Suddenly and unexpectedly in August 1972 the Commonwealth Government decided to conduct an enquiry into poverty in Australia. It was not exactly what the Churches, Welfare Organisations and the Opposition (then a Labor opposition) wanted . . . But it did represent a significant milestone in the poverty debate in Australia. At last the Federal Government had officially acknowledged that poverty was a problem! (Hollingworth 1972).

Britain, End of the 1980s. Margaret Thatcher in her third term in office and current government policies on employment, taxation, tax allowance, social security and the social services resulting in women . . . getting poorer all of the time (Carlen 1988).

The second quote above was written about Britain but could as easily have been written about Australia. In 1972 there was optimism about Australia’s capacity to deal with the issue of poverty. It was out in the open. There was a commitment to doing something about it.

In 1991, just under twenty years later poverty is once again the fault of the poor. The government, far from having a commitment to doing anything about poverty, has introduced legislation which will continue to actively increase poverty in Australia and which isolates and rigorously controls the victims of that poverty. These changes impact heavily on women either directly because they are subject to them, or indirectly because they are members of families on which the legislation has an impact.

The two particular pieces of legislation to be discussed in this paper are the changes to the sole parent's pension to redefine 'married person' and 'defacto spouse' and the changes to the unemployment benefit.

The Sole Parent's Pension: 'Married Person' and 'Defacto Spouse'

To qualify for sole parent's pension a person must not be a member of a couple or, if a member of a couple, must be living separately and apart from their partner. 'Member of a couple' is defined at sub-section 4(2) of the Social Security Act 1991 and includes a person who is legally married to another person and is not living separately and apart
from that person or a person who is living in a marriage like relationship with another person.

What this means is that if you are living in a residence with a member of the opposite sex, whether or not you are legally married to that person and you are living in a marriage like relationship, you are deemed to be a member of a couple and are ineligible for the sole parent's pension.

This has been the case for some time and there has developed a considerable body of case law about what constituted a marriage like relationship. However, until January 1990 the Department of Social Security had to prove that a person was in a marriage like relationship. This changed from 1 January 1990 when section 3A of the Social Security Act 1947 was introduced. Sub section 4(3) of the 1991 Act is in substantially the same terms as section 3A.

Sub section 4(3) requires the Secretary (being the officer of the Department on the counter who deals with the application) to consider a number of things. Broadly, these are:

- the financial aspects of the relationship
- the nature of the household
- the social aspects of the relationship
- any sexual relationship between the people; and
- the nature of the people's commitment to each other.

(see Appendix 1)

If the Secretary is of the opinion that, having considered these things, you are in a marriage like relationship, you are deemed to be a married person. The Secretary's decision can be appealed, but whereas previously the Secretary had to prove you were in a marriage like relationship, now you have to prove that you are not. If you are found to be in a marriage like relationship you have been fraudulently obtaining sole parent's pension and you become liable to a criminal prosecution. This is the only criminal offence where you have to prove that you are not guilty.

By far the most significant impact of these changes is on women because women are by far the majority of recipients of the sole parent's pension. It is worth noting that a person who fraudulently obtains several benefits under different names does not have to prove themselves innocent whereas a woman, who may well have had no other source of income, despite living with a man, does.

To understand the full impact of these changes on women it is necessary to understand how the tribunals and courts have dealt with the question of a 'marriage like relationship'.
Tribunals and courts

Much of the case law in this area comes out of cases which were interpreting the old Family Law Act. There is a real question about how appropriate it is to use these cases in interpreting what is supposed to be beneficial legislation. This question has never been addressed by the courts or tribunals.

The cases have effectively determined that while the question of financial support is a factor to be considered, it is not determinative. They have laid down that the whole of the relationship will be examined. If, in looking at the whole of the relationship, an elusive 'tie that binds' (author's terminology) can be found, then no matter what the relationship has or does not have it is a marriage like relationship. Part of the morality behind these decisions is that a woman, who is not legally married to a man or is legally married to him but is 'separated under the same roof', should not be in a better position than one who is married to a man and continues to reside in a relationship of marriage with him. The effect is that anything that may conceivably be considered to be a marriage like relationship has been held to be one.

A significant number of these cases involve women who either do not consider themselves to be in marriage like relationships with the men involved, or who even if they do are not being supported by the men. They are obtaining an income in the only way they have available to them. They have no power at law to compel the men they are living with to support them and their children. These women then become subject to continuous harassment and subject to the risk of substantial debts and criminal prosecution by the Department.

As far as the author is aware no man has been prosecuted in Australia for being an accessory in these sorts of cases. Yet, according to the Department, the man has lived with the woman and had the benefit of the income she 'fraudulently' obtained. The fact that women now have to prove that they are not in a 'marriage like relationship' significantly increases the risk that they will be found to be in such a relationship.

Many women have to struggle for years on very low incomes bringing up their children in circumstances of real poverty. If they are investigated by the Department and a marriage like relationship is found, they may then have to struggle for years to pay off the debt which the government and the Department says they have incurred.

The men who have failed to support them do not incur any penalty and in the vast majority of cases, fail to support them yet again.

The Changes to the Unemployment Benefit

It is really a misnomer to talk about 'changes' to the unemployment benefit. The unemployment benefit has been abandoned. From 1 July 1991 an unemployed person initially obtains a Jobsearch Allowance when they become unemployed and after twelve months unemployment (or when the person turns eighteen and has been unemployed for twelve months) they obtain the Newstart Allowance.

Under both the Jobsearch Allowance and the Newstart Allowance compliance with the activity test is required. The activity test requires that the person is actively seeking and willing to undertake paid employment, and that they should undertake a course of vocational training, participate in a labour market program, or participate in another course. In making such a direction the Secretary only has to be of the opinion that the person's participation will improve their chances of obtaining work or assist
them in seeking work. An agreement, on which payment depends, is made as part of the Newstart Allowance.

The terms of the agreement can include a requirement that the person undertakes one or more of the following:

a) a job search;

b) a vocational training course;

c) paid work experience;

d) measures designed to eliminate or reduce any disadvantages the person has in the labour market;

e) participation in a labour market program conducted by the CES; or

f) an activity proposed by the person.

These provisions (particularly (d)) are so broad that the person can be required to do anything from having their hair cut to seeking psychiatric counselling.

The legislation is both highly directive and punitive. If the person does not comply with the requirements of the activity test or the agreement and a host of other mandatory provisions the benefit will be lost. For each time that the person does not comply he/she will be precluded from obtaining benefits for longer and longer periods.

The stated intention of this legislation is to create a more flexible labour market. The government is seeking to deregulate the labour market to create a system like that in the United States where employees bargain on an individual basis and market forces determine wages. The side effect is that there will be a dramatic increase in poverty. In order to deregulate the labour market the government needs a large pool of unemployed people all competing for jobs. If many of these people do not have access to any income because they cannot comply with the requirements of the activity test and the activity agreement then they will take any terms and conditions of employment they can get. They will have to, in order to survive.

The impact on women of these changes to the unemployment benefit is significant. Large numbers of young women are unemployed. Many older women are no longer eligible for the sole parent's pension if their youngest child has turned sixteen, or the widow's pension, and many do not live in a marriage like relationship with a man. Many of these women have to accept the single rate of Jobsearch Allowance and then the Newstart Allowance.

The wives of unemployed men are the ones who have to struggle with an inadequate income when they receive the dole and an even less adequate income when their husbands cannot get the dole because they cannot comply with the requirements of the activity test and the agreement.

It is usually women who try to hold families together as they are torn apart by the effects of poverty, who see their children becoming involved in drugs and crime and in most cases are helpless to stop it. There may be a man around to assist them but in many cases there is not. It is usually women who suffer the consequences of increased violence resulting from powerlessness and frustration.
People who are subject to the present social security legislation are deliberately being more and more highly regulated and more and more marginalised. Women form a significant part of that population. Because of their increasing marginalisation they are becoming increasingly more likely to come into contact with the criminal justice system.

Australians have to learn to look at our laws critically and to be able to assess whether the laws being implemented are just. We must look behind the law and seek to determine what its impact will be and we must make decisions about whether we want that effect or not.

Laws which seek to regulate unnecessarily or to bury issues beneath the weight of the law are bad laws and must be rejected. The 'defacto' legislation and the 'unemployment' legislation are examples of two such laws.

References


APPENDIX 1

Extract from Social Security Act 1991—Member of a Couple Criteria for Marriage Like Relationships

4(3) In forming an opinion about the relationship between 2 people for the purposes of (determining whether they are members of a couple), 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.