bailey[78] takes a similar stance to Finlay emphasising the injustice to the de facto parties if the law does not adapt.

It could of course be claimed that the law is inmutable on some points and that it cannot change to suit those who step outside of it, no matter how widespread such rebellion is. It could be pointed out that if half the population decide rape, pillage and murder is good Sunday afternoon entertainment, it would be no justification for the law to accommodate their needs. Yet this is basically a moral argument and is fully answered in the anti-recognition section.

3. Individual Justice

The very basis of this argument is that no matter how much one theorizes upon the rights and wrongs, there are people out there who suffer injustices because there is no law to protect them.[79] No one denies that legal protection devices such as the exprss contract do exist but as Weyrauch[80] points out the contract is only a viable choice for the middle class, highly educated, and self-assertive. What do those with less bargaining power do? It follows that they are at the mercy of judicial discretion, which is not an ogre in itself. Yet often because of technical difficulties in fitting a fact situation into an appropriate remedy, individuals suffer a hard time. Surely this is not a desirable situation in itself, but especially not when one suspects that the disadvantaged group are predominantly female, poorly educated and without financial means? If the law inadvertantly becomes an instrument of oppression against groups enduring disadvantages in other spheres of life as well, something is badly wrong. Any counter to the effect that the letter of the law is supreme and cannot be held responsible for the plight of minority groups, is unrealistic and inhumane.

4. The rights of children

It should be remembered that in a significant number of de facto relationships children are a by-product and as such any denial of aid to parent(s) may directly affect the children's upbringing and living standard. Oliver states that recognition would be public acknowledgement of the fact that de facto families with children are "no less socially functioning families for all that — and they are performing one of the most vital social functions — rearing children."[81] She fears that the denial of recognition impedes them in this function, not only financially, but by lowering their social status.

Does this mean that increased recognition should only be granted to those relationships with children? While that

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tended to be the view of Susan Oliver, it is submitted that once the law extends itself into these situations it would be a natural extension to gradually extend this through to childless couples. Basically it is a question of definition. If it is accepted that legal recognition for some unmarried couples is necessary, how those couples are defined is a secondary matter.

5. The role of the state

Finlay sees the policy of recognition as part of the broader theme of the role of the welfare state. Laissez-faire he claims is dead. The philosophy of the welfare state is to assume a duty to interfere in private relationships in order to save individuals from themselves and others. This is basically a counter attack to the suggestion that people who refrain from marriage must have done so because they wished to remain outside the reach of the law. It could also be added that in New Zealand the law already sees fit to alter or strike down contracts under the Matrimonial Property regime,[82] as well as examining the everyday commercial contracts with its doctrines, of inequality of bargaining power, duress, unconscionability and so forth. In other words if the law can in other circumstances ignore the actual intention of parties why should there be an outcry if de facto intention is similarly dealt with? Besides, it is not as if de facto relationships are at present immune from legal intervention.[82A]

A further argument against recognition has always been the extra financial burden which would be placed on the welfare state. The first answer to this is that human considerations always outweigh the financial, and if money must come from somewhere, why not cancel orders for new warfare equipment or government limousines? It is, afterall, a matter of priorities. However, for those who are worried about the extra expenditure, MacDougall points out that if certain laws (i.e. maintenance) were fully extended to de facto spouses some burden would be taken from the state and placed on the individual properly responsible.[83] Naturally this only applies to

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limited areas, and extension of recognition would inevitably result in the state having to pay out additional benefits.

6. Anomalies in law

Cretney[84] puts forwards the proposition that without proper recognition of de facto relationships anomalies arise. Unless there is no recognition altogether (which is not the case in New Zealand) there is a situation where unmarried couples are included in some statutes but not in others. Although Cretney wrote about the British situation his point is just as relevant to New Zealand. For a clear example consider the law that allows the domestic purposes benefit to be withdrawn from a woman who lives with a man as if they have entered into a marriage relationship, yet denies that some woman receipt of the major part of his estate if he dies intestate. (For full discussion, see chapter II).

Is not the elimination of anomalies a worthwhile target?

7. Impediments to marriage

As was pointed out in'argument 5' the manifestation of intention to avoid legal intervention is often seen in the formation of a de facto relationship. However, there are cases where a couple simply cannot marry because of a previous marriage(s) or where they view their relationship as a prelude to marriage i.e. on a permanent basis. In other words, if an unmarried couple have formed the intention to create a relationship as binding as marriage, or are even indifferent to the prospect of legal intervention, why should some presumption against intervention be applied in their favour?

8. Recognition as a virtual punishment

Although it is a peculiar justification for the recognition of de facto rights, Zuckerman tentatively suggests that if a couple hold themselves out to be married they deserve the obligations as well as the "perks" of such a status.[85] Put in less vindictive

terms it is based on the fact that the married status has disadvantages such as less superannuation than for two single people, higher maintenance obligations etc. It means that unmarried couples do not just get protection of their property rights but all the responsibilities that go with it. To deny them recognition at all or grant only partial recognition may bring about the situation where they got too many advantages as opposed to disadvantages. While the rationale is similar to that which abhors anomalies in law this has the additional justification that it is the holding out that warrants the responsibilities not a desire for uniformity in law.

B. Anti Recognition

1. Party intention

Perhaps the major argument against legal recognition of de facto rights is to contend that the absence of marriage is indicative of a desire to avoid the legal consequences of such a status. Zuckerman, Weyrauch, Finlay and Cretney all put this point forward. It should also be noted that the 1977 Australian Royal Commission on Human Relationships made the following point:[86]

> if parties refrain from marrying because they do not want to incur the legal and financial obligations of marriage then the law should be slow to impose these obligations on them.

This raises three issues. Firstly, can there be a general presumption that because a couple has not married it is a calculated move to avod legal intervention? Secondly even if such a presumption is accurate in the majority of cases can it be a justification for an across the board rule? Finally, even if party intention is clearly to avoid legal consequences in a certain case, does that mean the law has no duty to intervene even if there could be gross injustice on the facts?

Ruth Deech[87] discusses this type of rationalisation of intervention. As to the first question, she claims that nowadays with divorce easily available "nearly everyone can free himself or herself to marry ...."[88] She catalogues the major reasons for not marrying. There are those experimenting with a trial period of living together to test compatibility. There are those retaining benefits such as maintenance or single social security benefits. Another group reject the legal incidents of marriage, such as community property along with the ritualistic elements. She feels that women in particular may wish to avoid marriage because they see it as a male dominated institution which limits female independence. She acknowledges the existence of those who hold themselves out as being married but claims that even they have different expectations and are aware of their "illicit status." While all her examples are valid it is submitted that she credits the average person with a degree of forethought that in many cases is not present. People tend to drift into relationships guided by their emotions and it is only afterwards that they analyse what their expectations were. She also ignores certain minority cultures[89] where the formal legal ceremony may not be customary but the relationship is nevertheless considered both permanent and binding.

While it is fair to say that many couples who do not marry are motivated by a desire to avoid its restrictions it is submitted that this cannot justify imputing such motives to all de facto relationships. There remain individuals who gave no thought to the matter and rather than ignore their rights because of majority motive reasoning, would it not be more reasonable to remain open minded (i.e. at least build some sort of intention test into the original definition).

Finally, even in those cases where partyintention was clearly to avoid restrictions, can that be the sole deciding factor? Deech claims that once intention is established the argument ends. She claims to do otherwise would be "to deny the freedom to try

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alternative forms of a relationship."[90] She goes as far as to suggest that it contravenes the European Convention on Human Rights.[91] While this may be true to a limited extent it is submitted that inevitably a choice must be made between the lesser of two evils. Should the right to act to personal or more importantly someone else's detriment be preserved, or should freedom of intention ultimately give way to individual justice on the facts ? (The writer's opinion has already been stated in argument 5 of justification for recognition).

2. Problems of definition

Once again nearly all the writers in this area raise the initial point of the difficulty in defining which relationships are to be included or excluded from legal recognition. However, it is the opinion of the writer that this does not deserve to rate as a justification for denying recognition. The courts have never, in the past, refused to decide a point of law simply because the facts were too difficult to establish. Experts are called upon to classify the facts, and in such a way would a definition be drafted in accordance with informed opinion as to the appropriate qualifications. Obviously it would not cover all contingencies, but that is no excuse for not making the attempt at all.

Of more weight are the arguments that the inclusion of heterosexual de facto rights in law would only produce further anomalies in law. As Deech states[92] what becomes of brother and sister partnerships, homosexual unions and those other unions forbidden by law to marry (i.e. polygymous or polyandrous groups)? She claims that if heterosexual unions are singled out women cohabitants will be put on the level of long term prostitutes "with delayed payment subject to arbitration."[93] The only other justification she finds for this limit is the presence of children, but then counters that this should apply to all unions, lawful or not, if children are present.

There are obvious replies to her points. Firstly cohabitation is viewed as "long term prostitution" for the woman, is not marriage merely a legally institutionalised version of the same thing? Secondly, instead of seeing justification to limit one group's rights by highlighting another group's lesser rights, why not take up the cause of both for the better rather than seek consistent injustice? A more conservative solution is that no union which cannot acquire legal rights by marriage should be able to do so by cohabitation. This explains the favoured position of the heterosexual de facto union quite simply.[94]

3. Competing claims

Cretney maintains that widespread recognition of de facto rights could possibly "involve introducing polygamy into English law."[95] In other words there will often be the situation where a man, for example, will have or have had relationships with two women (one his legal and one his de facto wife) and yet both will be treated in law as a wife. Whose claim has priority?

Public morality would tend to go on the side of the wife's claim. However, MacDougall envisages a wide divergence in judicial practice according to individual circumstances. Without going into detail of the decisions in the competitive rights area, it is enough to acknowledge that a difficulty exists. Deech claims these issues need clarification before recognising unmarried cohabitants in law. It is the opinion of the writer that once the decision has been made to extend or implement de facto rights, introduction should be immediate. Problems such as these should either be legislated for (they are already taken account of in New Zealand maintenance law[96]) or tackled as they arise. Once more this is a difficulty that emerges from the increased legal recognition, but not a justification, it itself, for denying it.

4. The role of women

Deech, particularly, is adamant that in a time when most

women are building social and financial independence, women should not be encouraged to take advantage of a legal system that stereotypes them as the weaker partner needing protection of the court against exploitation. She challenges the assumption that women are struggling to free themselves from an exploitation that involved undervaluing of their domestic skills, handicaps in employment and denial of education, and as such should receive a finacial share of assets on break up as compensation or rehabilitation resources. She would rather women gain equal status by shouldering equal responsibility. She stresses the advantage of comfortable life style that the housewife's "exploitation" brought in return, "a privileged person", she calls it. In effect,[97] she criticizes the regime applying to married women and uses this as justification for denying an unmarried woman the same protection. Of cohabitation, she writes:

> Is it not more true to say that cohabitation (and marriage), far from being a situation of detriment, is a benefit to women, and to men, chosen freely, for more pleasent and rewarding financially than the single life, and needing no restoration of lost opportunities at its termination.[98]

Unfortunately, all relationships are not run along the middle class dream prototype that she describes? Firstly, she criticizes the tradional marriage-like situation and demands that unmarried women should not be encouraged to live and capitalise on it. However, rather than admit that the lifestyle is damaging to women she concludes what a cosy (if undesirable) little life it is, anyway. While there is merit in the proposition that women should be encouraged to be self-supportive, it does not follow that this will be achieved by denying the rights to de facto women that their married counterparts already have. She must withdraw those legal remedies from them as well, which is a topic in itself. Her second point of the undesired lifestyle being too advantageous to merit post break up remedy (she tends to talk in terms of property/ maintenance rights) is impractical, it is submitted. People do not always plan their lives and relationships all that neatly.

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Unwanted children arrive, wives are physically and emotionally battered so as to be unable to immediately resume normal lives. Flourishing careers are sacrificed to the traditional role, and "the opportunity, if she takes it, to continue her education or pursue her hobbies"[99] is a pipe-dream when one has several children under school age, no basic education to initiate contacts, diminished self-confidence or even a part-time factory job. Too often survival, not middle class social antics, is the name of game. As such, it is the opinion of the writer that the remedies and protections already provided to married women are both necessary and desirable and thus would be of benefit to unmarried women. Possibly it does not provide women with incentive to be fully self-supportive but at least it gives them a chance to get on their feet, first. Maybe then they can fight the greater battle.

So far this section has assumed that women are the ones requiring the protection. Although it is admitted that in certain cases it may be the male who is disadvantaged, it is nevertheless the opinion of the writer that it is women generally who, are at the disadvantage. As Honore points out[100], "the husband generally earns the family living, and, on the whole, the more he earns, the more he makes the important decisions." If he makes the decisions chances are that property is in his name. Besides, nothing can change the basic fact that women bear children and as such, it is they who generally rear them, sacrificing work experience, earning power, social contact etc. It is to be wished that it were otherwise.

5. Devaluation of marriage

The Royal Commission on Human Relationships emphasised the point that any extension of de facto rights should be framed so as not to be a disincentive to marriage. In this view they are joined by writers such Cretney and MacDougall. Bailey however, feels that marriage is not devalued by bettering the lot of the unmarried. There is more to marriage than the benefits it confers and it is the opinion of the writer that enough people

value marriage for religious, ethical, moral or sentimental reasons for it always to be a popular alternative to cohabiting without legal sanction. It is worth remembering, however, that many people as a matter of principle would wish the law to give official preference to what they believe is the proper institution.

6. Moral repugnance

Although people are probably more tolerant "of unwedded bliss" than in the past. There are still those who would claim that it is immoral to "live in sin" and that people do not acquire rights until they do the "decent thing" and marry. A typical example of this attitude is expressed by Samuels when she writes that "if people wish to have the privileges and advantages and protections of marriage then they should enter into that status and assume the inherent responsibilities.[101] There is nothing to be said about such views except that it is doubtful whether it is the role of law to enforce such moral judgments (even though they masquerade as the views of "right minded members of society").

While it is admitted that there are worthwhile considerations on both sides, it is nevertheless the opinion of the writer that the humanitarian considerations of people in need must inevitably outweigh the disadvantages of denying party intention with its associated difficulties of definition, conflict of rights, and increased financial burden on the state.

V. LAW REFORM — A CONCLUSION ON THE LEGAL RECOGNITION OF DE FACTO RELATIONSHIPS

A. The Definitive Ramifications of Recognition

So far the moral, social, financial and practical ramifications of recognising de facto relationships have been examined. However, it still remains to discuss what recognition will mean in terms of the definition of the two life styles of cohabitation and marriage themselves. There can be no doubt that marriage is an institution unique in the commitment it involves and the obligations it imposes. If cohabitation were to be formalised to the same extent one either loses the opportunity to lead a less regimented life style, thus extending the boundaries of marriage, or marriage itself becomes "de specialised" to the extent that all relationships become cohabitation agreements with varying degrees of formality involved. Therefore, in deciding whether not to recognise de facto relationships at all, or to a partial or full marriage-like extent one must take these considerations into account.

Much has been written of a world wide trend to simultaneously attach increasing legal consequences to cohabitation while making marriage less rigid. The effect is to create a virtual assimilation of the two institutions somewhere in the middle. Glendon[102] describes this phenomenon in three countries. In France she claims that the de facto relationship is now so legalised that it closely resembles marriage, an example of cohabitation being assimilated into marriage. In Sweden she describes the emergence of "informal marriage" as a social and legal institution (i.e. their matrimonial property regime equally applies to certain unmarried couples) while within marriage there is the demise of many distinguishable features of its formal nature. (i.e. no alimony on marriage break up). This is a clear example of the two institutions meeting in the middle. Finally she claims that the United States are so liberal in labelling de facto relationships as "common law" marriages that cohabitation is moving closer to

marriage in terms of formality. Finlay explains the trend in terms of marriage having to de formalise to ensure its own survival. He claims that if divorce, for example, had not been made more readily available marriage would eventually have been by passed in favour of cohabitation. The extended recognition of de facto relationships is perhaps more obviously explained by the need to standardise the protection that is inevitably required when two people have a relationship resembling marriage.

Inevitably, when considering what degree of legal protection to grant de fact relationships, one must ask what is the desirable relationship between the two? Blake[103] in an argument for the minimisation of legal consequences in all spheres of life suggests that the law should look to making marriage more like cohabitation in that every couple should be encouraged to regulate their own relationship by agreement with the courts only intervening in the event of fraud, unfair pressure or other unacceptable behaviour. While Pearl[104] takes the same view as Blake, Finlay believes that it is cohabitation that has to be formalised if individuals are to receive the greater protection that marriage provides. Bailey also views legal recognition for de facto couples in terms of regulating their rights further in accordance with the marriage model. It is also the opinion of the writer that the legal recognition of de facto relationships must be implemented by bringing them closer to the formality of marriage. However, it must be emphasised that the consequences should never be exactly equivalent to marriage. In order to maintain some freedom in determining how to run one's own domestic arrangements a choice of degree of formality must be available. To bring the two lifestyles totally together only serves to devalue the inherent advantages of each. Honoré sums the situation up when he claims that "so long as marriage is the central institution of our society it will be necessary to have some differential between married and unmarried couples. But it need not be a wide one."

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B. Areas and Regimes of Reform

As it is the submission of this paper that de facto relatinships should only be recognized to a partial extent i.e. a degree less than marriage, it becomes a question of which aspects of New Zealand law warrant de facto inclusion and which do not. First of all it should be acknowledged that New Zealand does, in fact, recognize de facto relationships to a limited extent. (See chapter II). However, it is submitted that this is still not sufficient. The major areas of deficiency are de facto rights on the death of the other spouse and at the end of the relationship. Although uncertain, the possible exclusion of de facto couples from the fundamental rights the Human Rights Commission Act 1977 has to offer, is also unacceptable.

While property rights are a major concern this is not to be taken as meaning that other areas such as the denial of a molestation order in the area of domestic violence, or even the lack of facilities for conciliation/counselling in the Family Court structure, are not also suitable areas for reform. The list in fact goes on and on, however, it is the opinion of the writer that property rights are the fundamental area for reform as they affect so many de facto couples, as do the basic protections from everyday discrimination that the Human Rights Commission Act 1977 provides. Once a move has been made in the granting of de facto rights, the scope of reform should be made easier gradually covering all areas of deficiency.

Once an aim is formulated what is the most appropriate regime to cover the deficiency? What is being asked is not whether protection should be embodied in statute or left to judicial discretion, but whether the protection should take the form of extending already existing marriage regimes to de facto couples or creating totally new rights and obligations, unique to the de facto relationship. In the area of ensuring fair treatment from third parties it is submitted that the obvious solution is to merely

include certain de facto parties within existing rights. For example, "de facto marriage" can be reinserted in the Human Rights Commission Act 1977, as well as being inserted as to be read as included in marriage, husband or wife et cetera in other statutes conferring financial benefits.

The area of difficulty is regulating the legal rights between de facto parties.

1. Extending existing law

In regard to de facto property division on death it is submitted that to formulate a regime of rights independent from the Administration Act 1969 or the Family Protection Act 1955 would be to cause unnecessary confusion in the law. The most appropriate solution would surely be to allow "spouse" in both Acts to include a de facto spouse if certain conditions were met such as no competition with a legal spouse and perhaps a certain number of years spent in that capacity.

De facto property division on the termination of the relationship fits less easily into existing law. If a certain class of de facto spouse were allowed to apply for division "under the Matrimonial Property Act 1976 there would perhaps have to be a right of the court to dismiss an application if it were thought unjust to apply.[105] However, the drawback is that so long as de facto couples are offered a discretionary form of married rights there is too much scope for the judiciary to exclude certain cases as inappropriate (even although they have passed the "definition test"), forcing recourse, once again, to the piecemeal remedies of equity and common law.

2. An independent regime

While an independent regime is unnecessary for property division on death, it may well be the solution at the termination of the relationship. The "homemakers grievance" that Deech outlines[106] may not be inappropriate. She writes[107]

> By providing the services and in consequence not going out to work (or by working part time only) the claimant has sacrificed the opportunity to use his/her wages in the acquisition of savings or capital assets and has lost value and seniority on the labour market and should be compensated for this sacrifice.

By adopting this type of scheme or even another loosely based on the matrimonial property regime (perhaps a lesser presumption than equal sharing but considerable emphasis on non-financial contribution which would give the non-earner property rights in the assets (s)he failed to acquire (financially speaking) while keeping house, rearing children etc. Rather than Deech's compensation for assets not acquired, recognition that the assets were, in fact, acquired by joint efforts) the problem of whether to include a judicial prerogative to exclude such relationships as is seen fit from existing law is avoided. Once a definition is formulated a de facto couple would have their property disputes dealt with consistently and with a high degree of certainty.

3. Encouragement of self-help

It is often advocated that instead of the law intervenint in de facto relationships, these couples should be encouraged to regulate their own lives by making contracts which the judiciary would be obliged to uphold except in extreme circumstances.[108] Such a solution could work for property division on death or break up, yet there are many inherent snags in contract law which would work against it (fully discussed later in the chapter) the greatest being the emotional link in these circumstances between the contracting parties. Contract require objective consideration and careful planning and it is doubted whether most couples could be persuaded to exercise this degree of forethought, or having done so, disregard their current feelings for their spouse.

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C. Definition

Regardless of what regime is to be applied, or how it will be effected (to be discussed in the following section) a decision must be reached about which couples should be included in the recognition. In chapter II the problem was introduced as a weighing up of the need for certainty and consistency without standardising the test so as to exclude deserving cases. Excluding definitions offered by the judiciary (see chapter II), the following is a list of factors that have either been embodied in statute or suggested as appropriate by various writers:

1. public reputation,[109]
2. intention of the parties,[110]
3. cohabitation (as opposed to the "mistress" situation where parties do not actually set up home together),[111]
4. length of the relationship,[112]
5. birth of children,[113]
6. permanence and stability,[114]
7. involvement or otherwise of legal spouse,[115]
8. mutual interdependence,[116]
9. evidence of support by one party,[117] and
10. whether the relationship can acquire legal status by marriage (i.e. means of excluding homosexual, incestuous, and minor relationships).[118]

It is the opinion of the writer that these suggestions range from completely inappropriate in any context, to appropriate in certain contexts, and finally to a necessary prerequisite in a general definition. For example, public reputation is too broad and too hard to establish legally as well as often being something apart from the actual nature of the relationship itself. If a couple choose to adopt the same name and pretend to the world that they are married, this proves little about the nature of their relationship except that they are sensitive to public censure. Evidence of support is inappropriate to most areas except in regard to a decision whether to withdraw a "singles" benefit or whether spousal maintenance might be appropriate. As a general requirement it is based

on a concept of marriage that assumes the female is the dependent weaker partner. While, unfortunately, the stereotype may still hold some truth, it should in no way be encouraged by the necessity of an unmarried couple having to prove such a relationship to qualify as "de facto". Similarly the birth of children is irrelevant as a major definitive factor. No one has ever claimed that a childless married couple was in any way any less a "married couple" because of the absence of children. The birth of children is irrelevant to all except maintenance questions as it is all too often an accidental occurence, anyway, not proof of permanence and stability. Besides if they are viewed as the sole justification for the legal recognition of their parents, the rights of the couple itself is ignored. Similarly, the existence of a legal spouse should have no prima facie relevance unless the definition concerns the property division on death, or in some cases the termination of a de facto relationship (i.e. where one party is already married). On the other hand, intention of the parties, cohabitation, length of the relationship, and potential legal status are all possibilities in drafting a general definition.

It is the conclusion of this paper that a general "all purposes" definition of "de facto relationship" is required, which would have the effect of the South Australian "putative spouse ", that is to say specific statutes could deem it to apply wherever "marriage", "husband" "wife" et cetera was referred to. In addition, to cater for the needs of specific areas of law, more specific definitions are required, which may raise or lower the inclusion standard of the general definition. On this basis the writer has tentatively drafted the following provisions:

1. <u>The general definition</u>

The relevant factors should be cohabitation under the same roof, (although not necessarily absolutely continuous), length of the relationship, permanence and stability coupled with mutual interdependence, and a requirement that the relationship be able to be legalised by marriage (until the law allows homosexual couples to marry it would be inconsistent to grant greater rights for

cohabitation. Besides the common law and equitable remedies are still available to these illicit couples). Party intention is also a possibility. Rather than have a rigid list of qualifications the Bailey suggestion of an alternatives scheme[119] has been adopted. She views it as the fairest way to overcome the danger of a too restrictive definition. Her example[120] is to fix a minimum time period, but if this was not met "a real financial hardship ... suffered by one or both parties if the law could not effect a readjustment between them" could suffice. The writer would further amend this by offering two alternatives. The definition would read:

> (a) A person is, on a certain date, the de facto spouse of that other person if, on that date, (s)he cohabits under the same roof with that person in a relationship of stability and mutual interdependence, and that relationship could at some time in the future acquire legal status by marriage, and
>
> (b) (i) (s)he has so cohabitated with that other person continuously (i.e. has not at any time been apart for more than three months) for a period of not less than two years immediately preceding that date, or
>
> (ii) an intention has been formed to create a permanent long term relationship and real hardship would be suffered by one party if the law does not affect a readjustment between them.

2. Specific definitions

Because certain rights in law involve specialised circumstances the following is a suggested list of adaptations to the general definition that could be made:

(a) Property rights on death of the de facto spouse

"Spouse includes any person within the general definition (substitute here the appropriate enacting provision) so long as no entitlement of a de facto spouse shall in anyway limit the valid

right of a legal spouse to receive an equitable share of the estate."

This phrasing is intended to provide for a compromise share if necessary between the two "spouses", not just an automatic presumption in favour of the legal spouse.

(b) Denial of benefits (i.e. sickness benefit, D.P.B.)

" Spouse includes any person within the general definition (a) (substitute enacting provision) and
(c) it can be proved that the beneficiary is financially supported to a substantial extent in household costs by that spouse. "

This entails waiving the time period or intention of permanence requirements in favour of a support requirement, which should, afterall, be the major consideration in the revocation of a benefit.

(c) Maintenance (spousal, of equivalence to Part VI Family Proceedings Act 1980)

"Spouse includes any person within the general definition (a) (substitute enacting provision) but if neither (b)(i) or (b)(ii) is applicable that person shall not be excluded if
(c) (s)he has had sexual relationships with that other person resulting in the birth of at least one child."

(d) De facto for the purposes of the Human Rights Commission Act 1977 or some similar protective measure

Because of the basic nature of these rights and the fact that discrimination could be levelled against almost any couple who live together, it is submitted that even the general definition is too rigid and should be waived in favour of a simple:

> De facto marriage applies to any two persons of opposite sexes who cohabit under the same roof in a relationship of a sexual and domestic nature.

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In conclusion, therefore, it is submitted that apart from these specialised definitions (not to be read as an exhaustive list) the general definition is appropriate to most other areas of law, especially property division on the termination of the relationship.

D. The Means of Reform

The final step once selected areas of law are chosen for reform, it has been decided what form that recognition should take and a definition has been formulated, is to embody the recognition in law. Basically it is a choice of statute, express contract or common law and equitable remedies such as trust, implied contract and estoppal, which are subject to judicial discretion.

1. Common law and equity

The advantage of the piecemeal remedies is that they allow justice to be done if the court thinks the case is deserving. In other words there is no problem of framing a strict definition when it is never necessary to label a relationship to apply the remedy. In terms of the remedy itself it means that the court can apply whatever division, amount of maintenance, succession right it feels appropriate to the case. However, the major pitfall is, of course, the lack of consistency, certainty and the fact that in many cases the implied contract, trust or whatever is a none too carefully concealed fiction. Overall, it is submitted that as the major preserve of de facto rights it is unsatisfactory and should only be the recourse for those who cannot include themselves within a more formalised framework (i.e. those outside the de facto definition such as the homosexual couple).

2. Express contract

Unless there was mass public education promoting the regulation of one's de facto relationship by contract, it would simply not apply in enough cases. As was pointed out in chapter II those who do avail themselves of it tend to be an elitist group. Bailey is

concerned that contract provides too much scope for exploitation and reasons that if the law sees fit to interfere in married contracts there is no excuse to do otherwise with cohabitation contracts.[121] Vaver[122] on the other hand favours the idea, claiming that they provide "for the spiritual benefit of the relationship by providing for consciousness raising, discussing the division of roles, and providing for conciliation in the event of dispute" as well as settling property division. Nevertheless it is the opinion of the writer that as the sole source of protection in a given area (i.e. property division in a broken down relationship) it is hopelessly inadequate even with the back up of common law and equity. Yet, in tandem with statutory measures (i.e. either inclusion in existing law or a separate statutory property division regime) it could provide a worthwhile means of contracting further in or out of the statutory super structure (so long as there were safeguards to strike down unjust agreements).

3. Statute

If a definition of "de facto" is to exist it must be embodied in statute. Against statutory law is its rigidity, yet it, more than any other form of recognition provides consistency and certainty. It is also submitted, that whether it is decided to incorporate de facto recognition in existing law or formulate an independent system, it is nevertheless necessary to ensure that the remedy is in statute. It has been claimed that this form of recognition, more than any other, diminishes the distinction between marriage and cohabitation (i.e. no longer statutory protection for marriage and piecemeal remedies for the unmarried). Perhaps this is so, yet what does the theory of institutions or scruples about the granting of official approval matter so long as just solution in the resolution of their problems is available to a greater number of people? As it is, the courts will be involved in the resolution of terminology of disputes that invariably arise out of statute, and it is at this level that societal values will shape de facto law

into its own unique form. It is this very combination of judicially interpreted legislation that will hopefully provide something nearer the appropriate balance of arbitrary and discretionary remedy that de facto relationships lack in present law.

FOOTNOTES

[1]Government Superannuation Fund Act 1956.

[2]Social Security Amendment Act 1976, s.2.

[3]Section 63(b), Social Security Act 1964 as amended by s.27A, 1978 Amendment Act.

[4]Clause 49.

[5]See Millet v. Millet [1924] N.Z.L.R. 381.

[6]Supplementary Benefits Act 1976 (U.K.) Sch. 1 para. 3(1)(b).

[7]Social Security Act 1975 (U.K.) s.24(2), s.25(3), etc.

[8]Domestic Violence and Matrimonial Proceedings Act 1976, s.1(2); s.2(2).

[9][1978] 2 N.Z.L.R. 75.

[10]Supra note 4.

[11]Zuckerman, "Formality and the Family — Reform and Status Quo" (1980) 96 L.Q.R. 248, 253.

[12]Gammans v. Ekins [1950] 2 K.B. 238.

[13][1967] 1 Q.B. 503.

[14]At p.511.

[15]See Tanner v. Tanner [1975] 1 W.L.R. 1346; Horrocks v. Forray [1976] 1 All E.R. 736 in particular.

[16]Section 11, Family Relationships Act 1975 (S.A.).

[17]Wright v. Slane [1979] Recent Law 10.

[18]Supra note 2.

[19]Section 123(c), Accident Compensation Commission Act.

[20]Section 124(a) ibid.

[21]Section 53(2)(a) and (b).

[22]Section 73(1) and s.79.

[23]Section 8, Family Proceedings Act 1980.

[24]Section 9 ibid.

[25]Section 13 ibid.

[26]Sections 20-26 ibid.

[27]Sections 72-77 ibid.

[28]Sections 62-66 do not apply to unmarried couples.

[29]Clauses 16 and 49 which would have ensured this were struck out of the Bill.

[30]Diwell v. Farnes [1959] 1 W.L.R. 624, [1959] 2 All E.R. 379.

[31][1972] 2 All E.R. 38.

[32]Pettit v. Pettit [1970] A.C. 77.

[33]Gissing v. Gissing [1971] A.C. 886.

[34]At p.41.

[35][1975] 1 W.L.R. 1338.

[36][1974] Recent Law 323.

[37][1975] 1 N.Z.L.R. 138.

[38]See for Canadian examples, Rathwell v. Rathwell (1978) 83 D.L.R. (3d) 289; Becker v. Petkus (1978) 87 D.L.R. (3d) 101.

[39][1977] Vol. 2 N.S.W.L.R. 685.

[40][1979] 2 M.P.C. 65.

[41]557 P. 2d 106 (1976) (S.C. California).

[42]See Snell v. Potter [1953] N.Z.L.R. 696; Fender v. St. John Mildway [1938] A.C. 1; Sparks v. Southall [1920] 1 Ch. 122; Andrews v. Parker [1973] 2d R. 94 for discussion of public policy.

[43]Whether such a move would be taken today is uncertain, but the fact remains that there is no certainty while it is even a possibility.

[44]This becomes apparent in regard to the H.R.C. debate from the comments of the politicians generally. See New Zealand Parliamentary Debates Vol. 411, 412, 415 (1977) pp.1220- ; 1343- ; 2210- ; 4099- .

[45]At p.3.

[46][1975]1 W.L.R. 1346.

[47][1978] 1 W.L.R. 693; [1978] 2 All E.R. 942.

[48][1976] 1 All E.R. 736.

[49][1979] Ch. 91; [1978] 2 All E.R.

[50][1976] Fam. 107; [1975] 3 All E.R. 970.

[51][1979] 1 W.L.R. 431; [1979] 2 All E.R. 945.

[52]Op. cit. 259 and 260.

[53]Anti-Discrimination Act 1977 (N.S.W.) Pt. IV.

[54]Equal Opportunity Act 1977 (Vic.).

[55]Sex Discrimination Act 1975 (S.A.).

[56]Anti-Discrimination Bill 1978 (Tasmania).

[57]Section 4(1).

[58]Section 3.

[59]Espinoza v. Thoma 580 F. 2d 346 (Ca. and Neb. 1978).

[60] See Board of Trustees of Mount San Antonio Junior College District of Los Angeles County v. Hartman 246 Cal. App. 2d 756, 55 Cal. Rptr. 144 (1966). However few states would basically exercise this power without some adverse effect on the fitness to teach or other related reason. (See Erb v. Iowa State Bd. of Public Instruction 216 N.W. 2d 339 (Iowa 1974); Board Trustees of C.J.C.D. of L.A. County v. Stubbletied 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (1971)).

[61] See Inda v. United Airlines Inc. 405 F. Supp. 426 (N.D. Cal. 1975); Spragis v. United Airlines 444 F. 2d 1194 (7th Cir. 1971); In re Consolidated Pretrial Proceedings etc. 582 2d 1142 (7th Cir. 1978).

[62] Clause 7(4).

[63] Part IV.

[64] Part II.

[65] Parts IV and V.

[66] Section 3.

[67] The writer spoke to staff in the Housing Corporation who confirmed that this was, in fact, the case.

[68] The informant was a member of the Parliamentary staff who was adamant that semantically "marital status" cannot support any meaning but married or not married.

[69] Taranaki Council of Civil Liberties and the Commission on Women in particular.

[70] Unfortunately the submission gave no reference so this particular comment cannot be traced to its source.

[71] Hon. Mr. Brill, M.P. Kapiti in the New Zealand Parliamentary Debates, Vol. 412, p. 2210.

[72] Hon. Mr. Finlay in the New Zealand Parliamentary Debates Vol. 412,p. 2212.

[73] Hon. Mr. Harrison in the New Zealand Parliamentary Debates Vol. 411, p. 1220.

[74] In the New Zealand Parliamentary debates Vol. 411 p.1343, it was stated that "the definition of marital status will now be a matter for the Commission and ultimately, of course, for the Courts ...."

[75]H.A. Finlay, "The Informal Marriage in Anglo-Australian Law" in Eekelaar and Katz, Marriage and Cohabitation in Contemporary Societies (1980).

[76]Dwyer in "The 'Matrimonial Home': Recent Trends" in De Facto Relationships: Legal Aspects (1981) claims that the phenomenan "continues to become more widespread" at p.41.

[77]S. Cretney, "The Law Relating to Unmarried Partners from the Perspective of a Law Reform Agency" in Eekelaar and Katz, Marriage and Cohabitation in Contemporary Societies (1980).

[78]Rebecca Bailey, "Legal Recognition of De Facto Relationships" (1978) 52 A.L.J. 174.

[79]Ibid. 185.

[80]Walter Otto Weyrauch, "Metamorphoses of Marriage: Formal and Informal Marriages in the U.S." in Eekelaar and Katz, Marriage and Cohabitation in Contemporary Societies (1980).

[81]Oliver, "The Mistress in Law" (1978) 31 Current Legal Problems 81, at p.99.

[82]Section 21, Matrimonial Property Act 1976.

[82A]Dwyer op. cit. 41, states that the law already interferes with the property rights of de facto couples by an array of bewildering legal devices. (ie trust, contract)

[83]Don MacDougall, "Policy and Social Factors Affecting the Legal Recognition of Cohabitation without Formal Marriage" in Eekelaar and Katz, Marriage and Cohabitation in Contemporary Societies (1980) p.316.

[84]Op. cit. 364.

[85]This argument forms part of Zuckerman's status model which presupposes that because a relationship resembles marriage it should be treated as such.

[86]Final Report (1977) Vol. 4, p.73.

[87]Ruth Deech, "The Case Against Legal Recognition of Cohabitation" in Eekelaar and Katz, Marriage and Cohabitation in Contemporary Societies (1980).

[88]Op. cit. 301.

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[89]It should be remembered that in the submissions on the H.R.C. Bill both Maoris and certain Island groups, it was suggested, place less emphasis on marriage than Pakeha society.

[90]Op. cit. 302.

[91]Deech claims it is in contravention of Articles 8(1); 23(3); and 23(4).

[92]Op.cit. 303.

[93]Idem.

[94]It can also refer to incestuous relationships and those between minors.

[95]Op. cit. 365.

[96]See the 20th Schedule to the Social Security Amendment 1980 in which a series of alternative calculations are offered in calculating maintenance contributions, one of which (2(c)(iv)and(v)) takes the second family into account (whether de facto or legal).

[97]Op. cit. 304.

[98]Op. cit. 305.

[99]Supra note 76.

[100]Tony Honoré, Sex Law (1978) p.39.

[101]Samuels, "The Mistress and the Law" (1976) 6 Family Law 152, p.160.

[102]Glendon, State, Law and Family (1977).

[103]Blake, "To Marry or Not to Marry" (1980) 10 Family Law 29.

[104]Pearl, "The Legal Implications of a Relationship outside Marriage" [1978] C.L.J. 252.

[105]As in clause 49, M.P. Bill 1975, later struck out.

[106]Op.cit. 88.

[107]Idem.

[108]Along the lines of cl. 16 in the M.P. Bill 1975.

[109]MacDougall, op. cit. 318.

[110]Implied by many but a favourite of the writer.

[111]A common wording in statute (see chapter II).

[112]Also a factor in almost every statute i.e. S.A. putative spouse.

[113]Oliver, op. cit. 103; MacDougall, op. cit. 318; Deech, op. cit. 310.

[114]Bailey, op. cit. 185; Oliver, op. cit. 99 strongly disfavours it.

[115]Macdougall, op. cit. ; Cretney, op. cit. ; Deech, op. cit. ; all point out the difference it makes.

[116]Pearl, op. cit. 269.

[117]Oliver, op. cit. 98.

[118]MacDougall, op. cit. 319; Bailey would extend the protection to homosexual couples, while Cretney also can find no logic for denying such an extension.

[119]Op. cit. 185.

[120]Idem.

[121]Op. cit. 185 and 186.

[122]Vaver, "The Legal Effects of De Facto Relationships" [1976] Recent Law 161. See pages 165 and 166 for a full discussion of contract.

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