

Marriage-like relationships

POLICY GUIDELINES FOR ASSESSMENT
UNDER SOCIAL SECURITY LAW

October 2007

Report by the Commonwealth Ombudsman,
Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. **14|2007**

Reports by the Ombudsman

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EXECUTIVE SUMMARY

Whether a person is a ‘member of a couple’ can be an important factor in determining both their qualification for a social security payment and the rate of that payment. The *Social Security Act 1991* sets out two key classes of people who can be said to be members of a couple: those who are legally married and not separated, and those who are considered to be in a ‘marriage-like relationship’.

Centrelink decisions with respect to whether or not a person is in a marriage-like relationship have been a consistent source of complaints to this office over a number of years. Indeed it is an issue that has been commented on in annual reports, and one that was the subject of media comment in 2005.

Based on the difficulty decision makers appeared to be experiencing in applying this aspect of social security law, the Ombudsman’s office decided to undertake an investigation on an own motion basis, in accordance with s 5(1)(b) of the *Ombudsman Act 1976*, into the policy guidelines for assessing marriage-like relationships under the legislation.

The investigation involved:

- examining complaints about marriage-like relationship decisions received by the Ombudsman’s office to identify areas causing administrative difficulties
- analysing the relevant legislative provisions in the social security law and case law interpreting these provisions
- reviewing current and revised Department of Families, Community Services and Indigenous Affairs (FaCSIA) policy guidelines for the assessment of marriage-like relationships. These policy guidelines were then examined in light of the legislation and case law.

The investigation was not intended to be an exhaustive analysis of marriage-like relationship policy across the range of Commonwealth laws.

In response to the commencement of this investigation, FaCSIA conducted a review of each of its guidelines relating to marriage-like relationship decisions during 2005, early 2006 and June 2007. This resulted in significant changes to the information available to Centrelink investigators to support them in making decisions. These changes have greatly improved the potential for more consistent decision making.

As a result of FaCSIA’s amendments, our investigation was streamlined and focused on additional improvements we considered could be made to address the issues raised by complaints to the Ombudsman’s office.

The Ombudsman made the following recommendations for improvement to the policy guidelines relating to marriage-like relationships.

Recommendations

Recommendation 1

That the policy guidelines be amended so that the discretion under s 24 of the *Social Security Act 1991* is not improperly fettered.

Recommendation 2

That the policy guidelines be clarified to convey the importance, in making decisions under s 24, of considering the individual position of the person seeking discretion, as well as the position of the couple.

Recommendation 3

That the policy guidelines be amended to specifically address procedural fairness. They could require that before making a decision based on a person being a member of a couple, customers should be advised in writing of the proposed decision (including detailed reasons) and be provided with an opportunity to respond.

Recommendation 4

That the policy guidelines be amended to clarify that while it would generally be relevant to seek evidence from an alleged partner, there may be circumstances—such as domestic violence—where it is not appropriate.

Recommendation 5

That the policy guidelines be amended to clarify that it is not mandatory to obtain evidence from independent professionals to reach a decision that a person is not a member of a couple. In many cases, relevant evidence is available from friends, family, neighbours, colleagues etc, if the Centrelink customer/s have not previously engaged with any of the suggested independent professionals in a professional capacity.

Recommendation 6

That the policy guidelines emphasise the need to conduct ‘member of a couple’ investigations as quickly as reasonably possible, and emphasise that investigations should not be kept open in anticipation of new information becoming available if the existing investigation does not substantiate a finding that a marriage-like relationship exists.

Recommendation 7

That the policy guidelines be amended to require that, where a ‘member of a couple’ decision has been made and new evidence is obtained which suggests that the person may be in a marriage-like relationship, further investigation must not be undertaken unless approved by a more senior officer not involved in the original investigation.

Recommendation 8

That the policy guidelines be amended so that, where a person seeks a review of a decision that they are a member of a couple, the delegate must consider the need for payment pending the outcome of the review.

Recommendation 9

That the Ombudsman’s office, in conjunction with Centrelink and the departments with responsibility for marriage-like relationship policy, establish measures to review the quality and consistency of decision making in these areas in about 12 months.

PART 1—BACKGROUND TO THE INVESTIGATION

1.1 Whether a person is a ‘member of a couple’ can be an important factor in determining both their qualification for a social security payment, and the rate of that payment. The *Social Security Act 1991* (Social Security Act) sets out two key classes of people who can be said to be members of a couple—those who are legally married and not separated, and those who are considered to be in a ‘marriage-like relationship’.

1.2 Complaints to the Ombudsman’s office have raised issues relating to both the policy relevant to marriage-like relationship investigations and decisions, as well as the application of that policy.

1.3 Given the importance of policy guidance for decision makers, this office decided to undertake an investigation on an own motion basis, in accordance with s 5(1)(b) of the *Ombudsman Act 1976*, into the policy guidelines for assessing marriage-like relationships under the social security law.

1.4 In response to our investigation, FaCSIA conducted reviews in 2005, early 2006 and June 2007 of its guidelines relating to marriage-like relationship decisions.

1.5 These reviews resulted in significant changes to the information available to Centrelink investigators that, in our opinion, greatly improves the potential for more consistent decision making. We welcome FaCSIA’s initiative to examine and clarify its processes and introduce these improvements. As discussed in Part 2 of this report, there remain some areas of the policy guidelines where we consider further development is necessary.

History

1.6 The term ‘in a marriage-like relationship’ is used to reflect the expectation of the legislature, and society generally, that those people in a relationship akin to marriage should not be advantaged over those people who are legally married.

1.7 This concept reflects an acknowledgement by the Parliament that all partnered people—whether legally married or in a de facto relationship—could generally be said to be financially interdependent. This means that for Australia’s needs-based welfare system, the income and assets of both partners in the relationship are taken into account for the purposes of assessing qualification for social security payments. For example, a person who has no income or assets would not qualify for any income support from the Government if their partner’s income and/or assets were too high. Under social security law, half of the income and assets of a person’s partner are treated as being those of the person and therefore can preclude or reduce their social security entitlement. In other words the person is expected to be supported by their partner depending on the partner’s capacity to do so. This is determined with reference to the relevant income and assets tests. Attachment A provides examples of the current social security payment rates and income and assets test limits for comparative purposes.

1.8 The concept also has been applied as a qualification condition for some payments such as parenting payment (single) or widow allowance, which are only available to people who are not in a marriage-like relationship. In addition, whether or not a person is in a marriage-like relationship affects the availability of the more

generous, single (unpartnered) rate of income support payments across the board. Generally, being regarded as single attracts a higher rate in recognition that living costs are higher for a person living alone. By contrast, economies can be gained to a certain extent by sharing the costs of utilities, accommodation and food. This is reflected in the payment rates for rent assistance, which has three rate categories: partnered, single and sharer.

1.9 Being married can, in other instances, be an advantage for people on social security payments that have age-related rates, such as youth allowance and Austudy. Generally these payments are subject to parental income and assets tests as well as individual income and assets tests. The parental means tests do not apply if the applicant can establish that they are 'independent' of their parents: that is, it would not be reasonable to expect their parents to support them. The main categories for independence are:

- the person is married or has been in a marriage-like relationship for at least 12 months
- the person has supported themselves through employment for a period of at least 18 months
- an assessment has been made that there has been an extreme family breakdown or a person is at serious risk.

1.10 The Social Security Act recognises the increasing prevalence of cohabitation outside marriage and has broadened its parameters to include not only those people living in marriages, but also those engaged in what the legislation terms 'marriage-like relationships'.

1.11 Although this term was originally coined in an attempt to ensure equity in the treatment of married and de facto couples, its implications today tend to be more wide reaching. In particular, the complexity of modern relationships means that it is often difficult to assess whether a person is married but living separately and apart, is in a relationship akin to marriage, or simply has living arrangements that are unusual or cohabitative for affordability or caring purposes. Difficulties arise in assessing the nature of the relationships between people such as:

- flatmates and long-term friends
- people with shared custody of their child
- people who spend time together but live separately
- people who are separated but move in and out of the house to look after children
- people who provide care for a former partner in the same house.

1.12 Section 4(3) of the Social Security Act now provides a list of factors to be taken into account in deciding whether or not a relationship is marriage-like. These include the financial and social aspects of the relationship, the nature of the household and the nature of the couple's commitment to each other, as well as any sexual relationship. However it is important to recognise this is a discretionary area of decision making on which reasonable minds can reach different results.

1.13 For example, it is possible for a decision maker to decide that a couple live separately and apart even though many of the marriage-like relationship criteria, set

out at s 4(3) of the Social Security Act,¹ may be present. Conversely, it is possible to decide that a person is in a marriage-like relationship despite not satisfying even the majority of the criteria.² An example of this would be where the couple is still married but living separately in the same residence.

1.14 The difficulty of making marriage-like relationship decisions may be reflected in the relatively high proportion of decisions that are set-aside during internal and external review. The data below, provided by Centrelink, demonstrates this point.

FIGURE 1: Overturn rate of marriage-like relationship (MLR) decisions versus all Centrelink decisions by category of review

| Category of review | 2004–05 | | 2005–06 | |
|---|---------------|---------------|---------------|---------------|
| | MLR decisions | All decisions | MLR decisions | All decisions |
| Original Decision Maker (ODM) reconsiderations | 7% | 15% | 21% | 30% |
| Authorised Review Officer (ARO) review of ODM decisions | 38% | 20% | 38% | 20% |
| SSAT review of ARO decisions | 42% | 28% | 37% | 28% |
| AAT customer initiated* review of SSAT decisions | 29% | 15% | 20% | 15% |
| AAT–Secretary initiated review of SSAT decisions | 50% | 46% | 21% | 40% |

SSAT (Social Security Appeals Tribunal)

AAT (Administrative Appeals Tribunal)

*Customer initiated reviews occur when the customer seeks a review of the SSAT decision.

1.15 As can be seen, in almost all review categories the proportion of marriage-like relationship decisions overturned on review is significantly higher than the proportion of Centrelink decisions overall that are similarly overturned. There are undoubtedly a number of reasons why this may be the case, but the most likely explanations would seem to be the following.

- The level of information available to a subsequent review officer or tribunal may be greater than that relied upon in earlier decisions—this is especially true of marriage-like relationship decisions where a very broad range of information can be relevant to a determination.
- Marriage-like relationship decisions, by their very nature, tend to be subjective. Unlike a decision to grant an age pension where a person is required to meet age and income/asset tests—both of which are verifiable on the facts and clearly governed by the law—no such set of ‘tick-boxes’ exists for determining whether a person’s living arrangements constitute a marriage-like relationship. Although there are procedures in place to guide decision making, it is not unusual for the decision maker’s own experiences and values to weigh into the decision process. This opens the way for subsequent decision makers to potentially (and not inappropriately) reach a different conclusion on precisely the same set of circumstances.

¹ These criteria are set out and discussed in more detail in Part 2, and the legislation is at Attachment B.

² See *Cahill and Secretary, Department of Family and Community Services* [2005] AATA 1147.

1.16 This subject was broached in the Federal Court's recent judgment in *Pelka v Secretary, Department of Family and Community Services* [2006] as follows:

The judgment to be made is difficult and, once out of the range of obvious cases falling within the core concept of 'marriage-like', will be attended by a degree of uncertainty. Indeed, it may be that different decision-makers on the same facts could quite reasonably come up with different answers.³

1.17 Whatever the reasons for these disparities, they undoubtedly raise questions of consistency and equity in decision making.

Objectives

1.18 The objectives of this investigation were to examine the policy guidelines available to decision makers when exercising their discretion under social security law in relation to marriage-like relationships:

- for consistency between the policy and the law
- to identify administrative problem areas that need improvement.

Methodology

1.19 Our investigation involved:

- examining complaints about marriage-like relationship decisions received by the Ombudsman's office to identify areas causing administrative difficulties
- analysing the relevant legislative provisions in the social security law and case law interpreting these provisions
- examining FaCSIA policy guidelines for the assessment of marriage-like relationships in light of the legislation and case law.

1.20 The relevant FaCSIA policy is found in the *Guide to Social Security Law* (the Guide), which is available on FaCSIA's website.

1.21 The Ombudsman's office also received representations from the National Welfare Rights Network, a peak community body for welfare rights issues.

Scope of investigation

1.22 The current governance arrangements for the administration of social security law in Australia delineate between responsibility for policy and service delivery. Although Centrelink delivers social security programs, it is not responsible for social security policy. Rather, it enters into purchaser/provider agreements with other Australian Government agencies, which purchase program delivery services from Centrelink. These agreements are called Business Partnership Agreements.

1.23 Although policy responsibility for broader social security law is shared between FaCSIA, the Department of Education, Science and Training (DEST) and the Department of Employment and Workplace Relations (DEWR), FaCSIA advises that it has sole responsibility for marriage-like relationship policy as reflected in the social security law. Our investigation was restricted to consideration of this policy.

³ [2006] FCA 735

1.24 The Ombudsman’s office is aware that in some quarters there is a wider debate about ‘member of a couple’ policy under the social security law.⁴ For example, some argue that the ‘member of a couple’ provisions are discriminatory in that they are directed to heterosexual couples. This means that where qualification is based on being a member of a couple, some social security payments are only available to heterosexual couples.

1.25 On the other hand, heterosexual couples can be disadvantaged because social security law assumes that the relationship will provide equal financial support for both parties. This means that under the income and assets tests, the payment rate of a member of the couple who has no income or assets will be reduced because half of their partner’s income and assets will be regarded as being theirs. In addition, because they are a member of a couple, the maximum basic rate of payment available is approximately 83.5% of the maximum basic rate available to a person who is considered to be single.

1.26 Based on instances where the assumption has proven to be incorrect and the consequences that has had for the individual affected, proposals have been made that social security payments should be based on an assessment of individual circumstances rather than on a person’s status as a ‘member of a couple’.⁵ In 1994, the Australian Law Reform Commission also noted that the assumption that a marriage-like relationship will provide equal financial support for the parties is inaccurate and that there is a need to address entitlement to independent income.⁶ We have not addressed these broader policy issues in this report.

1.27 The assessment of people’s marital status can arise under a whole host of government laws and policies relating to entitlement (for example, the allocation of housing). It is possible that the test will vary from one area to another, although the core of the test will be the same. It is equally possible that the tests will be administered differently, because they are designed for different purposes. However, the administration of legislation is likely to be called into disrepute if there is glaring inconsistency and incompatibility.

1.28 During the course of this investigation a member of the National Welfare Rights Network made a submission to the Ombudsman’s office, which claimed inconsistencies exist in the administration of migration and social security laws. The submission noted the similarity between the definition of marriage-like relationships under the social security law and the criteria used for assessing a married or de facto couple under migration law. It was put to the Ombudsman’s office that despite these similarities, the terms are applied quite differently in practice—that is, while a marriage-like relationship is defined quite broadly under the social security law to restrict or deny benefits (by finding that there is a marriage-like relationship), it can be defined quite narrowly where someone claims to be a member of a couple in order to sponsor a partner for migrant entry into Australia. We have not examined this, but draw attention to it as an issue.

1.29 With this in mind, our investigation was limited to considering the policy guidance for decision makers in the social security context.

⁴ The social security law incorporates the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, and the *Social Security (International Agreements) Act 1999*.

⁵ See T Hopkins, *Divorcing marital status from social security payments*, 30(4) *Alternative Law Journal*, August 2005, 189-193.

⁶ Australian Law Reform Commission, *Equality before the Law: Women’s Equality, Part 2*, Report No. 69 Part II, 1994, paras 12.17 and 12.22.

PART 2—THE LEGAL AND POLICY FRAMEWORK

Legislation

2.1 The Social Security Act sets out the conditions to be taken into consideration in determining if a person is a ‘member of a couple’. The general definitions for determining whether a person is a ‘member of a couple’ for social security purposes are found at s 4(2), 4(3) and 4(3A) of the Act. Attachment B reproduces these provisions.

2.2 Section 4(2) of the Act sets out the physical conditions that define a ‘member of a couple’:

Summary of physical conditions for a member of a couple

- married and living together or
- members of the opposite sex who have reached the age of consent who are living in a marriage-like relationship that is not prohibited (for example, not a blood relative).

2.3 Section 4(3) of the Act outlines the criteria to be taken into account in deciding the status of relationships:

Summary of marriage-like relationship criteria

- financial aspects of the relationship
- nature of the household
- social aspects of the relationship
- any sexual relationship and
- the nature of the couple’s commitment to each other.

Case law

2.4 Although the Social Security Act does not include a definition of marriage-like relationship, s 4(3) provides the criteria for considering whether someone is in a marriage-like relationship. Historically the courts and tribunals have held that no single criterion is determinative and all of the circumstances of the relationship must be considered before making a decision. It is also clear from the case law that the criteria indicating the existence of a marriage-like relationship and the criteria indicating against a marriage-like relationship must be weighed up in reaching the decision.

2.5 The discretionary nature of marriage-like relationship decisions means that notions of marriage and marriage-like relationships are flexible and can incorporate contemporary community understandings. The Administrative Appeals Tribunal (AAT) has described the term marriage-like relationship as:

... a difficult concept to explain these days. There is such variation in relationships between couples that it is very hard to say which relationships are marriage-like and which are not.⁷

⁷ *Secretary, Department of Social Security and Le-Huray* (1995) 36 ALD 682 (at para [16]).

2.6 The Federal Court has also commented that:

It seems futile to deny that subjective views as to what are involved, as basic attributes of the marriage relationship, will intrude into the assessment called for. However, it is in my view important that the departmental officers or tribunals charged with the task at least take into account what is the norm for the peer group of the applicant. Only in this way can the legislation be fairly and justly accommodated to a multi-racial and otherwise diverse society.⁸

Policy guidelines

2.7 The discussion of the legislation and case law above illustrates the discretionary nature of assessing a person's relationship for social security purposes. A decision about whether a person is a member of a couple necessarily involves the exercise of the decision maker's judgement.

2.8 Although the s 4(3) criteria provide some guidance to decision makers, it is clear that the decision maker must not approach the decision as merely a box-ticking exercise, because the criteria are not simple factual checks. Rather, the criteria to be considered in determining whether someone is in a marriage-like relationship are complex, requiring the decision maker to use his or her judgement.

2.9 Accordingly, policy guidelines can play an important role in assisting the decision maker by providing guidance on how to properly approach identifying and weighing up relevant considerations, and by drawing attention to contemporary themes in marriage-like relationship decisions. In this way, the policy may be seen as an administrative mirror reflecting society's views.

2.10 FaCSIA has issued policy guidelines for the assessment of marriage-like relationships in the form of the Social Security Law Guide. Although the policy is not binding in law, it is a relevant consideration for the decision maker in determining whether a person is a member of a couple.⁹

2.11 Section 1.1.M.120 of the Guide, *Member of a Couple*, provides a brief, general explanation of the meaning of 'member of a couple'. It correctly provides that there is no legislative definition of 'married and not separated', or of 'marriage-like relationship'. Accordingly, all of the circumstances of the relationship, as per the five s 4(3) criteria, must be considered.

⁸ *Lynam and Director-General of Social Security* (1983) 53 ALR 128.

⁹ See *Stevens and Secretary, Department of Family and Community Services* [2004] AATA 1137.

PART 3—PROBLEM AREAS

Problem areas exposed by complaints to the Ombudsman

3.1 While marriage-like relationship decisions will ideally be based on the facts of the individual case, in our experience there are a number of problem areas that commonly arise. These include situations where:

- a couple is legally married but living separately and apart, such as:
 - where a couple is separated but living under one roof
 - where one party is providing care for the other
 - where the parties still have joint financial arrangements
 - where the parties have arrangements for the shared care of a child or children
- the parties are long-term friends and/or housemates
- there are special reasons that warrant a person being treated as if they are not a member of a couple
- there is reluctance to use the discretion under s 131 and s 145 of the *Social Security Administration Act 1991*, which allows payment to be made pending the outcome of a review of a marriage-like relationship decision.

Case study: Living under the one roof sharing the care of children

Ms A approached the Ombudsman because her parenting payment had been cancelled as a decision had been made that she was in a marriage-like relationship. Ms A shared a house with her former partner, because at that time she was arranging her finances so that she could move out, and also to facilitate shared care of their children. The domestic arrangements were that Ms A and her estranged husband each had separate sections of the house but shared the kitchen and laundry facilities. Ms A had no income or assets of her own and the intention was for the arrangement to be temporary.

Centrelink made an unannounced visit to inspect the living arrangements and noted from its inspection of the kitchen that there was no evidence of meals being prepared separately. Ms A explained that was because her payment had been cut off and she was forced to rely on her estranged husband for food. (Centrelink had not offered payment pending the outcome of the review of her circumstances.)

Centrelink decided that the fact that her estranged husband was prepared to support her financially while she had no income of her own was further proof of a marriage-like relationship. In reality, the loss of her income prevented Ms A from being able to move out as planned.

Case study: Flatmates

Two young females and one male had been flatting together for a couple of years. When Ms B completed her studies she claimed Newstart Allowance (NSA) because she was no longer qualified for Austudy. In completing the living arrangements section of the claim, Ms B indicated that Ms C and Mr D (a female and male flatmate) also lived at that address.

Centrelink decided it was unable to grant her NSA until it had established whether or not Ms B and Mr D were in a marriage-like relationship. As part of the assessment Centrelink sent a questionnaire about the relationship to Ms B and Mr D.

Mr D refused to complete the form on the basis that he was not receiving a social security payment and said he was only a flatmate of Ms B. This caused an impasse until Centrelink made alternative enquiries. Meanwhile Ms B suffered financial difficulties because of the delay in granting her payment. Upon closer examination of the relationship, the only marriage-like factor that applied was that Ms B, Ms C and Mr D were flatmates who shared general living expenses equally, however each had his/her own bedroom.

3.2 The following material illustrates the difficult areas that arise for decision makers. Because of the complexity of the issues involved and the breadth of the discretion allowed for decision makers in forming an opinion, the Ombudsman's office considers there is a need for good policy guidelines for staff, and for proper scrutiny of decision making. Both of these themes are taken up later in this part of the report.

Living separately and apart: separated under one roof

3.3 The concept of living separately and apart has been the subject of a number of tribunal and court decisions. Although some of these decisions were made in relation to the superseded *Social Security Act 1947*, they are still considered applicable to the current definitions.

3.4 In *Staunton-Smith v Secretary, Department of Social Security* (1991), the Federal Court considered that:

... it is not sufficient to merely note that a couple are sharing accommodation, nor is it sufficient to note that one is financially dependent on the other; it is necessary to delve deeper to find the reasons for those arrangements.¹⁰

3.5 The Court also emphasised the necessity of having regard to the particular circumstances of the people affected by the decision, rather than falling back on standards or conventions.

3.6 In considering whether a married person is living separately and apart from their spouse while living under the one roof, the emphasis tends to be on whether the nature of the relationship has substantially changed since the separation. In these cases, the focus is on the breakdown of the relationship rather than physical separation.

3.7 The mere fact that a couple are living under the same roof does not mean they are in a marriage-like relationship, because the truth may be that they live separate lives and the only commonality of the relationship is that they share accommodation. This illustrates that all of the s 4(3) criteria remain relevant in considering the nature of the relationship.

3.8 The policy guidelines in the Guide at 2.2.5.20 *Verifying Living Separately and Apart* and 2.2.5.30 *Determining Separation Under One Roof* are the main guidelines available to decision makers dealing with this issue. Like the case law, the guidelines indicate that the separation must be both physical and emotional. Section 2.2.5.30 of the Guide also refers to the need for parties separated under the one roof to explain a change in their relationship, gradual or sudden, constituting a separation. It also draws attention to the importance of considering all aspects of the relationship, including the impact of different cultural and religious backgrounds. An example is

¹⁰ (1991) 25 ALD 27.

given in which a couple from a diverse background were deemed to be ‘living separated and apart’ despite evidence that people in their community perceived them as a couple. In the particular circumstances of that example, although the relationship had broken down, separation was considered shameful and the couple maintained the appearance of marriage to avoid public shame.

Caring for children

3.9 It has long been considered important to take into account the amount of continued contact between non-resident parents and children when conducting a marriage-like relationship investigation.¹¹ However, in recent years, there has been an increasing emphasis in family law on the rights of children to have regular contact with both the resident and non-resident parent. In these circumstances, separated parents may enter into particular living arrangements to ensure that this contact occurs.

3.10 Case law indicates that having arrangements in place to ensure contact with both parents does not necessarily mean that the parties are in a marriage-like relationship. As with all decisions about a person’s relationship status, all of the circumstances of the relationship, including changes to that relationship post-separation, must be considered.

3.11 In *Re Secretary, Department of Family and Community Services v R1 and Anor* (2005) the AAT decided that Centrelink, in determining the woman was in a marriage-like relationship with her former husband based on various factors including regular overnight visits and jointly owned assets, had failed to properly consider the underlying reasons for these arrangements. Specifically, the AAT decided that the indicators Centrelink had identified as proving the existence of a marriage-like relationship were, in reality, an indication of the parties’ efforts to maintain appropriate and consistent shared care and living conditions for their children following their separation.¹²

Long-term friends and flatmates

3.12 Section 2.2.5.10 of the Guide discusses friends and housemates in relation to financial aspects of the relationship, the nature of the household and the nature of the commitment. The Guide explains that there are ‘sharers’ who are not in a marriage-like relationship but whose major reason for sharing is to split the costs of accommodation. It also emphasises that sharing household tasks is not necessarily indicative of a marriage-like relationship. For example, people in shared accommodation (and not in a marriage-like relationship) often have a roster/agreement for household tasks, rather than performing traditional roles that couples may undertake in a household.

3.13 The Guide also provides assistance for considering the presence or absence of a sexual relationship. Section 2.2.5.10 emphasises that the presence of a sexual relationship does not of itself prove a marriage-like relationship, nor does its absence disprove it. It clarifies that the presence of a sexual relationship should be taken into account along with the degree of emotional support and other forms of interdependence and commitment. Important indicators to consider are whether it is an ongoing exclusive sexual relationship (and its duration) and whether or not they have a child together.

¹¹ See *Re Jurd and Secretary to the Department of Social Security* (1990) 20 ALD 781.

¹² (2005) AATA 827.

3.14 In determining whether a relationship is marriage-like, the Guide instructs decision makers to consider the nature of commitment, such as if there is an emotional attachment that is qualitatively different to the commitment of either party to anyone else at that time and qualitatively different to relationships with close relatives, friends or co-tenants.

Guidelines improved during the course of this review

3.15 During the course of this review, improvements that deal with some of the concerns that prompted the review have been made to the Guide. Paragraphs 3.16 to 3.24 outline some of these changes. Under the current guidelines, decision makers are provided with specific guidance on how to assess relationships involving carers, long-term friends and flatmates and people sharing parenting of children. This is a significant improvement given that previous policies did not specifically alert decision makers that such relationships might include aspects that are typically present in a marriage or marriage-like relationship, without necessarily having the quality of a marriage or marriage-like relationship.

3.16 Section 2.2.5.10 of the Guide, *Determining a Marriage-Like Relationship*, has introduced examples or case studies that illustrate circumstances where initial perceptions might lead the decision maker to incorrectly assume members of the opposite sex sharing accommodation for caring purposes, are in a marriage-like relationship.

3.17 The revisions also introduced further clarification on circumstances where a person is providing care for a former partner.

3.18 Section 2.2.5.10 explicitly states that:

It is government policy to encourage the aged and people with a disability to remain in their own home if support is available.

3.19 This section also illustrates other situations when a person sharing accommodation with someone of the opposite sex is not necessarily in a marriage-like relationship. This could be when they share primarily for reasons of affordability, companionship or safety. If there is little evidence of other criteria, the decision maker should not form the opinion that a marriage-like relationship exists. This applies even if the two parties were in a marriage-like relationship in the past.

3.20 Where children are part of the investigation, the revised guidelines note:

Schools, child-care centres, sports organisations, etc are under no circumstances to be contacted as part of the investigation of a marriage-like relationship ...

3.21 The only exception is where the Centrelink customer has given permission for that person to be contacted.

3.22 Changes made to Sections 2.2.5.10 and 2.2.5.30 of the Guide on 4 June 2007 provide further clarification about determining whether a couple have separated by stating that:

The separation means more than a physical separation as it involves the destruction of the marital/marriage-like relationship (the consortium vitae), and ONE OR BOTH PARTIES FORM THE INTENTION TO SEVER OR NOT TO RESUME THAT RELATIONSHIP AND ACT ON THAT INTENTION. Usually one party moves out of the marital home as a result of the separation. However this subsection is also applicable where the parties continue to live separated in the same residence.

3.23 Section 2.2.5.30 of the Guide, *Determining Separation Under One Roof*, was expanded and rewritten in June 2006 to give decision makers more detailed information about what should be considered when assessing the relationship between couples who have separated, but are still living under the one roof. This section provides clarification by requiring the decision maker to assess the following aspects of the relationship:

- the five factors that are indicators of a marriage-like relationship
- self contained residences
- first hand statements and third party representations
- the financial aspects
- the nature of the household
- social aspects
- the presence or absence of a sexual relationship
- the nature of the commitment.

3.24 Section 2.5.5.50 of the Guide, *Discretion to Treat a Person as Not Being a Member of a Couple for a Special Reason*, was substantially restructured in August 2006 to include the use of headings that allow better identification of the relevant issues. Examples and some policy guidelines have also been updated in this section to reflect relevant case law decisions in this area of policy.

3.25 Section 6.6 of the Guide, *Member of a Couple Reviews*, has undergone several revisions during the course of this review. Initially a list of circumstances that would generally trigger further investigation of the nature of a relationship was removed.

3.26 In April 2006, consistent with other sections of the Guide that deal with gathering of information and evidence, the word 'must' has been substituted with 'may' in relation to interviewing or involving both parties in the review process. As discussed later in this part, we have identified further areas for improvement on this matter.

Areas needing further policy clarification

3.27 Notwithstanding the improvements already made to the Guide, during the course of the review the Ombudsman's office has identified areas of policy where decision makers would be assisted by further expansion of the guidelines. Paragraphs 3.26 to 3.34 discuss which policy guidelines need further clarification.

Conduct of internal reviews

3.28 Centrelink may assess whether a person is a member of a couple at the time they apply for a benefit and/or at any time after a benefit has been granted. Section 6.6 of the Guide, *Member of a Couple Reviews*, sets out policy guidelines for conducting a review to verify if a person who is receiving a benefit is a member of a couple under the social security law.

3.29 Generally a review will be conducted where there is sufficient information to believe that a person who claims to be single may be a member of a couple. For example, there may be information on a claim or review form indicating that a person

has changed their residential address, or Centrelink may receive information from a member of the public that indicates a person is not declaring their true living arrangements.

3.30 A member of a couple review is conducted by issuing a review form to the person and their alleged partner and requiring them to provide information about their living arrangements. A decision is then made on whether or not the person is considered to be a member of a couple. It is critical to ensure the process used in reaching a decision is defensible, and to that end it is important to have clear policy guidelines on matters such as the frequency and timing of reviews, as well as the gathering of evidence. For example the Guide should make it clear to decision makers that member of couple reviews should not be an ongoing process where no decision is reached.

Exercising discretion for special reasons

3.31 Section 24 of the Social Security Act gives the decision maker the discretion to treat a person who is a member of a couple as not being a member of a couple if satisfied that there are special reasons in the particular case. The Act does not define 'special reasons' and decision makers must exercise their judgement in deciding whether special reasons exist. Although the exercise of this discretion is not common, there have been a number of case law decisions that have considered the breadth of the discretion. Many of the cases involve situations where one member of the couple is residing overseas or is newly arrived in Australia without an income.

3.32 A revised section 2.2.5.50 *Discretion to Treat a Person as Not Being a Member of a Couple for a Special Reason* was issued by FaCSIA on 7 August 2006. The format and use of new headings in the revised policy more clearly explains the special discretion granted by s 24 of the Social Security Act.

3.33 However, the policy appears to unduly restrict the wide discretion that s 24 gives to decision makers in its discussion about partners who are serving a 'newly arrived resident's waiting period' and subject to an assurance of support. In this regard, the policy states that:

Section 24 is NOT to be applied to a customer if their non-residentially qualified partner (assuree) has an AoS (assurance of support) in place and the assuree has a valid and legal means of obtaining support from the assurer and/or access to a social security benefit that has not been exercised. The legal obligations of the assurer make it inappropriate to exercise the discretion contained within section 24.

3.34 Even if it would be appropriate in most situations described above not to exercise the s 24 discretion, the discretion is sufficiently wide that it might be open to exercise the discretion depending on the particular circumstances of the case. Accordingly, a blanket prohibition on the exercise of the discretion inappropriately (that is, unlawfully) fetters the decision maker's discretion. This is something that should be addressed.

Recommendation 1

That the policy guidelines be amended so that the discretion under s 24 of the *Social Security Act 1991* is not improperly fettered.

3.35 When considering whether there are special reasons to exercise the discretion to treat a person as not being a member of a couple, it is important for the

decision maker to focus on the position of the person claiming the use of the s 24 discretion, rather than to focus on the position of the couple. The Federal Court considered this matter in *Boscolo and Secretary, Department of Social Security* [1999]. In that instance, the man was separated from his wife as a result of lengthy child custody proceedings in Sydney. His wife remained in Perth because she was a newly arrived migrant and had better support networks in that city. The AAT had previously determined that these circumstances were not so exceptional as to constitute special circumstances for the purposes of s 24. In the AAT's view the geographical separation and additional living costs were caused by the couple's decision that the wife would remain in Perth. However, on appeal the Federal Court overturned that decision and remitted the matter back to the AAT for re-examination, emphasising the need to focus on the position of the person claiming to be single, rather than on the position of the couple.¹³

3.36 Accordingly, although it is appropriate to consider all of the circumstances of the case, the focus should remain on the person, rather than perhaps considering why the partner may have acted in a particular way. The current policy guideline could specifically inform decision makers of the importance of this approach.

Recommendation 2

That the policy guidelines be clarified to convey the importance, in making decisions under s 24, of considering the individual position of the person seeking discretion, as well as the position of the couple.

Aspects of decision making in need of constant oversight

3.37 This section of the report covers areas of administration that involve extraordinarily complex policy. These policies are, of necessity, discretionary and subjective. This unavoidably leads to appeals and complaints, especially about inconsistency and bias in how individual decisions are made.

Procedural fairness

3.38 Natural justice requires that a person be given the opportunity to be heard before a decision that could adversely affect them is made. The case study below illustrates the consequences of not properly considering the person's evidence.

Case study: Evidence from the person and the other party

A debt of over \$5,000 was raised against Ms E because Centrelink determined that she was in a marriage-like relationship with Mr F and not entitled to parenting payment (single). In setting aside the decision, the SSAT noted that there was negligible information collected during Centrelink's decision-making process as to the personal feelings and thoughts of Ms E and Mr F.

The SSAT further noted that Centrelink's enquiries were almost entirely confined to investigating the financial situation of Ms E and Mr F. The SSAT considered that information should also have been sought from the parties themselves and from witnesses who knew them. Centrelink subsequently acknowledged that it failed to afford Ms E the opportunity to fully explain her circumstances and to properly consider the information she provided.

¹³ [1999] FCA 106

3.39 A decision that a person is a member of a couple may have significant financial consequences for the person and his/her family. It may result in the refusal, cancellation or reduction in payments. It may also lead to a debt being raised against a person. Although the person may be given an opportunity to present evidence during the course of an investigation, considerable evidence from other sources may be gathered during the investigation, particularly if it is lengthy. In these circumstances, the person should be sent details of the proposed decision (including reasons), with the opportunity to respond before the decision is made.

Recommendation 3

That the policy guidelines be amended to specifically address procedural fairness. They could require that before making a decision based on a person being a member of a couple, customers should be advised in writing of the proposed decision (including detailed reasons) and be provided with an opportunity to respond.

3.40 Revised section 6.6 of the Guide describes the review process, which requires the person to provide information about their domestic circumstances. Decision makers are instructed that a thorough investigation is to take place before a decision is made, which includes verifying all evidence by primary sources or third parties wherever possible. The Guide also states that as part of the review process both parties may be interviewed and asked to provide additional information about their living arrangements.

3.41 However, it may not always be appropriate to seek information from the other party. The National Welfare Rights Network has submitted that there may be such situations, for example, where the other party is a violent former spouse or where the two parties are involved in a child custody dispute. They consider it would be counter-productive to approach the alleged partner for information in these circumstances. Although evidence of the other party would generally be relevant, it is not necessary for making a decision about whether a person is a member of a couple or not. The Ombudsman's office agrees that there may be situations, such as domestic violence, where it would be inappropriate to seek evidence from the alleged partner. The guidelines should therefore be updated to reflect that there might be some instances where it is inappropriate to contact the other party during an investigation.

Recommendation 4

That the policy guidelines be amended to clarify that while it would generally be relevant to seek evidence from an alleged partner, there may be circumstances—such as domestic violence—where it is not appropriate.

Gathering evidence from third parties

3.42 In the past, policy guidelines stated that in order to be satisfied a couple is 'separated under one roof' there must be a public demonstration of a separation, and that this will generally be accepted if there is supporting evidence from two independent people of professional standing. Examples of acceptable professionals include: ministers of religion, doctors, police, counsellors, social workers, solicitors, and community leaders.

3.43 The Ombudsman's office has received complaints from people who said they experienced difficulty in obtaining references from two independent professional

people. It will not necessarily be the case that all members of the community would have contact with the listed professionals or that, even if they did, the particular professional would necessarily be aware of their relationship status and/or living arrangements.

3.44 Under the current policy, evidence from friends and families will also be considered, although it will not generally be given substantial weight. Although the guidelines strongly suggest objective indications of separation should be sought from an independent person of professional standing, they also state that the person will not generally be required to initiate a new contact with such a professional purely for the purpose of assessing their relationship status. Rather, where independent referees are not available to verify separation, a departmental social worker's report may be required. The guidelines suggest this might occur where the separation is not public knowledge due to cultural reasons or the threat of domestic violence.

3.45 This policy also takes a more practical approach to information gathering in acknowledging that evidence from independent professionals may not be readily available. This is consistent with the case law that indicates evidence from friends, colleagues, neighbours and families (and not necessarily independent professionals) is relevant and can provide evidence of sufficient weight for a decision that a person is not in a marriage-like relationship.

3.46 The real value of third party evidence in these cases is the degree of knowledge and experience the third party has in respect of the couple. This knowledge will often depend on the degree of proximity and intimacy the third party has in relation to the couple. The policy does not clearly reflect this. It should explain to decision makers that it is not mandatory in all circumstances to obtain evidence from independent professionals.

Recommendation 5

That the policy guidelines be amended to clarify that it is not mandatory to obtain evidence from independent professionals to reach a decision that a person is not a member of a couple. In many cases, relevant evidence is available from friends, family, neighbours, colleagues etc, if the Centrelink customer/s have not previously engaged with any of the suggested independent professionals in a professional capacity.

3.47 Although the Ombudsman's office recognises there may be issues of credibility and impartiality in accepting evidence from close friends and/or family, it would seem these would be more appropriately addressed on a case-by-case basis, and the information provided weighted accordingly.

Length of investigations

3.48 An area where the policy currently remains silent concerns the length of investigations. The Ombudsman's office has received complaints in which marriage-like relationship investigations have been ongoing for lengthy periods, in some instances for more than a year.

3.49 It is understandable that it is difficult to prescribe a specific time frame for investigations, and they will vary depending on factors such as the complexity of the case and the ease of obtaining relevant information. However, given the often sensitive nature of marriage-like relationship investigations and the uncertainty and stress that an investigation may cause to both the person and the other party, it

would be appropriate for the policy guidelines to emphasise the importance of undertaking an investigation and reaching a decision as quickly as reasonably possible. In particular, it is not generally appropriate to keep an investigation open in the hope that some new information will present itself.

Recommendation 6

That the policy guidelines emphasise the need to conduct ‘member of a couple’ investigations as quickly as reasonably possible, and emphasise that investigations should not be kept open in anticipation of new information becoming available if the existing investigation does not substantiate a finding that a marriage-like relationship exists.

The frequency and duration of investigations

3.50 Individual complainants as well as the National Welfare Rights Network have raised the issue of repeated marriage-like relationship investigations. A related issue that has been raised is whether Centrelink should review a period of time in which a person has previously been found not to be a member of a couple. Particularly for couples living separately under one roof, this may give rise to concerns about repeated investigations and the possibility that a future investigation will disregard the findings of a previous investigation.

3.51 The current section 6.6 of the Guide contains no investigation moratorium or limitation on the review process, other than stating that reviews should be conducted when there is sufficient evidence to believe that a person claiming to be single may in fact be a member of a couple.

3.52 This policy tells decision makers that further investigation after a ‘member of a couple’ decision has been made should not occur unless new factual evidence is obtained which suggests that the person may be in a marriage-like relationship. It states that people should not be repeatedly asked to complete the assessment of living arrangement forms, except in certain circumstances (for example, as a result of a subsequently scheduled program review).

3.53 Given the uncertainty and disruption that may accompany repeated ‘member of a couple’ reviews, decisions about whether to re-investigate are sensitive. Accordingly, the Ombudsman’s office considers that a decision to re-investigate whether a person is a member of a couple should only be approved by more senior officers not involved in the original investigation. This would ensure subsequent investigations are conducted only where the circumstances warrant, and would reduce the potential for perceptions of bias or harassment.

Recommendation 7

That the policy guidelines be amended to require that, where a ‘member of a couple’ decision has been made and new evidence is obtained which suggests that the person may be in a marriage-like relationship, further investigation must not be undertaken unless approved by a more senior officer not involved in the original investigation.

Payment pending review

3.54 If a ‘member of a couple’ review results in an adverse decision for a person and the person applies for a review of that decision, Centrelink has the discretion to approve continuing payment pending the outcome of the review. The experience of the Ombudsman’s office is that the granting of payment pending review is infrequent. In some instances this is because Centrelink officers are not aware of this option but, more commonly, because the officer is concerned that continuing payment will only add to a person’s debt if the adverse decision is affirmed.

3.55 However, in many instances, non-payment or payment at the partnered rate may place a person in hardship. This office has been made aware that, in some extreme cases, people allege they were forced to reconcile with their ex-partner because their payment was cancelled.

3.56 The current guideline relating to payment pending review says that the discretion to continue payment at the single rate pending review should be made according to the particular circumstances, especially if there is a significant risk of hardship as a result of paying the partnered rate. Although we appreciate there is a concern in some instances that a person not be placed at risk of accruing a debt, it would seem reasonable to assume that for many people, there is a greater risk to them and their families if they are not granted payment pending review.

Recommendation 8

That the policy guidelines be amended so that, where a person seeks a review of a decision that they are a member of a couple, the delegate must consider the need for payment pending the outcome of the review.

Areas of decision making requiring future monitoring

3.57 This review highlighted areas of policy where administration could benefit from future monitoring. These include:

- *Where members of the opposite sex are living under the one roof.* This is an area of constant change in community values and perceptions about relationships generally. It will also be a growth area for decision making in view of the ageing population and consequent increase in people needing care. This prediction is further supported by the focus on government initiatives to assist people to remain in their own homes for as long as they are able and want to.
- *Shared custody arrangements for children.* This is another expected area of increasing complexity as well as volume, as significant changes to parental access to their children come into effect with the child support reforms.
- *Decision-making processes,* such as frequency of reviews and the gathering of evidence.
- *Debt raising and recovery processes.*

3.58 As outlined earlier in this report, these areas of policy are the responsibility of three departments and are administered by Centrelink. As a result of the potential tensions in how the policy is applied for different programs, the Ombudsman’s office considers there is a role for ensuring consistency in how it is applied. It also suggests

that the monitoring focuses on overall trends rather than the current quality assurance processes that appear to be driven on a case-by-case basis.

Recommendation 9

That the Ombudsman's office, in conjunction with Centrelink and the departments with responsibility for marriage-like relationship policy, establish measures to review the quality and consistency of decision making in these areas in about 12 months.

PART 4—AGENCY COMMENTS ON RECOMMENDATIONS

4.1 The following agencies with policy or administrative responsibilities relating to the application of marriage-like relationship concepts for social security related purposes were invited to comment on a draft version of the report.

- Centrelink
- Department of Education, Science and Training (DEST)
- Department of Employment and Workplace Relations (DEWR)
- Department of Families, Community Services and Indigenous Affairs (FaCSIA)
- Department of Human Services (DHS)
- Department of Veterans' Affairs (DVA).

4.2 Responses were received from FaCSIA, DEWR, Centrelink and DHS. All agencies are members of a Marriage-Like Relationship Working Group, which convened a meeting to discuss the contents of the report. This office recognises the important role this group has in ensuring consistent decisions across programs and noted a high level of consistency in the responses to the report. On that basis, only issues involving differing perspectives have been discussed in this part.

Agency comments on draft report

4.3 All agencies supported Recommendation 9. This was the only recommendation that DHS commented on specifically. Recommendations 1, 4 and 5 were also accepted without qualification by any agency.

Recommendation 2—specific comments

4.4 Recommendation 2 was generally accepted with the proviso that decisions need to take account of all of the circumstances and strike a balance between the individual circumstances of the person and the circumstances of the couple. The importance of ensuring that guidelines do not create anomalous outcomes was also noted.

4.5 The Ombudsman's office agreed with these comments and made a small textual amendment to the draft recommendation.

Recommendations 3, 6 and 7—general comments

4.6 Recommendations 3, 6 and 7 were described in the agency comments as being procedural rather than policy, and therefore the information should be located in Centrelink's procedural guidelines. The comments also indicated that the Centrelink procedural guidelines that address the issues raised in this report were already in practice.

4.7 Although recognising that these recommendations have an element of procedural content, this office considers that where decision makers are called upon to exercise high levels of discretion, it is important for the policy intent to be clearly stated as well as being reflected in the procedural guidelines.

4.8 The Ombudsman’s office considers it is also important to note that the Guide is the only publicly available statement about how ‘marriage-like relationships’ policy is intended to be applied. Given also that the office is aware of several instances where the procedural guidelines appear not to have been followed, it considers the recommendations should stand and be reflected in both the policy guidelines and procedural guidelines.

Recommendation 3—specific comments

4.9 Specific comments relating to Recommendation 3 state that it is current Centrelink procedure to advise of adverse marriage-like relationship decisions face-to-face or by phone. Centrelink further suggested that the recommendation would add a new unnecessary level of review to the existing extensive review and appeal process already available.

4.10 Recommendation 3 had the objective of ensuring that individuals likely to be affected by an adverse decision would have an opportunity to respond to the evidence about the nature of their relationship before a decision is made. In our experience, it is during the face-to-face or telephone interview referred to above, that the individual first learns their circumstances have been under investigation. The person can then be presented with a range of historical evidence that they have never seen or had an opportunity to examine closely, and are expected to make a response about any allegations made during the interview.

Recommendation 7—specific comments

4.11 Centrelink disagreed with the need to establish a panel of senior officers for the purpose of approving further investigation of marriage-like relationships after a decision has been made as outlined in Recommendation 7. Centrelink said it would ensure that relevant references within existing procedures adequately stipulate that a further investigation will only be initiated if new evidence becomes available which suggests a change in circumstances.

4.12 DEWR commented that it did not support Recommendation 7 because section 6.6 of the Guide states that once a decision has been made, new factual evidence must be obtained by Centrelink in order to conduct a review of whether or not a person is a member of a couple. DEWR also noted that Recommendation 7 referred to the receipt of ‘new factual evidence’ and it considered that if the evidence was ‘new’ and ‘factual’ Centrelink should take appropriate action. This could include further investigation or review of the relationship.

4.13 The Ombudsman’s office noted these comments and agreed with DEWR’s statement that new ‘factual’ evidence would require appropriate action to be taken. The office also agreed that its earlier suggestion that consideration be given to establishing a panel of senior officers for the purpose of approving further investigations is a procedural matter with significant cost implications for agencies. However, as the frequency of review of some marriage-like relationships has been a continuing source of complaints, this office considered some intervention by an independent, more senior officer could address the costs to the agency caused by officers whose objectivity might be compromised, as well as prevent unnecessary disruption to the individual.

4.14 In view of these observations, Recommendation 7 was amended to take account of the comments received whilst still addressing the issues raised by this report.

Recommendation 8—specific comments

4.15 Recommendation 8 was generally accepted with all agencies clarifying that discretion still needed to be exercised by decision makers in relation to this recommendation. DEWR further commented that according to the Guide, the decision maker should not form an opinion that a person is a member of a couple unless sufficient evidence is available.

4.16 The Ombudsman's office agreed that decision makers still needed to exercise discretion about whether or not to grant payment pending review. However, the recommendation remained unchanged because it requires decision makers to consider if payment pending review should be granted.

ATTACHMENT A

Single versus Partnered payment comparisons (current at 1 July 2007)

| PAYMENT RATES—GENERAL | | | |
|------------------------------|--------------------------|----------------------|------------------------|
| Payment type | Maximum fortnightly rate | | |
| | Partnered | Single (no children) | Single (with children) |
| Pension | \$438.50 each | \$525.10 | |
| Allowance, eg Newstart | \$382.80 each | \$424.30 | \$458.90 |

| YOUTH RATES (UNDER 21 YO) | | | |
|----------------------------------|--------------------------|-------------|----------------|
| Payment type | Maximum fortnightly rate | | |
| | Partnered | Independent | Living at home |
| Disability Support Pension | | | |
| Under 18 yo | \$438.50 | \$446.60 | \$289.00 |
| DSP 18–20 yo | \$438.50 | \$446.60 | \$327.60 |

| Youth Allowance— Without children | Partnered | Away from home | At home |
|--------------------------------------|-----------|----------------|----------|
| Under 18 | \$348.10 | \$348.10 | \$190.50 |
| 18 and over | \$348.10 | \$348.10 | \$229.10 |

| Youth Allowance— With children | Partnered | Single |
|-----------------------------------|-----------|----------|
| Under 18 | \$382.20 | \$456.00 |
| 18 and over | \$382.20 | \$456.00 |

| ADDITIONAL PAYMENTS | | |
|----------------------------|--------------------------|---------|
| Payment type | Maximum fortnightly rate | |
| | Partnered | Single |
| Pharmaceutical Allowance | \$2.90 each | \$5.80 |
| Remote Area Allowance | \$15.60 each | \$18.20 |

| Rent assistance (no children) | Partnered | Single | Single (sharer) |
|----------------------------------|-----------|----------|-----------------|
| Maximum fortnightly payment | \$98.20 | \$104.00 | \$69.33 |
| Rent needed for maximum pay't | \$281.53 | \$231.27 | \$185.04 |
| Nil payment if rent is less than | \$150.60 | \$92.60 | \$92.60 |

| ASSET TESTS | | |
|-----------------------------|-------------------------------------|-------------------------|
| Homeowner | For full pension / allowance | For part pension |
| Partnered (combined) | Up to \$236,500 | Less than \$531,000 |
| Single | Up to \$166,750 | Less than \$343,750 |

| Non-homeowner | For full pension / allowance | For part pension |
|-----------------------------|-------------------------------------|-------------------------|
| Partnered (combined) | Up to \$357,500 | Less than \$652,000 |
| Single | Up to \$287,750 | Less than \$464,750 |

| INCOME TESTS | | |
|-----------------------------|-------------------------------|-------------------------------|
| Pension | For full pension (p/f) | For part pension (p/f) |
| Partnered (combined) | \$232.00 | \$2439.00 |
| Single | \$132.00 | \$1459.25 |

| Allowances: Newstart, Widow, Partner, Sickness, Mature Age | For full allowance (p/f) | For part allowance (p/f) |
|---|---------------------------------|---------------------------------|
| Partnered (each) | Up to \$62.00 | Less than \$731.34 |
| Single | Up to \$62.00 | Less than \$800.50 |

Note: For Youth Allowance, Austudy and ABSTUDY, personal as well as parental income test limits may apply. If the person is 'independent' they are not subject to a parental income test. One of the categories for 'independent' is if the person is 'married'.

ATTACHMENT B

General member of a couple definitions in the *Social Security Act 1991*

Member of a couple—general

- 4(2) Subject to subsection (3), a person is a **member of a couple** for the purposes of this Act if:
- (a) the person is legally married to another person and is not, in the Secretary's opinion (formed as mentioned in subsection (3)), living separately and apart from the other person on a permanent or indefinite basis; or
 - (b) all of the following conditions are met:
 - (i) the person has a relationship with a person of the opposite sex (in this paragraph called the **partner**);
 - (ii) the person is not legally married to the partner;
 - (iii) the relationship between the person and the partner is, in the Secretary's opinion (formed as mentioned in subsections (3) and (3A)), a marriage-like relationship;
 - (iv) both the person and the partner are over the age of consent applicable in the State or Territory in which they live;
 - (v) the person and the partner are not within a prohibited relationship for the purposes of section 23B of the *Marriage Act 1961*.

Note: a prohibited relationship for the purposes of section 23B of the *Marriage Act 1961* is a relationship between a person and:

- an ancestor of the person; or
- a descendant of the person; or
- a brother or sister of the person (whether of the whole blood or the part-blood).

Member of a couple—criteria for forming opinion about relationship

- 4(3) In forming an opinion about the relationship between 2 people for the purposes of paragraph (2)(a) or subparagraph (2)(b)(iii), the Secretary is to have regard to all the circumstances of the relationship including, in particular, the following matters:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets and any joint liabilities; and
 - (ii) any significant pooling of financial resources especially in relation to major financial commitments; and
 - (iii) any legal obligations owed by one person in respect of the other person; and
 - (iv) the basis of any sharing of day-to-day household expenses;
 - (b) the nature of the household, including:
 - (i) any joint responsibility for providing care or support of children; and
 - (ii) the living arrangements of the people; and
 - (iii) the basis on which responsibility for housework is distributed;
 - (c) the social aspects of the relationship, including:

- (i) whether the people hold themselves out as married to each other; and
 - (ii) the assessment of friends and regular associates of the people about the nature of their relationship; and
 - (iii) the basis on which the people make plans for, or engage in, joint social activities;
- (d) any sexual relationship between the people;
- (e) the nature of the people's commitment to each other, including:
- (i) the length of the relationship; and
 - (ii) the nature of any companionship and emotional support that the people provide to each other; and
 - (iii) whether the people consider that the relationship is likely to continue indefinitely; and
 - (iv) whether the people see their relationship as a marriage-like relationship.
- 4(3A) The Secretary must not form the opinion that the relationship between a person and his or her partner is a marriage-like relationship if the person is living separately and apart from the partner on a permanent or indefinite basis.

ATTACHMENT C

Glossary

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| AAT | Administrative Appeals Tribunal |
| ARO | Authorised Review Officer |
| DEST | Department of Education, Science and Training |
| DEWR | Department of Employment and Workplace Relations |
| DHS | Department of Human Services |
| DVA | Department of Veterans' Affairs |
| FaCSIA | Department of Families, Community Services and Indigenous Affairs |
| Guide | Guide to Social Security Law |
| NSA | Newstart Allowance |
| ODM | Original Decision Maker |
| Social Security Act | <i>Social Security Act 1991</i> |
| SSAT | Social Security Appeals Tribunal |