DSS, was to go to the flat as a carer and not to live there. This worked against the flat being described as a home of Kinsey.

The AAT did not accept these submissions. The Tribunal commented:

> 'The flat was used by the applicant not as a matter of convenience but of necessity in fulfilling her role as a carer, once the decision was made that it was in the best interests of the family in general and Megan in particular that care be provided for her in the flat as well as the house. That task is both constant and demanding. The separate accommodation gave some degree of independence to both Megan and the applicant. It enabled the applicant to maintain care yet from time to time obtain some respite. The applicant expected and anticipated she would spend a good proportion of her time in the flat. It became a home of the applicant.'

(Reasons, p.7)

The Tribunal also supported its conclusions having regard to the purpose of the legislation. It said:

> 'The purpose of the Act is to assist those people who provide care at home. Doubtless, it is both to the advantage of the family and the general community that this be so. The quality of life of a recipient of care is enhanced if administered in a home environment. To enable this to be done often involves re-arranging living quarters by, for example, an addition to an existing house or the building of a flat in the grounds.'

(Reasons, pp.7-8)

The history of carer's pension was also referred to by the AAT. The history indicated that the intention of the legislation was to provide support for those who provide care in a home environment. The Tribunal commented that its conclusion that the flat was a home of Kinsey was in keeping with the legislative purpose.

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS with the direction that the flat by itself constituted a home of Kinsey and her daughter.

[B.S.]

Cohabitation

RAYNER AND SMITH and SECRETARY TO DSS
(No. Q89/113; Q89/132)
Decided: 20 September 1990 by K.J. Lynch, W.A. de Maria and T.R. Gibson.

Jillian Rayner and Michael Smith sought review of decisions by the DSS to raise overpayments of $10 740.50 in respect of Smith and $10 450.30 in respect of Rayner for the period May 1986 to September 1987, during which they had each received a supporting parent's benefit. The DSS raised each overpayment because it formed the view that during this period Rayner and Smith were living together on a *bona fide* domestic basis although not legally married.

The evidence

Smith had a son, D. Rayner and Smith commenced living together in 1983 and their child, K, was born in April 1985.

Jillian Rayner applied for supporting parent's benefit in May 1985 but it is not clear from the AAT's reasons whether she was living with Smith at that time or whether the benefit was paid.

The AAT did not clearly state whether Rayner and Smith lived apart from then until May 1986 but one could infer this from the AAT's reasons. At one stage Rayner lived in Tasmania and Smith apparently visited her to attempt to persuade her to return to Brisbane.

In May 1986 Rayner and Smith commenced to occupy a house in Camp Hill as tenants. The electricity was connected in the name of Smith and the telephone was listed under J.A. and M.V. Rayner.

Smith, Rayner and another person, G, who claimed to have lived in the Camp Hill house, gave evidence that, shortly after moving in with Rayner, Smith moved out with his son D while K remained with Rayner. They also said that D continued to attend a school near the Camp Hill house and was picked up from the house every evening by Smith.

The AAT first found that it was not prepared to accept G's evidence. It then decided that it must exercise caution in accepting Smith's and Rayner's uncorroborated evidence because of their admissions to previously not being wholly truthful.

Throughout its reasons, the AAT referred to a number of instances in which Rayner or Smith had not been truthful in the past or gave evidence to the AAT which it found hard to believe.

By contrast, the AAT accepted the evidence of a neighbour who said she did not see anyone else at the Camp Hill house, other than occasionally, except the applicants and the 2 children.

Other evidence considered by the AAT to be significant included that Smith and Rayner were both involved in the purchase of a car in July 1986 after Rayner's car was substantially damaged whilst being driven by Smith. Also, Smith gave the Camp Hill address to an employer he worked for after the time he said he had left that address.

The AAT commented on the evidence of sexual relationship:

> 'There is no evidence either way before the Tribunal whether there was a sexual relationship between the parties at the relevant times. nor does there have to be, as we are interested in the mosaic of the relationship, not just one facet. It was not specifically asserted that they did have a sexual relationship and the denials were in broad terms. Ms Rayner said she did not sleep with Smith and Smith said he did not live with Ms Rayner. The evidence establishes that there was ample opportunity for a sexual relationship to have existed between them particularly in the mornings after D had gone to school when, on the evidence, Smith frequently stayed at the house for a couple of hours.'

(Reasons, para. 10)

Determining whether a *de facto* relationship existed

Reference was made to the criteria of assistance in determining the existence of a *de facto* relationship listed in *Tang* (1981) 2 *SSR* 15. The AAT noted that:

> 'One does not tick off a list of criteria and find a marriage *de facto* when the points pass a certain percentage but one looks for these criteria in the context of the total relationship.'

(Reasons, para. 9)

The AAT outlined its approach to deciding this case:

> 'The question for the Tribunal to decide, firstly, is whether the information before the respondent was sufficient for it to cancel the pension.'

(Reasons, para. 12)

The AAT quoted from *Cassarotto v Australian Postal Commission* 10 AAR 191 at 205, where it was said that, where a claim for compensation was made –

> 'In a practical sense, if not in a strict legal sense, it will be the responsibility of an applicant for review to ensure that there is laid before the Tribunal all material which it will be necessary for the Tribunal to have before it to enable it to come to a decision.'

(Reasons, para. 14)

Its conclusions were put by the AAT as follows:

'The Tribunal is not persuaded by the evidence of the applicants that the decisions under review are incorrect. The Tribunal is satisfied, also, that the evidence available to the respondent was such that the respondent was entitled to cancel the pensions in each case. The Tribunal is not persuaded by the evidence which has been placed before it in its review of the respondent's decision to set aside the decision appealed from.'

(Reasons, para. 14)

Formal decision

The AAT affirmed the decision under review.

[D.M.]

HILTON and SECRETARY, DSS (No. N89/451)

Decided: 29 October 1990 by R.N. Watterson, C.J.Stevens (M.T. Lewis dissenting).

By a majority (Watterson and Stevens) the AAT affirmed a decision of the SSAT that Hilton was eligible for a supporting mother's benefit 'at all relevant times' from 13 October 1981 until it was cancelled by the DSS as from 8 September 1988.

The issue was whether during that period Hilton was living with Ian Bradford as his *de facto* spouse.

The legislation

At the time, s.44 (1) of the *Social Security Act* provided that a person was qualified to receive supporting mother's benefit only if that person was a single person. A single person was defined as a person who was not married: s. 43(1).

According to s.3(1), a married person included a *de facto* spouse, which was defined as a person who is living with another person of the opposite sex as the spouse of that other person on a *bona fide* domestic basis although not legally married to that other person.

Findings

Hilton and Bradford had shared Bradford's home continuously from 1985 until 20 December 1989, when Hilton and her 2 children had moved to a separate residence. During that period Hilton had used the name of Bradford for various purposes, including that of registering the birth of her younger child.

Hilton had registered Bradford as the father of her 2 children, and had represented him as such to the children's school and even to her own parents. The AAT accepted her explanation that this was a facade erected in the interests of the children, and found that Bradford was not in fact the biological father.

Bradford had acted as a father figure to Hilton's children, looking after them in Hilton's absence both during and after the period of shared residence. The AAT accepted that this was consistent with the relationship being one of friendship and support.

Although sexual intercourse had taken place between Hilton and Bradford on at least one occasion, the AAT found that the relationship lacked the element of exclusivity. Hilton had had sexual relations with other men, and this was seen by her and by Bradford as being consistent with their relationship.

During the period that they had lived together, Hilton and Bradford had led largely separate social lives. Although some domestic tasks were shared, they each kept a separate household. They occupied separate rooms and did not eat meals together.

Their financial relations caused the AAT some difficulty. In November 1989, Bradford caused a transfer of his home to be registered, from himself as sole owner to himself and Hilton (named as Bradford) as joint tenants. While this would normally indicate a marriage-like relationship, the AAT found that Bradford was confused as to the nature of the legal arrangement that he was making, believing that 'he had simply made arrangements for Mrs Hilton's children to inherit his property'.

The majority laid considerable weight on Hilton's move to separate accommodation in December 1989 as supporting its view that the relationship was one of strong friendship and mutual support rather than marriage-like.

The dissenting decision

Mrs Lewis dissented from the majority decision, finding that at all relevant times Hilton was living in a *de facto* relationship with Bradford. In her reasons, she noted the many inconsistencies and conflicts in the evidence, and found that neither Hilton nor Bradford were credible witnesses. She referred to the remarks of the AAT in *Petty* (1982) 10 *SSR* 99:

'The proper administration of the social welfare system depends upon applicants making a full and true disclosure of their circumstances. The question whether two people who reside under the one roof are living as husband and wife on a *bona fide* domestic basis although not legally married is difficult enough for the Director-General to resolve without people telling lies or trying to mislead. Where applicants make an untruthful or misleading statement concerning their relationship, they must realise that the inference is likely to be drawn that they are endeavouring to conceal the true nature of their relationship.'

In support of her conclusion, Mrs. Lewis found that:

- whether he was the father of Hilton's children or not, he accepts and enjoys the role of father and is registered as such
- Hilton had used the name Bradford for various purposes and had presented to a number of different persons and instrumentalities either as his wife or his de facto wife
- they had provided mutual support and assistance over a number of years, in a way that was consistent with a marriage-like relationship, and
- there was considerable financial interdependence and sharing, such as the transfer of the title to Bradford's home, and the provision by him to Hilton of a sum of $26000 from his insurance settlement for the purchase of a car with no arrangements for repayment for some 3 years.

[P.O'C.]

Invalid pension: physical or mental impairment

SECRETARY TO DSS and VAN HENGST (No. 6285)

Decided: 12 October 1990 by H.E. Hallowes.

Van Hengst lodged a claim for invalid pension on 5 December 1988. This was rejected on the ground that a Commonwealth Medical Officer had found she