

THE BAXTER CASE: DE FACTO MARRIAGE AND SOCIAL WELFARE POLICY

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The case of Barbara Baxter drew a great deal of public attention to the administration by the Federal Department of Social Security of widow's pension payments. This article examines the case in the light of the Department's stated 1975 policy and procedural guidelines. In the course of evaluating the Baxter case the author reviews de facto marriage policy in Australia: its legislative history and purpose, its present rationale and some of the problems associated with its implementation. Alternative policies in Canada and the United States are also discussed. Mary Jane Mossman expresses the view that the Department's present policy is deficient in meeting the needs of persons such as Barbara Baxter and a reappraisal of social welfare policy in Australia is required.

I THE BAXTER CASE

1. Introduction

Barbara Baxter is divorced from her husband¹ and has custody of two sons, aged seven and four. She began to receive a widow's pension from the Department of Social Security² in 1972. She and her sons were living with her mother and step-father while she was attending technical college. In July 1975, after continuing problems with her step-father, she rented a unit for herself and her sons. Almost immediately, however, she found herself in financial difficulty and in September 1975 she and her sons decided to share accommodation with a fellow technical college student, Roger Baxter. They rented a three-bedroom unit in which the sons shared one bedroom and Roger and Barbara another. At the same time, Barbara decided to adopt a new surname to avoid her former husband; since she also wanted to avoid any difficulties for her sons in the new unit, she decided to adopt Roger's surname for herself and her sons. She notified the Department of Social Security of her change in name.

In November 1975 she received a visit from the Department's field officer who informed her that she was no longer eligible for a widow's pension. The Department notified her officially of her disentitlement in

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¹ The facts in the Baxter case are based on copies of letters and other documents in Barbara Baxter's possession, and her unsworn written statement to the Social Security Appeals Tribunal, Sydney.

² The Department of Social Security is the Federal Department responsible for administering the Social Services Act 1947 (Cth), which provides in Part IV for payment of a widow's pension to specified categories of women in need.

early December. She lodged an appeal with the Social Security Appeals Tribunal³ immediately and, through the Tribunal's intervention, her pension was restored pending the outcome of her appeal. The Tribunal interviewed Barbara in early February and also requested an interview with Roger in mid-March. The three members of the Tribunal were unable to agree on the appropriate disposition of the appeal; two members wished to dismiss it, while the third decided that the appeal should be upheld. Since the Tribunal's authority is limited to dismissing an appeal or recommending to the Director-General that it be upheld, the Tribunal's 2 - 1 decision to dismiss the appeal would ordinarily have resulted in dismissal at the tribunal level. However, the Tribunal decided to forward the entire file without a recommendation and to indicate the divided view of the Tribunal to the Director-General for consideration "at the highest level". In due course, Barbara received a letter dated 29 April 1976 from Senator Margaret Guilfoyle, Minister for Social Security, stating:

Your relationship with Mr Baxter and the circumstances under which you share accommodation with him place you in a similar position to that of a married person and, therefore, I must confirm that you are no longer eligible for payment of a widow's pension.⁴

Subsequently, Barbara received an official notice from the Department stating that her widow's pension would be terminated as of 10 June 1976.

Barbara had commenced a full-time B.A.Dip.Ed. programme in March 1976 and has continued her studies by taking on a part-time job five mornings per week. She now receives a T.E.A.S. allowance.⁵ Roger has no means to support her since he is also a student and is supporting his own children, who are in his wife's custody. Barbara and Roger have no intention to marry and have made no commitment to each other for the future.

³ The Social Security Appeals Tribunals were established in February 1975 without amendment to ss. 14 and 15 of the Social Services Act 1947 (Cth) (where review is only by the Director-General). The tribunals are located in each of the six state capitals and two territories. Each is composed of three members; one member has legal qualifications, one has expertise in social welfare matters and one is seconded from the Department of Social Security. When an appeal is lodged the tribunal must request a report from the Department and may also conduct an interview with the claimant. If the tribunal agrees with the Departmental decision, it must dismiss the appeal. When the tribunal disagrees with a Departmental decision, however, the tribunal has authority only to recommend that the appeal be upheld. The tribunal's recommendation is forwarded initially to the State Director who may decide to accept it. If the State Director refuses to implement the tribunal's recommendation, it is forwarded to the Director-General in Canberra for a decision. See Mossman, "The Baxter Case" (1976) 2 *Legal Service Bulletin* 66.

⁴ Letter to Barbara Baxter from Senator Margaret Guilfoyle, 29 April 1976.

⁵ A student allowance for purposes of tertiary education.

2. *Application of Departmental Policy*⁶

Section 59 of the Social Services Act 1947 (Cth) provides that, for the purpose of payment of a widow's pension, "widow" includes:

- (a) a dependent female;
- (b) a deserted wife;
- (c) a woman whose marriage has been dissolved and who has not remarried;
- (d) a woman whose husband is a mental hospital patient;
and
- (e) a woman whose husband has been convicted of an offence and is imprisoned and has been imprisoned for a period of not less than six months, including any period of imprisonment prior to and continuous with a period of imprisonment following upon the conviction;

but does not include a woman who is living with a man as his wife on a bona fide domestic basis although not legally married to him.⁷

There is no definition in the Social Services Act of the concluding phrase "living with a man as his wife on a bona fide domestic basis". In practice, the decision to terminate a widow's pension on this ground is made by officers of the Department of Social Security according to a twelve-page policy statement issued in March 1975 entitled "De Facto Marriage Relationships (Cohabitation)".⁸ The Departmental policy sets out procedural guidelines for its officers in cases of suspected de facto relationships and enumerates relevant factors to be considered in deciding that a de facto marriage exists. However, a close examination of the procedure and the substantive decision in the Baxter case reveals significant departures from the Department's stated policy.

(a) *Procedures*

A Departmental field officer made unannounced visits to Barbara Baxter on two occasions in November 1975.⁹ On the first occasion, she was suffering from chicken pox and, in consequence, writing her

⁶ This article is an examination of the application of Federal Department of Social Security policy to the entitlement of women under the Social Services Act 1947 (Cth) to the widow's pension. The subject of social security benefits is dealt with comprehensively in a forthcoming article by Professor R. Sackville entitled "Cohabitation and Social Security Entitlements" in Sackville, *Essays on Law and Poverty: Bail and Social Security* (1977).

⁷ The same requirement of the absence of a bona fide domestic relationship is required to qualify for a supporting mother's benefit in Part IV AAA of the Act.

⁸ Department of Social Security, "De Facto Marriage Relationships (Cohabitation)" (Canberra, March 1975). The fact that this policy statement was still in effect when the Baxter case was decided was confirmed in a letter from Senator Guilfoyle to the N.S.W. Council for Civil Liberties, 29 July 1976.

⁹ Note 1 *supra*. Barbara's statement about the conduct of the enquiry was disputed by the field officer during a subsequent enquiry by the Department (to

technical school exams at home under supervision. Nevertheless, the field officer insisted on interrupting her exam to ask questions concerning her former husband. Several days later, the same field officer returned and it is alleged that he stated that Barbara was a "naughty little girl". Apparently, he advised her that she could not have a pension if she shared her bed with a man. He then wrote out a statement concerning her relationship with Roger. He insisted that she sign it and suggested that her failure to do so would result in a less friendly visit at which she would be read aloud a summons at the door. Barbara Baxter remembers no questions at all relating to the financial arrangements in the household. Her impression was that the admission of the sexual relationship was sufficient to disentitle her to the pension.

Barbara Baxter's allegations concerning the field officer's inquiry are strikingly inconsistent with the general direction to field officers contained in the Departmental policy statement of March 1975. Paragraph 22 states:

As a general rule inquiries should not be pursued to undue lengths in an attempt to prove the existence of a *de facto* marriage relationship. It is preferable to determine a claim on incomplete information and allow the claimant the benefit of the doubt rather than risk the possibility of offending the parties concerned and creating embarrassing situations. Inquiries should not take on an inquisitorial or intrusive nature. Gratuitous observations reflecting on a person's character, integrity or credibility should also be avoided.¹⁰

The guidelines further state that although "something more than suspicion"¹¹ is needed to result in disentitlement of the claimant, "it is not necessary to obtain an admission that the parties are living together as husband and wife".¹² Furthermore, the existence of a sexual relationship is "only one of a number of factors"¹³ to be taken into account and the guidelines list several others¹⁴ which were apparently ignored by the field officer. Moreover the guidelines expressly require that

which Barbara had no access). In her letter of 29 April 1976, Senator Guilfoyle stated: "I regret that you were not satisfied with the interview conducted by the Field Officer from the Department. The Field Officer concerned has stated that he had no intention of creating the impression you gained and his recollection is that the interview was conducted in a friendly and courteous manner. The officer concerned is highly regarded by his senior officers and has a reputation of having established good relations with many of the Department's clients."

¹⁰ Note 8 *supra*.

¹¹ *Id.*, para. 21.

¹² *Ibid.*

¹³ *Id.*, para. 26.

¹⁴ *Id.*, para. 29. The other factors are listed in para. 29 under seven headings; (1) Co-residence, (2) Accommodation, (3) Household Duties, (4) Financial Arrangements, (5) Leisure Time, (6) Appearance of Marriage, (7) Children.

“direct or indirect questioning as to whether the claimant or pensioner has sexual relations with the other party should be avoided”.¹⁵

Although the alleged conduct of the field officer did not conform to the Departmental guidelines, none of the review procedures in the Baxter case offered an opportunity to examine the propriety of his conduct. Formal complaints by Barbara Baxter to the Department remained unanswered until the letter from the Minister in April 1976 and her reply is of scant assistance in determining whether the field officer's actions, as opposed to his intentions, were condoned by the Department.¹⁶ Although Barbara and Rober did have interviews before the Tribunal, its procedures do not entitle claimants to have access as of right to the Departmental report nor an opportunity to cross-examine the field officer who obtained the statement.¹⁷ Nevertheless, Barbara's pension was terminated.

(b) *The substantive decision*

The Departmental policy states as a general principle that “the decision as to whether or not a de facto marriage relationship exists is ultimately a matter of personal judgment”.¹⁸ The object of the enquiry is to:

. . . determine beyond all possible doubt that the couple reside together as husband and wife. This generally implies that the parties have so merged their lives and resources that the relationship is indistinguishable from marriage.¹⁹

This statement is qualified in the Department's policy by the assertion that a mere “sharing of the costs of lodging, food, cooking and laundry” need not lead to the conclusion that a de facto marriage exists.²⁰ However, where a man supports the woman with whom he lives it is a reasonable inference to conclude that they live as man and wife.²¹ As stated earlier, the existence of a sexual relationship is only one of a number of factors to be considered in making the decision.²² From these guidelines it is possible to formulate the general principles of the Department's cohabitation policy. For the purposes of a pension, living in a de facto marriage situation involves a merger of lives and resources and a woman who is supported by the man with whom she

¹⁵ *Id.*, para. 26, see also para. 40.

¹⁶ Note 9 *supra*.

¹⁷ “Social Security Appeals System: Principles and Procedures” (Canberra, December 1974) Part 4, para. 4.3; Part 5, paras 5.1 to 5.4. See discussion in Sackville, note 6 *supra*, text between notes 18 and 19.

¹⁸ Note 8 *supra*, para. 14.

¹⁹ *Id.*, para. 25.

²⁰ *Id.*, para. 28.

²¹ *Id.*, para. 27.

²² *Id.*, para. 26.

shares accommodation is *prima facie* a de facto wife. However, a sexual relationship is not, by itself, a determining factor and a man and woman may "share" their lives without "merging lives and resources".

The Department's general principles are amplified in its policy statement by a list of "relevant factors" to be considered in appropriate cases.²³ The weight to be accorded to these individual factors is not set out and is implicitly a matter of "personal judgment".²⁴ The additional factors include the circumstances in which the parties took up residence together (and whether either party has another address); details of ownership of the accommodation and furniture; the frequency of meals together; performance of household duties by the woman which are "normally done by a wife for her husband" and *vice versa*; whether there is a "pooling of resources"; earnings from employment by each party; whether the parties spend leisure time together; whether the parties have represented themselves as man and wife or have used the same name and whether their friends and neighbours accept them as a married couple; and whether there are children of the association.²⁵

In the context of these guidelines the facts which are relevant for consideration in the Baxter case are the sexual relationship and the use of Roger's surname by Barbara and her sons. Of these, as mentioned earlier, the sexual relationship is merely one factor to be weighed along with others, and there is evidence that the adoption of Roger's surname was designed to promote an objective other than a representation of marriage.²⁶ When Barbara commenced living apart from her mother and step-father, it was necessary for her to use a name other than her married surname to avoid her former husband. She adopted Roger's surname to avoid difficulties in renting the unit in Epping. However, she has never positively asserted to neighbours there that she is married to Roger although it is undoubtedly true that the use of his surname has created a misleading impression which she has not corrected. Moreover, Barbara tried to ensure that any possible misunderstanding about her status was confined to the units; she has positively stated that she is unmarried on her records at Macquarie University, to a former employer, to all her friends and at the bank where she maintains an account to which Roger has no access. She has explained to her sons that Roger is not their father and they do not refer to him as such. The boys are registered at their school as being without a father. In the overall context it is clear that the use of Roger's surname was convenient to avoid Barbara's former husband (although any new surname would have achieved this purpose) and to obtain shared accommodation in Epping without difficulties. The use of Roger's

²³ *Id.*, para. 29.

²⁴ *Id.*, para. 14.

²⁵ *Id.*, para. 29.

²⁶ Note 1 *supra*.

surname creates a misleading impression of marriage only in the one limited context of the block of units; the world at large has no misconceptions about Barbara's marital status. Nevertheless, the sexual relationship and the use of Roger's surname were regarded by the Department as sufficient evidence that Barbara lived with Roger as his wife on a bona fide domestic basis.

The doubtful quality of these two factors must be compared with other factors in the Baxter case which were apparently overlooked in the Department's determination. The general principles set out in the guidelines indicate that a *prima facie* case of de facto marriage exists whenever the woman is supported by the man with whom she lives.²⁷ In the Baxter case there was no evidence of any financial support. Roger Baxter is also a student who receives a T.E.A.S. allowance, most of which is needed to help support his own children. He is married and when he separated from his wife in July 1975, he had considerable financial difficulty until he and Barbara decided to share accommodation some months later. He contributes to the support of his children and maintains a joint bank account with his wife (who also calls herself Mrs Baxter). His wife is named as the beneficiary under his will and the recipient of a life insurance policy, as well as his next of kin on his passport. Roger accepts no responsibility to support Barbara and has no resources available for that purpose. Her decision to take a part-time job to support herself and her sons following the termination of her widow's pension is ample testimony of this fact. In the absence of financial support, no *prima facie* case of a de facto marriage relationship, pursuant to the Department's policy, can be established.

A close analysis of the relevant factors set out in the Department's policy indicates that the parties have not "merged their lives and resources",²⁸ but merely adopted a sharing arrangement. It was clearly to their mutual advantage to reduce the costs of accommodation by living together and, in September 1975, financial considerations were extremely significant for both Barbara and Roger. They brought to the unit furniture owned by each of them and while it is used by both of them, they regard its ownership as unchanged. The parties do not routinely have their meals together. Indeed, Roger spends each morning from 7.30 a.m. with his children preparing them for school and cares for them each afternoon after school until their mother returns from work at approximately 6 p.m. They do not spend Christmas or other holidays together and Roger seldom accompanies Barbara and her children on their outings. On the few occasions Roger and Barbara attend social functions together they are never regarded as husband and wife. Household chores and expenses are shared equally. There is no "pooling of resources" but rather an agreement to share expenses

²⁷ Note 8 *supra*, para. 27.

²⁸ Note 8 *supra*, para. 25. See also paras 28 and 29(4).

equally, regardless of the resources of each party. There are no children of their association. Moreover, they openly assert that they have no commitment to one another for the future and no intention to marry.

The Baxter example is a difficult case in relation to the application of the Department's de facto marriage policy. It falls between two extremes where, on the one hand, the parties wish to be regarded as man and wife (clearly a de facto marriage), and on the other, where the relationship is merely one of housekeeper-lodger (clearly not a de facto marriage).²⁹ Having factors common to each extreme, the Baxter case presented considerable difficulty for both the Tribunal and the Department. The relationship between Roger and Barbara is essentially that of flatmates who share accommodation to save expenses, but whose lives are not merged as one. The only factors which tend to negative this conclusion are the sexual relationship and Barbara's use of Roger's surname. Against these two factors there are the others which must also be considered, including the lack of support by Roger, knowledge by the world at large that Barbara is not married, their separate lives in relation to their own children, and their sharing of all expenses as individuals without a "pooling of resources". Taking these additional factors into account, it is submitted that the Department's decision cannot be justified in relation to its own policy.

II DE FACTO MARRIAGE POLICY IN AUSTRALIA

The Baxter case has significant implications for social welfare policy in Australia. To appreciate this, it is necessary to examine the history and objectives of the Department's policy on de facto marriage and its relationship to the Social Services Act 1947 (Cth). It is submitted that even if the policy of the Department could be regarded as properly applied to the Baxter case, the Departmental policy itself is inappropriate and should be revised.

1. *Legislative History and Purpose*

The present definition of "widow" in section 59 is the result of an amendment to the Social Services Act in October 1975.³⁰ Prior to that time, the definition in section 59 included the list of five categories of women qualified to receive the widow's pension,³¹ but the concluding phrase "but does not include a woman who is living with a man as his wife on a bona fide domestic basis although not legally married to him" did not appear. The wording of the 1975 amendment is similar to the wording used in section 83AAA(1)(b) in relation to a similar requirement to qualify for a supporting mother's benefit, a new benefit intro-

²⁹ *Id.*, paras 13 and 14.

³⁰ Social Services Act (No. 3) 1975 (Cth), effective 27 October 1975.

³¹ See text at note 7 *supra*.

duced by an amendment to the Social Services Act in 1973.³² The 1975 amendment to the definition of "widow" thereby created a degree of parity in the Social Services Act between the two payments in terms of criteria of eligibility. However, the presence of a de facto marriage relationship had routinely resulted in disentitlement of widows' pensions long before the 1975 amendment³³ and the history of this practice reveals fundamental inconsistencies between legislative provisions and Departmental practice.

Widows' pensions were initially introduced by the Federal Government in 1942, although the idea of providing payments to widows had by then been mooted for several years³⁴ and had been a specific election promise of the Labor Party in 1940.³⁵ The original legislation made provision for three classes of widow pensioners:³⁶ those with dependent children; those without dependent children but who were more than fifty years old; and a special class of those in "necessitous circumstances" who were permitted to receive the pension for twenty-six weeks following the death of their husbands.

The scheme was primarily designed to benefit those widows who could not reasonably be expected, because of age or the necessity of caring for young children, to engage in employment. Within these groups, however, the term 'widow' was given a rather generous definition by including women who had lost a breadwinner in other circumstances [such as desertion, divorce, de facto widow or where the husband became a patient in a hospital for the insane].³⁷

From the beginning the widow's pension was payable to women who were not strictly "widows",³⁸ but who, because of the loss of a male breadwinner, were in need of governmental support.

³² Social Services Act (No. 3) 1973 (Cth) s. 83AAA(1)(b) defines eligibility for a supporting mother's benefit to include a woman who "is not living with, and for a period of at least six months has not been living with, a man as his wife on a *bona fide* domestic basis although not legally married to him . . ."

³³ The Departmental policy issued in March 1975 indicates its applicability to widow pensioners. Its routine application to widow pensioners was verified during interviews with Departmental officers in 1974 during a research study conducted under the auspices of the Commonwealth Commission of Enquiry into Poverty.

³⁴ As early as 1908 a motion was passed during the Fourth Commonwealth Conference of the Australian Labor Party that "pensions be provided for widows and orphans". See Kewley, *Social Security in Australia 1900-1972* (1973) 211.

³⁵ *Id.*, 212.

³⁶ These original classes of widow pensioners are retained in the present s. 60.

³⁷ Kewley, note 34 *supra*, 214.

³⁸ Significantly, the term "widow" included a woman whose de facto husband had died, although the term "de facto widow" was changed by the Widows' Pensions Act 1943 (Cth) to "dependent female". The Attorney-General, Dr H. V. Evatt, is reported to have stated that the term "de facto widow" was "inaccurate, offensive and had no legal meaning"; Cth Parl. Deb., 24 March 1943, 2299, quoted in Kewley, note 34 *supra*, 216. Dependent females may qualify for the widow's pension in certain cases pursuant to s. 59 of the present Act.

It is significant that the absence of a male breadwinner was not originally an express requirement for a widow's pension. However, such a condition of eligibility could be inferred from the legislative and social context in which the widow's pension was created. In that context, it is likely that the Government intended to provide support for particular women who, by legislative definition as deserted wives, widows, or dependent females, were no longer being supported by a husband or de facto husband. In addition, the fact that the pension was available only to women who were over fifty years old or had the care of children and not to men in similar circumstances reflected the prevailing view in 1942 that such women, but not such men, could not be expected to support themselves. By making the widow's pension available to women on this basis the legislature implicitly accepted a responsibility to support them in the absence of support from a male breadwinner. Obviously this notion required as a corollary that a woman who subsequently formed a relationship with another man would cease to be eligible for a pension because of the existence of a new male breadwinner.

The absence of a "bona fide domestic relationship" was not expressed as a condition of eligibility for a widow's pension until the 1975 amendment to section 59. Nevertheless, legislative authority for disentitling claimants on such grounds might have been found before 1975 in the requirements of the former section 62 which provided that:

A pension shall not be granted to a widow—

- (a) unless she is of good character;
- (b) if she is not deserving of a pension. . . .

These requirements of section 62 were repealed in November 1974³⁹ when the Minister for Social Security decided to remove these and other "offensive anachronisms"⁴⁰ from the Social Services Act. At the same time, identical conditions of entitlement for age⁴¹ and invalid⁴² pensions were repealed. The existence of a provision similar to section 62 for age and invalid pensions reflects very clearly the benevolent origins of social welfare in Australia. Legislation providing for age and invalid pensions was enacted originally in 1908 and included from the beginning the requirement that a pensioner be of good character.⁴³

³⁹ Social Services Act (No. 3) 1974 (Cth).

⁴⁰ Press Statement by the then Minister for Social Security, Mr Bill Hayden, M.P., 20 March 1974.

⁴¹ Note 39 *supra*, s. 22(a) and (b).

⁴² *Id.*, s. 25(a).

⁴³ There was some demand in the original legislative debates for a definition of good character but no definition was included in the legislation. However, as the result of the debate, the Government "did agree to delete a clause, similar to one in the New South Wales Act, which required the applicant to have led a temperate and reputable life during the five years immediately preceding the date of his application". See Kewley, note 34 *supra*, 75.

This provision was then adopted three decades later in 1942 in the legislation for widows' pensions thereby perpetuating the philosophy that social welfare was to be granted only to the deserving poor.⁴⁴ A widow pensioner who formed a relationship with a man who was not her lawful husband could be regarded as "not of good character" and not qualified to receive assistance; she was entitled only to seek support from the man who was, however, under no legal obligation to assist her.

Despite the apparent usefulness of these provisions it is significant that the Department has never officially relied on section 62 to justify disentitlement to the widow's pension on the grounds of a de facto marriage. The Department's submissions to the Bland Committee in 1973 indicated that the provisions of section 62 were rarely, if ever, invoked to disentitle claimants. In any event the Department could not rely on section 62 after its repeal in November 1974 and could not rely on the amendment to section 59 until its enactment in October 1975. A number of conclusions might follow from these facts. One theory is that the Department acted without any legislative authority at all between November 1974 and October 1975 and prior to 1974.⁴⁵ Possibly, retrospective authority for its actions prior to 1974 could be found in section 62 before its repeal, but such authority would depend on the somewhat tenuous assertion that during that period a woman living with a man on a bona fide domestic basis was, *ipso facto*, not of good character and not deserving of a pension.

There is another theory which might justify the Department's actions. In the absence of an express requirement that a claimant must not live with a man on a bona fide domestic basis, it was nevertheless open to the Department to disentitle such a claimant, not on the grounds of the relationship, but rather because of the financial resources available to her. Section 18 of the Act defines "income" for the purpose of the Act as:

. . . any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever, within or outside Australia, and *includes any periodical payment or benefit by way of gift or allowance from a person other than the father, mother, son, daughter, brother or sister of the first-mentioned person*, but does not include [income derived from property, an

⁴⁴ The concept of the "deserving poor" derives from the Elizabethan poor laws and the provision of welfare assistance by charitable organisations prior to the acceptance of social welfare as a governmental responsibility. For reference on the concept see Hollingsworth, *The Powerless Poor* (1972) 43-64; Lewis, *Values in Australian Income Security Policies* (1973) 1-2.

⁴⁵ The latter was admitted by the Department. See the detailed submissions by the Department of Social Security on the exercise of discretion pursuant to the Social Services Act to the Committee on Administrative Discretions.

instalment of a superannuation payment, or the value of food relief, *etc.*]⁴⁶

Clearly, a woman who received financial support from the man with whom she lived would be required to include that amount in her income and where the amount was sufficient she would be disentitled to a pension. However, if the Department sought to justify its actions using this theory, it would be bound to direct its enquiries to the financial relationship of the claimant and her alleged *de facto* husband; any enquiry into other aspects of the relationship would be completely irrelevant. Unfortunately, this possible theory is also rendered untenable because the Department's policy, well-documented in its statement in March 1975,⁴⁷ is to make enquiries into all aspects of the relationship including but not restricted to financial arrangements. As a result section 18 is also unpersuasive as a justification for the Departmental enquiries routinely conducted prior to October 1975.

Since that date the amendment to section 59 provides statutory authority for these Departmental enquiries. Nevertheless the analysis prior to the 1975 amendment is not entirely academic because it is possible to formulate conclusions about legislative purpose from the history of the Act. Assuming that the Department's practices prior to 1974, contrary to its assertions, were based on section 62 which prescribed the "good character and desert" requirements, the repeal of those provisions might be regarded as an attempt to remove from the Social Services Act conditions of eligibility relating to morality and behaviour.⁴⁸ The intention in repealing section 62 and other similar provisions was to make eligibility for a pension dependent on objective criteria and financial need. In this context, a provision requiring the absence of a *bona fide* domestic relationship can be regarded as undesirable because it reintroduces a need to enquire into personal morality and behaviour. For this reason the 1975 amendment to section 59 is inconsistent with the stated legislative purpose in repealing section 62. On the other hand, without reliance on section 62, and prior to the 1975 amendment to section 59, the absence of express authority to disentitle a woman living in a *de facto* marriage clearly allowed the Department to disentitle a claimant who was supported by a man pursuant to the definition of "income" in section 18. Such a result, which required an enquiry into the financial relationship alone, was clearly consistent with the express policy which led to the repeal of section 62. In this context the 1975 amendment abruptly halted the trend to objective criteria of entitlement by introducing as an express condition of eligibility the

⁴⁶ Emphasis added. S. 59(2) provides that "income" has the same meaning for the purpose of entitlement to a widow's pension as s. 18 except in relation to income derived from property.

⁴⁷ Note 8 *supra*.

⁴⁸ Note 40 *supra*.

absence of a bona fide domestic relationship. Moreover, as a result of that amendment, the Department's routine practice of enquiring into all aspects of the relationship was approved and belatedly authorised.⁴⁹ In consequence the amendment to section 59 represents a significant redirection of social welfare policy.

2. Departmental Policy—Its Rationale⁵⁰

The essence of the Department's de facto marriage policy is its attempt to analyse a man—woman relationship in terms of factors generally associated with legal marriage. Where the relationship strongly resembles a legal marriage because of a high correlation of these factors, the Department regards the relationship as a de facto marriage. There are a number of difficulties implicit in such a procedure. One is the choice of factors associated with legal marriage. Although it may once have been possible to assert that particular factors were uniformly apparent in every marriage relationship, both the nature of marriage and the role of women in society have changed in recent years, sometimes dramatically. In light of these changes some of the factors considered by the Department in determining whether a de facto marriage exists are of questionable validity.⁵¹ For this reason the Department may conclude that a de facto marriage exists, such as in the Baxter case, despite the parties' failure to regard themselves as married and in the absence of any mutual financial support.

Moreover, the procedures for implementing a de facto marriage policy are also not without pitfalls. Since the policy requires an evaluation of the nature of the relationship according to specified criteria, evidence about the details of the parties' affairs is essential. Much of this evidence must be collected by field officers of the Department by questioning neighbours, tradesmen in the neighbourhood, and the claimant herself. Inevitably, some of these enquiries may be embarrassing or humiliating for claimants and undoubtedly create potential opportunities for abuse by unscrupulous field officers. Even if field officers conduct their investigations with the best of intentions and goodwill, their conduct may nevertheless bring the Department into disrepute because of inevitable invasions of privacy.

⁴⁹ Significantly, the Departmental policy statement of March 1975, which set out the legislative basis for its policy, did not include the good character requirements of s. 62 of the Social Services Act 1947 (Cth) nor the income provisions of s. 18. However, the policy statement indicated, without replication, that the policy was "supportable in law"; note 8 *supra*, para. 3. See also Commission of Inquiry into Poverty, *Law and Poverty in Australia* (1975) 189-190.

⁵⁰ See also Sackville, note 6 *supra*, text at note 39.

⁵¹ "Does the woman perform those household duties normally done by a wife for her husband, e.g. preparing meals, washing clothes, looking after him during sickness, etc.? Does the man perform those household duties normally done by a husband for his wife, e.g. decorating, washing-up [*sic*], looking after the children, etc.?" Note 8 *supra*, para. 29(3).

Taking into account the difficulty in formulating criteria for a de facto marriage policy and the hazards routinely associated with its application in practice, there are ample reasons, in theory, to justify its discontinuance. On the other hand, such a policy is not entirely without purpose and the Department itself has attempted to state reasons to substantiate its usefulness. Primarily the Department is concerned to achieve the objective of fairness in treatment between married couples and those who live as man and wife without being legally married.

The basic rationale behind the existing policy is to ensure that a man and woman who, for convenience, economic or other reasons, live together in circumstances similar to that of husband and wife, are not placed in a better position *for pension or benefit purposes* than a legally married couple. . . In cases involving cohabitation, . . . any decision to treat a man and woman as a married couple does not carry the slightest implication that a moral judgment has been made. Rather, the decision is one based on equity and it is taken to ensure that a man and woman residing together, and sharing the economies and advantages enjoyed by a legally married couple, are not accorded benefits greater than those available to a legally married couple.⁵²

These objectives of fairness and equity in the Department's policy are commendable. However, the formal justice achieved by the choice to provide the same treatment to two groups of women (married and unmarried), whose positions differ in marked respects, may result in unfairness in practice. The decision to disentitle a de facto wife because her position is somewhat similar to that of a married woman may create unfairness in practice because the de facto wife's legal status is already inferior to that of a married woman. A de facto marriage creates no legal entitlement to support from the de facto husband while he is alive, and the de facto wife's claim against his estate after his death is uncertain.⁵³ Unlike a legal wife, a de facto wife who is deserted has no right to claim maintenance for herself,⁵⁴ although she may have a claim for maintenance in respect of any child of which her de facto husband is the father.⁵⁵ Since the legal consequences of marriage are absent from a de facto marriage relationship, it is arguable that the Department could more effectively promote fairness if pensions were paid to de facto wives as compensation for the greater financial security enjoyed by legally married women.

Clearly this form of fairness was not intended by the Department's policy, which is limited (as the words emphasised in the quotation

⁵² *Id.*, paras 9 and 11. (Emphasis added).

⁵³ Testator's Family Maintenance and Guardianship of Infants Act 1916 (N.S.W.) s. 3.

⁵⁴ Tasmania is the only exception, see Maintenance Act 1967 (Tas.) s. 16.

⁵⁵ Maintenance Act 1964 (N.S.W.) s. 15.

above show) to fairness "for pension or benefit purposes".⁵⁶ The intention is not to achieve fairness overall between *de facto* wives and legally married women; it is to pay an amount of pension to a woman having regard to her circumstances, disregarding whether her "marriage" is legal or *de facto*. Since a pension is not payable to a married woman with a husband—breadwinner, even where the amount of their family income is sufficiently meagre to fall within the acceptable range for a widow's pension, fairness requires that no pension should be payable to a *de facto* wife in the same circumstances. Of course, there is an assumption in this policy that *de facto* husbands provide financial support to their "families" just as husbands in legal marriages must. Clearly, the fairness desired by the Department would be achieved in practice if all *de facto* wives were supported by their *de facto* husbands. However, the Baxter case aptly demonstrates that a relationship may be regarded by the Department as a *de facto* marriage although the *de facto* wife receives no support at all from her *de facto* husband. In such circumstances it is obvious that fairness alone cannot justify the Department's policy. Some other rationale is needed.

The obvious explanation is that the Department's policy is based on an unarticulated but very significant assumption that a man should support his *de facto* wife just as does the husband who has a legal obligation to support his wife. This policy excludes from eligibility for a pension not only those who have a legal right to support from a husband but also those whom the Department decides should in the circumstances be supported by a *de facto* husband, despite the absence of any legal entitlement to support. Although the Department obviously wishes to encourage *de facto* husbands to provide financial support, the policy effectively penalises only the woman who loses her entitlement to social security, has no legal right to support from her *de facto* husband and is frequently unqualified for employment or unable to undertake regular work because of her obligation to care for her children.

The Department cannot compel the *de facto* husband to provide support, but its policy penalises *de facto* wives whether their *de facto* husbands fail to provide support because they are unwilling or unable to do so. The result is a dramatic reversal of the legislative objective which motivated the establishment of widows' pensions for women without financial support to care for young children.⁵⁷

3. *Departmental Policy—Some Problems*

The widow pensioner's dilemma is most easily resolved by severing her relationship with her *de facto* husband thereby re-establishing entitlement to a pension. Such action may frequently be the only

⁵⁶ Note 8 *supra*, para. 9.

⁵⁷ Note 34 *supra*, 214.

reasonable alternative for a woman who has the care of small children and needs financial support. This means that the Department's policy is effectively regulating the personal conduct and sexual behaviour of its claimants. While it is necessary for welfare assistance to be granted on conditions, it is unjustifiably oppressive for these conditions to include standards of personal conduct.⁵⁸ Moreover, this policy clearly perpetuates the most undesirable aspects of the "good character and desert" requirements which were repealed in 1974 expressly to avoid criteria of eligibility which contained inherent judgments about morality and worthy behaviour.⁵⁹

The dire consequence of the Department's policy for de facto wives who are not supported by their de facto husbands illustrates that there are objectives in addition to fairness sought to be achieved. Significantly, the fairness objective could be better achieved by a policy which clearly distinguished between those de facto wives who are supported and those who are not. The absence of a legal obligation to support his de facto wife need not exclude the possibility that a de facto husband may feel a moral obligation to support her and in practice, many such relationships do represent a merger of lives and resources. A woman who receives such support would be disqualified for a pension pursuant to the definition of "income" in section 18 of the Act. There would be no need for intrusive investigations into her personal affairs. However, a woman like Barbara Baxter, who receives no support from her de facto husband, would not be disqualified for a pension on account of her relationship with him.

The focus of such a policy is not the relationship between the parties but the existence of financial support for the de facto wife. There is no longer any need to enquire into sleeping arrangements, the use of leisure hours, whether meals are eaten together and which party performs particular household duties because these factors are irrelevant to the issue of whether the claimant has assessable income for pension purposes. If the enquiry is directed to determining whether a widow pensioner is supported by a man, it will no longer be necessary to ascertain whether there are other factors in her relationship which bear sufficient similarity to the Department's indicia of legal marriage. Significantly, some of the same factors adopted by the Department as indicia of marriage have been expressly rejected as indicia of marriage

⁵⁸ The attempt to regulate private conduct through eligibility for various forms of governmental assistance has been frequently criticised, particularly in the U.S.A. where such provisions have been struck down as unconstitutional. See O'Neil, *The Price of Dependency* (1970) 278-284; O'Neil, "Unconstitutional Conditions: Welfare Benefits with Strings Attached" (1966) 54 *Calif. L. Rev.* 443; Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965) 74 *Yale L.J.* 1245.

⁵⁹ Note 40 *supra*.

in the new Family Law Act 1975 (Cth). Specifically, section 49(2) of that Act provides that:

the parties to a marriage may be held to have separated and to have lived separately and apart [sufficiently to entitle them to a decree of divorce] notwithstanding that they have continued to reside in the same residence or that either party has rendered some household service to the other.

The clear implication is that a legal but undissolved marriage may be regarded as at an end despite the provision of household services and shared residence.⁶⁰ Abolition of the need to enquire into the nature of the relationship for purposes of determining eligibility for a widow's pension would also alleviate the inconsistent indicia of marriage between Family Law Act matters and those concerning social security entitlement.

The focus on support rather than the relationship between the parties has procedural advantages as well. Although it would not lessen the need for enquiries by the Department, the enquiries would be confined to the claimant's financial circumstances. Such investigations are routinely conducted by the Department in relation to recipients of all social security payments⁶¹ and it is likely that the sophisticated methods of detecting those who abuse the system at present would be equally successful in these investigations. The assertion that this proposal is no more attractive than the existing policy because it also necessitates enquiries⁶² is misconceived. A recognition that invasions of privacy do occur in social security matters does not lessen the need to ensure that enquiries are limited to factors which are relevant to the issue of entitlement to social security. Enquiries about a claimant's personal relationship constitute a more serious invasion of privacy than enquiries about assets and income which are routinely conducted in the community in relation to taxation, bank loans and credit ratings. Since the primary purpose of social security payments is assistance to persons in need, enquiries about income and assets are both necessary and legitimate. There is no similar justification for enquiries about sexual behaviour or personal living arrangements.

For these reasons, a policy which disentitles only *de facto* wives actually supported by a man better achieves the Department's objective

⁶⁰ The test is "whether or not the parties have in fact established separate households, albeit the same roof covers both". See *Wiggins v. Wiggins* (1976) 2 C.C.H. *Australian Family Law and Practice Reporter* 90.004.

⁶¹ Enquiries are made whenever information is received regarding entitlement; regular checks are also made at defined intervals of groups of pensioners and beneficiaries.

⁶² Interviews with Departmental Officers, Sydney, 1974, as part of research for the Commonwealth Commission of Enquiry into Poverty. Commonwealth Commission of Enquiry into Poverty, *Law and Poverty in Australia* (1975) 191-192.

of fairness than does its existing policy. A policy which focuses on income and financial support achieves more fairness in practice than one which scrutinises the nature of the parties' relationship. As well, the choice of factors to determine that a de facto marriage exists is difficult and inconclusive in the light of changing patterns of legal marriages. Both the Department and claimants will benefit from a change which directs enquiries away from personal conduct towards financial affairs.

III ALTERNATIVE POLICIES IN PRACTICE

The difficulties evident in the Department's de facto marriage policy are not unique to Australia. The problems experienced by administrators who must decide whether a de facto marriage exists are well illustrated by a recent decision in England.⁶³ An elderly lady and her male boarder were investigated by the National Insurance Tribunal which concluded that no de facto marriage existed, thereby entitling her to a pension. Subsequently, however, the Supplementary Benefits Tribunal also investigated her eligibility for benefits and decided on the same facts that a de facto marriage did exist. Similar problems are evident in New Zealand.⁶⁴

An excellent illustration of a policy which focuses on the financial relationship of the parties is *Re Proc and the Minister of Community and Social Services*,⁶⁵ a decision of the Divisional Court in Ontario. In that case, Mrs Proc had applied for an allowance as a "disabled person" under the Family Benefits Act 1970 (Ontario).⁶⁶ A Medical Advisory Board subsequently determined that her application should be for an allowance as a "permanently unemployable person". The regulations made pursuant to the Act disentitle such a claimant if she is "dependent upon her spouse for support and maintenance where the spouse is not eligible for [an Old Age Pension]".⁶⁷ The Director of Family Benefits found Mrs Proc to be disentitled according to this Regulation and his decision was confirmed after a hearing before the Board of Review on the ground that Mrs Proc lived with a man in a "marriage in fact, if not in law".⁶⁸

⁶³ See Adam, "Man About the House" *New Statesman*, 27 August 1976, 266 and (1976) 2 *Legal Service Bulletin* 68. For a fuller discussion of the position in England see Sackville, note 6 *supra*, text at note 26.

⁶⁴ Social Security Act 1964 (N.Z.) s. 63 permits the Commission in its discretion to regard as husband and wife any man and woman "living together on a domestic basis as husband and wife". For a recent decision on this section, see Decision 158, (1976) 1 N.Z.A.R. 1. See also Sackville, note 6 *supra*, text at note 22.

⁶⁵ (1975) 53 D.L.R. (3d) 512; (1975) 6 O.R. (2d) 624. The Divisional Court is a branch of the Supreme Court.

⁶⁶ R.S.O. 1970, c. 157.

⁶⁷ R.R.O. 1970, Reg. 287, s. 6(d) as amended by O. Reg. 715/73, s. 5.

⁶⁸ Note 65 *supra*, 514 (D.L.R.) and 626 (O.R.).

This conclusion was based on the fact that Mrs Proc, who had separated from her husband in 1952 and who had been subsequently compelled to cease work due to ill-health, had shared accommodation since 1964 with Mr Moquin. Initially, Mr Moquin had moved into Mrs Proc's home but when he subsequently moved house, she moved with him. The parties enjoyed a limited sexual relationship from 1964 although Mrs Proc's deteriorating health eventually resulted in its termination. They had had no sexual relationship for five or six years at the time of the Divisional Court hearing. At that time, Mrs Proc had her own bedroom on the ground floor and was unable to climb the stairs to the upstairs bedroom and she did not perform the household duties of a wife for Mr Moquin. The parties had separate social lives, they owned no joint property and Mrs Proc did not hold herself out as Mr Moquin's wife except that she adopted his name and claimed to be his dependent for the purpose of the provincial hospital and medical plan. In the absence of any other financial resources, Mr Moquin provided food for Mrs Proc and did not require any contribution from her as rent. He did not, however, recognise that he was under any legal obligation to support her.⁶⁹

The Divisional Court allowed the appeal by Mrs Proc from the decision of the Board of Review. The Court expressly refused to consider whether Mrs Proc was the "common-law wife" of Mr Moquin and confined its decision to the specific provisions of the legislation. This reasoning required an interpretation of the term "spouse" in the Regulations, which was defined to include "a person who although not legally married to another person lives with that person as if they were husband and wife".⁷⁰ In construing this definition, the Court stated:

We consider that, as a matter of law, the expression 'lives with that person as if they were husband and wife' must be construed in the light of the overall purpose of the statute, which is to prescribe the rules whereby persons are to be entitled to an allowance by reason of need. That expression ought therefore to be applied by reference to the economic relationship of persons who are living together. The material considerations here are the responsibility taken by the 'husband' for the support and maintenance of the 'wife', their respective interests in the matrimonial home, the liability assumed by the 'husband' for the debts of his 'wife' and the like. The statute is not primarily concerned with the frequency

⁶⁹ These facts were contained in the judgment of Henry J. in the Divisional Court, as a result of the Court's decision on a preliminary motion to permit affidavits to be filed by the appellant to supplement the skeletal record of facts contained in the official reasons of the Board of Review; McChesney, (1975) 3-2 *Bulletin of Canadian Welfare Law* 6. Among the facts omitted from the record of the Board of Review were Mrs Proc's occupation of a separate bedroom, their separate social lives and the absence of joint ownership of property. Letter from R. A. McChesney, counsel in *Re Proc*, 15 May 1975.

⁷⁰ R.R.O. 1970, Reg. 287, s. 1(1)(d) as amended by O. Reg. 715/73, s. 1.

of sexual relations, nor is it concerned with the attitude adopted by the couple towards the outside world as a matter of social intercourse. The approach by which the Board reached the view that these two persons were 'married in fact if not in law' reflects, in the context of their reasons, undue emphasis upon the sexual relationship and insufficient analysis of the economic relationship.⁷¹

The Court proceeded to analyse the economic relationship and concluded that Mr Moquin acknowledged no conjugal responsibility for Mrs Proc's economic support, but proceeded entirely from charitable and humanitarian motives. Moreover, while he provided her with food and lodging he accepted no responsibility for her financial obligations. The Court concluded that the indicia of economic responsibility were not present and that Mrs Proc did not have a "spouse". As a result she was entitled to an allowance under the Family Benefits Act 1970 (Ontario).⁷²

Re Proc focused on the economic relationship between the claimant and Mr Moquin; it is significant that this focus occurred in the context of legislative criteria which defined disentitlement in terms of living as "husband and wife".⁷³ In effect, the Court read into the legislative definition a restriction on the factors to be considered in making such a determination. *Re Proc* is especially significant for Australia because it demonstrates that even where a statute defines eligibility in terms of the absence of a de facto marriage, a court may interpret that requirement as one restricted to the economic relationship of the partners to a de facto marriage. In the context of the Social Services Act 1947 (Cth), adoption of the reasoning in *Re Proc* would achieve the objective of confining enquiries to the financial resources of a widow claimant without repealing the 1975 amendment to section 59. This possibility is particularly significant because it permits the Appeals Tribunals or the Director-General to alter existing practices within the Department without the need for legislative change.

Re Proc is also significant because the Court, in reaching its decision, took into account the subjective opinions of Mrs Proc and Mr Moquin about their relationship, as well as the absence of a legal obligation for mutual support. In determining whether the economic relationship was one of "man and wife", the absence of Mr Moquin's legal obligation, coupled with the fact that he felt obliged only on humanitarian grounds to support Mrs Proc, necessitated a conclusion, according to the Court, that Mrs Proc and Mr Moquin did not live "as

⁷¹ Note 65 *supra*, 518 (D.L.R.) and 630 (O.R.).

⁷² An appeal to the Ontario Court of Appeal was dismissed without reasons on 1 April 1975; McChesney, "Proc in the Ontario Court of Appeal" (1976) 4-1 *Bulletin of Canadian Welfare Law* 44.

⁷³ Note 70 *supra*.

man and wife".⁷⁴ The adoption of the twin criteria of the existence of a legal obligation and the parties' subjective opinion of the relationship is most significant. Generally a man owes no legal obligation to support a woman to whom he is not married. Moreover, while a man may frequently feel a moral obligation to support his de facto wife, the existence of "charitable and humanitarian" motives on Mr Moquin's part were not regarded by the Court in *Re Proc* as sufficient indicia of an economic relationship of man and wife. This aspect of the decision has been rightly regarded as placing the law in Ontario, in effect, in the same position⁷⁵ as that in the United States as a result of the decision in *King v. Smith*⁷⁶ in 1968.

A comparison of the decision in *Re Proc* with that reached in the Baxter case suggests several different policies which might be adopted in relation to de facto wives who seek social welfare assistance. At one extreme is the solution proposed in *King's* case which declared that legislation disentitling de facto wives to social welfare payments was unconstitutional because the de facto husband had no legal obligation to support the woman claimant and her children.⁷⁷ In the absence of any legal entitlement to support from the man, the claimant was held to be entitled to social welfare. This solution provides maximum security to a woman claimant who, in the absence of legal entitlement to support from a man, has a legal right to social welfare assistance. The obvious disadvantage of this solution is that the security of de facto wives is achieved at the cost of a significant financial burden on the social welfare system.

By contrast, at the other extreme is the Australian solution which provides for outright disentitlement of a widow pensioner who lives with a man as his wife on a bona fide domestic basis. There is no regard for the lack of legal entitlement to support from the man and no enquiry into the amount of support actually received from him. The focus of the Department's enquiry is the nature of the relationship and support by the man is used only as *prima facie* evidence that the relationship is a bona fide domestic one. In the absence of support the Department may nevertheless determine that there is a bona fide domestic relation-

⁷⁴ Note 65 *supra*, 518 (D.L.R.) and 630 (O.R.). In *Re De Lima and Minister of Community and Social Services* (1973) 35 D.L.R. (3d) 481, the Court also rejected as a reason for disentitlement an obligation for support which cannot be legally enforced.

⁷⁵ Ulmer, "Re Proc and Minister of Community and Social Services" (1976) 4-1 *Bulletin of Canadian Welfare Law* 1, 5.

⁷⁶ (1968) 392 U.S. 309. For a discussion of the U.S. position see Sackville, note 6 *supra*, text at note 31.

⁷⁷ The decision in *King v. Smith* was based on interpretation of the AFDC legislation which ensured social welfare payments to dependent children. The Court held that the absence of a man's legal obligation to support the children of his de facto wife meant that the children remained entitled to AFDC payments.

ship, taking into account numerous other evidentiary factors. This solution effectively limits the financial burden on the welfare system by disentitling both the widow claimant who receives support from a de facto husband, and the one who lives with a man as his wife on a bona fide domestic basis (according to the Department) despite the absence of actual support from a de facto husband. For this reason, the Australian solution requires a widow pensioner to forgo a relationship with a man who is incapable or unwilling to support her. The relationship poses a real threat to her financial security.

Significantly, the decisions in the *Proc* case and the Baxter case would be identical using either one of these solutions. If disentitlement can occur only where the de facto husband has a legal obligation to support the claimant, as the Court held in *King v. Smith*, both Mrs Proc and Barbara Baxter would be entitled to social welfare payments. In neither case is there a legal obligation on the part of the de facto husband to support Mrs Proc or Barbara Baxter. The same conclusion results from an application of the actual reasoning in *Re Proc* which includes as a factor the absence of a legal obligation to support the de facto wife. At the other extreme, using the Australian solution of outright disentitlement due to the existence of a bona fide domestic relationship, neither Barbara Baxter nor Mrs Proc would be entitled to social welfare assistance. The Department decided that Barbara Baxter was not entitled to a pension because she lived with Roger as his wife on a bona fide domestic basis and this conclusion was reached despite the absence of actual support on Roger's part. Mrs Proc would have been similarly disentitled according to the Australian policy because she was supported by Mr Moquin, thereby creating a *prima facie* case for disentitlement. Moreover, Mrs Proc used Mr Moquin's name for the purpose of obtaining hospital and medical care as his dependent, thereby receiving a significant monetary benefit. By contrast, Barbara Baxter's use of Roger's surname to obtain accommodation in the block of units resulted in no direct monetary benefit. Since Barbara was disentitled because of her use of Roger's surname as well as the sexual relationship, it follows that Mrs Proc's limited use of Mr Moquin's name would also tend to disentitle her. The sexual relationship was non-existent in Mrs Proc's case at the time of the court hearing although the evidence indicated that its discontinuance was primarily due to Mrs Proc's ill health. The Australian Department, having concern for the overall nature of the relationship, might have regarded this factor as one of limited significance but nevertheless one which tended to confirm that Mrs Proc lived with a man as his wife on a bona fide domestic basis. In the result, both Barbara Baxter and Mrs Proc would be disentitled to a widow's pension in Australia.

There are identical results in *Re Proc* and the Baxter case using either the reasoning in *King's* case or the Australian policy. By adopt-

ing the rationale of *King* which places primary emphasis on the de facto wife's financial security, both Mrs Proc and Barbara Baxter would qualify for social welfare assistance. On the other hand, an application of the Australian policy, which emphasises conservation of scarce welfare resources, disentitles Mrs Proc as well as Barbara Baxter. The significance for Australia of the decision of the Ontario Court in *Re Proc* is that it points to a solution which promotes both the competing goals of security for claimants and conservation of welfare resources. By focusing on the economic aspects of the de facto marriage, the court in *Re Proc* addressed itself to the essential issue of the financial relationship of the claimant and her de facto husband. Applying this approach, it is open to the Australian Department of Social Security to decide that a claimant who is in fact supported by a de facto husband, despite the absence of a legal obligation to do so, need not be supported through the social welfare system. On the other hand, a claimant who is not supported by her de facto husband is eligible for a widow's pension if she satisfies the other criteria of eligibility. Using this reasoning, Barbara Baxter, who was not supported by her de facto husband (even after the termination of her pension) would be clearly entitled to a widow's pension. Significantly, Mrs Proc would not be entitled to a pension on this basis because she was actually supported by Mr Moquin. This conclusion, which differs from that reached by the Court, can be justified in terms of the need for a fairer compromise between the competing goals of security for claimants and conservation of limited welfare resources. If social welfare assistance is to be granted to those who are in genuine need, claimants who are actually supported will not qualify. This proposal offers less security for claimants than that in *King's* case but, by ensuring that claimants without actual support will qualify for a pension, it achieves the goal of providing assistance to those in need which the present Australian policy demonstrably fails to do. Moreover, this proposal has the merit of redistributing resources without disregarding the real needs of claimants.

Adoption of such a policy in Australia in relation to de facto marriage among widow pensioners requires a recognition that the existing policy is inappropriate and that a choice be made from among the various alternative proposals. This conclusion results from the iniquities of the present policy which regulates the personal conduct of social welfare recipients in relation to matters that should be entirely irrelevant to a determination of eligibility for social welfare assistance.⁷⁸ The policy also necessitates intrusive investigations into the living arrangements of recipients thereby creating potential opportunities for abuse.

⁷⁸ Note 58 *supra*.

The choice of a new policy is a difficult task. Clearly there are good reasons to support either the approach of the Court in *King's* case or the actual reasoning of *Re Proc*. In a society which allows income tax deductions to taxpayers as of right, it is not illogical to recognise equally a right to welfare assistance since both concessions represent payments of government largesse.⁷⁹ A legal right to welfare assistance means that entitlement ceases only where there is legal entitlement to support from another source. On the other hand, the payment of social welfare assistance to widow pensioners who qualify because they have no legal right to support from their de facto husbands, but who are not actually in need, is an uneconomical redistribution of community resources. These competing arguments create a dilemma in relation to the adoption of the *King* approach which would, moreover, represent an abrupt and important change in the direction of social welfare policy in Australia.

The adoption of the reasoning of *Re Proc* in its entirety would achieve the same result as the adoption of *King v. Smith*, since *Re Proc* also requires a decision on eligibility which takes into account the absence of any legal obligation for support of the de facto wife. *Re Proc* is important because it points to a proposal which ensures social welfare assistance to widow pensioners without support and *only* to those without actual support. This proposal requires an enquiry into the economic relationship between the claimant and the man with whom she lives to determine whether she is supported in fact by the man. Only where there is evidence of actual support is the claimant disentitled to a pension. The onus of proof should be on the Department to show support where the claimant asserts eligibility for a pension. Significantly, *Re Proc* demonstrates that this policy could be adopted in Australia without legislative amendment. In that case, the Court construed the phrase "living as man and wife" as restricting Departmental enquiries to the economic factors in the relationship. Similarly, the Australian provision in the 1975 amendment to section 59 could be restricted so that, in determining whether the claimant lives with a man as his wife on a bona fide domestic basis, the Department must confine its enquiries to economic arrangements between the claimant and her de facto husband. By this means the unacceptable aspects of the present policy would be avoided. There would be no regulation of sexual mores and personal conduct, and opportunities for abuse by field officers during enquiries would be minimised.

The advantages of a change in policy without the need for legislative action include expedition and convenience. However, there is inherent danger in a de facto marriage policy which is redefined to require investigation of the economic arrangements of the relationship rather

⁷⁹ Reich, "The New Property" (1964) 73 *Yale L.J.* 733; Commonwealth Commission of Enquiry into Poverty, note 62 *supra*, 166.

than a focus on the income available to the claimant. The danger is that the need to examine the relationship, although restricted to economic factors, may permit a subtle but distinct return to a focus on other aspects of the relationship, especially if Departmental officers familiar with the former routines must carry out the new policy.⁸⁰ A better solution is the total repeal of the 1975 amendment to section 59, leaving the claimant to prove financial eligibility by means of a routine application of the income provisions of section 18 of the Act. The existence of a *de facto* marriage is completely irrelevant to a determination of eligibility in this proposal, although the claimant's eligibility would be denied if she were supported by a *de facto* husband. The essential issue is financial support. In the light of legislative history regarding criteria of eligibility, legislative repeal of the 1975 amendment can be supported on the ground that the amendment is an aberration and inconsistent with the trend of social welfare policy prior to 1975.

IV A PERSPECTIVE ON SOCIAL WELFARE POLICY

The fundamental principles of the Australian social security system are revealed by an examination of eligibility criteria for pensions and benefits. It is not sufficient to demonstrate financial need to qualify for social security payments; claimants must also meet objective requirements, such as age, invalidity, unemployment, or the need to care for young children. In choosing to provide income support for designated groups of individuals within the community, the social security system denies payments to those who do not satisfy the objective criteria of eligibility despite demonstrated financial need. The dividing line between those who qualify for social security payments and those who do not is the result of complex historical and political events and reflects the historic goals and values of the community.⁸¹

The issue of Barbara Baxter's entitlement to a widow's pension focused on the relationship between Barbara and Roger. However, the essential issue is whether, having regard to all the circumstances, Barbara Baxter should be placed within or outside the dividing line between those who should receive social welfare assistance and those who should not. The real problem is that Barbara Baxter requires a form of assistance which is not presently available. She needs income support for a limited period of time while she acquires the resources to become self-sufficient. Her position is not unlike that of many women in the community who, as the result of marriage breakdown, are

⁸⁰ There is a significant discrepancy among field officers and others in the Department about appropriate questions and behaviour during these investigations. Note 62 *supra*.

⁸¹ Lewis, note 44 *supra*.

without employment skills or experience and have the custody of young children.

The decision in the Baxter case highlights in a practical way the need for a new category of income support to meet present-day needs of those in Barbara's position. At a more fundamental level, the case also demonstrates the need to reappraise social welfare policy and ensure that, as a method of social planning and distribution of resources, it represents the needs and values of the Australian community. It is submitted that the Department's present policy is manifestly deficient in this respect, and that a new policy which meets the needs of people like Barbara Baxter will ensure that Australia's social welfare policy realistically reflects the values and goals of the present-day community.