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the more they stay the same**

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Cohabitation rule in social security law: The more things change the more they stay the same

Lyndal Sleep, Kieran Tranter and John Stannard*

This paper examines recent Administrative Appeals Tribunal decisions to gather a snapshot of how Centrelink Customer Service Officers investigate and decide cohabitation decisions under the *Social Security Act 1991* (Cth). It argues that as the Act requires all aspects of clients' relationships be investigated, clients are subject to a regime of surveillance which causes specific, identifiable, harms. While the rule has been gender neutral in its application since 1994, the AAT decisions reveal that the clients most affected by the rule are women with children. In this the current cohabitation rule continues the legacy of its predecessors. What is new is the intensity of the surveillance.

INTRODUCTION

In her recent article, Tamar Hopkins returned the spotlight onto the cohabitation rule in Australian social security law.¹ The cohabitation rule has two elements. The first is the two-tiered nature of Australia's social security system which treats individual clients differently from "partnered" clients. This involves individual clients receiving a higher maximum rate of pay, and also partnered clients' rates of pay being subject to the partners' income and assets. The second is a provision which deems clients who are not de jure married to be "partnered" if they are in a relationship that is "marriage-like".

Historically, the rule had been subject to considerable feminist criticism concerning the way that it had oppressed women.² However, over the last decade the rule has not received critical attention. Indeed, one textbook writer suggests that the rule is not part of the contemporary Australian social security system.³ This is incorrect. In contrast the cohabitation rule has been broadened in its scope from the female-only focus of its introduction with the Widow's Pension in 1942.⁴ Indeed, it was only as recently as 1994 that the rule was applied to all pensions, allowances and benefits under the *Social Security Act 1991* (Cth).⁵

The National Welfare Rights Network has identified problems with the way that Customer Service Officers (CSOs) in Centrelink currently administer the rule. The Network has become alarmed at:

- the lack of reliability of evidence used by Centrelink in making cohabitation decisions;

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¹ Hopkins T, "Divorcing Marital Status from Social Security Payments" (2005) 30 Alt LJ 189.

² Eastale P, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001) pp 69-74; Wilkie M, *Women Social Security Offenders: Experiences of the Criminal Justice System in Western Australian* (Research Report No 8, Crime Research Centre, 1993); Scutt J, *Women and the Law: Commentary and Materials* (Law Book Co, 1990) pp 369-372; Neave M, "From Difference to Sameness - Law and Women's Work" (1992) 18 MULR 768.

³ Roach Anleu SL, *Deviance, Conformity and Control* (3rd ed, Longman, 1999) p 295. Graycar's and Morgan's seminal text also seems to suffer this lapse; the 1990 first edition examined and criticised the rule in detail (Graycar R and Morgan J, *The Hidden Gender of Law* (Federation Press, 1990) p158); in the 2002 second edition the rule is a note for consideration at the end of a chapter (Graycar R and Morgan J, *The Hidden Gender of Law* (2nd ed, Federation Press, 2002) pp 14-15).

⁴ Carney T and Hanks P, *Social Security in Australia* (OUP, 1994) p 232.

⁵ *Social Security (Home Child Care and Partner Allowances) Legislation Amendments Act 1994* (Cth); *Social Security (Parenting Allowance and Other Measures) Legislative Amendment Act 1994* (Cth).

- the revisiting of clients who had been found not to be cohabiting in past investigations;
- the size of debts;
- Centrelink misconceiving caring relationships among the aged, and ongoing shared parenting after a relationship breakdown, as marriage-like;
- insensitivity to cultural factors influencing clients' relationship choices; and
- rude, aggressive and intimidating behaviour of Centrelink staff.⁶

This article comes from a joint research project between the Brisbane Welfare Rights Centre (Inc) and the Socio-Legal Research Centre at Griffith Law School that aims to investigate these concerns. There are two hurdles to research on the administration of the cohabitation rule. The first is that Centrelink does not keep records concerning its "member of a couple" decisions.⁷ The second relates to client privacy and consent for direct analysis of Centrelink files. Past researchers have negotiated these hurdles by accessing old departmental files,⁸ or looking at how a merits review tribunal decides cohabitation decisions.⁹ In this article our data is extracted from the 2005 decisions by the Administrative Appeals Tribunal (AAT). Unlike Goodman, who was interested in how the Social Security Appeals Tribunal made cohabitation decisions, we did not focus on the AAT's determinations as such. Instead, we forensically examined the publicly available written reasons of the AAT to gather a snapshot of how CSOs investigated and decided the initial cohabitation determination.¹⁰

From this analysis we argue that the cohabitation rule does not provide clear guidance on who is a member of a couple or how cohabitation investigations should be undertaken. Rather it provides a nebulous concept of a "marriage-like relationship" that in its breadth and generality requires CSOs to investigate and consider "all aspects of the relationship". This has led to a situation whereby to administer the rule correctly, CSOs must survey and investigate all aspects of clients' lives. The effect of this surveillance and investigation leads to harming clients. Cohabitation decisions can directly harm clients through cancellation of payment, the raising of debts, and criminal prosecutions. The investigations can also harm clients through causing homelessness, damaging relations, and exposing the client to humiliation and loss of reputation.

This argument is in three parts. The first part shows that the cohabitation rule in the *Social Security Act*, as elaborated in the **Guide to Social Security Law [AQ: Please confirm my change of this title]**,¹¹ is nebulous, and in its generality requires CSOs to investigate all aspects of a client's life. The second part examines the 2005 AAT decisions to show the types of investigation required by the rule. This section documents how clients, and the people that they come in contact with, are subject to intense surveillance through the investigations required by the rule; it also documents the harms that clients have suffered because of that administration. The final part suggests that at one level nothing new is occurring. Notwithstanding the de-gendering of the rule in 1994, the 2005 AAT decisions

⁶ National Welfare Rights Network, "Spotlight on Marriage-like Relationships" (2004) 22 *Rights Review: News & Comment on Social Security Issues* 5.

⁷ Department of Human Services, *Answers to Questions on Notice HS44: Impact of "marriage-like" relationships on payment recipients* (Senate Finance and Public Administration Committee, 2005), [1], http://www.aph.gov.au/senate/committee/fapa_cte/estimates/add_0405/human_services/hs44.pdf viewed 30 November 2005.

⁸ Jordan A, *As His Wife: Social Security Law and Policy on De Facto Marriage* (Research Paper No 16, Department of Social Security, 1981).

⁹ Goodman H, "Social Security Appeals Tribunal Decisions and De Facto Relationships: Some Pointers to Variance with the Department of Social Security Decisions" (1997) 4 *AJ Admin L* 92.

¹⁰ We identified the dates of written evidence submitted to the Tribunal compared to the date of the primary decision and drew on direct summaries by the Tribunal of the primary decisions. In this way the 2005 AAT decisions provide a sample of contemporary administration of the cohabitation rule. The limitations of this sample must be acknowledged. Given that data about primary cohabitation decision by Centrelink is unknown, it is difficult to determine whether the AAT sample is representative of clients, payments and the types of investigation. Anecdotal evidence from the National Welfare Rights Network suggests that the sample reflects the types of experiences of Centrelink clients that approach the Network for assistance in this area.

¹¹ Guide to Social Security Law (Department of Family and Community Service), http://www.facs.gov.au/guide/ind_gde/socialse.htm viewed 18 March 2005.

show that the rule continues its historical function in the subordination of women. However, what *is* new is the level of surveillance.

COHABITATION RULE IN THE SOCIAL SECURITY ACT 1991 (CTH)

In contrast to recent welfare reform that has focused on individuals and individuals' "obligations",¹² it remains the bedrock of Australian social security law that a client's relationship status determines eligibility and rates of payment. For Parenting Payment Single a client's relationship status is an actual condition for eligibility.¹³ For the other payments, including Aged Pension, Newstart Allowance and Disability Support Pension a client's relationship status and a partner's assets and income affects the rate of payment.¹⁴ Youth Allowance does not have a lessor rate for partnered clients, but for clients who have achieved "independent" status a partner's income and assets are taken into account.¹⁵

The wording used throughout the Act is "member of a couple". Section 4(2) of the Act defines "member of a couple" to include persons formally married and persons of the opposite sex who are, in the Secretary's opinion, in a "marriage-like relationship". There are exceptions. Section 4(2)(a) excludes formally married persons who are living separately and apart, and s 24 allows persons who otherwise would be treated as a member of a couple to be considered independent for a "special reason".¹⁶ The term "marriage-like relationship" is further defined in s 4(3). This section sets out five criteria, including "all the circumstances of the relationship" that the CSOs, acting as the Secretary's delegates,¹⁷ should have regard to when forming the opinion of the existence of a marriage-like relationship:

- the financial aspects of the relationship (s 4(3)(a));
- the nature of the household (s 4(3)(b));
- the social aspects of the relationship (s 4(3)(c));
- any sexual relationship (s 4(3)(d)); and
- the nature of the people's commitment to each other (s 4(3)(e)).

In listing five criteria the Act seems to give clear guidance to CSOs. This appearance is cemented through the fact that each factor (except s 4(3)(d)) is divided into several sub-factors. However, this appearance of clarity is misleading.

The legal interpretation of s 4(3) has emphasised that the criteria are points for CSOs to consider: "the Act does not provide a checklist of circumstances that must be met in all cases".¹⁸ They should not be read as a balance test where a relationship has to satisfy the majority of the criteria.¹⁹ Nor has one, for example financial, been considered fundamental. Indeed, in the few Federal Court decisions concerning past articulations of the rule, the court repeatedly rejected the notion that there was an essential criterion.²⁰ Therefore, the legal interpretation of s 4(3) is that it sets out relevant considerations that CSOs must have regard to in a real sense and give weight to them as part of the

¹² Disney J, "Social Policy" in Manne R (ed), *The Howard Years* (Black Inc Agenda, 2004) p 191; Mendes P, "Welfare Reform and Mutual Obligations" in Aulich C and Wettenhall R (eds), *Howard's Second and Third Governments: Australian Commonwealth Administration 1998-2004* (UNSWP, 2005) p 135.

¹³ *Social Security Act 1991* (Cth), s 1068A.

¹⁴ *Social Security Act 1991* (Cth), ss 1068 (Newstart and Parenting Payment Partnered), 1064(4) (Aged Pension and Disability Support Pension).

¹⁵ *Social Security Act 1991* (Cth), s 1067G-H1. Youth Allowance does recognise a marriage-like relationship of 12 months duration as qualifying a client for independent rate, *Social Security Act 1991* (Cth), s 1067C. For clients who have moved from another payment to Youth Allowance a partnered rate applied, ss 1067F, 1067G-B4.

¹⁶ See also *Social Security Act 1991* (Cth), s 4(6).

¹⁷ Centrelink is the delegate of the Secretary for the Secretary's powers under the *Social Security Act 1991* (Cth), Sutherland P and Anforth A, *Social Security and Family Assistance Law* (2nd ed, Federation Press, 2005) pp 7-8.

¹⁸ *Re Pill and Secretary, Department of Family & Community Services* (2005) 81 ALD 266 at 272 per Member Carstairs.

¹⁹ *Stauton-Smith v Secretary, Department of Social Security* (1991) 25 ALD 27 at 38 (O'Loughlin J).

²⁰ *Lambe v Director-General of Social Services* (1981) 57 FLR 262; 4 ALD 362 at 368-369 (Evatt, Fisher and Ellicott JJ); *Lynam v Director-General of Social Security* (1984) 1 AAR 197; 52 ALR 128 at 131 (Fitzgerald J).

decision.²¹ They provide a core of what needs to be investigated, but do not close off the circumstances of a relationship from investigation:

it is possible a decision-maker might decide that the individual is a member of the couple even though she [sic] does not satisfy all or even the majority of the criteria. Conversely, many of the indicia ... might be present yet the circumstances as a whole might justify the conclusion that the couple live separately and apart.²²

In addition, the notion of “living together” as a basic premise for the finding of a marriage-like relationship is also not required under the Act. In 1995 an amendment to the trigger provisions for a marriage-like relationship determination in s 4(2)(b)(i) replaced the phrase “living together” with the more generic phrase “has a relationship with a person”.²³ The amendment was explained as a technical amendment that would prevent Sole Parent Pension to be paid to a member of a couple who is transitorily physically apart from their partner, for example if the partner worked as a long distance truck driver.²⁴ However, in removing the “living together” trigger the amendment expanded the range of relationships that can be considered “marriage-like”. While s 4(3A) excludes the finding of a marriage-like relationship where persons are living “separately and apart from the partner on a permanent or indefinite basis”, the rule has expanded to cover persons not formally “living together” but who are not living separately and apart on a permanent basis.²⁵

This means that the rule sets out a nebulous account of a marriage-like relationship; there are a series of questions to be asked, but that those questions, broad as they are, are not exclusive to other questions that might be pertinent from the context as a whole, and a relationship need not satisfy any of the criteria for there to be a lawful determination that there was a marriage-like relationship. This is not a rule that provides a sharp definition that would ground a tight and targeted administrative decision-making process. Instead, its nebulous nature means CSOs, in order to administer the rule properly, must undertake open and unconstrained investigations into clients. This is reflected in Centrelink’s internal Guide to Social Security Law, which instructs CSOs in the application of the Act. The Guide makes it clear that:

[A] customer’s opinion about their relationship is NOT sufficient ... Any one factor chosen in isolation from the many complex issues involved is not conclusive, and all factors will vary in significance according to the individual situation.²⁶

The Guide elaborates on s 4(3) to suggest the type of evidence that should be gathered in making a determination. This ranges from ownership of property, nominees on wills or superannuation, responsibility for household expenses, responsibility for household tasks, layout of the furniture, form of address used by children, care arrangements for children, perceptions of family, friends and regular associates, sexual activities, and the level of emotional support.²⁷ The Guide is more explicit concerning how CSOs should investigate claims that a client is not a member of a couple because they are living separately and apart from an ex-partner. Clients must present evidence that their relationship has “broken down”.²⁸ It directs CSOs to base decisions on “public demonstration of separation” proved by the “supporting evidence of 2 independent people”.²⁹ The Guide then suggests a range of professionals; these include clergy, lawyers, community leaders and social workers, whose statements are considered adequate.³⁰ What is clear from the Guide is that CSOs must gather detailed

²¹ *Re Secretary, Department of Family & Community Services and Bell* [2000] AATA 252 at [9] (Member Christie).

²² *Re Cahill and Secretary, Department of Family & Community Services* [2005] AATA 1147 at [22] per Senior Member McCabe.

²³ *Social Security (Non-Budget Measures) Legislation Amendment Act 1995* (Cth).

²⁴ Sutherland and Anforth, n 16, p 16.

²⁵ An example of this provision in operation is the recent AAT decision in *Re Perera and Secretary, Department of Family & Community Services* (2004) 78 ALD 739; see also Guide to Social Security Law, n 11, para [2.2.5.10], “Nature of a household: separate residences”.

²⁶ Guide to Social Security Law, n 11, para [2.2.5.10], “Summary”.

²⁷ Guide to Social Security Law, n 11, para [2.2.5.10], Guide to Social Security Law.

²⁸ Guide to Social Security Law, n 11, para [2.2.5.30], “Introduction”.

²⁹ Guide to Social Security Law, n 11, para [2.2.5.30], “Independent evidence”.

³⁰ Guide to Social Security Law, n 11, para [2.2.5.30], “Independent evidence”.

and very personal information from the client, the alleged partner, associates and institutions. Indeed, the only prohibition in the Guide is on approaching schools directly to obtain details of a child's registration.³¹

In summary the current cohabitation rule in the *Social Security Act* creates, due to its nebulous nature, an open field that compels Centrelink to investigate and gather evidence about the totality of a client's and alleged partner's lives.

RECENT AAT DECISIONS CONCERNING THE COHABITATION RULE

The implications of the openness of the rule can be seen in recent AAT decisions concerning "member of a couple". It can be seen that the rule requires a regime of invasive surveillance that appears to risk harming clients and their associates. Twenty-nine decisions from 2005 were examined.³² In this sample, 20 clients were female and nine male; 22 were client appeals and seven were departmental appeals commenced by Centrelink; 12 clients were receiving Parenting Payment, seven were receiving Disability Support Pension, four were receiving Aged Pension, two were receiving Carer's Payment and two were receiving Newstart. Sickness Allowance and Youth Allowance were each represented once.

What is immediately clear from the sample is the range of information gathered by CSOs of clients' and others' lives prior to a decision. First and foremost, a significant source of information used by CSOs in the initial decision was from inter-departmental data-matching programs, particularly client's and alleged partner's tax returns.³³ After 15 years of inter-departmental data-matching within the federal government,³⁴ the use of such information from this source is unsurprising. Centrelink's internal data matching can be seen working in *Re Stewart and Secretary, Department of Family & Community Services* [1005] AATA 263, where the client was granted Newstart as a single person and then declared that he was a member of a couple when his partner applied for a payment. Centrelink also gathered material from banks and other financial institutions, including application forms³⁵ and transaction records.³⁶ Another source of information was the gathering of evidence from employers.³⁷ It is possible to argue that in the context of income support, the gathering of financial information from the Australian Tax Office, banks, and employers is reasonable. However, even from these sources Centrelink can be seen gathering evidence beyond confirmation of employment and income. In *Re Pelka and Secretary, Department of Family & Community Services* [2005] AATA 120 and *Re Secretary, Department of Family & Community Services and Glachan* [2005] AATA 899, Centrelink relied on the alleged partner's superannuation application where the client was listed as the partner's de facto.

Centrelink can also be seen as gathering material from institutions that regularly ask people to reveal their relationship status or nominate next of kin. How a client or alleged partner was registered at medical practices and hospitals was often part of the documentary record of the primary decision.³⁸

³¹ Guide to Social Security Law, n 11, para [2.2.5.30], "Independent evidence".

³² This included all unreported AAT decisions from January to November 2005 and the decisions that were reported in the *Administrative Law Decisions*.

³³ *Re Secretary, Department of Family & Community Services and Hirst* [2005] AATA 621; *Re Caldwell and Secretary, Department of Family & Community Services* [2005] AATA 523 at [4]; *Re Lasan and Secretary, Department of Family & Community Services* [2005] AATA 724 at [7.16].

³⁴ Hughes G, "An Overview of Data Protection in Australia" (1991) 18 MULR 83.

³⁵ *Re Ah-See and Secretary, Department of Family & Community Services* (2005) 84 ALD 209 at 217 [70], *Re Secretary, Department of Family & Community Services and Nahas* [2005] AATA 478 at [28]; *Re Pelka and Secretary, Department of Family & Community Services* [2005] AATA 120; *Re Cahill and Secretary, Department of Family & Community Services* [2005] AATA 1147 at [19].

³⁶ *Re Ayres and Secretary, Department of Family & Community Services* [2005] AATA 627.

³⁷ *Re Lasan and Secretary, Department of Family & Community Services* [2005] AATA 724 at [7.18]; *Re Caldwell and Secretary, Department of Family & Community Services* [2005] AATA 523.

³⁸ *Re Fayad and Secretary, Department of Family & Community Services* (2005) 85 ALD 185; *Re Pill and Secretary, Department of Family & Community Services* (2005) 81 ALD 266; *Re Secretary, Department of Family & Community Services and Mehanna* [2005] AATA 575.

Centrelink also gathered similar material from schools and childcare centres.³⁹ Other documents gathered were children's birth certificates,⁴⁰ and the planning approval from a local council checking that the client's property had a "granny flat" where the ex-partner could live separately and apart from the client.⁴¹ In *Re Secretary, Department of Family & Community Services and Dempster* [2004] AATA 1287, the date when the client and alleged partner entered into a joint electricity account was taken as the beginning of the relationship for calculation of a debt.⁴²

In addition to gathering documents from other entities, CSOs can also be seen commissioning or requesting evidence or reports. In *Dempster*, Centrelink requested written statements from her daughter and also from a local religious leader concerning whether the client was in a marriage-like relationship.⁴³ In *Glachan*, officers from the Business Integrity section of Centrelink conducted a four-hour interview with a woman who was in a relationship with the person that Centrelink alleged was the client's partner.⁴⁴ In *Re Secretary, Department of Family & Community Services and Webb* [2005] AATA 668, Centrelink documented the landlord's opinion about whether the client and the alleged partner were in a relationship.⁴⁵ Similar reports by real estate agents were gathered in *Re Pill and Secretary, Department of Family & Community Services* (2005) 81 ALD 266.⁴⁶ In *Re Ah-See and Secretary, Department of Family & Community Services* (2005) 84 ALD 209 the real estate agents went one step further and provided Centrelink with a report on whether the agent thought the alleged partner was actively residing in the leased flat and also with photographs of the inside of the flat during the tenancy.⁴⁷ This matter also involved other audio video material. Centrelink had an investigator video the alleged partner's movement to and from the client's property prior to deciding that they were in a marriage-like relationship.⁴⁸

This breadth of material that Centrelink gathers concerning clients and alleged partners suggests a regime of intense surveillance. It demonstrates that Centrelink clients and people that they interact with are particularly under surveillance, and the agents of this surveillance might be employers, schools, hospitals, associates, family, and real estate agents who are required to pass information on to Centrelink, or be asked to make judgments concerning clients' relationship status. Centrelink can and does have investigators with cameras watching residences. A striking element of this surveillance is Centrelink's "tip off recording system",⁴⁹ Six decisions show that the investigation into the client was triggered by anonymous "public denunciation".⁵⁰

Living within this level of surveillance must be damaging to Centrelink clients and clearly is damaging to any notional right to privacy that Australian citizens might expect to enjoy. However, these abstract harms open the way for quite specific harms and exposure of clients to other risks. The end point for many Centrelink investigations is the finding of a marriage-like relationship. This can have up to four formal consequences.

The first is the reduction in payment from the independent to the partnered rate. The second is cancellation of payment due to the alleged partner's income and assets. The third is the raising of an

³⁹ *Re Secretary, Department of Family & Community Services and Webb* [2005] AATA 668 at [35]; *Re Secretary, Department of Family & Community Services and R1 and R2* [2005] AATA 827.

⁴⁰ *Re Secretary, Department of Family & Community Services and Glachan* [2005] AATA 899 at [70].

⁴¹ *Re Kantarovski and, Department of Family & Community Services* [2005] AATA 1153 at [19].

⁴² *Re Secretary, Department of Family & Community Services and Dempster* [2004] AATA 1287 at [49].

⁴³ *Re Secretary, Department of Family & Community Services and Dempster* [2004] AATA 1287 at [19] and [25].

⁴⁴ *Re Secretary, Department of Family & Community Services and Glachan* [2005] AATA 899 at [44].

⁴⁵ *Re Secretary, Department of Family & Community Services and Webb* [2005] AATA 668 at [37].

⁴⁶ *Re Pill and Secretary, Department of Family & Community Services* (2005) 81 ALD 266 at 271 [24].

⁴⁷ *Re Ah-See and Secretary, Department of Family & Community Services* (2005) 84 ALD 209 at 213 [37], 216 [65].

⁴⁸ *Re Ah-See and Secretary, Department of Family & Community Services* (2005) 84 ALD 209 at 217 [68-69].

⁴⁹ *Re Pill and Secretary, Department of Family & Community Services* (2005) 81 ALD 266 at 269 [14] per Member Carstairs.

⁵⁰ *Re Pill and Secretary, Department of Family & Community Services* (2005) 81 ALD 266 at 269 [14]; *Re Ah-See and Secretary, Department of Family & Community Services* (2005) 84 ALD 209 at 211 [16], 216 [63]; *Re Camilleri and Secretary, Department of Family & Community Services* [2005] AATA 212 at [5]; *Re Caldwell and Secretary, Department of Family & Community Services* [2005] AATA 523 at [3]; *Re Secretary, Department of Family & Community Services and Webb* [2005] AATA 668 at [6-7]; *Re Secretary, Department of Family & Community Services and Dempster* [2004] AATA 1287 at [6].

administrative debt. These debts can be significant. In *Re Cahill and Secretary, Department of Family & Community Services* [2005] AATA 1147, Centrelink initially raised a debt of \$127,343.10.⁵¹ According to material supplied to the Senate Finance and Public Administration Committee, in 2003-2004 Centrelink, in relation to member of a couple decisions, raised 2,673 debts of less than \$5,000; 177 debts between \$5,000 and \$30,000; and 124 debts greater than \$30,000.⁵² The fourth consequence is criminal prosecution. In 2003-2004, Centrelink assessed 833 clients with debts relating to membership of a couple for criminal prosecution, referring 176 to the Commonwealth Director of Public Prosecutions (CDPP). In that same period the CDPP prosecuted 113 Centrelink clients for obtaining a financial advantage through their membership of a couple,⁵³ securing 111 convictions.⁵⁴ Not only do these convictions result in criminal records, fines and community orders, but there is the possibility of gaol. According to the Australian Law Reform Commission, on 13 December 2004 there were 84 women in custody who had been convicted of a federal offence, most for social security fraud.⁵⁵ While the Commission's data does not indicate directly the number of prisoners whose conviction involved claiming they were not a member of a couple, past studies indicate that a significant proportion of federal female prisoners were gaoled because of the cohabitation rule.⁵⁶ In two of the AAT decisions it was disclosed that Centrelink was actively considering referring the client to the CDPP.⁵⁷ In *Glachan*, the report notes that CDPP dropped the prosecution just days before trial.⁵⁸

Bare statement of these consequences does not communicate how cohabitation decisions affect clients. Again, the sample records the effect of the primary determination on clients. In *Re Berghofer and Secretary, Department of Family & Community Services* (2004) 78 ALD 467 the decision by Centrelink that the client was in a marriage-like relationship with his long-term carer and the cancellation of his Disability Support Pension caused homelessness.⁵⁹ In *Dempster*, investigations by Centrelink caused the alleged partner to remove from his property the caravan that the client was living in, causing her to be "sleeping in parks".⁶⁰ While homelessness is an extreme consequence many other clients suffered financial difficulties following Centrelink's decision. In *Re Caldwell and Secretary, Department of Family & Community Services* [2005] AATA 523 when the client's Disability Support Pension was cancelled due to the alleged partner's income, she was forced to rely financially on her sons.⁶¹ This was similar to how the client in *Webb* fell behind with her mortgage payments.⁶² In *Glachan*, the cancellation of the client's Parenting Payment caused her to become nearly \$8,000 in debt to the alleged partner for rent.⁶³ However, financial costs are not the only effects on clients; in several AAT decisions Centrelink's investigations caused relationships to end. In *Caldwell*, the finding of a marriage-like relationship by Centrelink ended what had been a very long term friendship.⁶⁴ Similarly, in *Re Garde and Secretary, Department of Family & Community Services* [2005] AATA 924, a mutual caring relationship for two sufferers of clinical depression ended as a result of Centrelink's investigations.⁶⁵ While in *Re Dyson and Secretary, Department of Family & Community Services* [2005] AATA 105, a decision about the effect of a partner's income

⁵¹ *Re Cahill and Secretary, Department of Family & Community Services* [2005] AATA 1147 at [8].

⁵² Department of Human Services, n 7, [4].

⁵³ *Commonwealth Criminal Code 1995* (Cth), s 135.2; Director of Public Prosecutions (Cth), *Annual Report 2003-2004*, pp 33-34.

⁵⁴ Department of Human Services, n 7, [6].

⁵⁵ Australian Law Reform Commission, *Sentencing of Federal Offenders* (Discussion Paper 70, 2005) pp 610 [29.12-29.14], 660-666 [39].

⁵⁶ Wilkie, n 2.

⁵⁷ *Re Pelka and Secretary, Department of Family & Community Services* [2005] AATA 120 at [5]; *Re Secretary, Department of Family & Community Services and Glachan* [2005] AATA 899 at [44].

⁵⁸ *Re Secretary, Department of Family & Community Services and Glachan* [2005] AATA 899 at [4].

⁵⁹ *Re Berghofer and Secretary, Department of Family & Community Services* (2004) 78 ALD 467 at 471 [11].

⁶⁰ *Re Secretary, Department of Family & Community Services and Dempster* [2004] AATA 1287 at [18].

⁶¹ *Re Caldwell and Secretary, Department of Family & Community Services* [2005] AATA 523 at [30].

⁶² *Re Secretary, Department of Family & Community Services and Webb* [2005] AATA 668 at [24].

⁶³ *Re Secretary, Department of Family & Community Services and Glachan* [2005] AATA 899 at [18].

⁶⁴ *Re Caldwell and Secretary, Department of Family & Community Services* [2005] AATA 523 at [11].

⁶⁵ *Re Garde and Secretary, Department of Family & Community Services* [2005] AATA 924 at [6].

on a client's payment, the client acknowledged that the financial and personal stress that came from Centrelink misunderstanding the nature of his wife's business "had caused tensions within the marriage".⁶⁶ In *Re Weaver and Hetherington and Secretary, Department of Family & Community Services* [2005] AATA 372 "problems with Centrelink in Brisbane" motivated Hetherington to move out of the residence he was sharing with his ex-partner and child, and relocate interstate.⁶⁷

Indeed, it can be seen that Centrelink continually expects clients to move from their current address as a formal demonstration of their independence. In *Webb*, Centrelink considered the client to no longer be in a marriage-like relationship once she moved out of the alleged partner's house even though she remained the primary care giver for his grandchildren.⁶⁸ In *Re Milosev and Secretary, Department of Family & Community Services* [2005] AATA 363, Centrelink began paying the client at the independent rate from the day his wife moved out.⁶⁹ Similarly, in *Re Lenard and Secretary, Department of Family & Community Services* (2005) 80 ALD 421 Centrelink placed significant weight on the fact that the husband had not formally left the family residence and only recognised the client as independent once he had left the house.⁷⁰

These last two matters point to another effect of Centrelink's cohabitation decisions, the making of clients subject to the unilateral actions of the alleged partner. In both those decisions payment was not restored until the alleged partner actively proved separation. In *Caldwell* and *Webb*, the clients were exposed to extreme financial difficulty because the alleged partners did not provide financial support to compensate for the clients' cancelled pension.⁷¹ Indeed, several of the decisions report hostile reactions from the alleged partner to Centrelink's investigation and decision. In *Re Lasan and Secretary, Department of Family & Community Services* [2005] AATA 724, the client's estranged wife wrote to Centrelink indicating that she was "not a Centrelink customer [and] [t]here is no law in this country wish [sic] can force me to support another person without my wish".⁷² The rendering of Centrelink's client vulnerable to the unilateral actions of others can also be seen during the pre-decision investigation. In *Pelka* the action of the alleged partner to describe the client as his "de facto" in various work documents, done without the client's knowledge or consent, was a significant factor for Centrelink in finding a marriage-like relationships.⁷³

Other harms that Centrelink clients are exposed to are loss of reputation and humiliation. The requesting of statements from work colleagues, family and neighbours of clients and alleged partners creates the opportunity for gossip, innuendo and barriers to social interaction. Indeed, in *Glachan* there is the suggestion that Centrelink's request for statements from the principal of the children's school and from other parents, damaged the client's and her children's relations within the school.⁷⁴ Further, loss of face and reputation can be identified when clients challenge the decision that they are a member of a couple by alleging at merits review that they are living separately and apart from their ex-partner under the one roof. In *Re Fayad and Secretary, Department of Family & Community Services* (2005) 85 ALD 185 a Muslim woman disclosed that she was having an extra-marital affair.⁷⁵ In *Re Camilleri and Secretary, Department of Family & Community Services* [2005] AATA 212, a mother of six children within an Italian migrant family was forced to make it widely known that her marriage had ended and that she had been a victim of domestic violence.⁷⁶

In summary, recent AAT decisions suggest that the nebulous nature of the cohabitation rule subjects Centrelink clients, and those around them, to intense surveillance, with the routine gathering of documentary evidence from banks, employers, schools and real estate agents through to the active

⁶⁶ *Re Dyson and Secretary, Department of Family & Community Services* [2005] AATA 105 at [13].

⁶⁷ *Re Weaver and Hetherington and Secretary, Department of Family & Community Services* [2005] AATA 372 at [32].

⁶⁸ *Re Secretary, Department of Family & Community Services and Webb* [2005] AATA 668 at [15].

⁶⁹ *Re Milosev and Secretary, Department of Family & Community Services* [2005] AATA 363 at [12].

⁷⁰ *Re Lenard and Secretary, Department of Family & Community Services* (2005) 80 ALD 421 at 426 [12], 14].

⁷¹ *Re Caldwell and Secretary, Department of Family & Community Services* [2005] AATA 523 at [30]; *Re Secretary, Department of Family & Community Services and Webb* [2005] AATA 668 at [24].

⁷² *Re Lasan and Secretary, Department of Family & Community Services* [2005] AATA 724 at [11].

⁷³ *Re Pelka and Secretary, Department of Family & Community Services* [2005] AATA 120 at [13], [25].

⁷⁴ *Re Secretary, Department of Family & Community Services and Glachan* [2005] AATA 899 at [32-33].

⁷⁵ *Re Fayad and Secretary, Department of Family & Community Services* (2005) 85 ALD 185 at 197 [62-66].

⁷⁶ *Re Camilleri and Secretary, Department of Family & Community Services* [2005] AATA 212 at [15].

requesting of statements from associates, family and teachers and ultimately the commissioning of video surveillance and the acting upon anonymous tip-offs.

This causes actual harm. Formally, through reduction of payment, administrative debts and criminal prosecution, but also Centrelink's administration of the rule causes homelessness, forced relocations, further financial difficulties; puts considerable stress on what otherwise were positive relationships, especially parent-child relationships; creates dependence on the unilateral actions of others; and causes loss of reputation and humiliation. In short the rule sets up an administrative process that harms clients.

THE MORE THINGS CHANGE ...

It has been argued that the nebulous articulation of the cohabitation rule in the Act and the Guide requires CSOs to investigate all aspects of a clients' life. Through examining the 2005 AAT decisions it was shown that clients and the people they come in contact with are subject to intense surveillance through the investigations required by the rule and that this surveillance leads to identifiable harms to clients. Notwithstanding that the present rule applies to both genders, the 2005 AAT decisions show that the rule continues its historical function in the subordination women. However, what *is* new is the level of surveillance.

The recent AAT decisions paint a negative picture of how the cohabitation rule requires surveillance that harms clients. This conclusion suggests that there are unintended outcomes and possible room for other agendas to operate behind the rule. The first seems to be to hound clients and those around them to such an extent that they tire of the "bullshit from the Department"⁷⁷ and survive without Centrelink payments.⁷⁸ This cost saving is not always the outcome of Centrelink's investigations. One of the aspects of the recent review of the Parenting Payment Single program by the Australian National Audit Office was on the "new child review" policy. This policy involves a face-to-face interview and other investigations of all clients who have given birth 40 weeks after being granted Parenting Payment Single to determine if the client has become a member of a couple.⁷⁹ Contrary to what might be expected the Australian National Audit Office found that in 2001-2002, the policy, on average, resulted in a net increase of payment to clients.⁸⁰

The second purpose seems, in contrast to the history of protestations by the Department of Family and Community Services and its predecessors that the rule is not a moral one,⁸¹ to be an attempt at controlling clients and ensuring through surveillance and punishments that clients maintain certain types of relationships. Clients are judged as either financially dependent on another, or else are independent of all others, and only then are they legitimately able to be eligible for state support. The nebulous formulation of the rule opens clients to an unstructured process of investigation where CSOs use considerable discretion deciding who to investigate and how to investigate. Notwithstanding, the admonishments in the Guide to the contrary, the very nature of the openness of the rule and the discretion that it asks the CSO to exercise in investigating the whole of the client's relationship, makes it unavoidable that personal judgments by CSOs of the probity and morality of clients have considerable scope in how the rule is applied. The scope for different interpretations of the same facts, giving rise to different conclusions about whether a relationship is marriage-like can be seen in the high number of Authorised Review Officer (ARO) decisions that vary or set aside marriage-like relations decisions when compared to all Centrelink decisions. In 2003-2004 39% of ARO decisions changed the initial decisions compared with the across the board average of 32%, while in 2002-2004 40% of ARO decisions changed the initial decisions compared with an average of 29%.⁸² At the extreme end the discretionary nature of the cohabitation rule has led to situations where clients have

⁷⁷ *Re Berghofer and Secretary, Department of Family & Community Services* (2004) 78 ALD 467 at 472 [13].

⁷⁸ For example what the client did in *Re Ayres and Secretary, Department of Family & Community Services* [2005] AATA 627.

⁷⁹ Guide to Social Security Law, n 11, para [6.2.4.10], "PP Reviews" (viewed 13 December 2005).

⁸⁰ Australian National Audit Office, *Review of the Parenting Payment Single Program* (Audit Report No 44 2002-03), pp 87-88 [4.60-4.70].

⁸¹ Guide to Social Security Law, n 11, para [2.2.5.10], "Summary"; Carney and Hanks, n 5, p 232; Jordan, n 8, p 70.

⁸² Department of Human Services, n 7, [3]; Centrelink, *Centrelink Annual Report 2003-04* (2004), p 140.

been convicted of a criminal offence, only to have the AAT decide that there was no debt in the first place!⁸³

The scope for personal discretion in how individual decision-makers apply the rule to the same, or highly similar facts, can also be seen in the Australian National Audit Office which found considerable variation in how CSOs conducted new child reviews, and that many CSOs reported that they “feel uncomfortable asking personal questions and that they did not feel that they had the investigative skills required”.⁸⁴ However, instead of recommending changes to the rule or tighter guidance on the conduct of investigations the Audit Office recommended better training for CSOs to “probe all issues that must be addressed”, with Centrelink’s response that determining marriage-like relationships “is a complex area of administration that is often contested and often requires a CSO to exercise judgment with sensitivity”.⁸⁵

The openness of the administration due to the nebulous formulation of the rule must be seen in the context of who the rule affects. Notwithstanding the gender-neutral language of the current rule, in that it applies to men and women and to all payments, the 2005 AAT decisions reveal that it is still women, and particularly still women with the primary care responsibility for children, who remain the prime focus.⁸⁶ It is women from ethnic minorities and also women who are attempting to share parent with the children’s father, that are subject to considerable scrutiny. What this seems to indicate is that the openness of the rule leads Centrelink to administer a regime that controls women through surveillance, fines and prosecutions with the result of actively harming their life, informed by an anachronistic notion of human relationships. Women (and children) are expected to be either in a totally dependent relationship with a man, or they are to be utterly independent of men. Any blurring between these two poles, the Muslim woman who does not want the shame associated with a public admission of her marriage breakdown, or the mother who tries to keep the father involved in the children’s life, are subject to surveillance and harm. This is what has not changed. Past feminist criticisms of the rule retain their potency: “[t]he welfare system reinforces the patriarchal family system and this helps with the subordination and dependency of women”.⁸⁷

Perhaps in response to the sustained concern about welfare fraud and welfare dependency over the last 20 years, or maybe as an unintended consequence of the computerisation of social security administration, what has changed is the intensity of surveillance. Jordan notes that in 1975 a field officer from the then Department of Social Security was censured as being “overzealous” in putting direct questions concerning the client’s relationship to neighbours and attempting to get signed statements from friends and employers.⁸⁸ In 2005 this type of evidence gathering, along with requesting documents from institutions, computer data-matching, acting on tip-offs and video surveillance, has become an everyday part of Centrelink’s administration of the rule.

⁸³ See the matters discussed in Mussett J, “Crime? And Punishment! Sole Parent Pensioners, Criminal Convictions and Administrative Review” in Disney J (ed), *Current Issues in Social Security Law* (Centre for International and Public Law, 1994), p 95.

⁸⁴ Australian National Audit Office, n 80, pp 90 [4.76], 92 [4.83].

⁸⁵ Australian National Audit Office, n 80, p 92 [4.84], [4.86].

⁸⁶ Half of the AAT appeals concerned women with children. *Re Lenard and Secretary, Department of Family & Community Services* (2005) 80 ALD 421; *Re Fayad and Secretary, Department of Family & Community Services* (2005) 85 ALD 185; *Re Ah-See and Secretary, Department of Family & Community Services* (2005) 84 ALD 209; *Re Secretary, Department of Family & Community Services and Glachan* [2005] AATA 899; *Re Camilleri and Secretary, Department of Family & Community Services* [2005] AATA 212; *Re Secretary, Department of Family & Community Services and Dempster* [2004] AATA 1287; *Re Secretary, Department of Family & Community Services and Webb* [2005] AATA 668; *Re Secretary, Department of Family & Community Services and Nahas* [2005] AATA 478; *Re Yakoubian and Secretary, Department of Family & Community Services* [2005] AATA 452; *Re Weaver and Hetherington and Secretary, Department of Family & Community Services* [2005] AATA 372; *Re Secretary, Department of Family & Community Services and R1 and R2* [2005] AATA 827; *Re Secretary, Department of Family & Community Services and Mehanna* [2005] AATA 575; *Re Cahill and Secretary, Department of Family & Community Services* [2005] AATA 1147; *Re Kantarovski and, Department of Family & Community Services* [2005] AATA 1153.

⁸⁷ Bryson L, “Women as Welfare Recipients: Women, Poverty and the State” in Baldock CV and Cass B (eds), *Women, Social Welfare and the State in Australia* (New ed, Allen & Unwin, 1988) p 135.

⁸⁸ Jordan, n 8, p 44.

It is appropriate to conclude by canvassing reform. The present version of the cohabitation rule requires all Centrelink clients, and particularly women who are claiming independence, to be subjected to a level of inquisitorial surveillance that was impermissible and possibly unimaginable 30 years ago. An obvious reform would be to limit the discretion that CSOs have when conducting a member of a couple investigation, through clear guidelines on what type of evidence can be gathered from whom in which specific circumstances. This would not only address some of the concerns expressed by CSOs to the Audit Office concerning the lack of guidance in the current rule, but be able to reduce the harm suffered by Centrelink, for example minimise the possibility for loss of reputation and humiliation through restrictions on the gathering of statements from associates.

While this reform might address how Centrelink investigates, the broad requirement in the current rule that all aspects of a client's relationship must be examined, remains. The seemingly impossible intellectual task of developing a limited criterion for "marriage", and the invariable openness of any list to discretion and moral judgment, coupled with the continual uneven impact of the rule on women, has led several commentators to suggest that the rule should be abolished and there be only a single rate of payment.⁸⁹ Such a suggestion has an intellectual clarity to it. However, we have two concerns. The first is that in a period where the "family" has become a key political concept, framed by anxieties over its supposed decline, removal of "couples" as a category from social security law seems unlikely. The second is that calls to abolish different rates of pay for independent and partnered clients might lead to the universal adoption of the lessor partnered rate across the board, cutting the rate of pay of independent clients, and through this exposing them to greater financial risks.

An alternative reform, that has been regularly canvassed, would be to make financial aspects of a relationship an essential criterion, with the remaining criteria still needing to be considered to determine whether, on this financial base, a marriage-like relationship exists.⁹⁰ The justification for this reform relates to the professed rationale for the cohabitation rule; that person in a relationship should not receive greater financial support through the welfare system than persons who are genuinely single.⁹¹ For Mossman the financial nature of the rule's rationale means that financial considerations should be central to how the rule is understood and administered.⁹²

However, the current understanding of financial aspects of a relationship needs clarification. It currently covers large scale financial interrelations such as asset sharing, joint debts and "wealth creation" activities, and also covers the mundane sharing of living expenses.⁹³ The first category suggests long term commitment and mutual financial involvement, while the second is what occurs in a shared house where the relationships are transitory and borne out of economic convenience. Therefore, care needs to be taken in limiting the essential financial aspect criterion to those joint financial decisions that clearly point to commitment.

This reform to the cohabitation rule would dramatically change how CSOs conducted investigations. Investigations would occur in two stages, an initial gathering of financial evidence to determine financial interdependence, and then the wider investigation into the other criteria only if the clarified financial aspect was found to be present. In the 2005 AAT sample most clients were found to be financially independent. Therefore, such an amendment would mean that a significant portion of Centrelink clients would become exempt from the invasive surveillance and harm that comes from the administration of the current rule.

While one objection to this reform would be that it would result in more clients on an independent rate and a commensurable increase in the social security budget, this does not necessarily follow. This reform would greatly streamline the administration associated with the rule, from the evidence to be gathered prior to a decision, through to the costs associated with the continuous

⁸⁹ Hopkins, n 1 at 201; Neave, n 2 at 796; Edwards M, "Individual Equity in Social Policy" in Goodnow J and Pateman C (eds), *Women, Social Science and Public Policy* (Allen & Unwin, 1985) p 102.

⁹⁰ Carney and Hanks, n 4, p 235; Ronalds C, "De Facto Relationships: Mixed Government Approaches" in Disney, n 83, p 90.

⁹¹ Neave, n 2 at 796; Fairbairns Z, "The Cohabitation Rule – Why it Makes Sense" (1979) 2(3) *Women's Studies International Quarterly* 319.

⁹² Mossman MJ, "The Baxter Case: De Facto Marriage and Social Welfare Policy" (1977) 2 UNSWLJ 1 at 16-17.

⁹³ Compare *Social Security Act 1991* (Cth), ss 4(3)(a)(i), (ii), (iii) with s 4(3)(a)(iv).

reviewing of clients. What might appear to cost the taxpayer in the short term may well be recouped through the reduction of administrative complexities and streamlining investigatory practices; and in the long term by more secure and reliable eligibility for single people, and especially for single parent families, with all that implies for the economic prosperity of future generations.

CONCLUSION

This article has forensically examined the publicly available written reasons of the AAT to gather a snapshot of how CSOs in Centrelink investigate and decide initial cohabitation decisions. It argued that the current articulation of the rule is nebulous and requires CSOs to investigate all aspects of a client's life. The AAT material revealed that this required investigation has led to a new level of intense surveillance which causes specific, identifiable, harms to clients. What is also new is that this surveillance and harm can now harm men, particularly men who are caring for children, or as in *Berghofer*,⁹⁴ are cared for by a friend. However, what is not new is that, notwithstanding that some men are subject to the rule, the rule continues what it has always done, surveying and harming women.

⁹⁴ *Re Berghofer and Secretary, Department of Family & Community Services* (2004) 78 ALD 467.