

**From “form” to function and back again: a comparative  
analysis of form-based and function-based recognition of  
adult relationships in law.**

Kathy Griffiths

Cardiff School of Law and Politics

Cardiff University

Submitted for examination: May 2017

This thesis is submitted in partial fulfilment of the requirements for the degree  
of Doctor of Philosophy

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### Thesis summary

This thesis explores the desirability and viability of a function-based as opposed to a form-based approach to adult relationship recognition in law. It explores the benefits and difficulties with both form-based and function-based approaches to determine whether either has any significant advantage over the other, both in relation to a need to provide a system of relationship recognition that is inclusive of the diversity of family relationships formed today, and in relation to the protective and symbolic functions of family law. To do this, the thesis will compare the English and Welsh approach to relationship recognition with that adopted in Australia.

The thesis will show that form- and function-based approaches share many of the same benefits and both can be flexible because they can be used in ways that are inclusive of a variety of relationship types and both approaches have their disadvantages. On balance, function-based systems appear more principled than form-based systems because they focus on the quality of the relationship and not merely on its structure and function-based systems are better placed to protect the vulnerable partner in a relationship because there is no need to opt-in for legal recognition. But, form-based systems should not be abandoned because they have the benefit of being administratively efficient, and are better placed to serve family law's symbolic function. Both form- and function-based approaches have the potential to be used in radical ways to respond to the needs of real families, but social reality and political will limits the development of both approaches to relationship recognition.

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## **Abbreviations**

ABS – Australian Bureau of Statistics

ACT – Australian Capital Territory

Cth – Commonwealth

BSA – British Social Attitudes Survey

NSW – New South Wales

NT – Northern Territory

ONS – Office for National Statistics

SA – South Australia

Tas – Tasmania

Qld – Queensland

Vic – Victoria

WA – Western Australia

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Marriage (Same Sex Couples) Act 2013

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## **Australia**

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### **A note on terminology**

Throughout the thesis various “catch-all” terms will be used to describe different types of relationship. The ambit of these terms will be explained in the relevant chapters, but it is helpful at the outset to outline what the various terms mean. The term ‘couple’ is used to denote that a relationship is romantic, and perhaps sexual, in nature. The term ‘registered couple relationship’ is used to describe the formalised relationships of couples. The term ‘informal couple relationship’ is used in contrast to ‘registered’ and ‘formalised’, to describe an informal relationship between couples. These catch-all terms are used where possible for the sake of convenience and clarity because different terminology is used to describe these relationships in the different jurisdictions explored in the thesis. The following table summarises the different terminology in relation to couple relationships:

Table 1

<u>Jurisdiction</u>	<u>Registered couple relationship</u>	<u>Informal couple relationship</u>
England and Wales	Civil partnership	Cohabitant
Australian Federal law	n/a	De facto relationship
New South Wales	Registered relationship	De facto relationship
Tasmania	Significant relationship	Significant relationship
Victoria	Domestic relationship	Domestic relationship
Queensland	Civil partnership	De facto relationship
Australian Capital Territory	Civil union Civil partnership	Domestic partnership
South Australia	n/a	Domestic partnership
Northern Territory	n/a	De facto relationship
Western Australia	n/a	De facto relationship

Similarly, the term ‘caring’ is used in contrast to ‘couple’, to show that these relationships are not necessarily romantic or sexual and are open to all family relatives. ‘Registered caring relationship’ is used to describe the formalised relationships available for those in caring relationships. The term ‘informal caring relationship’ is used in contrast to ‘registered’ to denote the informal nature of the relationship. For the purposes of clarity, the following table outlines the terminology used in the Australian states that recognise caring relationships in law:

Table 2

<u>Jurisdiction</u>	<u>Registered caring relationship</u>	<u>Informal caring relationship</u>
Tasmania	Caring relationship	Caring relationship
Victoria	Caring relationship	n/a
New South Wales	n/a	Close personal relationship
Australian Capital Territory	n/a	Domestic relationship
South Australia	n/a	Domestic partners



## Introduction

Traditionally marriage has been, and arguably continues to be, at the centre of family law in England and Wales.<sup>1</sup> George notes that marriage enjoys a privileged legal position at the 'top of the hierarchy of relationships'<sup>2</sup> and Glennon recognises that 'marriage remains the central adult relationship to which obligations legitimately attach'.<sup>3</sup> But, the privileging of marriage is not accepted by everyone as the correct approach towards adult relationship recognition, and there have been calls for consideration of the legal position of unmarried people who live in other types of relationship.

Brenda Hoggett, as she was then known, writing in 1980, questioned the different treatment of married and unmarried relationships in law in light of the fact that the legal consequences of marriage had changed so drastically. She explained that, historically, marriage was used as a means to promote stable families: marriage was a life-long relationship based on the concept of unity, with no possibility of divorce, and the law set out the 'package deal' of legal consequences that attached to the relationship.<sup>4</sup> But, gradually, the legal consequences of marriage changed in such a way as to better protect the 'weaker' partner, usually the wife. For example, reforms such as separate property for husbands and wives; the ability of spouses to enter contracts with each other and to sue each other in tort; and improved remedies for domestic violence, all served to better protect the 'weaker' spouse.<sup>5</sup> These changes 'narrowed the gap between marital and non-marital relationships' and, consequently, Hoggett believed that the position of unmarried couples should be considered because,

*Any person who compromises his or her breadwinning capacity in order to cater without reward at market value for the domestic needs of others should be entitled to some compensation for that loss... Family law no longer makes any attempt to buttress the stability of marriage or any other union. It has adopted principles for the protection of*

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<sup>1</sup> Herring notes that although unmarried sexual relationships are now also recognised in varying degrees by the law, and that parenthood is an important focus of family law, 'marriage is still of considerable significance': J Herring *Caring and the Law* (Hart Publishing, 2013), 188.

<sup>2</sup> R George *Ideas and Debates in Family Law* (Oxford University Press, 2012), 57.

<sup>3</sup> L Glennon 'Obligations between Adult Partners: Moving from Form to Function?' (2008) 22(1) *International Journal of Law, Policy and the Family* 22, 25-6.

<sup>4</sup> B Hoggett 'Ends and Means: The Utility of Marriage as a Legal Institution' in J Eekelaar and S Katz *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Butterworths, 1980), 94-5.

<sup>5</sup> *ibid* 97.

*children and dependent spouses which could be made equally applicable to the unmarried.*<sup>6</sup>

Essentially, Hoggett's argument is that, if the legal consequences of marriage are there to protect the economically weaker partner both during and after the relationship, then the same considerations should also apply to unmarried relationships where the same compromises are made. For Hoggett, the question was not only whether marriage-like remedies should be extended to unmarried couples, but 'whether the legal institution of marriage continues to serve any useful purposes.'<sup>7</sup>

Similarly, Eric Clive, also writing in 1980, argued that marriage was unnecessary as a legal concept and that married couples could be dealt with in the same way as the unmarried in different areas of law. For example, he argued that, at least in a 'theoretical sense', 'marriage is obviously not a necessary legal concept in relation to finance and property'. Instead of having a statutory system of financial remedies for spouses that provides the opportunity for an award of maintenance on the basis that the parties were married, the 'state could base a private law right to maintenance on factual criteria such as the existence of dependent children or the length of the relationship'.<sup>8</sup> For Clive, the fact of marriage would be irrelevant to deciding maintenance claims, because the important factor would be whether there were dependent children or the presence of some other factors that caused a loss to one partner.<sup>9</sup>

More recently, in 2002, the Law Commission issued a discussion paper on the property rights of people who live together in informal relationships. The scope of the discussion included not only unmarried couples, but also relationships between 'friends, relatives and others who may be living together for reasons of companionship and care and support.'<sup>10</sup> The Commission did not make any proposals for reform because they were unable 'to devise a statutory scheme for the determination of shares in the shared home which can operate fairly and evenly across all the diverse circumstances which are now to be encountered.'<sup>11</sup> Rather, the Commission noted that the 'purpose of the paper' was 'to provide a framework for future public debate'. They noted,

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<sup>6</sup> *ibid* 100-1.

<sup>7</sup> *ibid* 101.

<sup>8</sup> E Clive 'Marriage: An Unnecessary Legal Concept?' in J Eekelaar and S Katz *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Butterworths, 1980), 73.

<sup>9</sup> *ibid* 74. It is worth noting that Clive does not explain what these 'other factors' that may cause a loss to one partner may be.

<sup>10</sup> Law Commission *Sharing Homes: A Discussion Paper* (July 2002), i.

<sup>11</sup> *ibid* iv.

*We accept that marriage is a status deserving of special treatment. However, we have identified... a wider need for the law to recognise and to respond to the increasing diversity of living arrangements in this country. We believe that further consideration should be given to the adoption... of broader based approaches to personal relationships, such as the registration of certain civil partnerships and/or the imposition of legal rights and obligations on individuals who are or have been involved in a relationship outside marriage.*<sup>12</sup>

The Commission did not challenge the ‘special treatment’ of marriage, but, significantly, did acknowledge that due to the increasing variety of home sharing arrangements that are now commonplace, where people care for and support one another, it is time to consider reform.

Since the Law Commission made this point almost fifteen years ago, civil partnerships were introduced as a registration option for same-sex couples in 2004,<sup>13</sup> and legislation was passed to enable same-sex couples to marry in 2013.<sup>14</sup> But, despite Law Commission proposals in 2007 for a framework for dealing with the financial consequences of the breakdown of unmarried cohabiting couple relationships, and the introduction of several private members’ Bills proposing similar reforms to those recommended by the Law Commission in 2007,<sup>15</sup> no other reforms have been forthcoming.

Hoggett, Clive and the Law Commission’s suggestions for reform are similar because they are united by a concern over what can be described as a focus on ‘function’ instead of ‘form’; they all look at the functions performed within a relationship, and the relationship generated need that can arise as a result of the performance of these functions, rather than focus only on whether two people are married. The current approach to the legal recognition of adult relationships in England and Wales can be, and often is, described as ‘form-based’.<sup>16</sup> Form-based recognition can be a reference to a *mechanism* of relationship recognition that recognises relationships on the basis of their formalised nature; steps are taken to register the relationship and make that relationship formal.<sup>17</sup> ‘Function-based’ recognition is different; this is where the

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<sup>12</sup> *ibid* iv.

<sup>13</sup> Civil Partnership Act 2004.

<sup>14</sup> Marriage (Same Sex Couples) Act 2013.

<sup>15</sup> For example, Cohabitation Rights Bill 2016; Cohabitation Rights Bill 2015; Cohabitation Rights Bill 2014; Cohabitation Rights Bill 2013; Inheritance (Cohabitants) Bill 2012; Cohabitation Bill 2009; Cohabitation Bill 2008.

<sup>16</sup> See for example, A Barlow and G James ‘Regulating Marriage and Cohabitation in 21<sup>st</sup> Century Britain’ (2004) 67(2) *Modern Law Review* 143; A Barlow and others *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21<sup>st</sup> Century* (Hart Publishing, 2005); Glennon (n3).

<sup>17</sup> For detailed discussion on the meaning of ‘form’, see Chapter 2, 2.2.

performance of particular functions triggers legal recognition of a relationship.<sup>18</sup> In recent years, many authors have written on how a function-based approach to relationship recognition should be introduced either in place of, or alongside, the current form-based system. For example, Barlow and James believe that the law relating to unmarried cohabiting couple relationships is ‘complex, inconsistent and confusing’ and in need of reform because the functions of married and unmarried couple relationships ‘are broadly the same’<sup>19</sup> and so these couples should be treated in the same way on relationship breakdown and death.<sup>20</sup> They advocate a plurality of approaches to relationship recognition, combining form-based and function-based systems, where unmarried couples are recognised alongside married couples.<sup>21</sup> Fineman goes further and looks beyond the sexual relationships of marriage and unmarried cohabitants, and suggests that relationships between caretakers and dependants should be the law’s focus.<sup>22</sup> This is a call for a function-based approach to recognition with relationships of caretaking being at the centre of law rather than the continuing focus on marriage.

### **Aims of the thesis**

In light of the calls for the introduction of function-based systems of recognition, this thesis will explore the desirability and viability of a function-based as opposed to a form-based approach to adult relationship recognition in law. To do this, the thesis will examine both form-based and function-based frameworks of relationship recognition to explore the similarities and distinctions between them, and explore whether either approach has any significant advantage over the other. The thesis will explore the following research questions:

1. How do the theoretical similarities and differences between form-based and function-based approaches to relationship recognition play out in practice?
2. What factors have supported and constrained the development of form-based and function-based approaches to relationship recognition?

The focus of the thesis is adult relationships. The thesis explores existing analysis of family relationship recognition frameworks in the context of the results of a comparative study of developments in adult relationship recognition in England and Wales and Australia. The

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<sup>18</sup> For further discussion on the meaning of ‘function-based’ recognition as used in the thesis, see Chapter 2, 2.3.1.

<sup>19</sup> Barlow and James (n16) 152-3.

<sup>20</sup> *ibid* 172. For discussion of the treatment of unmarried cohabiting couples in England and Wales, see Chapter 6, 6.3.

<sup>21</sup> *ibid* 175-6.

<sup>22</sup> M Fineman *The Autonomy Myth: A Theory of Dependency* (New Press, 2004), 123. For a discussion of a radical approach to reform, see Chapter 2, 2.3.3.2.

comparative study utilises Hansard, Law Commission reports and other relevant policy documents to examine the rationales behind developments in relationship recognition in the two jurisdictions. It also makes use of some case law to explore how different frameworks of relationship recognition work in practice. This enables form-based and function-based approaches to relationship recognition to be viewed and evaluated in a new light.

Australia has been chosen as a comparative jurisdiction for three reasons. Firstly, in Australia, form-based and function-based approaches are currently used alongside each other which, prima facie, provides a stark contrast to the marriage-centric approach in England and Wales. Australia recognises the formalised relationships of marriage, registered couple relationships and registered caring relationships as well as recognising informal relationships between 'de facto' (marriage-like) couples and caring relationships under a function-based system. The analysis of the function-based reforms in Australia, specifically the reforms to recognise relationships beyond marriage-like couples, is particularly important because, to date, there has been only limited commentary available on this type of relationship recognition.<sup>23</sup> Secondly, both Australia and England and Wales are common law jurisdictions that share a history.<sup>24</sup> Prior to the federation of Australia on January 1<sup>st</sup> 1901, the separate self-governing Australian colonies were part of the British Empire and were subject to British authority.<sup>25</sup> For example, prior to Federation in 1901, most of the Australian colonies 'adopted the English Matrimonial Causes Act 1857', with divorce law provisions later developing to be different in the colonies.<sup>26</sup> Thirdly, as will be made clear in chapter one,<sup>27</sup> Australia and England and Wales have both witnessed a general decline in the marriage rate and an increase in alternative living

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<sup>23</sup> See for example, J Millbank 'Domestic Rifts: Who is using the Domestic Relationships Act 1994 (ACT)?' (2000) 14(3) *Australian Journal of Family Law* 163; J Millbank and K Sant 'A Bride in her Every-Day Clothes: Same-Sex Relationship Recognition in NSW' (2000) 22(2) *Sydney Law Review* 181; R Graycar and J Millbank 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition' (2007) 25 *Washington University's Journal of Law and Policy* 121; A Head 'The Legal Recognition of Close Personal Relationships in New South Wales' (2011) 13 *Flinders Law Journal* 53; B Sloan *Informal Carers and the Law* (Hart Publishing 2013).

<sup>24</sup> This was noted by, for example, E Nash and A Parker 'No-Fault Divorce: The Australian Experience' (2016) 46(3) *Family Law* 261, 262.

<sup>25</sup> N Aroney and others *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015), vi, 2.

<sup>26</sup> M Harrison 'Australia's Family Law Act: The First Twenty-Five Years' (2002) 16(1) *International Journal of Law, Policy and the Family* 1, 3. See also G Barwick 'The Commonwealth Marriage Act 1961' (1962) 3 *Melbourne University Law Review* 277, 279-80, where the section entitled 'history of marriage law' explains that English statutes were applied in most of Australia prior to Federation, with these provisions later being adapted in the different states. See also P Parkinson 'The Yardstick of Equality: Assessing Contributions in Australia and England' (2005) 19(2) *International Journal of Law, Policy and the Family* 163, 163, where Parkinson explains that there are many connections between Australian and English family law because both jurisdictions sometimes borrow ideas from each other.

<sup>27</sup> See Chapter 1, 1.1.

arrangements. In this way, Australia is a useful comparator because while the jurisdictions share a history, and have experienced similar demographic changes with a decrease in the marriage rates, the Australian approach has developed in a strikingly different way to that in England and Wales.

### **Structure of the thesis**

The thesis is divided into four sections. The first section comprises two chapters. As a prelude to examining what type of framework of relationship recognition is most appropriate, the first chapter will discuss demographic data relating to relationships and living arrangements, social attitude survey results and sociological accounts of family life. This will show that one rationale for considering reform of the marriage-centric, form-based approach to relationship recognition is that the current framework does not correspond well with modern relationship practices or attitudes towards those practices. The second chapter will introduce a second rationale for reform by considering the different functions of family law. It will be argued that while the functions of family law are debatable, family law performs both a protective and a symbolic function. This chapter will also explore the theoretical advantages and disadvantages of 'form-based' and function-based recognition systems as identified in some of the existing literature on relationship recognition, and will suggest that both have the potential to provide for diverse family relationships.

The second section of the thesis comprises three chapters with a focus on the advantages and limitations of form-based relationships. It will begin by discussing marriage before moving on to explore the other form-based recognition models, such as England and Wales' 'civil partnerships' and Australia's 'registered couple relationships' and 'registered caring relationships'. The discussion will highlight the fact that form-based systems are flexible enough to provide for a diverse range of relationship types, and that some benefits are common to all form-based systems, with the most significant difference between them being social rather than legal. The third section consists of two chapters exploring the development of function-based approaches to relationship recognition. The chapters will look at the way 'cohabiting' relationships are recognised on a functional basis in England and Wales (insofar as they are recognised at all), and examine Australia's 'de facto' and 'caring' relationships. This will show that function-based recognition is also flexible enough to provide for family diversity, and that form-based and function-based recognition are similar in many ways but there are differences between them.

The final section will bring together the main findings of the thesis and consider the implications of these findings. The conclusion will explain that form-based and function-based mechanisms of relationship recognition share many of the same effects, and both can be used in innovative ways to recognise diverse family relationships, but only where there is a call for, and the political will for, such recognition. The conclusion will suggest that, on balance, function-based recognition provides a more principled way forward because the quality of a relationship is of fundamental importance and function-based recognition is best placed to protect vulnerable partners. But this does not mean that form-based systems should be abandoned altogether, because they are better placed to fulfil family law's symbolic function. Taken together, the findings of this thesis suggest that Hoggett and Clive were right to question the legal privileging of marriage and to explore options for reforms that would protect the weaker partner in a relationship, regardless of whether that partner was married.

## **Chapter 1 – Changing relationship practices**

This chapter explains the context in which the research has been carried out and explores existing literature to identify what type of family life is important to people and why, before the thesis moves on to consider possible reforms to the current framework of relationship recognition. The chapter will begin by discussing demographic data relating to family relationships and living arrangements to demonstrate that relationships are changing: not everyone marries, and many people are forming alternative relationships. While the demographic data shows that something has changed, it does not give any indication as to *why* relationship practices are changing. To shed some light on this, the chapter will discuss public opinion survey data to show that these different living arrangements are becoming increasingly acceptable and valuable. Next, sociological accounts of family life will be explored to show that the declining marriage rate should not be taken as an indication that family is becoming any less important. ‘Family’ is a term that can capture a broad range of relationships beyond marriage, and, arguably, what we value most about our families are the functions they perform rather than the ‘form’ that they take. The conclusion will argue that if we want the English and Welsh system of relationship recognition to be more inclusive of a diversity of relationships and to provide for ‘real’ families, it is time to consider different ways of recognising relationships.

### **1.1 The changing demographic picture**

Relationship practices have changed dramatically, and to understand the full extent of this change it is necessary to examine how people use both formalised and informal relationships. The term ‘formalised relationships’ is used here to refer to relationships that are legally recognised because of their formal nature: this means that eligible people have taken steps to register, or formalise, their relationship.<sup>1</sup> ‘Informal relationships’ is used in contrast to formalised relationships and signifies that no steps have been taken to formalise the relationship. This section will discuss statistics from both England and Wales and Australia to show that both jurisdictions have experienced similar changes, but, as will become clear later in the thesis, they have taken very different attitudes towards responding to these demographic changes.

#### **1.1.1 Formalised relationships**

##### **1.1.1.1 Marriage and divorce**

The change in marriage statistics is striking: at one point, most people would have married, they would have married young and it is likely that their relationship would have lasted

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<sup>1</sup> For further discussion of the meaning of ‘formalised relationship’ see Chapter 2, 2.2.1.



a lifetime. But, this is no longer the case: fewer people are marrying; those who do marry do so later in life; many marriages end in divorce; and some people will choose to re-marry following divorce. This is important because it suggests that a framework of relationship recognition that prioritises life-long marriage does not correspond well with the reality of how people actually utilize marriage.

According to the Office for National Statistics (ONS), 161,030 marriages were formed in England and Wales in 1862, with the general marriage rate, or the number of men and women marrying per thousand unmarried men or women, being 58.7 for men and 50.0 for women.<sup>2</sup> The number of marriages gradually rose, and by 1972, 426,241 marriages were formed, with a marriage rate of 78.4 for men and 60.5 for women.<sup>3</sup> There has been a 'long-term decline in the marriage rates between 1972 and 2009'<sup>4</sup> and the general marriage rate in 2014 was 23.0 for men and 20.9 for women.<sup>5</sup> In addition to the declining marriage rate, most people now marry older. In 1970, the average age at first marriage was 24.4 for men<sup>6</sup> and 22.4 for women.<sup>7</sup> These figures have gradually increased, and in 2013 average age at first marriage was 32.5 for men and 30.6 for women.<sup>8</sup> Of those marrying in 2013, 67% were first-time marriages for both partners, 15% were re-marriages for both partners, and the remaining 18% were re-marriages for one partner.<sup>9</sup>

The Australian statistics are not always directly comparable with those for England and Wales, because the general marriage rate in England and Wales is defined by the ONS as how many people per 1000 unmarried people over 16 marry, whereas the crude marriage rate in Australia is defined by the Australian Bureau of Statistics (ABS) as how many people per 1000 of the entire population marry in a year. The data is still valuable however because it shows that

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<sup>2</sup> Office for National Statistics 'Marriage Summary Statistics 2012 (Provisional)' (Dataset, 2012), Table 2b, available from <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/datasets/marriagesummarystatisticsprovisional> accessed 11/01/2017.

<sup>3</sup> *ibid.*

<sup>4</sup> Office for National Statistics 'Marriages in England and Wales: 2013' (Statistical Bulletin, 2016), 3.

<sup>5</sup> Office for National Statistics 'Marriages in England and Wales, 2014' (Dataset, 2017), Table 8, available from

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/datasets/marriagesinenglandandwales2013> accessed 21/03/2017.

<sup>6</sup> Office for National Statistics 'Marriages in England and Wales, 2013' (Dataset, 2012), Table 6, available from

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/datasets/marriagesinenglandandwales2013> accessed 11/01/2017.

<sup>7</sup> *ibid* Table 7.

<sup>8</sup> Office for National Statistics 'Marriages in England and Wales: 2013' (n4) 6.

<sup>9</sup> *ibid* 4.

there has been a decline in marriage rates in Australia. According to the ABS, Australia has witnessed a general decline in the marriage rate since the 1970s,<sup>10</sup> and in 2015, the crude marriage rate was 4.8, a decrease from 6.1 in 1995.<sup>11</sup> The median age for marriage in 2015 was 31.8 years for males, and 29.8 years for females,<sup>12</sup> an increase from the 1995 figures which were 27.3 for males and 28.5 for females.<sup>13</sup> In 2015, 71.9% of marriages were first marriages for both parties, 16.4% were re-marriages for one partner, and 11.7% were re-marriages for both parties.<sup>14</sup>

In 1858,<sup>15</sup> only 24 divorces were granted in England and Wales, and this steadily increased to 512 by 1900.<sup>16</sup> This number continued to increase, and in 2003 153,065 divorces were granted.<sup>17</sup> The number of divorces has been reducing since 2003, which is consistent with the declining number of marriages,<sup>18</sup> and the number of divorces granted in England and Wales in 2014 was 111,169.<sup>19</sup> Likewise, the crude divorce rate in Australia, the number of divorces in a year per 1000 of the population, has increased from 0.1 between 1901-1910, to 0.8 between 1961 and 1970, and has remained between 2.2-2.9 divorces since 1976.<sup>20</sup> The median duration of marriages in England and Wales, that is the number of years a marriage persists prior to divorce, has fluctuated between 8.9 and 12.2 years over the last 50 years, and the median duration of a marriage for divorces granted in 2014 was 11.7 years.<sup>21</sup> In Australia, the average

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<sup>10</sup> Australian Bureau of Statistics 'Year Book Australia: 2012' (2012), available from <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Marriages,%20de%20facto%20relationships%20and%20divorces~55>> accessed 02/02/2017.

<sup>11</sup> Australian Bureau of Statistics 'Marriages and Divorces, Australia, 2015' (2016), available from <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3310.0Main%20Features112015?opendocument&tabname=Summary&prodno=3310.0&issue=2015&num=&view=>>> accessed 02/02/2017.

<sup>12</sup> *ibid.*

<sup>13</sup> Australian Bureau of Statistics 'Marriages and Divorces, Australia, 2015: The Changing Nature of Marriage in Australia (feature article)' (2016), available from Australian Bureau of Statistics 'Marriages and Divorces, Australia, 2015' (n11).

<sup>14</sup> Australian Bureau of Statistics 'Marriages and Divorces, Australia, 2015' (n11).

<sup>15</sup> 1858 was the year when divorce via court order was first available in England and Wales: Matrimonial Causes Act 1857. For a history, see S Cretney *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003), 161-195. For discussion of divorce, see Chapter 3, 3.2.2.

<sup>16</sup> Office for National Statistics 'Divorces in England and Wales: 2014' (Dataset, 2014), Table 1, available from <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/datasets/divorcesinenglandandwales>> accessed 11/01/2017.

<sup>17</sup> *ibid* Table 1.

<sup>18</sup> Office for National Statistics 'Divorces in England and Wales 2014' (Statistical Bulletin, 2016), 3.

<sup>19</sup> *ibid* 2.

<sup>20</sup> Australian Bureau of Statistics 'Year Book Australia: 2012' (n10).

<sup>21</sup> Office for National Statistics 'Divorces in England and Wales 2014' (n18) 8.

length of marriages before divorce has increased, with the median duration to divorce being 11.3 years in 1999 and 12.3 years in 2009.<sup>22</sup>

The general decline in marriage, and increase in divorce, begs the question as to what other relationships and living arrangements people form during their lifetime. Barlow and others suggested in the 18<sup>th</sup> British Social Attitudes (BSA) Report, that the changing demographic picture is not indicative of a 'simple "decline" in marriage', but rather, 'there appears to be a far more complex picture of sequential cohabitations, separations, marriages and divorces.' They explain that '[m]any of us will experience some or all of these family types at one period or another in our lives.'<sup>23</sup> The authors are correct in their assertion that people live in different types of relationship, but, as the discussion will show, the real picture of relationship practices is more complex still than involving only marriage and cohabitation.

#### 1.1.1.2 Civil partnerships, the Australian registered relationships and dissolution

Civil partnerships have been an option for same-sex couples in England and Wales to register their relationships since late 2005.<sup>24</sup> While initially popular, the number of new civil partnership formations has decreased, especially following the introduction of same-sex marriage in 2013.<sup>25</sup> 1,857 civil partnerships were registered during the 11 days in 2005 where this was possible, and a further 14,493 were formed during 2006.<sup>26</sup> The number of civil partnerships formed in 2007 was almost half the 2006 figure at 7,929,<sup>27</sup> which equates with a rate of 0.8 civil partnerships formed per 1,000 of the unmarried population.<sup>28</sup> Following the 2013 reforms allowing same-sex couples to marry,<sup>29</sup> the number of civil partnerships formed has decreased rapidly and in 2015, only 861 civil partnerships were registered.<sup>30</sup> The average age of civil partners is higher than the average age for marriage. In 2006, the average age was 40.1, which later increased to 48.7 in 2015,<sup>31</sup> with 48% of those registering a civil partnership in 2015

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<sup>22</sup> Australian Bureau of Statistics 'Year Book Australia: 2012' (n10).

<sup>23</sup> A Barlow and others 'Just a Piece of Paper? Marriage and Cohabitation' in A Park and others (eds) *British Social Attitudes: Public Policy, Social Ties* (18<sup>th</sup> Report, 2001), 29.

<sup>24</sup> Civil Partnership Act 2004. For discussion of civil partnerships, see Chapter 4.

<sup>25</sup> Marriage (Same Sex Couples) Act 2013.

<sup>26</sup> Office for National Statistics 'Civil Partnership Formations' (Dataset, 2016), Table 2, available from <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/datasets/civilpartnershipstatisticsunitedkingdomcivilpartnershipformations>> accessed 11/01/2017.

<sup>27</sup> *ibid* Table 1.

<sup>28</sup> *ibid* Table 2.

<sup>29</sup> Marriage (Same Sex Couples) Act 2013. For discussion of same-sex marriage see Chapter 3, 3.2.1.5.

<sup>30</sup> Office for National Statistics 'Civil Partnerships in England and Wales: 2015' (Statistical Bulletin, 2016), 4; Office for National Statistics 'Civil Partnership Formations' (n26) Table 1.

<sup>31</sup> Office for National Statistics 'Civil Partnership Formations' (n26) Table 4.

aged over 50.<sup>32</sup> The majority, or 84%, of people who entered a civil partnership in 2015 had never previously been parties to a marriage or a civil partnership.<sup>33</sup> As the number of civil partnerships has increased, so has the number of dissolutions. 40 dissolutions were granted in 2007, and this figure increased to 329 in 2009, and 1,211 in 2015.<sup>34</sup>

Australia has provided options for registration of both couple relationships,<sup>35</sup> which are akin to England and Wales' civil partnerships (although most of the Australian registration options are available for both same- and opposite-sex couples), and to register caring relationships.<sup>36</sup> The data from Australia is not as easily available as that for England and Wales, but Rundle has provided data in a 2011 article that gives indications as to the number of people who are formalising their relationships by means other than marriage.<sup>37</sup> For example, Rundle notes that between 2008 and 2011, 194 registered relationships were formed in the Australian Capital Territory, and only four relationships dissolved, and similarly in New South Wales, 847 registered relationships were formed, and two were dissolved. In Tasmania, 214 relationships were registered between 2004 and 2011 and twelve were dissolved, and similarly in Victoria between 2008 and 2011, 541 relationships were registered and two dissolved.<sup>38</sup> Taken together, the data on civil partnerships and the registration options is important because it shows that people do make use of formalised relationships other than marriage, and suggests that any discussion of reforming the current framework of relationship recognition should explore the potential of formalised relationships to recognise family diversity.

### **1.1.2 Informal relationships**

#### **1.1.2.1 Cohabitants**

Alongside the changing marriage rates, the other substantial change in the demographic picture is the increase in the number of couples who cohabit in informal relationships, or as Barlow and others noted, who experience 'sequential cohabitations'. The ONS note that cohabitants, whom they define as living with a partner without being married or in a civil

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<sup>32</sup> Office for National Statistics 'Civil Partnerships in England and Wales: 2015' (n30) 6.

<sup>33</sup> *ibid* 9.

<sup>34</sup> Office for National Statistics 'Civil Partnership Dissolutions' (Dataset, 2016), Table 1, available from <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/datasets/civilpartnershipstatisticsunitedkingdomcivilpartnershipdissolutions>> accessed 11/01/2017.

<sup>35</sup> For detailed discussion on the Australian registered couple relationships, see Chapter 4.

<sup>36</sup> For detailed discussion on the Australian registered caring relationships, see Chapter 5.

<sup>37</sup> This data will be further discussed in Chapters 4, 4.3.2.2 and 5, 5.2.3.2b.

<sup>38</sup> See O Rundle 'An Examination of Relationship Registration Schemes in Australia' (2011) 25(2) *Australian Journal of Family Law* 121, 145.

partnership,<sup>39</sup> are the fastest growing family type in the UK. In 2016, there were 3.3 million cohabiting couple families in the UK, over double the 1.5 million figures for 1996.<sup>40</sup> Roughly 25% of couples cohabited prior to marriage in the 1970s, which increased to almost 50% in the late 1980s.<sup>41</sup> By 2012, approximately 80% of married couples were cohabiting prior to marriage,<sup>42</sup> which means that not cohabiting prior to marriage is as uncommon today as was pre-marital cohabitation in the 1970s.<sup>43</sup>

Younger people are most likely to cohabit, with 27% of those aged 25-34 cohabiting in 2012, an increase from 15% in 1996.<sup>44</sup> The over 65s had the largest percentage increase in the number of cohabitants, with a fourfold increase from 0.2% in 1996 to 2.2% in 2012.<sup>45</sup> Consequently, the median age of the cohabiting population in 2012 was 34.3, an increase of 3.8 years since 1996.<sup>46</sup> The number of cohabitants who have never married or registered a civil partnership has increased from 6.8% of the population in 2002, to 9.5% in 2015.<sup>47</sup> Barlow and others note that in 2006, 36% of cohabitants had been married before, which suggests that cohabitation is used 'as a refuge for those disillusioned by marriage'.<sup>48</sup> Barlow and others noted that in 2006 the average length of a cohabiting relationship was 6.9 years, which increases to 8.5 years for cohabitants with children.<sup>49</sup>

The picture is similar in Australia, where there has also been an increase in the number of couples who cohabit without marriage. In 2006, couples living in marriage-like informal relationships comprised 7% of the adult population, an increase from 5% in 1996. In 2006, 70% of unmarried couples had never married, and 27% were separated or divorced.<sup>50</sup> 81% of couples marrying in 2015 had cohabited with their partner prior to marrying,<sup>51</sup> an increase from 70% in

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<sup>39</sup> Office for National Statistics 'Short Report: Cohabitation in the UK 2012' (Short Report, 2012), 1.

<sup>40</sup> Office for National Statistics 'Families and Households: 2016' (Statistical Bulletin, 2016), 3-4.

<sup>41</sup> É Beaujouan and M Ní Bhrolcháin 'Cohabitation and Marriage in Britain since the 1970s' (2011) 145 *Population Trends* 35, 42. Note that these figures only include those who married when aged under 50.

<sup>42</sup> Office for National Statistics 'Short Report: Cohabitation in the UK, 2012' (n39) 3.

<sup>43</sup> Beaujouan and Bhrolcháin (n41) 43.

<sup>44</sup> Office for National Statistics 'Short Report: Cohabitation in the UK, 2012' (n39) 3-4.

<sup>45</sup> *ibid* 3-4.

<sup>46</sup> *ibid* 3.

<sup>47</sup> Office for National Statistics 'Population Estimates by Marital Status and Living Arrangements, England and Wales: 2002 to 2015' (Statistical Bulletin, 2016), 9.

<sup>48</sup> Barlow and others 'Just a Piece of Paper?' (n23) 42. Similarly, Beaujouan and Bhrolcháin (n41) 47, note that in 1980-84, most cohabiting relationships lasted for around two years, whereas by 2000-04 this had increased to 4 years.

<sup>49</sup> A Barlow and others 'Cohabitation and the Law: Myths, Money and the Media' in A Park and others (eds) *British Social Attitudes* (24<sup>th</sup> Report, 2008), 33.

<sup>50</sup> Australian Bureau of Statistics 'Year Book Australia: 2012' (n10).

<sup>51</sup> Australian Bureau of Statistics 'Marriages and Divorces, Australia, 2015' (n11).

1995.<sup>52</sup> This all shows that cohabitation, or living with a partner without marriage, is an increasingly common prelude, or alternative, to marriage and shows how people experience a combination of marriage and cohabitation in a lifetime.

### 1.1.2.2 Other living arrangements

Alongside formalised relationships and informal cohabitation, people also form other types of informal relationship and it is necessary to explore how many people live in other types of relationship to show the complete picture of contemporary living arrangements. The ONS note that in England and Wales in 2015, 28.4 million people, or 60.5% of the population aged 16 and over, were living in a couple relationship, be they married, civil partners or cohabitants.<sup>53</sup> But, there is a substantial minority of 39.5% of adults who are forming other relationships and living arrangements. Of the 18.9 million families in the UK in 2016, 2.9 million were lone parent families, an increase from 2.4 million in 1996.<sup>54</sup> There has also been an increase in the number of adults who live alone, from around 17% of households in 1971 to 28% in 2016.<sup>55</sup> Additionally, households containing more than one family have increased from 0.2 million in 1996 to 0.3 million, or 1.2%, in 2016:<sup>56</sup> this category includes unrelated families sharing accommodation, or families who 'may be related in some way, for example, a married couple and their son and his girlfriend.'<sup>57</sup> The ONS also mention an additional category of household that consists of 'two or more unrelated adults' who may be a group of friends, students or adult siblings.<sup>58</sup> This group has also increased from 0.7 million in 1996 to 0.9 million, or 3.3% of all households, in 2016.<sup>59</sup>

Similarly, in Australia, of the 8.9 million households in 2012-13, 74% were 'family' households, which the ABS defines as including a married or cohabiting couple and lone parents,<sup>60</sup> and 26% of the population had formed alternative relationships and living

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<sup>52</sup> Australian Bureau of Statistics 'Marriages and Divorces, Australia, 2015: The Changing Nature of Marriage in Australia (feature article)' (n13).

<sup>53</sup> Office for National Statistics 'Population Estimates by Marital Status and Living Arrangements' (n47) 3.

<sup>54</sup> Office for National Statistics 'Families and Households: 2016' (n40) 4.

<sup>55</sup> *ibid* 9: the ONS note that these figures are not directly comparable as the 1971 figures come from the General Household Survey and the 2016 figures stem from the Labour Force Survey, but they indicate that there has been a substantial increase in the number of single person households since 1971.

<sup>56</sup> *ibid* 10.

<sup>57</sup> *ibid* 10; see also 2: the ONS define 'family' as relationships between married couples, civil partners, cohabiting couples, with or without children, or a lone parent.

<sup>58</sup> Office for National Statistics 'Families and Households' (Dataset, 2016), Table 7 n8 and Table 8 n8, available from <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/datasets/familiesandhouseholds>> accessed 12/01/2017.

<sup>59</sup> Office for National Statistics 'Families and Households: 2016' (n40) 10.

<sup>60</sup> Australian Bureau of Statistics 'Family Characteristics and Transitions, Australia, 2012-13' (2015), available from -

arrangements. In Australia, the ABS note that in 2011, 45% of Australians were living in couple relationships<sup>61</sup> and 2.4% of the population lived in 'other related persons' households, which usually comprised of elderly parents living with adult children or adult siblings living together.<sup>62</sup> The ABS further noted in 2012-3 that 23% of households contained a person living alone, and 3% of households were 'group households'.<sup>63</sup>

These figures are indicative of a broad variety of living arrangements, but they do not provide any detail relating to the nature of these relationships. For example, the 'two or more unrelated adult' category by the ONS does not give any indication as to *why* these adults are choosing to live together, be it a temporary house-sharing arrangement to save money or if they are long-term relationships between friends or siblings. It is safe to assume that many of these people will be in relationships of some sort with other adults because significant relationships can exist when partners do not cohabit. There is a growing body of literature on a particular type of relationship, called living-apart-together (LAT) relationships. LAT relationships are relationships between two people who consider themselves to be a couple, but, for whatever reason, do not live together.

#### *1.1.2.2a LATs: Living-Apart-Together*

Estimating the number of LATs is difficult because there is no formal record of the existence of the relationship,<sup>64</sup> and it is difficult to discern where the line is drawn between a temporary boyfriend-girlfriend type relationship and a more permanent relationship with a partner who lives elsewhere.<sup>65</sup> Duncan and Phillips argue that some LAT relationships are a 'stage' in a relationship, which may or may not progress into cohabitation or marriage, or they may alternatively be seen as an opportunity to allow flexibility for people in how they conduct

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<<http://www.abs.gov.au/ausstats/abs@.nsf/0/E6A9286119FA0A85CA25699000255C89?Opendocument>  
> accessed 02/02/2017.

<sup>61</sup> Australian Bureau of Statistics 'Household and Family Projections, Australia, 2011-2036' (2015), available from  
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/3236.0Main%20Features62011%20to%202036?opendocument&tabname=Summary&prodno=3236.0&issue=2011%20to%202036&num=&view=>>  
=> accessed 02/02/2017.

<sup>62</sup> *ibid.*

<sup>63</sup> Australian Bureau of Statistics 'Family Characteristics and Transitions' (n60).

<sup>64</sup> S Duncan and M Phillips 'People who Live Apart Together (LATs) – How Different are they?' (2010) 58(1) *Sociological Review* 112, 117. See also J Haskey 'Living Arrangements in Contemporary Britain: Having a Partner who usually Lives Elsewhere and Living Apart Together (LAT)' (2005) 122 *Population Trends* 35, 36; K Upton-Davis 'Living Apart Together Relationships (LAT): Serving Intimacy from Obligation' (2012) 29(1-4) *Gender Issues* 25, 26-28. For discussion of the difficulties associated with identifying the existence of an informal relationship under a function-based approach to recognition, see Chapter 6, 6.1.

<sup>65</sup> Duncan and Phillips 'People who Live Apart Together' (n64) 117.

their relationships.<sup>66</sup> Levin suggests that to be in a LAT relationship, three conditions must be fulfilled: 1) both parties must agree that they are in a couple relationship; 2) other people must view them as a couple, and; 3) they must live in separate homes.<sup>67</sup>

Duncan and Phillips, by defining LATs as those 'who have an intimate relationship with a partner who lives elsewhere',<sup>68</sup> estimate that roughly around 10% of the adult population in England and Wales could be categorised as being in LAT relationships, and that this 'equates to over a quarter of all those not married or cohabiting'.<sup>69</sup> Haskey tentatively suggests that somewhere between 1.7 and 2.1 million men, and 1.8 and 2.3 million women in England and Wales have partners who live elsewhere; but, after discounting those who may be in casual relationships such as those whose LAT partner lives with their parents, the numbers are nearer 0.9 million men and 1.2 million women.<sup>70</sup> Similarly in Australia, Reimondos, Evans and Gray report that around 7-9% of the adult population in Australia are in a romantic relationship with a partner who lives elsewhere.<sup>71</sup> Haskey estimates that around 50% of LATs are under 50<sup>72</sup> and Duncan and Phillips' findings support this as they found that LAT relationships are most prominent among 18-24 year olds.<sup>73</sup> Reimondos and others also found that in Australia, most LATs tend to be in the 18-24 age group, with 44% of their sample belonging to this age bracket.<sup>74</sup> LAT relationships are not all short term, and Duncan and others found in their research that of those they interviewed who identified themselves as LATs, 19% had been together for less than 6 months; 24% had been together for up to 1 year; 17% for 2 years; 22% for 3-5 years and 19% for over 6 years.<sup>75</sup> Likewise, Reimondos and others found that in Australia although many of the LAT partners in their sample had only been in the LAT relationship for less than 12 months, 28% had been in a LAT relationship for 3 years or more.<sup>76</sup>

This shows that not only do people experience a series of cohabitations and marriages, but additionally they may also experience other types of relationships, such as a LAT

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<sup>66</sup> S Duncan and others 'Practices and Perceptions of Living Apart Together' (2014) 5(1) Family Science 1, 8.

<sup>67</sup> I Levin 'Living Apart Together: A New Family Form' (2004) 52(2) Current Sociology 223, 227. For a similar definition of LATs, see Haskey (n64) 36, 42.

<sup>68</sup> Duncan and Phillips 'People who Live Apart Together' (n64) 112. The authors do not indicate what they mean by 'intimate' in this context.

<sup>69</sup> *ibid* 114.

<sup>70</sup> Haskey (n64) 35, 42.

<sup>71</sup> A Reimondos, A Evans and E Gray 'Living-apart-together (LAT) Relationships in Australia' (2011) 87 Family Matters 43, 43.

<sup>72</sup> Haskey (n64) 39.

<sup>73</sup> Duncan and Phillips 'People who Live Apart Together' (n64) 122 Table 3.

<sup>74</sup> Reimondos, Evans and Gray (n71) 49.

<sup>75</sup> Duncan and others (n66) 6, Table 5.

<sup>76</sup> Reimondos, Evans and Gray (n71) 48.



relationship. This all suggests that a system of relationship recognition that prioritises life-long marriage over other relationships is inadequate because it not only fails to acknowledge and provide for the diversity of relationships that are formed today, but fails to acknowledge that people are likely to experience a series of different types of relationships during their lifetime.

## **1.2 Changing social attitudes**

To reinforce the suggestion that a system of relationship recognition that prioritises marriage is inappropriate in light of the changing demographic picture, it is necessary to explore sources that help us to understand what people value about their relationships. This will provide some explanation as to why the demographic picture has changed, as well as further build the case that the current marriage-centric approach in England and Wales needs re-thinking. The findings of BSA surveys that explore people's attitudes towards family and relationships show that the changing demographic picture has been accompanied by a change in attitudes towards relationships outside marriage.<sup>77</sup> There is no comparable data available from Australia, so Australia will not be discussed in this section.

### **1.2.1 Views on marriage and cohabitation**

The 18<sup>th</sup> BSA Report found that most people idealised marriage. 59% of people in 2000 felt that 'even though it may not work out for some people, marriage is still the best kind of relationship', with only 20% disagreeing, and only 9% felt that marriage was 'only a piece of paper'.<sup>78</sup> But, further BSA results show that people's views on marriage and cohabitation are far more complex than this would suggest and this helps explain the changing demographic picture; while people view marriage as an ideal, cohabitation is also viewed as an acceptable and valuable choice. The 18<sup>th</sup> BSA Report found that in 1994, 64% of people thought it was 'all right for a couple to live together without intending to get married' and 58% felt that pre-marital cohabitation was 'a good idea'. They found that these numbers were similar in 2000 where they were 67% and 56% respectively.<sup>79</sup> The 24<sup>th</sup> BSA report found that 66% of people in 2006 felt that 'there is little difference socially between being married and living together',<sup>80</sup> and that 48% of

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<sup>77</sup> The British Social Attitudes Survey is an annual survey by NatCen that asks a sample of people what it is like to live in Britain. The focus of every survey is different, and the same questions are not asked every year. This section will draw on the 18<sup>th</sup> and 24<sup>th</sup> surveys in particular, because these are the most recent surveys that explored people's attitudes towards adult relationships in a way that is relevant for the thesis.

<sup>78</sup> Barlow and others 'Just a Piece of Paper?' (n23) 38, Table 2.7.

<sup>79</sup> *ibid* 32, Table 2.2.

<sup>80</sup> S Duncan and M Phillips 'New Families? Tradition and Change in Modern Relationships' in A Park and others (eds) *British Social Attitudes Survey* (24<sup>th</sup> Report, 2008), 5, Table 1.2.

people felt that 'living with a partner shows just as much commitment as getting married', while 35% disagreed.<sup>81</sup>

Barlow and others found that the majority of people in 2006 believed in the 'common law marriage myth', that unmarried couples who live together for a specific period of time have the same legal rights as married couples. 51% of people incorrectly believed that common law marriage 'definitely' or 'probably' exists, while 38% of people correctly believed that common law marriage 'probably' or 'definitely' does not exist. A further 10% of people were uncertain about the legal position of the unmarried cohabitant.<sup>82</sup> Interestingly, the same survey found that the majority felt that married couples and cohabiting partners should have the same rights upon relationship breakdown.<sup>83</sup> This all suggests that cohabitation and marriage are viewed as similar relationships that should be treated similarly by the law by most people, even though the law treats these relationship types very differently in England and Wales.

The changing attitudes towards marriage and cohabitation have practical implications. As Barlow and others note in their discussion of the 18<sup>th</sup> BSA report findings,

*...overall, marriage is still widely valued as an ideal but... it is regarded with much more ambivalence when it comes to everyday partnering and (especially) parenting. Meanwhile, cohabitation is widely accepted both as a prelude to marriage and as an alternative, even when there are children involved... This conclusion has important policy implications, suggesting that supporting marriage above and beyond other arrangements does not chime with people's opinions about the practicalities of everyday life as a partner and a parent.*<sup>84</sup>

There is a contrast between what people think of marriage, and how they make use of that formalised relationship: marriage is an aspiration for many, but it is not viewed as particularly necessary for the business of everyday living because cohabitation is seen by many as a social

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<sup>81</sup> Duncan and Phillips 'New Families?' (n80) 5, Table 1.2.

<sup>82</sup> Barlow and others 'Cohabitation and the Law' (n49) 41, Table 2.5. See also A Barlow and others *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21<sup>st</sup> Century* (Hart Publishing, 2005), Chapter 3.

<sup>83</sup> Barlow and others 'Just a Piece of Paper?' (n23) 48, Table 2.11: 61% believed that a cohabitant should have the same rights as a spouse to financial support on the breakdown of a relationship, and 93% felt that a cohabitant should have inheritance rights over the family home. See also Barlow and others 'Cohabitation and the Law' (n49) 45, Table 2.6, where similar findings were made relating to relationships which were 10 years or more. Note however that only 38% of people thought that a cohabitant should have rights to financial provision in a relationship of 2 years.

<sup>84</sup> Barlow and others 'Just a Piece of Paper?' (n23) 41.

equivalent to marriage. The law's attitude towards cohabitants<sup>85</sup> does not correspond with popular views about the acceptability and role of that relationship type.

### 1.2.2 Attitudes towards other relationships

It is not just cohabitation that is increasingly seen as an acceptable way of conducting a couple relationship. The 24<sup>th</sup> BSA Report asked questions to, and about, partners in LAT relationships. Duncan and Phillips suggested in this Report that living apart from a partner was merely a stage in the relationship, and it appears that mixed reasons were responsible for why partners lived apart. Around 1/2 of the people in LAT relationships in the sample stated that there were external constraints that prevented them from living with their partner, such as financial concerns or their partner working or studying elsewhere. Around 1/3 of LATs lived apart because that was their preference.<sup>86</sup> The Report found that in a normative sense, LAT relationships are viewed as valuable with 54% of people agreeing that 'a couple do not need to live together to have a strong relationship', and only 25% disagreeing.<sup>87</sup> Taken together with the demographic data indicating that LAT relationships can be fairly long-term, there is an argument to be made that the position of couples in LAT relationships should be considered alongside informal cohabiting relationships, considering that some LATs would live together if they could, and most people feel that living apart is not an indication of a "weak" relationship.<sup>88</sup>

Alongside the couple relationships, some BSA surveys have asked people how they feel about their friends. Duncan and Phillips in the 24<sup>th</sup> Report note that they found evidence 'for the idea that friends can act like family', with 75% of people stating they had 'at least one close friend' whom they can share their 'private feelings and concerns with', and 84% had received 'help and support' from their close friend(s) when 'facing a difficult problem'.<sup>89</sup> They also found that 71% of people disagreed with the statement that 'friends are for fun, not for discussing personal problems with', and only 12% agreeing with the statement. Additionally, when people were asked to place themselves on a scale of 1-5, 1 meaning close ties with friends was more important than close ties with family, and 5 meaning that close ties with family were most important, 39% placed themselves in the middle of the scale; 48% of people felt that 'maintaining close ties with family is more important than having close friends'; and 13% stated

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<sup>85</sup> For some discussion of the treatment of cohabitants by law, see Chapter 6, 6.3.

<sup>86</sup> Duncan and Phillips 'New Families?' (n80) 16.

<sup>87</sup> *ibid* 16.

<sup>88</sup> See also Bowman's recent work on LAT couples in the US. Bowman argues that LAT relationships should be legally recognised in some areas of law to help the partners care for one another, such as hospital visitation rights and family leave. C Bowman 'Is LAT (Living Apart Together) a New Family Form which the Law should take account?' (SLSA Conference, Newcastle University, 6 April 2017).

<sup>89</sup> Duncan and Phillips 'New Families?' (n80) 23.

that close friends were more important. Duncan and Phillips note that the fact that so many people placed themselves in the middle of the scale is significant because it lends support to the 'idea that friends are becoming more like family and *vice versa*.'<sup>90</sup> This indicates that although the majority of people are in couple relationships, whether formal or informal, cohabiting or living apart, other people may also form significant relationships based on friendship and that the position of these relationships may need to be considered in any relationship recognition reform.

The findings of the 24<sup>th</sup> Report however also suggest that while friends may be important to some, the majority still feel that 'family' is *most* significant. Duncan and Phillips suggest that 'given the persistence of norms about given obligations to family', it is not surprising that the majority of people feel that family members should make an effort to stay in contact with each other, 'even if they don't have anything in common'.<sup>91</sup> Does this mean that there is something special, or unique, about 'family' relationships, which distinguishes them from 'friends', or is it more the case that there is something that makes some of our relationships more significant than others?

### **1.3 The meaning and significance of 'family'**

To explore what we mean by 'family', it is necessary to delve deeper into what makes some relationships more significant than others and consider what characterises relationships as 'family'. This adds insight into *why* relationship practices are changing and is important for this thesis because the way we view family is relevant to the question of reforming the current relationship recognition framework; we must understand which relationships are significant to people, and why they are significant, to consider what framework of recognition would best serve the diversity of family relationships that are formed today.

#### **1.3.1 The changing nature of personal relationships**

Some sociologists believe that the nature of contemporary relationships is so different from those of the past that there has been an inevitable change in modern relationship practices, which explains why people experience multiple types of relationships. Beck and Beck-Gernsheim explain that in the past, 'human lives used to be determined by a multitude of traditional ties' that could be problematic because 'they rigorously restrict[ed] the individual's choices'; but, they were also valued because they offered 'familiarity and protection, a stable

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<sup>90</sup> Duncan and Phillips 'New Families?' (n80) 24. See also the discussion below at 1.3.2.2b about literature on 'families of choice' and how friends are family for some people.

<sup>91</sup> *ibid* 24, Table 1.9 – 55% of people agree that 'people should make time for relatives like aunts, uncles and cousins', and 68% agree that 'people should make time for close family members'.

footing and certain identity.<sup>92</sup> Similarly to the BSA findings discussed above where the majority of people idealise marriage,<sup>93</sup> Beck and Beck-Gernsheim note that 'stable partnership[s]' continue to be seen as the 'ideal and aim',<sup>94</sup> but our expectations for our relationships are changing. They argue that 'the nuclear family, built around gender and status, is falling apart on the issues of emancipation and equal rights, which no longer conveniently come to a halt outside our private lives.'<sup>95</sup> Modern relationships are affected by external factors, where the labour market demands that workers are mobile and able to pursue employment opportunities even if this is 'at the cost of their commitments to family, relations and friends.' In today's increasingly individualistic society where 'biographies are removed from the traditional precepts and certainties', and individuals can choose their own path rather than follow a pre-determined (gendered) one,<sup>96</sup>

*...it is no longer possible to pronounce in some binding way what family, marriage, parenthood, sexuality or love mean, what they should or could be; rather these vary in substance, exceptions, norms and morality from individual to individual and from relationship to relationship. Increasingly, the individuals who want to live together are, or more precisely are becoming, the legislators of their own way of life...<sup>97</sup>*

Beck and Beck-Gernsheim conclude that the changes we are seeing in relationship behaviour are not about family becoming any less important. Rather, family 'is simultaneously disintegrating and being put on a pedestal.'<sup>98</sup>

Beck and Beck-Gernsheim's work suggests that the changing demographic picture, and the way we experience many different types of relationship in a lifetime, can be explained by our obsession with love, where,

*...people marry for the sake of love and get divorced for the sake of love. Relationships are lived as if they were interchangeable, not because we cast off our burden of love but because the law of true love demands it.<sup>99</sup>*

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<sup>92</sup> U Beck and E Beck-Gernsheim *The Normal Chaos of Love* (Blackwell Publishers, 2002), 45-6.

<sup>93</sup> See above, 1.2.1.

<sup>94</sup> Beck and Beck-Gernsheim (n92) 16.

<sup>95</sup> *ibid* 1-2.

<sup>96</sup> *ibid* 5-6.

<sup>97</sup> *ibid* 5.

<sup>98</sup> *ibid* 173.

<sup>99</sup> *ibid* 11.

For Beck and Beck-Gernsheim, love has become the new religion.<sup>100</sup> This change in expectations of relationships suggests that the current framework of recognition that focuses on promoting life-long marriage is outdated because it corresponds only with the ideal for relationships and not the reality. Similarly, Giddens also sees a change in the nature and expectations of our relationships. He claims that romantic love became the foundation for all marriages during the nineteenth century, and 'the spread of ideals of romantic love was one factor tending to disentangle the marital bond from wider kinship ties and gave it an especial significance.' Spouses were increasingly seen as 'collaborators in a joint emotional enterprise' with the home becoming 'a distinct environment set off from work'.<sup>101</sup> Romantic love 'introduced the idea of a narrative into an individual's life'. In this way, romantic love was associated with a sense of freedom<sup>102</sup> because it allowed people to make choices about who to marry on the basis of love,<sup>103</sup> although this freedom was limited to a choice of who to marry and not whether to marry.<sup>104</sup> The 'for-ever', 'one and only qualities of the romantic love complex'<sup>105</sup> can be contrasted with what Giddens calls 'pure relationships', which are rooted in 'confluent love',

*...where a social relation is entered into for its own sake, for what can be derived by each person from a sustained association with another; and which is continued only in so far as it is thought by both parties to deliver enough satisfaction for each individual to stay within it.*<sup>106</sup>

Confluent love is an active concept that centres on the 'special relationship', whereas romantic love is static and is expected to be an exclusive, life-long relationship with a 'special person'.<sup>107</sup> Confluent love is about reciprocity: it is about 'emotional give and take', a relationship between two equals, regardless of the sex of the couple.<sup>108</sup> This change in the nature of relationships suggests a rejection of life-long marriages as the norm and an acceptance that relationships should not continue if they are no longer fulfilling, and helps to explain why people experience a series of different relationship types over a lifetime.

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<sup>100</sup> *ibid* 11-13.

<sup>101</sup> A Giddens *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Polity Press, 1992), 26.

<sup>102</sup> *ibid* 39-40.

<sup>103</sup> *ibid* 41.

<sup>104</sup> *ibid* 42-3; see also 62.

<sup>105</sup> *ibid* 62.

<sup>106</sup> *ibid* 58.

<sup>107</sup> *ibid* 61-2.

<sup>108</sup> *ibid* 62-3.

It is possible to criticise the work of Giddens and Beck and Beck-Gernsheim for their disregard of the reality of 'choice':<sup>109</sup> not everyone will be free and unencumbered and easily able to leave an unsatisfactory relationship. Diduck for example criticises Giddens' failure to realise the gendered implications of the pure relationships, where 'the free-moving autonomous individual resembles more closely the lived realities of men, who more easily than women are able to move from one pure relationship to the next in search of self-fulfilment.'<sup>110</sup> Similarly, Duncan and Phillips note in the 24<sup>th</sup> BSA Report that 75% of people felt that 'many couples stay in unhappy relationships because of money or children', which suggests 'that most people see the world of families and relationships as potentially involving severe structural constraints to personal choice.'<sup>111</sup> Even bearing in mind the criticisms of Beck and Beck-Gernsheim and Giddens' work, the theories they put forward remain significant because of the insight they give on our expectations for family life.

### 1.3.2 The concept of 'family'

There is a difference between our expectations of what family should mean, and our actual experience of family life. As Bittman and Pixley succinctly put it, family life tends to be thought about 'with some combination of hope and experience.' They suggest that using 'a phrase such as the double life of the family' illustrates that 'there are endless inconsistencies between 'the family' that most people hope for and how they experience it.'<sup>112</sup> Gillis has expressed similar ideas relating to the complexity and significance of 'family' as a concept and notes that,

*...we all have two families, one that we live with and another we live by. Too often the families we live with exhibit the kind of self-interested, competitive, divisive behaviour that we have come to associate with the market economy and public sphere. Often fragmented and impermanent, they are much less reliable than the imagined families we live by. The latter are never allowed to let us down. Constituted through myth, ritual and image, they must be forever nurturing and protective, and we will go to any lengths to ensure that they are so, even if it means mystifying the realities of family life.<sup>113</sup>*

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<sup>109</sup> For discussion of the complex idea of choice, see Chapter 2, 2.3.2.3.

<sup>110</sup> A Diduck *Law's Families* (Lexis Nexis/Butterworths, 2003), 6.

<sup>111</sup> Duncan and Phillips 'New Families?' (n80) 10.

<sup>112</sup> M Bittman and J Pixley *The Double Life of the Family: Myth, Hope and Experience* (Allen & Unwin, 1997), xi.

<sup>113</sup> J Gillis *A World of their own Making: Myth, Ritual and the Quest for Family Values* (Harvard University Press, 1997), xv.

The 'family we live with' refers to the reality of family life whereas the 'family we live by' refers to an imagined ideal that helps us make sense of the (often) disappointing reality of family life.

#### 1.3.2.1 The family we live by

Diduck has built on Gillis' conceptualization of our dual family membership and identified the presence of 'contrasting narratives' within the family we live by: it is comprised of the competing ideals of the traditional and modern family.<sup>114</sup> Diduck explains 'that law's ideal family shares this successfully contradictory framework and that this family has attained normative status in contemporary Britain.'<sup>115</sup> The conflicting values of the mythical traditional and modern families sheds light on why the demographic picture has changed because they help explain why many people experience a series of relationships, and why people idealise marriage and yet divorce or never marry; our hopes and expectations for our families are so high that no real relationship can live up to them.

##### *1.3.2.1a The traditional family*

As Diduck notes, there is a 'popular perception' that family life 'is not like it used to be', but precisely what has been lost is up for debate: the traditional family is an 'elusive concept' because both its meaning and 'location in time' are subject to change.<sup>116</sup> As Diduck puts it,

*That [the traditional family] may exist only on an ideal or mythical level is not important... we continue to idealise [it] as historical truth rather than acknowledge the possibility that the 'traditional family' never existed as a lived reality, but rather was always imaginary and is forever lost.<sup>117</sup>*

Diduck explains that the traditional family promotes particular values that are upheld as aspirational such as stability, loyalty and unity, but there are also negative characteristics that cannot be forgotten, such as patriarchy, heterosexism and race and class hierarchy.<sup>118</sup> All of the different characteristics ascribed to the traditional family, even the negative ones, are significant

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<sup>114</sup> Diduck (n110) 20-1.

<sup>115</sup> *ibid* 20.

<sup>116</sup> *ibid* 21. See also Gillis (n113) 4-5 where it is noted that the Victorians may have longed for a traditional family 'located sometime before industrialization and urbanization' whereas today it is the traditional family of the 1950s and 1960s which is the 'location of the family and community life' we imagine we have lost. See also S Coontz *The Way we Never Were* (BasicBooks, 1992), 8-9: Coontz suggests that when idealising the traditional family, the values and behaviours that are upheld are actually a patchwork of values drawn from different eras. For example, a notion of the 'traditional family' encompassing a loving husband-wife relationship, and the mother being 'totally available' for the children 'combines some characteristics of the white, middle-class family in the mid-nineteenth century' and some of a rival family ideal first articulated in the 1920s.

<sup>117</sup> Diduck (n110) 22.

<sup>118</sup> *ibid* 22-3.



because of the role this myth plays in offering family ‘members a clear sense of their place’ within the family, as well as ‘their place in the world.’<sup>119</sup>

The ‘traditional family’ myth explains why many continue to idealise marriage. Diduck suggests that the poignancy associated with the supposed loss of the traditional family may partly be due to the ‘loss of the certainty of the traditional identities and connections which, arguably, are rooted in the narrative of romantic love.’<sup>120</sup> Similarly to Giddens’ view of ‘romantic love’,<sup>121</sup> Diduck explains that this type of love creates ‘cultural understandings of how one behaves and what it means to be ‘in love’’. Romantic love is a private matter as it is ‘not contaminated by grubby material and social matters like money, employment, or other worldly conditions’. Romantic love lasts forever and creates a family that looks like the lost ‘traditional family’.<sup>122</sup>

#### *1.3.2.1b The modern family*

If the traditional family with its roots in romantic love explains the appeal of marriage to many, then the modern family myth explains why many marriages end in divorce and why people experience a series of relationships. The modern family is based on qualities of choice, equality and negotiation. Diduck notes that in the modern family, family members relate to each other ‘as equal individuals, continually making and remaking... individual and joint biographies and obligations according to individualised and personalised moral economies’ that would be inconceivable in the ‘romantic discourse’ of the traditional family.<sup>123</sup> In the same way that the traditional family is rooted in the narrative of romantic love, the modern could be said to be rooted in Giddens’ ‘confluent love’ because, as Diduck explains, ‘modern intimacy need not be either forever or exclusive; it is sustained only so long as it is mutually satisfying to the lovers’.<sup>124</sup> The values of the modern family do not correspond well with a system of relationship recognition that prioritises life-long marriage because the modern family is a work in progress. As Diduck explains, ‘the relationship [the modern family] creates is not an ideal; it is open to change and its terms are therefore in our control.’<sup>125</sup>

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<sup>119</sup> *ibid* 23.

<sup>120</sup> *ibid* 24.

<sup>121</sup> Discussed above, 1.3.1.

<sup>122</sup> Diduck (n110) 24-5.

<sup>123</sup> *ibid* 25-6.

<sup>124</sup> *ibid* 26.

<sup>125</sup> *ibid* 26.

### 1.3.2.2 The family we live with

The incompatibility of the values that inform the traditional and modern family myths are irrelevant to their significance as aspirational signposts of what we expect from our families. Diduck explains that the 'family we live with' embodies 'the social, material and emotional 'messiness' that results from our experienced reality of trying to reconcile' the 'essentially irreconcilable' traditional and modern family ideals. She notes that our lived experience of family life is characterised by contradiction, as we 'attempt to find ways of living with fluidity, insecurity, conflict and individualism, *and* with loyalty, altruism, stability and forever romanticism.' Unlike the family we live by, our real relationships are not able to reconcile these irreconcilable characteristics.<sup>126</sup> But, the characteristics mentioned by Diduck, such as loyalty, altruism and stability associated with marriage and the traditional family are all functions that continue to be valued within relationships, alongside the modern family's focus on fluidity and individualism. People want relationships to perform similar functions to those once (supposedly) performed by marriage, but it is not only permanent marriage relationships that can perform these functions. For the family we live with, 'family' is not confined to marriage and blood relationships and the functions that relationships perform are often the reference point according to which an individual will determine whether a relationship is familial in nature. This supports the argument that the current framework of relationship recognition needs reforming because a marriage-centric approach does not correspond well with the reality of family life for real families.

#### *1.3.2.2a Thinking of family in a fluid way: the family practices approach*

The term 'family' carries particular connotations and this makes some authors cautious of the term. Morgan, for example, has concerns that 'the family' evokes images of the 'cornflakes packet' family, or in other words the heterosexual nuclear family, with all other families judged 'according to the extent to which they conformed to or departed from' this image.<sup>127</sup> For Morgan, talking about 'the family' may also 'lend support to right-wing political agendas' and obscure the 'rich diversity' of families.<sup>128</sup> Similarly, Smart argues that 'family' prioritizes 'biological connectedness and/or physical place' because it 'generally conjures up an image of degrees of biological relatedness combined with degrees of co-residence.'<sup>129</sup> They both conclude however that family is a significant term and cannot always be avoided. Morgan notes that family is an 'emotionally charged... term' and sometimes, no other word will do. For example, a

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<sup>126</sup> *ibid* 27-8.

<sup>127</sup> DHJ Morgan *Rethinking Family Practices* (Palgrave Macmillan, 2011), 3.

<sup>128</sup> DHJ Morgan *Family Connections: An Introduction to Family Studies* (Polity Press, 1996), 186-7.

<sup>129</sup> C Smart *Personal Life: New Directions in Sociological Thinking* (Polity Press, 2007), 6-7.

'family event' is distinct from other events involving similar activities,<sup>130</sup> presumably because of the special relationship between the people involved. Smart states that it is not possible to stop using the term altogether because the idea of family 'resonate[s] with a host of cultural and personal meanings' and '[f]amilies do matter, whether real or imagined'.<sup>131</sup>

Defining family is a difficult task because many different types of relationship can be considered family by different people. Morgan believes that the term 'family' suggests 'a kind of misplaced concreteness' and gives 'the family' 'a thing-like quality'. He recognises that 'individuals do not start from scratch as they go about family living' because there is already a set of cultural, legal and economic constraints that set a framework for how to behave.<sup>132</sup> He recognises that we are all simultaneously a part of 'the families we live with and the families we live by', as articulated by Gillis, as they 'are mutually implicated in each other'. The ideals of the family we live by have not been 'produced in a vacuum'; ideas surrounding what family should be have 'themselves drawn upon practices', thus illustrating how both the ideal and the actual everyday practices of families are 'intimately related'.<sup>133</sup> To capture the complexity of the lived family experience, Morgan avoids the term 'family' and instead has developed the 'family practices' approach. 'Family practices' focuses on the everyday qualities of family relationships, or the functions that families perform, rather than on the 'form' that they take. It is a focus on the 'links' between particular (family) units, regardless of the fact that 'some of these links may be dormant or unrecognised and certainly not all of them will be active all the time.'<sup>134</sup>

A family practices approach has the potential to include several different types of relationship beyond that of the nuclear family. For example, Morgan emphasises that 'family' is not the same as 'household' because family networks may exist regardless of geographical proximity.<sup>135</sup> Family practices could potentially include LATs, couples who live apart together, because the focus of the approach is on how people relate to each other rather than whether they conform to a particular image of the (nuclear) cohabiting 'family'. The family practices approach as envisaged by Morgan does not take a particularly broad view of 'family' however, and relationships such as friendships are not included within the approach. Morgan acknowledges that friendships may be equally, or even more, significant than 'family' for some

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<sup>130</sup> Morgan (n127) 3-4.

<sup>131</sup> Smart *Personal Life* (n129) 187.

<sup>132</sup> Morgan (n127) 7.

<sup>133</sup> *ibid* 68-9.

<sup>134</sup> *ibid* 172.

<sup>135</sup> *ibid* 172.

people, but treats them as distinct.<sup>136</sup> Morgan distinguishes between ‘friends’ and ‘family’ on the basis that ‘there is a taken-for-granted, given quality of family relationships which seems to rule out choice in the matter.’<sup>137</sup> This does not mean that Morgan is attempting to establish a hierarchy of significant personal relationships, rather he argues that there is a case to be made that family practices should be studied as a distinct set of practices as ‘long as some people continue to think that... family life is in some ways distinct’.<sup>138</sup>

Smart has developed the family practices approach with her concept of ‘personal life’. Smart’s approach reflects the fluidity of personal relationships by conveying ‘a sense of motion’<sup>139</sup> without retaining traditional ideas of ‘the white, middle-class, heterosexual’ family at its core.<sup>140</sup> ‘Personal life’ is a way of examining personal relationships without prioritising one type of relationship over another,<sup>141</sup> and so in this way it includes relationships such as friendships that would not be considered at all under Morgan’s family practices approach. Relationality is an important concept for personal life because it allows for recognition of the fact ‘that people *relate* to others who are not necessarily kin by ‘blood’ or marriage, thus allowing for considerable flexibility in approach.’<sup>142</sup>

The concepts of ‘family practices’ and ‘personal life’ are valuable because the authors suggest that there needs to be a move away from focussing on the ‘family’ as a static institution with a new focus on an active, fluid concept of significant relationships, but there is a subtle difference between the approaches. Morgan focusses on the performance of functions within a particular group of relationships that he views as ‘family’, which appears to be limited to relationships like marriage and blood ties. Smart focusses on the performance of functions within several different types of significant relationship, including but not limited to ‘family’ relationships, and so would include friendships. Perhaps Smart’s deliberate inclusion of a diversity of relationship types better reflects the complexity of lived relationships than Morgan’s narrower focus, but her preference for the ‘personal’ as opposed to ‘family’ may not reflect how people feel about the different significant relationships that they form. By extending the notion of ‘family’ in Morgan’s family practices approach in a way that is akin to Smart’s broad range of relationships in the personal life approach, we may have a clearer picture of the diversity of

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<sup>136</sup> *ibid* 37, 173.

<sup>137</sup> *ibid* 174.

<sup>138</sup> *ibid* 177.

<sup>139</sup> Smart *Personal Life* (n129) 29.

<sup>140</sup> *ibid* 30.

<sup>141</sup> *ibid* 28, 30.

<sup>142</sup> *ibid* 48 (emphasis in original text).

relationships that constitute the family we live with and so have a better understanding of the diverse relationship types that should be considered in any reforms of the current framework of relationship recognition.

### 1.3.2.2b *Defining family by its functions?*

It was noted above that 'family' is a term that carries heterosexual connotations. Many authors have written about the 'families of choice' formed by gay men and lesbians who, until fairly recently, could not marry in England and Wales, and still cannot marry in Australia. Families of choice, as Smart argues, are fluid in the sense that 'such families are made rather than given'.<sup>143</sup> An examination of the literature about these families of choice shows that they are characterised by the caring and supportive functions they perform rather than by reference to relationship type. For example, Weston's work on gay men and lesbians forming 'families of choice' is significant because it suggests that family is a fluid concept that can be applied to many different types of relationship, whether the familial tie is created by blood, law or choice. Similarly to Morgan's acknowledgement that the link between families may remain dormant, Weston's work highlights that relationships between blood relatives can cease, such as when a family member comes out as gay or lesbian; although the blood tie, or the 'link', remains, the functioning relationship has come to an end.<sup>144</sup> This adds a further layer of complexity to the term 'family' because being related by blood is not necessarily how everyone defines who counts as members of their family.<sup>145</sup> 'Families of choice' is an inclusive concept and it can include the more traditional family relationships of sexual partners and blood relatives, as well as ex-lovers, friends and people that once lived together.<sup>146</sup> Weston's families of choice were characterised by 'symbolic demonstrations of love, shared history, material or emotional assistance'<sup>147</sup> and 'closely associated with the experience of love were the practices through which people established and confirmed mutual, enduring solidarity.'<sup>148</sup> This suggests that what characterised any relationship as 'family' was the performance of particular *functions* and the quality of the relationship rather than a focus on a legal or biological tie.

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<sup>143</sup> C Smart 'Making Kin: Relationality and Law' in A Bottomley and S Wong (eds) *Changing Contours of Domestic Life, Family and Law* (Hart Publishing, 2009), 17.

<sup>144</sup> K Weston *Families We Choose: Lesbians, Gays, Kinship* (Columbia University Press, 1997), 108, 199, and in general see Chapter 3.

<sup>145</sup> This is also true in relation to adoption and assisted reproduction, where the 'factual' family tie is obscured by the social one.

<sup>146</sup> Weston (n144) 107-116.

<sup>147</sup> *ibid* 109.

<sup>148</sup> *ibid* 116.

Weeks, Heaphy and Donovan made similar findings to Weston. They showed that non-heterosexuals<sup>149</sup> form ‘families of choice’, that are often, but not always, distinct from their ‘families of origin’, or their biological relatives. Similarly to Morgan, they note that ‘family’ ‘is a powerful and pervasive word in our culture’ and has come to be ‘deployed to denote something broader than the traditional relationships based on lineage, alliance and marriage, referring instead to kin-like networks of relationships, based on friendship and commitments ‘beyond blood’.’<sup>150</sup> They argue that the increasing diversity of families is not an indication that there has been a decline in the value of responsibility and commitment between family members, rather, responsibility and commitment are to be found in a broad variety of relationships that may be considered family by those involved.<sup>151</sup> They found Morgan’s family practices approach useful in understanding the relationships and living arrangements of non-heterosexuals, because family practices allows for family to be thought of in a fluid way. Adopting a family practices approach shows that ‘many non-heterosexuals “do family” in ways that parallel heterosexual patterns.’<sup>152</sup> They explain that ‘families of choice’ are diverse in terms of relationship types, but that there are common expectations as to the nature of these relationships often based on ideas of care and support:

*These everyday experiments range across a variety of patterns, from couple relationships to what we call ‘families of choice’: flexible and informal and varied, but strong and supportive networks of friends and lovers, often including members of families of origin. They provide the framework for the development of mutual care, responsibility and commitment for many non-heterosexual people – and indeed for many heterosexuals as well.*<sup>153</sup>

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<sup>149</sup> Weeks, Heaphy and Donovan explain that ‘non-heterosexual’ is a term which includes homosexuals, lesbians, gay men, bisexuals and queers. Although ‘non-heterosexual’ is a term the authors are not entirely happy with, they use it because it is less contested than other terms, such as, for example, ‘homosexual’, which ‘has too long been associated with the psychological textbooks to be in acceptable common use as a self-description’: see J Weeks, B Heaphy and C Donovan *Same Sex Intimacies: Families of Choice and Other Life Experiments* (Routledge, 2001), vii-viii.

<sup>150</sup> *ibid* 9.

<sup>151</sup> *ibid* 23-5.

<sup>152</sup> *ibid* 49.

<sup>153</sup> *ibid*, 4. Note that Roseneil and Budgeon also found that the ‘families of choice’ can also be formed by people who identify as heterosexual, by rejecting the ‘traditional’ ideas of settling down with a conjugal partner: S Roseneil and S Budgeon ‘Cultures of Intimacy and Care Beyond ‘the Family’: Personal Life and Social Change in the Early 21<sup>st</sup> Century’ (2004) 52(2) *Current Sociology* 135, 151.

Weeks, Heaphy and Donovan cautioned that ‘friend’ is a word that can encompass a variety of relationships from acquaintances to those which ‘form part of an intimate circle’,<sup>154</sup> but nevertheless found that friendships formed a central part of the ‘families of choice’ of many non-heterosexuals, with friends being ‘like family’, or sometimes replacing families of origin altogether.<sup>155</sup> Similarly, Roseneil and Budgeon found that friends can occupy ‘a central place in the personal life’ for some people who demonstrated a ‘high degree of reliance on friends, as opposed to biological kin and sexual partners, particularly for the provision of care and support in everyday life’.<sup>156</sup> Their research suggested that for some people at least, there has been a ‘blurring of the category of ‘friend’ and ‘family’ with friends performing the roles expected of ‘family’.<sup>157</sup> This suggests that what categorises some relationships as family, and thus distinct, are the *functions* of care and support that they perform.

Spencer and Pahl also found that friends are important for many people, and they also point out that ‘friend’ is a term that has broad meaning. They explain that ‘friend’ could describe relationships between acquaintances, neighbours, or life-long relationships with an unrelated person, or even describe a relationship between partners, spouses or siblings: there is no agreement over the exact ambit of the term.<sup>158</sup> They found that for many people, ‘it is not the case that... family members have actually become friends, or friends have become family, but that there has been some blurring of boundaries’.<sup>159</sup> They note that we all form ‘personal communities’ that are a mixture of given and chosen relationships, or in other words a mixture of ‘family’ and ‘friends’, and that both types of relationship can be as important as each other. They argue that friendship takes many forms, but essentially provides support and ‘at its strongest, it is based on trust, commitment and loyalty’.<sup>160</sup> For Spencer and Pahl, within our personal communities, ‘where friends and family play varied and overlapping roles’, it is not possible to claim that ‘people nowadays have abandoned traditional ‘families of fate’ for ‘families of choice’ based on friends, since the truth... is far more complex.’<sup>161</sup> This suggests that it is the *functions* that a relationship performs that makes it significant, not necessarily whether

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<sup>154</sup> Weeks, Heaphy and Donovan (n149) 52. The same point is also made by S Westwood ‘My Friends are my Family’: An Argument about the Limitations of Contemporary Law’s Recognition of Relationships in Later Life’ (2013) 35(3) Journal of Social Welfare and Family Law 347, 348.

<sup>155</sup> See Weeks, Heaphy and Donovan (n149) Chapter 4.

<sup>156</sup> Roseneil and Budgeon (n153) 146.

<sup>157</sup> *ibid* 150.

<sup>158</sup> See L Spencer and R Pahl *Rethinking Friendship: Hidden Solidarities Today* (Princeton University Press, 2006), 33.

<sup>159</sup> *ibid* 125.

<sup>160</sup> *ibid* 210.

<sup>161</sup> *ibid* 154-5.

the relationship would be categorised as 'friend' or 'family'. Taken together, the insights of these different authors suggest that any relationship recognition reforms should consider the diversity of contemporary relationships practices because it is not necessarily the case that blood and legal ties take precedence over other relationships for everyone.

#### 1.3.2.2c *Displaying our family practices*

Thinking of 'family' in terms of the functions it performs is useful as a way of explaining the diversity of relationship types that comprise the family we live with, and Finch agrees that we ought to think about family practices in a fluid way.<sup>162</sup> But, Finch builds on Morgan's 'family practices' approach and asserts that simply 'doing' family is not enough, because we also need to be seen to be 'displaying' our family practices. By 'display', Finch means,

*...to emphasize the fundamentally social nature of family practices, where the meaning of one's actions has to be both conveyed to and understood by relevant others if those actions are to be effective as constituting 'family' practices.<sup>163</sup>*

Families must 'be 'displayed' as well as 'done' because their contours and character are not obvious in an environment where relationships and living arrangements' are so diverse. Finch notes that 'family relationships have always been subject to change over time', which is why family display is so important,

*... the more extensive volatility of contemporary relationships means that for many people, family relationships will need to be redefined and positively established on a more regular basis as new sexual partnerships are formed, as cohabitation gets reconstituted as legal marriage, as children leave (or do not leave) their parents' home in different ways and at different stages, and as more people experience periods of living alone. All of these phenomena are both more common and their duration less predictable than in the past, leading not only to a much greater diversity of family relationships but also to the need to reassess what 'family' and family practices mean on a fairly regular basis.<sup>164</sup>*

Additionally, Finch recognises the work of Giddens and Beck and Beck-Gernsheim for the way they highlight the link 'between relationships and social processes': in a world full of choices

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<sup>162</sup> J Finch 'Displaying Families' (2007) 41(1) Sociology 65, 69-71.

<sup>163</sup> *ibid* 66.

<sup>164</sup> *ibid* 69.



where relationships last as long as they are fulfilling, and we move from one relationship to the next, the need for display of our family practices is reinforced.<sup>165</sup>

The idea of 'displaying family' is important for the family we live with, because individuals actively display family to gain recognition of the familial nature of the relationship from others. Finch notes that this could be from another family member, or from a source external to the family such as colleagues, employers or public agencies.<sup>166</sup> This suggests that recognition from external sources legitimises the familial nature of a relationship in the sense that it "proves" that the practices are related to a *family* relationship and that this is valuable for individuals. One example of family display may be the focus on the 'proper wedding', as identified by Barlow and others, as one reason why people value marriage, 'either as a vague expectation or as a practical plan.' They identified that many cohabitants viewed a wedding as an (expensive) public display of their commitment, even when they felt that they were 'as good as married'.<sup>167</sup> This suggests that reforming the current approach to relationship recognition in a way that is more inclusive of the diversity of family relationships that are formed today could be valuable to all family relationships, but especially to those in non-traditional family relationships because this would be an acknowledgement by the state that their relationships are 'family'.

#### **1.4 Conclusion**

This chapter has showed that the demographic picture has changed considerably with marriage rates declining and rates of informal unmarried cohabitation increasing rapidly, as well as an increase in the number of adults living by themselves, living with unrelated adults or forming LAT relationships. These changing living arrangements have been accompanied by changes in social attitudes, and although many idealise marriage, other types of relationship such as cohabitation, LATs and friendships are also viewed as valuable relationships. The sociological literature suggests that 'family' is difficult to define, but, it appears that family should not be defined exclusively by reference to relationship type, rather it is the *functions* performed by a relationship that often characterises it as familial in nature. This is important because it shows that a framework of relationship recognition that prioritises life-long marriage above all other relationship types is incompatible with contemporary relationship practices and

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<sup>165</sup> *ibid* 70.

<sup>166</sup> *ibid* 74.

<sup>167</sup> Barlow and others *Cohabitation, Marriage and the Law* (n82) 69-70. See also similar findings in A Barlow and S Duncan 'New Labour's Communitarianism, Supporting Families and the Rationality Mistake: Part II' (2000) 22(2) *Journal of Social Welfare and Family Law* 129, 138. cf Chapter 4, 4.3.1 which considers the importance of family display in the context of civil partnerships and the Australian registered couple relationships.

attitudes behind those practices. The next chapter will build on these findings by exploring the theoretical differences and similarities between 'form'-based and 'function'-based approaches of relationship recognition in light of a discussion about the functions of family law, and will discuss whether either approach could offer a system that is more inclusive of the diversity of family relationships that are formed today and better corresponds with the way that people view these significant relationships.

## **Chapter 2 – Exploring the potential of ‘form’ and function**

This chapter explores some of the existing literature to determine the potential of both ‘form’-based and function-based frameworks of relationship recognition to respond to today’s increasingly diverse relationship practices. The chapter will begin by identifying some possible functions of family law. This is necessary because identifying a purpose of family law gives an indication as to what the law is, or should be, trying to achieve by recognising relationships and offers a yardstick against which to measure the merits and difficulties of form-based and function-based approaches. Next, it will be argued that ‘form’-based recognition is a term that has two distinct meanings, namely ‘formalised’ relationship and relationship ‘type’, and that formalised relationships have the potential to be used in ways that recognise family diversity. Following this, it will be argued that while function-based recognition has its advantages, it is potentially problematic because it comes with its own set of challenges. The chapter will conclude by summarising the findings from the literature and highlight the advantages and deficiencies of both approaches to suggest that they appear to be similar but there are some important differences between them.

### **2.1 Considering the functions of family law**

Identifying the functions of family law, or identifying what family law is supposed to achieve, is not without difficulty. Herring warns that ‘it is easy to assume there is agreement over the functions of family law and that typically involves assuming a particular image of the family,’ presumably as a married or cohabiting couple and their children.<sup>1</sup> In this way, identifying the functions of family law is challenging because it may lead to prioritising one type of family relationship above others. Dewar argues that family law is uncertain of its role or purpose because it is characterised by chaos, or a ‘sense of disorder’. This chaos is understandable, and acceptable, however, because ‘family law engages with areas of social life and feeling – namely love, passion, intimacy, commitment and betrayal – that are themselves riven with contradiction and paradox.’<sup>2</sup> This suggests that the inherent chaos of family law makes it difficult, if not impossible, to ascertain the functions of family law with certainty.

Regardless of the difficulties with identifying the functions of family law, it is helpful to have an idea of what family law is trying to achieve so that we can consider whether form-based

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<sup>1</sup> J Herring *Caring and the Law* (Hart Publishing, 2013), 190. See similar comments in A Diduck and K O’Donovan ‘Feminism and Families: *Plus Ça Change?*’ in A Diduck and K O’Donovan (eds) *Feminist Perspectives on Family Law* (Routledge Cavendish, 2006), 7.

<sup>2</sup> J Dewar ‘The Normal Chaos of Family Law’ (1998) 61(4) *Modern Law Review* 467, 468. See also, C Smart ‘Making Kin: Relationality and Law’ in A Bottomley and S Wong (eds) *Changing Contours of Domestic Life, Family and Law* (Hart Publishing, 2009), 11.

or function-based approaches are best placed to achieve these functions. As Herring notes, 'it is helpful to identify what family law is trying to do, as long as one acknowledges that these [functions] are open to debate and are not givens.'<sup>3</sup> Different authors may focus on different functions of family law, but, it seems that two espoused functions are particularly important for the purposes of this thesis. Firstly, there is consensus that protecting family members, both during a relationship and following relationship breakdown, is an accepted function of family law. This will be referred to as the 'protective function'. Secondly, family law performs the function of identifying who is related to whom, and so in this way has a symbolic role to play in helping people form their identities by recognising a relationship as being familial in nature. In this way, legal recognition of a relationship as being a family relationship is symbolically significant. This will be referred to as the 'symbolic function'.

#### 2.1.1 The protective function of family law

Herring adopts Eekelaar's identification of three 'primary functions' of family law as a starting point for making the argument that relationships of caregiving should be at the centre of law rather than sexual relationships.<sup>4</sup> These are the adjustive, protective and supportive functions,

*The first is to provide mechanisms and rules for adjusting the relationships between family members when family units break down. The second is to provide protection for individuals from possible harms suffered within the family. The third is to support the maintenance of family relationships.*<sup>5</sup>

Both the adjustive and protective functions identified by Eekelaar are essentially about protecting a family member who may be vulnerable in economic terms on relationship breakdown and may be in need of protection from other family members during the relationship. Similarly, Bailey-Harris argues that the law has a 'maternalistic role' to play because 'family relationships are commonly not equal' and are often 'characterised by a power imbalance – physical emotional or financial – which the law must redress in order to ensure fairness.'<sup>6</sup> The law has three roles or functions to fulfil when regulating families. The first is 'remedial' which, like Eekelaar's adjustive function, relates to regulating 'the consequences of family breakdown in a way that achieves a fair result between the parties'. This is 'of particular

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<sup>3</sup> Herring *Caring and the Law* (n1) 190.

<sup>4</sup> *ibid.*

<sup>5</sup> J Eekelaar *Family Law and Social Policy* (Weidenfeld & Nicholson, 1984), 25 (emphasis in original text).

<sup>6</sup> R Bailey-Harris 'Law and the Unmarried Couple: Oppression or Liberation?' (1996) 8(2) *Child and Family Law Quarterly* 137, 140.

importance in respect of the financial consequences of relationship breakdown.<sup>7</sup> This function is essentially about protecting the economically weaker partner. Similarly to Eekelaar, Bailey-Harris also identifies a 'protective' role, which means that family law should 'protect family members from abuse and exploitation by others, in the situation where the family is dysfunctional.' Bailey-Harris suggests that violence is the 'most serious form of exploitation within a family', but exploitation can take other forms such as 'financial exploitation of one adult by another'.<sup>8</sup> The third role is 'the promotion and welfare of children'.<sup>9</sup> This third function is less directly relevant here because the focus of the thesis is relationships between adults, but is still of importance because many couples, be they married or cohabiting, will have children, and caregiving responsibilities often lead to economic vulnerability for the primary caregiver,<sup>10</sup> and this gives rise to the need for the protective function of the law.

Similarly, Schneider has identified five functions of family law. The first three are similar to those advanced by Bailey-Harris and Eekelaar, and are based on popular expectations of the law's role: 'there are people... the law is widely expected to protect, contracts it is widely expected to facilitate, and disputes it is widely expected to arbitrate'.<sup>11</sup> In the same way as Eekelaar and Bailey-Harris, Schneider identifies a 'protective' function, by which he means that the law should protect family members from physical and non-physical harm such as 'economic wrongs'. The second function is 'facilitative', which refers to the way in which the law allows people to enter contracts to 'give effect to their private arrangements'. Helping family members resolve disputes such as upon divorce is the third function, referred to as the 'arbitral' function,<sup>12</sup> which like Bailey-Harris' remedial function or Eekelaar's adjustive function, could be described as protective in that it relates to protection of vulnerable partners on relationship breakdown. Taken together, the work of these authors suggests that there is broad consensus over one function of family law, namely that it should protect a vulnerable partner from harm, be that from physical or emotional abuse or financial exploitation, both when the relationship is continuing and following relationship breakdown.

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<sup>7</sup> *ibid* 140.

<sup>8</sup> *ibid* 142.

<sup>9</sup> *ibid* 142.

<sup>10</sup> L Glennon 'Obligations between Adult Partners: Moving from Form to Function?' (2008) 22(1) *International Journal of Law, Policy and the Family* 22, 44-5.

<sup>11</sup> CE Schneider 'The Channelling Function in Family Law' (1992) 20(3) *Hofstra Law Review* 495, 497.

<sup>12</sup> *ibid* 497.

### 2.1.2 The symbolic function of legal recognition

While the first three of Schneider's functions of family law are about protection, the final two functions are different. These are the 'expressive' and 'channelling' functions. The expressive function is about 'deploying the law's power to impart ideas through words and symbols', and this can alter behaviour, whilst the channelling function is a means by which the law guides people into particular types of relationship, such as marriage, either through incentives or disincentives. While the channelling function is about legal recognition being used as a means to encourage a particular type of family living, the expressive function can be used as a way to 'provide a voice in which citizens may speak', and is therefore indicative of family law's symbolic function.<sup>13</sup>

While chapter one identified that family relationships are created and sustained through everyday family practices, it was also suggested that legal recognition of a relationship is important because it validates the relationship as being familial in nature, that is legal recognition is a means of family display.<sup>14</sup> Additionally, the fact that people will use the term 'family' to describe their significant relationships even when they are of a relationship type that would not traditionally be regarded as family, such as friendships,<sup>15</sup> is significant because it suggests that people need to ascribe a label to their relationships to signify their importance. What is apparent from much of the existing literature is that the symbolic significance of the legal recognition of a family relationship is twofold; firstly, it is an acceptance by the state that a relationship is familial in nature, and secondly, it attaches a label to the relationship that lets other people understand that it is a family relationship. The symbolic significance of recognition is especially prevalent in the literature looking at the legal recognition of same-sex relationships, and this suggests that the symbolic function has already proved influential in developing form-based recognition of same-sex couples in England and Wales.

In a study on same-sex couples (who had all either gone through a commitment ceremony or were planning to enter a civil partnership), Smart found that legal recognition of a relationship as being a family relationship is important. She argued that many see civil partnerships as 'protective of same-sex relationships' because 'the law provides safeguards for the more vulnerable partners' as well as the fact that legal recognition 'protects the relationship from incursions from other kin or even some aspects of bureaucracy and officialdom.'<sup>16</sup> In this way,

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<sup>13</sup> *ibid* 498.

<sup>14</sup> See Chapter 1, 1.3.2.2c.

<sup>15</sup> See Chapter 1, 1.3.2.2b.

<sup>16</sup> Smart 'Making Kin' (n2) 18.

legal recognition not only protects a vulnerable partner, but also protects the relationship itself by giving it shape and definition that can be displayed by the couple and recognised by others. The relationship is given a label of 'family' so that third parties understand the significance and nature of the relationship to the partners, and legal recognition makes it difficult to deny or ignore the existence of a relationship. The earlier findings of Smart, writing with Shipman, confirm that recognition from family is as important as recognition of the relationship by the state. They found that 'many couples wanted the kind of respect and acknowledgment given automatically to their heterosexual brothers and/or sisters who either married or made a commitment. Recognition allowed these couples to be treated as both "adults" (i.e. becoming fully fledged citizens), but also as part of the family.'<sup>17</sup> As Smart goes on to explain in her later work, gaining legal recognition of a relationship through a civil partnership means that partners are connected 'in a socially recognised way'.<sup>18</sup> This leads Smart to suggest that 'the construction of legally recognised bonds of kinship may be emerging as one of the most critical functions of family law'.<sup>19</sup>

Similarly, in the context of same-sex marriage debates, Barker acknowledges that one reason why same-sex marriage is considered necessary by some people is that,<sup>20</sup>

*A state's recognition of same-sex relationships signals to wider society not only that same-sex relationships are no longer to be denigrated but also that they must be positively recognized and respected. Recognition from the state is, then, both an end in itself and a means to an end in that those who seek same-sex marriage not only seek recognition from the state, but also from members of birth families, religious institutions and employers.<sup>21</sup>*

Barker goes on to explain that the 'social recognition' that flows from legal recognition of same-sex relationships was 'found to be one of the key reasons for lesbians and gay men' to support the introduction of civil partnerships in England and Wales.<sup>22</sup> This all suggests that family law has a symbolic function to perform: legal recognition of a relationship by the state validates that relationship as being familial in nature. This is important for the thesis because it suggests that

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<sup>17</sup> B Shipman and C Smart 'It's made a huge Difference': Recognition, Rights and the Personal Significance of Civil Partnership' (2007) 12(1) Sociological Research Online, [4.8], see also [5.1] – <<http://www.socresonline.org.uk/12/1/shipman.html>>.

<sup>18</sup> Smart 'Making Kin' (n2) 18.

<sup>19</sup> *ibid* 23.

<sup>20</sup> See also R Auchmuty 'Same-Sex Marriage Revived: Feminist Critiques and Legal Strategy' (2004) 14(1) *Feminism and Psychology* 101, 106: Auchmuty says that the arguments in favour of same-sex marriage can be divided into two categories: the practical (relating to actual legal consequences) and the symbolic.

<sup>21</sup> N Barker *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan, 2013), 3.

<sup>22</sup> *ibid* 107. Barker refers here to the work of Shipman and Smart (n17).

recognising a broader variety of relationships may be significant in a symbolic sense, as well as allowing more types of relationship to be subject to family law's protective function.

## **2.2 Focussing on 'form'**

There is not much literature looking specifically at 'form'-based recognition, and it is not always clear what exactly 'form' means in the literature that advocates reforms of the current framework of relationship recognition. It is submitted that 'form' is a term that can be used to refer to two distinct concepts: either 'formalised' relationships, or a reference to relationship 'type'. For example, Barlow and James in their paper calling for the introduction of function-based reforms sometimes use 'form' to refer to formalised relationships and at other times use 'form' when they are referring to relationship type. 'Form' is used to refer to formalised relationships where they question whether marriage is recognised because of the '*form* of the relationship' as a 'state-endorsed contractual arrangement',<sup>23</sup> and also used to refer to relationship type when they say there are areas where the law 'regards cohabitation as a clearly inferior family form to marriage'.<sup>24</sup> It is necessary to consider the different meanings of 'form' further, because we need to know what 'form' really entails before we can consider whether an alternative approach offers something different.

### **2.2.1 'Form' in the first sense: formalised relationships**

'Form' in the first sense refers to 'formal' or 'formalised' relationships. This simply means that eligible people take steps to register their relationship in a manner prescribed by the state,<sup>25</sup> which leads to legal recognition of that relationship. In this way, England and Wales takes a form-based approach to the recognition of adult relationships because, despite the ad hoc legal recognition of some informal relationships,<sup>26</sup> the formalised relationships of marriage and civil partnership are privileged by law. Once a marriage or civil partnership has been entered into, a package of legal consequences is bestowed on that relationship. In other words, it is legally recognised. It is the act of entering the marriage contract or registering a civil partnership that triggers legal recognition.

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<sup>23</sup> A Barlow and G James 'Regulating Marriage and Cohabitation in 21<sup>st</sup> Century Britain' (2004) 67(2) *Modern Law Review* 143, 153 (emphasis in original text).

<sup>24</sup> *ibid* 147. This is also true of other authors. For example: Glennon (n10) where Glennon also uses 'form' ambiguously, e.g. at 39: 'In other words, the centralisation of relationship form means that we engage in regime comparisons, in abstract terms, as opposed to recognizing that the varied relationship types within each category requires more than a categorical approach.'

<sup>25</sup> Probert notes that '(s)ince 1753 it has been established that compliance with certain formal requirements is necessary to the validity of a marriage': R Probert 'When are we Married? Void, Non-Existent and Presumed Marriages' (2002) 22(3) *Legal Studies* 398, 398.

<sup>26</sup> See Chapter 6, 6.3 for details of the ad hoc legal recognition of informal cohabiting relationships.



The history and development of formalised relationships will be discussed in detail in the second section of this thesis<sup>27</sup> and further references to ‘form-based’ systems of recognition throughout the thesis will be a reference to ‘form’ in the first sense of formalised relationship unless otherwise stated. At this point it is necessary to consider some of the benefits of formalised relationships to be clear what this mechanism of relationship recognition has to offer as a prelude to exploring the desirability of a different approach.

#### 2.2.1.1 Administrative efficiency

One advantage of formalised relationships is that they are administratively efficient, or as Barlow and others note, they are an ‘administratively convenient approach’.<sup>28</sup> A relationship between two eligible people is made formal upon registration of a marriage or civil partnership, and this relationship will only end via death or by a process prescribed by law.<sup>29</sup> This provides an efficient system because the state knows who is in a formalised relationship with whom at any given time; this is important because of the legal consequences that flow from marriage and civil partnership. Administrative efficiency was referred to by the then government during the consultation process for civil partnerships as being a benefit of the new model of formalised relationships,

*There would be legal certainty about who had opted in and who had not, and when the legal relationship began and ended. This level of certainty would enable an accurate assessment of when liabilities began and ended.*<sup>30</sup>

Rundle makes the similar point that formalised relationships provide conclusive proof of the existence of a relationship.<sup>31</sup> Systems of recognition based on formalised relationships provide a straightforward mechanism to attach legal consequences to relationships. It must be remembered, however, that administrative efficiency may come at a price: only those relationships that have been made formal will be subject to family law’s protective function.

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<sup>27</sup> See Chapters 3, 4 and 5.

<sup>28</sup> A Barlow and others *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21<sup>st</sup> Century* (Hart Publishing, 2005), 107.

<sup>29</sup> Marriage may be ended via a formal divorce process, or can be annulled if particular circumstances are present: see the Matrimonial Causes Act 1973. The same is true of civil partnerships: Civil Partnership Act 2004. For discussion, see Chapter 3, 3.2.2 and Chapter 4, 4.1.2.2.

<sup>30</sup> Women and Equality Unit ‘Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples’ (2003), [2.3].

<sup>31</sup> O Rundle ‘An Examination of Relationship Registration Schemes in Australia’ (2011) 25(2) *Australian Journal of Family Law* 121, 124. See also J Millbank ‘The Role of ‘Functional’ Family in Same-Sex Family Recognition Trends’ (2008) 20(2) *Child and Family Law Quarterly* 155, 181.

### 2.2.1.2 Respect for choice and individual autonomy

Formalised relationships can be described as ‘opt-in’<sup>32</sup> or ‘choice-based models’<sup>33</sup> because people must actively take steps to register the relationship, or the relationship will not be legally recognised. In this way, respect for choice and autonomy is seen by some as a benefit of formalised relationships. This was highlighted by the government during consultation for civil partnerships,

*An opt-in scheme would enable people to make their own choices about how best to organise their lives. Couples with committed same-sex relationships who want a formal legal status and the attached rights and responsibilities could choose to enter the scheme... The government recognises that some people deliberately choose not to make formal commitments to each other, and/or to limit their liabilities in respect of each other. An opt-in system would support individual choices, and would not impose responsibilities on those who do not want them.*<sup>34</sup>

This suggests that a model of recognition that is not ‘opt-in’, presumably a function-based system that recognises relationships when they perform particular functions,<sup>35</sup> would ‘impose’ legal consequences on people who have not chosen them. Some authors agree with this viewpoint, and suggest that function-based models do not respect choice and autonomy. Scott, for instance, notes that an ‘autonomy-based framework’ where couples choose to be subject to legal recognition ‘is superior’ to an approach where ‘unchosen’ recognition is imposed on a couple.<sup>36</sup> Kovacs similarly believes that opt-in approaches of recognition should be available instead of function-based approaches to protect people who have made a deliberate choice not to seek legal recognition of their relationship.<sup>37</sup>

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<sup>32</sup> Women and Equality Unit (n30) [2.3].

<sup>33</sup> As noted by Glennon (n10) 29.

<sup>34</sup> Women and Equality Unit (n30) [2.2-2.3]. See also [4.25]: ‘The Government believes that couples should make a specific choice about entry into a new legal status.’

<sup>35</sup> For a detailed description of ‘function-based’ recognition, see below, 2.3.1.

<sup>36</sup> E Scott ‘Marriage, Cohabitation and Collective Responsibility for Dependency’ (2004) The University of Chicago Legal Forum 225, 230.

<sup>37</sup> D Kovacs ‘A Federal Law of De Facto Property Rights: the Dream and the Reality’ (2009) 23(2) Australian Journal of Family Law 104, 106, 109. See also: P Parkinson ‘Submission to the Senate Standing Committee on Legal and Constitutional Affairs: Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008’ (2008), 2, available from <[http://www.aph.gov.au/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2008\\_10/family\\_law/submissions/sub6\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2008_10/family_law/submissions/sub6_pdf.ashx)> accessed 23/01/2017.

### 2.2.1.3 Status and formalised relationships

Another benefit of ‘form’ in the first sense could be the status generated by formalised relationships. Sometimes, authors conflate ‘form’ with ‘status’ in a manner that suggests that the terms are interchangeable.<sup>38</sup> It is argued here that ‘form’ and status are distinct concepts, although the conflation of the terms is understandable considering that marriage, a form-based model, has historically been at the centre of family law and that a powerful status attaches to this relationship. For instance, in the often quoted so-called “definition” of marriage,<sup>39</sup> Lord Penzance explains that marriage is more than a contract,

*Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status... the laws of all Christian nations throw about that status a variety of legal incidents...*<sup>40</sup>

Almost 150 years later, Baroness Hale expressed similar ideas about marriage being both a contract and a status,

*Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into a package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state.*<sup>41</sup>

While it has long been established that marriage has a status, it is submitted that what is not always clear is the fact that ‘status’ can be a reference to a ‘legal’ or ‘social’ status. Lord Simon’s description of “status” in the *Amphill Peerage Case* could be taken as a description of a *legal* status: a ‘condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities. Such, for example, are the status of married persons’.<sup>42</sup> Both marriage and civil partnership generate a legal status because the law treats

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<sup>38</sup> For example, see, Barlow and James (n23) 167; Barlow and others (n28) 107.

<sup>39</sup> Probert explains that this ‘definition’ was never intended to provide a definition of marriage, rather it was a defence of the institution, and that the words were shaped by their historical context: see R Probert ‘Hyde v Hyde: Defining or Defending Marriage?’ (2007) 19(3) Child and Family Law Quarterly 322, 322. The actual legal structure of marriage will be discussed in detail at Chapter 3, 3.2.

<sup>40</sup> *Hyde v Hyde and Woodmansee* (1865-69) L R 1 P & D 130, 133.

<sup>41</sup> *Radmacher v Granatino* [2010] UKSC 42, [132].

<sup>42</sup> *The Amphill Peerage Case* (1977) AC 547, 577 (Lord Simon). See also in the Australian context, *Ford v Ford* (1947) 73 CLR 524, 529 (Latham CJ): ‘A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class, have rights or duties, capacities

these formalised relationships as a particular class and a package of legal consequences attaches to them. A *social* status is different because this refers to how society views the relationship. As Auchmuty notes,

*...marriage is more than simply a set of legal rules. It has symbolic significance that exists beyond, and sometimes in spite of, the legal and material reality. Marriage confers upon individuals the highest social status and approval.*<sup>43</sup>

Marriage provides a label, or a ‘stamp’,<sup>44</sup> for a relationship, giving society a means of understanding the nature of that relationship, and so in this way marriage provides a means of fulfilling family law’s symbolic function. As Barker explains, ‘the status of marriage is a universally understood and powerful symbol in signifying the importance of the relationship.’<sup>45</sup> Later chapters will discuss whether a social status akin to that attached to marriage attaches to all formalised relationships.<sup>46</sup> For now it is sufficient to say that it is unclear whether a social status is automatically generated following the creation of a legal status. For example, some, such as *Steinfeld and Keidan*, who recently challenged (unsuccessfully) the ban on opposite-sex civil partnership in the Court of Appeal, believe that the civil partnership status is different and favourable to the marriage status.<sup>47</sup> Others, such as *Wilkinson and Kitinger*, viewed civil partnerships as an inferior status to marriage, a ‘consolation prize’ that is ‘offensive and demeaning’ to same-sex couples.<sup>48</sup> Their view suggests that the social status of marriage is unique to marriage, and does not necessarily attach to all formalised relationships.

### 2.2.2 Form in the second sense: relationship type

The second sense in which ‘form’ is used to describe a mechanism of relationship recognition is a reference to relationship ‘type’. Many ‘types’ of relationship are formed by adults during their lifetime, as was shown in chapter one,<sup>49</sup> such as sexual relationships with partners living elsewhere (LATs), unmarried cohabiting relationships, relationships between

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or incapacities, specified by law which do not exist in the case of persons not included in the class and which, in most cases at least, could not be created by any agreement of such persons. An alien, for example, as distinct from a subject of the Crown, a married person as distinct from an unmarried person, a bankrupt as distinct from other persons generally, are all persons who have a particular status.’

<sup>43</sup> Auchmuty ‘Same-Sex Marriage Revived’ (n20) 102.

<sup>44</sup> Lord Wilson ‘Marriage is made for Man, not Man for Marriage’ (Medico-Legal Society, Belfast, Northern Ireland, 18 February 2014), 3, available from <<http://supremecourt.uk/docs/speech-140218.pdf>> accessed 23/01/2017.

<sup>45</sup> Barker (n21) 102.

<sup>46</sup> See Chapter 4, 4.3.2 and Chapter 5, 5.2.3.2b.

<sup>47</sup> See *Steinfeld and Keidan v Secretary of State for Education* [2017] EWCA Civ 81; *R (Steinfeld and Keidan) v Secretary of State for Education* [2016] EWHC 128 (Admin). For discussion see Chapter 4, 4.3.2.2.

<sup>48</sup> *Wilkinson v Kitinger* [2006] EWHC 2022 (Fam), [5].

<sup>49</sup> See Chapter 1, 1.1.

siblings or platonic friendships. This is by no means an exhaustive list and many of these relationships will be considered significant by those involved, regardless of whether the relationship is a 'type' recognised by the law.<sup>50</sup> Arguably, England and Wales currently has a form-based approach in this second sense because it is a particular type of relationship, the sexual couple, that the law prioritises over others: not only does the law privilege the formalised relationships of marriage and civil partnership, but the law also legally recognises unmarried cohabiting couples in some instances.<sup>51</sup>

Some commentators feel that this focus on a particular 'type' of relationship means that many other family relationships are ignored by the law. Westwood, for example, is concerned that legalising same-sex marriage may 'entrench one relationship form whilst further marginalising others, and [this] would jeopardise wider reform of relationship recognition'.<sup>52</sup> Fineman shares the concern that privileging the sexual couple, married or otherwise, means the law is not focussing on other significant relationships such as those of caretaking.<sup>53</sup> For Fineman, the focus of relationship recognition should not be on marriage, but instead on how to 'support all individuals who create intimate family relationships, regardless of their form.'<sup>54</sup>

#### 2.2.2.1 The potential of formalised relationships to provide for family diversity

Like Fineman who criticises the current framework of relationship recognition for being too exclusive, Brake believes that 'the great social and legal importance accorded marriage and marriage-like relationships is unjustified'.<sup>55</sup> For Brake, a focus on marriage and marriage-like relationships 'devalues' non-sexual relationships even when they perform similar 'functions' to 'traditional families', including 'material support, emotional security and frequent companionship'.<sup>56</sup> Brake believes that it is relationships characterised by care that should be at the centre of law, and not sexual relationships. As will be made clear below, Fineman's answer to the problem of prioritizing a particular relationship type over others is to suggest abolishing

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<sup>50</sup> See Chapter 1, 1.3.2.2b.

<sup>51</sup> For discussion, see Chapter 6, 6.3.

<sup>52</sup> S Westwood 'My Friends are my Family': An Argument about the Limitations of Contemporary Law's Recognition of Relationships in Later Life' (2013) 35(3) *Journal of Social Welfare and Family Law* 347, 349. Similar points have also been made by other commentators. See, K Weston *Families We Choose: Lesbians, Gays, Kinship* (Columbia University Press, 1997); C Donovan 'Why Reach for the Moon? Because the Stars aren't enough' (2004) 14(1) *Feminism and Psychology* 24; K Walker 'The Same Sex Marriage Debate in Australia' (2007) 11(1-2) *The International Journal of Human Rights* 109; R Auchmuty 'What's so special about Marriage? The Impact of *Wilkinson v Kitzinger*' (2008) 20(4) *Child and Family Law Quarterly* 475.

<sup>53</sup> See M Fineman *The Autonomy Myth: A Theory of Dependency* (New Press, 2004). See also Herring *Caring and the Law* (n1) Chapter 6; J Herring 'Making Family Law More Careful' in J Wallbank and J Herring (eds) *Vulnerabilities, Care and Family Law* (Routledge, 2015).

<sup>54</sup> Fineman *The Autonomy Myth* (n53) 75.

<sup>55</sup> E Brake *Minimizing Marriage: Marriage, Morality and the Law* (Oxford University Press, 2012), 1.

<sup>56</sup> *ibid* 92.

marriage<sup>57</sup> and instead recognising informal relationships that are characterised by caregiving.<sup>58</sup> Brake takes a different approach and argues that marriage can be adapted, or ‘minimized’, so that it provides a route to relationship recognition for *any* caring relationship, allowing ‘friendships, urban tribes, and care networks as well as polyamorous or monogamous’ relationships to enter a “marriage” and thus gain a distinctive status.<sup>59</sup> The proposal is about relaxing the terms of who can marry whom, so that any two or more people who are in a caring relationship can ‘marry’, whilst ensuring that marriage remains a distinctive status.<sup>60</sup>

Brake’s work is not intended ‘to provide a detailed legal proposal but rather to give a philosophical justification for a more flexible law supporting a variety of relationships’.<sup>61</sup> The proposal nevertheless remains interesting for the purposes of the thesis because it hints at the potential of formalised relationships to be used in different ways to better provide for different relationship types. The second section of this thesis will explore the potential of formalised relationships to be used in the way Brake suggests, as well as the factors affecting the potential flexibility of formalised relationships to provide for family diversity.

### **2.3 Focussing on ‘function’**

In contrast to the limited existing literature exploring what is meant by ‘form-based’ recognition, many commentators have written extensively on function-based recognition. The work of these commentators suggests that function-based recognition has the potential to be used in ways that are inclusive of a variety of relationship types. But this approach is not without practical difficulties and function-based systems can end up being just as exclusive as the current relationship recognition framework in England and Wales. Before exploring the difficulties with function-based recognition and examining a selection of suggestions for reform, however, it is necessary for the purposes of clarity to outline what is meant by ‘function-based’ recognition.

#### **2.3.1 What is ‘function’?**

References to a ‘function-based’ approach to recognition, as used in this thesis, must be distinguished from the established theoretical perspective known as ‘functionalism’ in sociology. Talcott Parsons believed that society was a social system and that every part of society had a

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<sup>57</sup> Fineman *The Autonomy Myth* (n53) 123.

<sup>58</sup> For discussion of Fineman’s proposal, see below, 2.3.3.2.

<sup>59</sup> Brake (n55) 156-8.

<sup>60</sup> *ibid* 162.

<sup>61</sup> *ibid* 164.

role to play. The nuclear family was an especially important part of society.<sup>62</sup> As Chambers succinctly summarises it,

*[Parsons] argued that the extended family of pre-industrial society was no longer viable. The family was necessarily transformed by industrialization from an extended, economic unit of production in rural societies into a small, mobile nuclear unit of consumption in urban society. Industrialization demands greater geographical and social mobility from its workforces. So the family unit shrank in size to adapt to this new economy.*<sup>63</sup>

For Parsons, the nuclear family had two main functions: the primary socialization of children; and providing personality stabilization for family members by providing emotional support. The success of the nuclear family in performing these functions was based on the gendered roles of the husband and wife: the husband had the role of bread-winning, whilst the wife attended to the 'emotional and domestic needs of the family.'<sup>64</sup>

The 'function-based' or 'functional' approach considered in this thesis is different, and refers to a particular approach towards the legal recognition of relationships. Function-based recognition refers to the recognition of relationships on the basis of their functions or their characteristics. This is essentially a manifestation of the 'family practices' approach, discussed in chapter one,<sup>65</sup> which recommends moving from a narrow focus on what family 'is', towards a wider and possibly more inclusive focus on what family 'does', by focussing on everyday family practices as a trigger for legal recognition of a relationship. Head sums up function-based recognition in this way,

*...in order to ascertain whether a particular non-marital relationship will fall under the cover of a particular legislative regime, the courts will conduct an objective review of that relationship, usually retrospectively, with a focus on particular relational characteristics. These characteristics are analysed against certain statutory criteria. If the relationship is found to meet a certain... threshold, then it is presumed to be one that is legally relevant.*<sup>66</sup>

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<sup>62</sup> D Chambers *A Sociology of Family Life: Change and Diversity in Intimate Relations* (Polity, 2012), 20. See also A Giddens *Sociology* (6<sup>th</sup> ed, Polity, 2009), 369-70.

<sup>63</sup> Chambers (n62) 20 (emphasis in original text).

<sup>64</sup> *ibid* 21. For a detailed account of functionalism, see: T Parsons 'The American Family: Its Relations to Personality and to the Social Structure' in T Parsons and R Freed Bales (eds) *Family Socialisation and Interaction Process* (Routledge, 1956).

<sup>65</sup> See Chapter 1, 1.3.2.2.

<sup>66</sup> A Head 'The Legal Recognition of Close Personal Relationships in New South Wales – a Case for Reform' (2011) 13 *Flinders Law Journal* 53, 55.

Similarly, Millbank has explained that,

*Functional family claims rest on a performative aspect, that is, the parties are granted legal rights because of what they do in relation to one another, not because of the status of who they are or what manner of legal formality they have undertaken.*<sup>67</sup>

A function-based approach is distinct from formalised relationships because the former focusses on the characteristics of a relationship to determine whether it is legally recognised whilst the latter focusses on whether the relationship is registered.

### **2.3.2 The difficulties with function-based recognition**

Millbank has written about the potential of function-based approaches to recognise the diverse variety of relationships that make up the family we live with. She noted that, ‘functional family approaches accord with a core objective of feminist legal scholarship and law reform projects – to centre ‘lived lives’ rather than legal doctrine or formal legal categories.’<sup>68</sup> This suggests that a function-based approach to family relationship recognition has the potential to be inclusive of the many different types of family relationship that are formed because the law’s focus would be shifted from privileging marriage towards a focus on the actual functions performed within family relationships.

But, function-based approaches are not without their difficulties and some authors are concerned about the potential implications of introducing such a system of relationship recognition. There appear to be three main concerns over function-based systems. Firstly, there are concerns apparent from Millbank’s work about the practical difficulties relating to proving the existence of a relationship under function-based recognition: this directly contrasts with the administrative efficiency of formalised relationships. Secondly, Millbank also identifies concerns about the type of family relationship that may inform the development of a function-based system of recognition. There is a risk that function-based systems can be overly exclusive if they are informed by a particular vision of family relationships. Thirdly, other commentators are concerned that a function-based system may impose unwanted rights and responsibilities onto relationships that people have not chosen, and they believe that formalised relationships are better placed to respect people’s relationship choices. It will be shown that the first two difficulties identified are more significant than the third.

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<sup>67</sup> J Millbank ‘The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family’ (2008) 22(2) *International Journal of Law, Policy and the Family* 149, 150 (emphasis in original text).

<sup>68</sup> Millbank ‘The Role of ‘Functional’ Family’ (n31) 156.



### 2.3.2.1 Practical difficulties: the uncertainty of function-based recognition

Millbank, writing in an article about 'lesbian and gay intra-family disputes' found that while function-based recognition has the potential to be used in an 'egalitarian, flexible and adaptive' way, and '*should* work to resolve intra-lesbian and donor versus mother disputes, the case law demonstrates that it has not done so.'<sup>69</sup> Millbank found that proving the existence of a relationship under a function-based approach can be onerous because it can take many years of litigation before a claim will be successful<sup>70</sup> and it can be especially difficult to ascertain the nature of a relationship retrospectively, which suggests that function-based systems can be uncertain. Millbank explains that when a relationship breaks down, there is no longer a 'united – functioning – functional family' unit for the court to look at, and instead 'the court is confronted with conflicted – dysfunctional – individuals with contradictory accounts of who their family is and was.'<sup>71</sup> Functional family arguments were misused by birth mothers who would often claim that the co-mother may have functioned as a parent in the past, but following relationship breakdown, the co-mother had 'ceased' being a parent. Millbank found that it was a time-consuming and challenging task for the co-mother to establish her role as a parent following relationship breakdown.<sup>72</sup>

The uncertainty and difficulties of proof identified by Millbank as being characteristic of function-based recognition stand in sharp contrast with the administrative efficiency of formalised relationships. As discussed above, the 'legal certainty' provided by civil partnerships, because partners had to opt-in for legal recognition, was seen as a benefit of introducing this new model of formalised relationship by the then government.<sup>73</sup> The potential uncertainty and difficulty with establishing the existence of a relationship under function-based systems is something that needs to be considered carefully in the context of reforms of the current framework of relationship recognition to determine the extent to which these are issues in practice and whether there are steps that can be taken to either overcome or alleviate them.

### 2.3.2.2 Difficulties of principle: the ideology of families

The second difficulty with function-based recognition, which is reminiscent of Herring's concerns about the risks of identifying the functions of family law discussed above, is the continuing influence of ideology about traditional families. Millbank, again in her work on

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<sup>69</sup> Millbank 'The Limits of Functional Family' (n67) 168-9 (emphasis in original text).

<sup>70</sup> *ibid* 168-9. See also J Millbank 'If Australian Law opened its Eyes to Lesbian and Gay Families, what would it see?' (1998) 12(2) Australian Journal of Family Law 1, 33.

<sup>71</sup> Millbank 'The Limits of Functional Family' (n67) 150-1.

<sup>72</sup> *ibid* 152.

<sup>73</sup> See above, 2.2.1.1.

lesbian and gay intra-family disputes, found that where a child is conceived with a known sperm donor, in many instances the sperm donor, rather than the co-mother, will be recognised as ‘the child’s other parent’.<sup>74</sup> This shows how the ‘ideological power of genetic connection’ can take precedence over a functional family relationship: due to the perceived need of a child for a father, the functioning same-sex headed family is ‘invisible’ because the ‘addition of a male parent is not seen to *take away anything from the family... it only adds to it*’.<sup>75</sup> Similarly, writing elsewhere, Millbank argued that function-based systems modelled on marriage can perpetuate ‘heterosexist model[s] of relationships which may not be appropriate’ because they ‘may not reflect the lived experience of couples in same sex relationships.’<sup>76</sup> A function-based system of recognition that draws on heterosexist assumptions about the nature of relationships will fail to legally recognise relationships that do not conform to these assumptions.

Millbank’s findings are important for the thesis because they suggest there is a danger that function-based recognition can be used to prioritise or privilege only a particular vision of family relationships that do not correspond with the complex reality of the variety of relationship types that make up the family we live with. Millbank’s work suggests that determining which family relationships are included, and importantly, which are excluded, from function-based recognition is a challenging task. One of the difficulties identified with the current framework of relationship recognition,<sup>77</sup> is that the focus on a particular relationship type only is too exclusive and ignores many other family relationships. Millbank’s findings suggest that function-based recognition can be used in an exclusive way if traditional ideas about *who* is family continue to dominate.<sup>78</sup> This suggests that function-based systems run the risk of being just as exclusive as the current form-based system and could exclude many significant family relationships, and so definitional issues are something that need to be considered for any reforms.

This all hints at another difficulty: function-based recognition can also be too inclusive if the parameters of recognition are defined too broadly, a problem that is unlikely to apply for formalised relationships where only those relationships that are registered are legally recognised. For example, if caregiving were to be the recognised function, the law may wish to

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<sup>74</sup> Millbank ‘The Limits of Functional Family’ (n67) 158-9.

<sup>75</sup> *ibid* 161-2 (emphasis in original text).

<sup>76</sup> Millbank ‘If Australian Law opened its Eyes’ (n70) 33.

<sup>77</sup> See above 2.2.2.

<sup>78</sup> Baldacci has also recognised this concern, and explained that a functional approach to recognition can result in ‘some families being excluded from recognition’ where there is a ‘rigid, mechanistic and patriarchal application’ of a definition: see, P R Baldacci ‘Pushing the Law to Encompass the Reality of our Families: Protecting Lesbian and Gay Families from Eviction from their Homes – *Braschi*’s Functional Definition of ‘Family’ and Beyond’ (1993-4) 21 *Fordham Urban Law Journal* 973, 988.

recognise a relationship of care between an elderly parent and their adult child, but may not wish to recognise the relationship between an individual who as an act of kindness offers assistance to a neighbour. The former relationship would be considered as family by most, whereas the neighbour relationship would not,<sup>79</sup> and legal recognition of the neighbour relationship runs the risk of being either useless or intrusive. There is something special about family relationships that differentiates them from non-family relationships and it is this context, the special family relationship, that gives meaning to the functions that are performed. As Smart has suggested, it is the motivation behind the performance of a function that makes it meaningful: everyday acts are meaningful in a family context because they are performed with love.<sup>80</sup> Beck and Beck-Gernsheim assert that it is impossible to define what 'love' means today,<sup>81</sup> which suggests it is equally impossible to legislate for it. The challenge for a function-based system is that the parameters of recognition need to be drawn in such a way that not all relationships that perform a particular function could be legally recognised, but also that the parameters are not so narrowly drawn that any function-based reforms would be as exclusive as the current form-based approach that it would supplement or replace. These difficulties of definition under function-based recognition are important in relation to the identified functions of family law: the relationships excluded from recognition will not benefit from the protective or symbolic functions of the law and so definitional issues are a potential problem for function-based recognition.

### 2.3.2.3 'Imposing' rights and responsibilities?

The third difficulty with function-based recognition,<sup>82</sup> is that some commentators feel that function-based systems impose unwanted rights and responsibilities onto relationships, whereas formalised relationships respect autonomy and choice because people must take steps to formalise and so could be said to accept the legal consequences of that choice. Choice and autonomy are powerful concepts that are difficult to argue against.<sup>83</sup> Moreover, this focus on autonomy and choice is reminiscent of modern family values that often entail an expectation

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<sup>79</sup> cf A similar example given by L Wilmott, B Mathews and G Shoebridge 'Defacto Relationships Property Adjustment Law – A National Direction' (2003) 17(1) Australian Journal of Family Law 1, 21 which will be discussed in Chapter 7, 7.1.1 on informal caring relationships.

<sup>80</sup> C Smart *Personal Life: New Directions in Sociological Thinking* (Polity, 2007), 60: Smart refers to the work of Mason who has argued that acts of care performed with love feel different to those performed without love. See J Mason 'Gender, Care and Sensibility in Family and Kin Relationships' in J Holland and L Atkins (eds) *Sex, Sensibility and the Gendered Body* (Basingstoke, 1996).

<sup>81</sup> U Beck and E Beck-Gernsheim *The Normal Chaos of Love* (Blackwell Publishers, 2002), 5.

<sup>82</sup> As alluded to above, see 2.1.1.2.

<sup>83</sup> This has also been pointed out by, A Barlow 'Solidarity, Autonomy and Equality: Mixed Messages for the Family?' (2015) 27(3) Child and Family Law Quarterly 223, 225.

that all family members are autonomous and equal and are in a position to negotiate the terms of their relationships.<sup>84</sup>

But, it is argued here that the notion that formalised relationships respect choice and autonomy, whilst function-based systems do not, is too simplistic because it makes incorrect assumptions about the variable factors behind relationship practices, and does not question the meaning of autonomy or consider the complex reality of the idea of 'choice'. While the idea of autonomy is powerful, Fineman has explained that autonomy is a myth because we are all dependent at some point in our lives,<sup>85</sup> and that everyone is vulnerable because vulnerability is an inherent part of the human condition.<sup>86</sup> Bailey-Harris has argued that 'party autonomy arguments assume freedom of choice and informed choice, an assumption which is by no means universally justified in the formation of family relationships.'<sup>87</sup> Chapter one explained that some people stay in unhappy relationships because of concerns over money or children, providing examples of external constraints that effect relationship practices.<sup>88</sup> The idea of 'choice' is a complex one, as Fineman sums up,

*Choices are made in social relations that reflect long-standing cultural and social arrangements and dominant ideologies about gender and gender roles... When individuals act according to the scripts culturally crafted for these roles, consistent with prevailing ideology and institutional arrangements, we may say that they have chosen their own path. Choice is problematic in this regard. Ideology and beliefs limit and shape what are perceived as available and viable options for all individuals in society.<sup>89</sup>*

There are many factors at play regarding any individual's relationship 'choices', including the powerful ideas of the traditional and modern family myths,<sup>90</sup> and the extent to which people make 'free' and 'informed' choices is open to debate.

Barlow and Duncan explain that the Labour Government in their 1998 Green Paper, 'Supporting Families', made a 'rationality mistake' in their promotion of marriage as the

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<sup>84</sup> See Chapter 1, 1.3.2.1b.

<sup>85</sup> Fineman *The Autonomy Myth* (n53) 34-5.

<sup>86</sup> M Fineman 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1, 8. For further discussion of Fineman's work, see below, 2.3.3.2.

<sup>87</sup> Bailey-Harris (n6) 138.

<sup>88</sup> See Chapter 1, 1.3.1. cf also Douglas' comments that the 'structural commitment' of marriage (and civil partnership) provides an inducement to stay within the relationship: see G Douglas 'Towards and Understanding of the Basis of Obligation and Commitment in Family Law' (2016) 36(1) *Legal Studies* 1, 16-7.

<sup>89</sup> Fineman *The Autonomy Myth* (n53) 40-1.

<sup>90</sup> See Chapter 1, 1.3.2.1.

preferred family type. The rationality mistake refers to the incorrect and simplistic assumptions made by the government about how people make relationship decisions that can lead to legislation being 'inefficient or even oppressive'.<sup>91</sup> These mistaken assumptions lead the government to legislate for the 'rational legal subject' and make the assumption that,

*...people take individualistic, cost–benefit type decisions about how to maximize their own personal gain. Change the financial structure of costs and benefits, and the legal structure of rights and duties, in the appropriate way and people will modify their social behaviour in the desired direction. Alternatively, people may make suboptimal decisions where they lack information about this cost–benefit structure. In this case, simply providing better information, or educating people so that they can access it and act upon it more effectively, will have the desired social effects.*<sup>92</sup>

The 'rational legal subject' will understand that the legal recognition of partners in cohabiting relationships is inferior to that of spouses, and so cohabitants (and lone mothers) will realise that the only rational course of action is to marry. Alternatively, as pointed out by Barlow and Smithson, another legally rational option for cohabitants is to make their own legal arrangements, for example about ownership in the family home and making wills to protect themselves.<sup>93</sup>

But, real people base their relationship choices on more complex reasoning than the 'rational legal subject'. Barlow and Duncan found that there are several reasons at play behind cohabitants' relationship practices, including the view that marrying would not make their relationships any stronger and that while marriage is viewed as symbolically significant, 'in terms of everyday moral adequacy few respondents saw marriage as a superior partnering or parenting form.'<sup>94</sup> Additionally, they found that many people believe in the 'common law marriage myth' and so operate under the false assumption that they are already treated as if they are married.<sup>95</sup> Barlow and Duncan conclude that people make relationship decisions,

*...with reference to moral and socially negotiated views about what behaviour is accepted or expected as right and proper and this negotiation, and the views that result, varies in*

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<sup>91</sup> A Barlow and S Duncan 'New Labour's Communitarianism, Supporting Families and the Rationality Mistake: Part II' (2000) 22(2) *Journal of Social Welfare and Family Law* 129, 130.

<sup>92</sup> A Barlow and S Duncan 'Supporting Families? New Labour's Communitarianism and the 'Rationality Mistake': Part I' (2000) 22(1) *Journal of Social Welfare and Family Law* 23, 24.

<sup>93</sup> A Barlow and J Smithson 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' (2010) 22(3) *Child and Family Law Quarterly* 328, 333.

<sup>94</sup> Barlow and Duncan 'New Labour's Communitarianism' (n91) 138.

<sup>95</sup> *ibid* 138-9. See also Chapter 1, 1.2.1.

*particular social contexts. Thus people make decisions in a different and arguably more sophisticated way, giving different results to those anticipated by the purposive policy-makers using conventional economic and legal models'.<sup>96</sup>*

Other researchers have also found that many factors influence a person's relationship choices. Barlow and James,<sup>97</sup> and Hibbs and others,<sup>98</sup> show that decisions whether to marry are not usually made based on an awareness of the legal consequences of marriage. Eekelaar and Maclean make similar observations, finding that people have varied reasons for marrying ranging from a desire to comply with convention, such as following religious teachings or parental wishes, or a symbolic desire to show the commitment the partners have towards each other publicly. Only in a minority of cases did people marry for pragmatic reasons, such as to take advantage of immigration rules.<sup>99</sup> This suggests that the notion of 'choosing' marriage is not straightforward because people take into account multiple factors, including external pressures, such as from family members, which may make marriage feel like the only acceptable relationship 'choice' for some.

Placing all this in the context of an enquiry about the appropriateness of different recognition frameworks, it seems that Millbank's concerns about the practical difficulties relating to function-based recognition, and the possibility of prioritising only a particular vision of family relationships and thus making recognition too exclusive, are important considerations to bear in mind when developing and introducing proposals for function-based recognition reforms. The concerns identified by other commentators about function-based recognition failing to protect individual autonomy and choice are of limited significance in so far as notions of autonomy and choice are complex, and the argument that form-based systems respect choice and autonomy is too simplistic.

### **2.3.3 How might function work in practice?**

To begin to test out the difficulties with function-based recognition as identified in the existing literature, and to get an idea of how function-based recognition may work in practice, this section will look at some suggestions for function-based reforms from existing literature. It should be remembered that the aim of many of the works discussed here is to explain *why*

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<sup>96</sup> Barlow and Duncan 'New Labour's Communitarianism' (n91) 141.

<sup>97</sup> Barlow and James (n23) 161.

<sup>98</sup> M Hibbs, C Barton and J Beswick 'Why Marry? The Perceptions of the Affianced' (2001) 31(3) Family Law 197, 205.

<sup>99</sup> J Eekelaar and M Maclean 'Marriage and the Moral Bases of Personal Relationships' (2004) 31(4) Journal of Law & Society 510, 517-523. See also J Eekelaar 'Why People Marry: The Many Faces of an Institution' (2007) 41(3) Family Law Quarterly 413, 418-422.

function-based recognition should be introduced, rather than to create blueprints for reform.<sup>100</sup> Suggestions for reform have been categorised into two groups, referred to here as ‘moderate’ and ‘radical’ function-based recognition. The categorisation is made to denote the relationship type that is the authors’ focus. Supporters of a moderate function-based reform focus on the most marriage-like of relationships, the unmarried cohabiting couple, while supporters of a radical reform call for a more dramatic change in relationship recognition and focus on the performance of a particular function, such as caregiving. The moderate function-based reforms remain exclusive in terms of relationship type, and so are limited in the extent they are able to remedy the exclusivity of the current framework of relationship recognition, while a radical function-based reform is potentially more inclusive because it looks at a more diverse range of relationship types.

#### 2.3.3.1 Moderate function-based recognition

Glennon has suggested that rather than continue with the current form-based approach, which privileges the ‘marital partnership’ with financial remedies provision on relationship breakdown, family law should shift its focus onto the ‘parental partnership’. Glennon argues that it is the function of caring for a child that leads to economic vulnerabilities for the primary caregiver, and not the formal nature of the relationship, and so both married and unmarried parents should be treated in the same way by law,<sup>101</sup>

*Collapsing relationship categories, at a policy level, would create the discursive environment to consider these issues in a value-neutral way. As an approach it would lay the foundations for conventional distinctions between married and unmarried relationships to be superseded by functional indicators, thus allowing the factual reasons for relationship obligations to emerge. On this model, the fact of marriage would become little more than ‘one of the circumstances of the case’ and the functions of individual relationships would take precedence over their form.<sup>102</sup>*

The ‘collapsing’ of ‘relationship categories’ has the potential to allow a principled discussion to take place that would consider the package of legal consequences that should attach to a relationship by reference to the functions performed by that relationship, rather than by reference to relationship type. This suggests that prior to any reform, consideration needs to be

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<sup>100</sup> Detailed blueprints for function-based recognition of informal cohabiting relationships in England and Wales by the Law Commission will be discussed in Chapter 6, 6.3.2.1c. See Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* (No 307, 2007).

<sup>101</sup> Glennon (n10) 44-5.

<sup>102</sup> *ibid* 45.

given to why some relationships are legally recognised while others are not. It appears that for Glennon, the protective function of family law justifies reforming the current relationship recognition framework, because having a child leads to economic difficulties for the primary caregiver whether they are married or otherwise.

Similarly, Barlow, Duncan, James and Park support a similar reform but for a wider category of relationships. They support the introduction of a moderate function-based reform that would allow for the legal recognition of unmarried cohabiting couples alongside form-based recognition of married relationships. Their argument as to why this is necessary is essentially that unmarried cohabitants' and married couples' relationships function in a similar way and that relationship generated (economic) disadvantage can occur in both types of relationship and so they both require the same legal response. They argue that we are witnessing a 'functional convergence' between married and informal cohabitation, with unmarried cohabitation taking on some of the traditional functions of marriage such as 'providing companionship, emotional support, sexual intimacy, financial interdependence and a site for homemaking and parenting'. Marriage has also evolved to be more akin to unmarried cohabitation, becoming an 'increasingly negotiated partnership, not necessarily involving financial dependency, which may be terminated at will.' Due to this functional convergence, they argue it is time for 'legal policy makers' to provide a 'rationale for' the 'protection and privilege' of marriage.<sup>103</sup> They ask, is marriage privileged today because of the 'form' of the relationship, as a 'state endorsed contractual-arrangement embodying a public commitment'? Or is it because of the 'functions and effects of marriage',

*...namely that is it a joint enterprise of sexual intimacy, companionship, emotional and financial support, homemaking, child bearing and child rearing, which is essential to society as a whole but which distorts the bargaining power, needs and resources of the individual parties who therefore should be legally protected?*<sup>104</sup>

For these authors, a form-based approach has the 'fundamental problem of leaving large numbers of cohabitants unprotected by family law from the acknowledged risks of the functions and effects of family life', because couples must opt-in, or register, to benefit under a form-based system. They argue that form-based systems 'do nothing to prevent exploitation in the situation where one partner refuses to marry or register' the relationship.<sup>105</sup> Barlow and others

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<sup>103</sup> Barlow and others (n28) 86-7. See also Barlow and James (n23) 153.

<sup>104</sup> Barlow and others (n28) 86.

<sup>105</sup> *ibid* 114.



note that this approach is ‘paternalistic’,<sup>106</sup> but, because ‘the likely financial detriment – which we know is unequally borne in family relationships – cannot be accurately predicted in advance’, legal remedies protecting the vulnerable partner when things go wrong are necessary.<sup>107</sup> Barlow and others suggest that a function-based system giving unmarried cohabiting couples the same rights as married couples on relationship breakdown and on death should be introduced into the law of England and Wales on the basis that this would better protect vulnerable cohabitants when the cohabitation relationship ends.<sup>108</sup> Like Glennon, Barlow and others also feel that the protective function of family law is a primary concern.

Barlow and others suggest that ‘cohabitants’ would only be recognised when the relationship was of a certain duration, most likely 2 years, or that there was a child of the relationship.<sup>109</sup> Whether any additional criteria, such as sexual intimacy and emotional and financial support, would need to be proven to demonstrate that the relationship was functionally similar to a marriage is not made clear by the authors. It may be important to draw narrower parameters on a function-based approach than merely recognising a relationship between any two people who have cohabited for a certain period of time, because this could be overly inclusive and defeat the aim of protecting the economically vulnerable partner who is in the same position as the economically vulnerable spouse.

Barlow and others argue that cohabitants ought to be given a ‘formal status’, so that, consistently with the findings of chapter one about the increasing number of cohabitants, the increasing acceptability of cohabitation as a relationship choice and the prevalence of the common law marriage myth,<sup>110</sup> ‘family law would be better aligned with both people’s expectations and their social practice.’<sup>111</sup> Barlow and others argue that the objective of ensuring that the law corresponds with expectation and practice cannot be achieved ‘if a legal status providing similar but inferior family law regulation for cohabitants was introduced’.<sup>112</sup> This suggests that a legal status can be generated by a function-based system in the same way as under the current framework by treating a relationship as a distinct category in law. But, it is unclear whether a social status already attaches to cohabiting relationships because of social

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<sup>106</sup> cf discussion above of Bailey-Harris’ identification of the ‘maternalistic role’ of the law in relation to regulating family relationships: see above, 2.1, and Bailey-Harris (n6) 140.

<sup>107</sup> Barlow and others (n28) 115.

<sup>108</sup> *ibid* 116.

<sup>109</sup> See discussion in Chapter 6, 6.3.2.1c of Law Commission proposals for similar reform which also requires a minimum duration requirement where there is no child of the relationship.

<sup>110</sup> See Chapter 1, 1.2.1.

<sup>111</sup> Barlow and others (n28) 116.

<sup>112</sup> *ibid* 116-7.

attitudes and practices towards cohabitation, or whether a social status akin to that of marriage would automatically follow from a legal status.

In response to concerns that function-based recognition does not respect choice or autonomy, Barlow and others propose that there should be an opt-out provision allowing couples who do not want to be treated as if they were married to opt-out of legal recognition. The opt-out provision should include 'some form of safety-net provision whereby children's interests are safeguarded and both partners can obtain independent legal advice'.<sup>113</sup> Barlow and others state that an opt-out provision 'would minimise oppression of those who wish to remain legally uncommitted' because they could avoid legal consequences that they do not wish to attach to their relationships. But, an opt-out provision is only effective in protecting choice and autonomy when people are aware of the legal consequences of their relationships and go ahead and take the practical step of creating an opt-out agreement.<sup>114</sup>

These moderate function-based suggestions do not go far enough. The moderate proposals do little in response to the increasing diversity of family relationships and would only recognise those relationships between parents or those that are marriage-like. Barlow and others, for example, base their argument for similar treatment of married and unmarried cohabitants on the fact that these different relationships perform similar functions, such as 'companionship' and 'emotional and financial support',<sup>115</sup> and that the relationship should be legally recognised to protect the economically vulnerable partner on relationship breakdown. As suggested in chapter one, these functions are also performed in other types of relationships, such as friendships, and are just as valuable in those contexts for many people.<sup>116</sup> Unless there is a justification for privileging only marriage-like relationships in law and ignoring other relationships, there is no reason to suppose that function-based systems must be limited to parents or unmarried cohabiting couples.

#### 2.3.3.2 Radical function-based recognition

While Glennon supports equating the position of married and unmarried parents and Barlow and others advocate the same treatment for married couples and unmarried cohabitants on relationship breakdown, Fineman is one commentator who goes further and looks beyond marriage and unmarried cohabitants. Fineman believes that marriage should be abolished for

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<sup>113</sup> *ibid* 117.

<sup>114</sup> See above, 2.3.2.3.

<sup>115</sup> Barlow and others (n28), 86.

<sup>116</sup> See Chapter 1, 1.3.2.2b. See also Barlow and others (n28) 117 where the authors acknowledge that function-based reforms do not have to be confined to sexual relationships.

all legal purposes, because marriage should not 'be the privileged mechanism whereby the state distributes certain social goods.'<sup>117</sup> The law needs to respond to the changing ways in which we live and accept that 'our expectations and aspirations for our families cannot be undone'. In line with Morgan's family practices approach,<sup>118</sup> Fineman argues that the law should be focussing on 'families as practising units'<sup>119</sup> and the current 'social and economic subsidies and privilege that marriage... receives' would be transferred 'to a new family core connection – that of caretaker-dependent'.<sup>120</sup> This is a function-based approach, with the function of caregiving acting as a trigger for legal recognition, and is reminiscent of the caring and supportive functions which some commentators identified as being characteristics of 'families of choice'.<sup>121</sup>

The rationale behind this move towards caregiving rather than sexual relationships as the focus of family law is that it would reflect the value of care work to society. Fineman explains that the historical treatment of the family as a private entity, free from the market and the state, has led to dependency being treated as a private family matter.<sup>122</sup> Society however, reaps the benefits of this 'essential and society-preserving' care work but carries none of the burdens, because it is the family's responsibility to undertake this essential work.<sup>123</sup> Fineman explains that dependency is part of being human: we are all inevitably dependant due to age, illness or disability<sup>124</sup> and are sometimes derivatively dependent when we care for others, and so are dependent on resources to undertake that care.<sup>125</sup> This focus on lived family practices, focussing specifically on caregiving functions, appears to be a principled basis for reform because, as chapter one showed, often what we value most about family are the functions they perform, and caring and supportive functions are often at the centre of our family practices.

Fineman's caretaker-dependant dyad would transform relationship recognition because it would abolish marriage whilst focussing on care. But, the radical potential of the reform is limited by the fact the caretaker-dependant relationship is a dyadic relationship, most likely to be found between a parent and a dependent child, or otherwise between adults where one 'family member is incapable of caring for her- or himself.'<sup>126</sup> This is not a purely functional approach because it continues to be limited by reference to relationship type in the sense that

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<sup>117</sup> Fineman *The Autonomy Myth* (n53) 123.

<sup>118</sup> See Chapter 1, 1.3.2.2a.

<sup>119</sup> Fineman *The Autonomy Myth* (n53) 67.

<sup>120</sup> *ibid* 123.

<sup>121</sup> See Chapter 1, 1.3.2.2b.

<sup>122</sup> Fineman *The Autonomy Myth* (n53) 36-7. See also Fineman 'The Vulnerable Subject' (n86) 5.

<sup>123</sup> Fineman *The Autonomy Myth* (n53) 263.

<sup>124</sup> *ibid* 34-5.

<sup>125</sup> *ibid* 35.

<sup>126</sup> *ibid* 139.

only particular relationships will be recognised and so will limit the number of relationship that may be legally recognised under this approach. Additionally, Fineman's idea that after abolishing legal marriage there would continue to be 'protection for the economically weaker party', because, for example, 'default' rules of equity, such as unjust enrichment and constructive trusts could offer a remedy where a cohabitant has contributed to the 'accumulated wealth' of their partner,<sup>127</sup> can be criticised. As chapter six will explain, it is debatable whether trusts and property law can deal effectively and appropriately with disputes between family members.<sup>128</sup>

Since suggesting the caretaker-dependant dyad as the new core family connection, Fineman has developed the vulnerability thesis. Essentially, Fineman argues that rather than being autonomous, we are all vulnerable because vulnerability is 'a universal, inevitable, enduring aspect of the human condition'.<sup>129</sup> Recognising that all humans are inherently vulnerable means that 'politics, ethics and law' need to 'be fashioned around a complete, comprehensive vision of the human experience if they are to meet the needs of real-life subjects'.<sup>130</sup> This means that law should centre on the vulnerable subject and not the autonomous liberal subject, because the latter is assumed to be self-sufficient, independent and always able to make rational choices.<sup>131</sup> The vulnerability analysis challenges assumptions and questions why some people are privileged whilst others are left behind.<sup>132</sup> Fineman's concept of vulnerability is useful in that it reinforces the ideas of Barlow and Duncan that the law is making a 'rationality mistake' because of the incorrect assumptions made about the reasons behind people's relationship practices, and additionally it challenges the notion that 'autonomy' needs protecting, because we are all vulnerable. The vulnerability analysis is not focussed specifically on relationship recognition however and so in that sense its usefulness for the thesis is limited.<sup>133</sup>

Polikoff is another commentator whose work could be seen as adopting a radical function-based approach, although in a different way to that advocated by Fineman. For Polikoff, laws that continue to treat married couples differently from everyone else must be re-evaluated because they are based in historical ideas of ensuring the continued gendered roles of husband

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<sup>127</sup> *ibid* 134.

<sup>128</sup> See Chapter 6, 6.3.2.1.

<sup>129</sup> Fineman 'The Vulnerable Subject' (n86) 8.

<sup>130</sup> *ibid* 10.

<sup>131</sup> *ibid* 10; see also 11-2 where Fineman explains that the liberal subject can also be criticised because it makes the assumption that 's/he can only be presented as an adult'.

<sup>132</sup> *ibid* 15-9.

<sup>133</sup> The vulnerability thesis has been subject to criticism. For example, see C Bendall 'Some are more 'Equal' than Others: Heteronormativity in the Post-White era of Financial Remedies' (2014) 36(3) *Journal of Social Welfare and Family Law* 260, 269; Barlow (n83) 227-8.

and wife, which no longer have a place in law.<sup>134</sup> So, if the laws no longer serve their original purpose, they should be reconsidered. This is reminiscent of Glennon's argument that there is a need to collapse relationship categories in order to have a principled discussion about the purpose of relationship recognition.<sup>135</sup> For Polikoff, 'a legal system in a pluralistic society that values all families should meld as closely as possible the purposes of a law with the relationships that law covers.'<sup>136</sup> Additionally, moving towards function-based recognition rather than focussing on formalised relationships is important for Polikoff because she believes that the law should be 'extending benefits' to family relationships where they really are supporting each other, regardless of whether there is a legal duty to support.<sup>137</sup> Polikoff argues that the administrative efficiency of formalised relationships like marriage is not a sufficient reason to ignore the rest of the population.<sup>138</sup> She explains that 'families' in all their various 'forms' are significant,<sup>139</sup>

*Adults build relationships for purposes other than childrearing. Whether married or unmarried, sexual or platonic, connected through biology, adoption, extended family or choice, adults create relationships that contribute to their health, happiness, well-being, identity and security. A society that cares about the welfare of its people will make laws that value and support those relationships. Laws must also justly address the consequences of these relationships when they end through death or dissolution.<sup>140</sup>*

Polikoff proposes what she has entitled the 'valuing all families' approach. Unlike Fineman, Polikoff would not abolish marriage, and similarly to Barlow and others, Polikoff's approach embraces both form-based and function-based approaches of relationship recognition. There would still be a legal status of marriage, although 'marriage' would be re-named as 'civil partnership' to avoid 'outmoded and undesirable meanings',<sup>141</sup> and would include both same- and opposite-sex couples. Specific legal consequences would attach to all civil partnerships to '[facilitate] straightforward treatment',<sup>142</sup> although some distinctions could be made depending on whether or not the couple had children.<sup>143</sup> Additionally, there would be

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<sup>134</sup> For comments on the changes made to the legal consequences of marriage, see Chapter 3, 3.3.

<sup>135</sup> See above, 2.3.3.1.

<sup>136</sup> N D Polikoff *Beyond (Straight and Gay) Marriage: Valuing all Families under the Law* (Beacon Press, 2008), 126.

<sup>137</sup> *ibid* 129.

<sup>138</sup> *ibid* 129-31.

<sup>139</sup> cf the discussion of 'families of choice' in Chapter 1, 1.3.2.2b.

<sup>140</sup> Polikoff (n136) 141.

<sup>141</sup> *ibid* 132.

<sup>142</sup> *ibid* 131.

<sup>143</sup> *ibid* 132-3.

a registration system of 'designated family relationships', whereby it would be possible to publicly declare that a relationship between two people should be considered a family relationship.<sup>144</sup> This would be available for unmarried people so that they could nominate a person to act on their behalf were they incapable of acting for themselves in areas such as 'healthcare and disposition-of-remains decisions'.<sup>145</sup> For all other situations, function-based recognition would apply and a relationship would only be legally recognised when that particular relationship would benefit from a particular legal provision. For example, 'a law designed to account for economic and emotional interdependence would automatically include those who had lived together interdependently for a certain period.'<sup>146</sup> Polikoff does not give an example of such a law, and importantly does not define 'interdependency', which would be necessary to help figure out how a decision would be made to determine whether a relationship was 'interdependent'. The value of Polikoff's suggestion for reform lies in the way it advocates an inclusive system of relationship recognition which is principled because it attempts to match up the purpose of the law with the functions performed by a relationship. Her proposal shows that, theoretically at least, a combination of form-based and function-based approaches may work well to respond to the diverse family relationships that are formed today.

#### **2.4 Conclusion: the thesis contribution**

The aim of this thesis is to explore the differences and similarities between form-based and function-based approaches towards the legal recognition of adult relationships by comparing the English and Welsh approach with that in use in Australia. The remainder of the thesis begins by accepting the arguments presented in chapter one, i.e. that the current form-based system in England and Wales does not correspond well with the way relationships are formed in contemporary society. Retaining the status quo that privileges married couples (and civil partners) above all other types of relationship is difficult to justify on the basis that 'family' is not synonymous with marriage (and civil partnership), and that 'family' is a term that can encompass many different types of relationship. The thesis also accepts that while the functions of family law are open to debate, there is consensus that family law has both a protective and a symbolic function, and so the potential of both form-based and function-based recognition to perform these functions will also be analysed.

In light of this, the thesis will test the findings of this chapter relating to the theoretical similarities and differences between form-based and function-based approaches to determine

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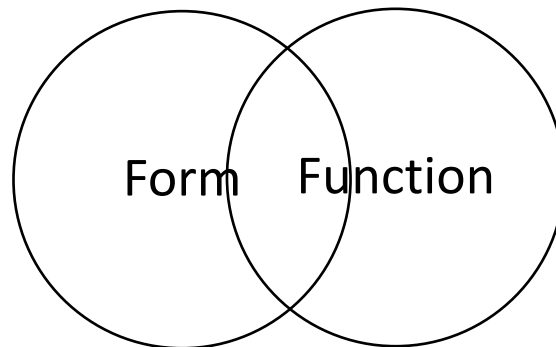
<sup>144</sup> *ibid* 131.

<sup>145</sup> *ibid* 134-5.

<sup>146</sup> *ibid* 131.

whether they are of practical concern. The first research question considered is how the theoretical similarities and differences between form-based and function-based approaches to relationship recognition play out in practice. This chapter has suggested that form- and function-based approaches can have similar effects, but that they are distinct in some ways. The sometimes overlapping effects of form-based, or formalised relationships, and function-based approaches are illustrated by the following figure:

Figure 1



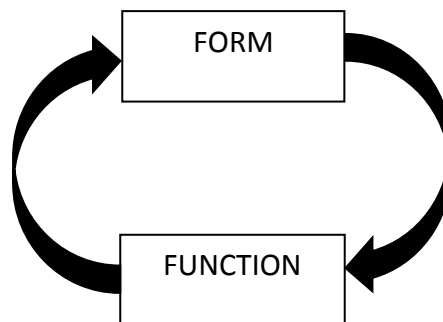
The literature suggests that it is possible for both approaches to respect choice and autonomy because form-based recognition requires parties to opt-in to gain legal recognition, and function-based recognition can incorporate an opt-out option. But, it has also been shown that 'choice' and 'autonomy' are complex concepts, and the efficacy of form-based and function-based recognition to respect autonomy and choice is dependent on a person having knowledge of the legal consequences of their relationship choices. Another similarity is that both systems appear to generate a status: the legal and social status of marriage is well-established, and Barlow and others' work suggests that a function-based approach can generate a legal status, although it is unclear if a social status automatically flows from the creation of a new legal status. It also appears that both form- and function-based systems are similar in that they are both limited by reference to relationship type, and that both systems are flexible enough to provide legal recognition of different types of family relationship.

The literature also suggests, however, that there are distinctions between form-based and function-based frameworks of relationship recognition. It seems that function-based recognition may be best placed to protect family members and fulfil family law's protective function because there is no need to opt-in as there is with form-based recognition. But function-based systems are not unproblematic. The current form-based system has the advantage of being administratively efficient because there is an official record of the start (and end) date of a formalised relationship. This contrasts with Millbank's findings that function-

based systems can be onerous because litigation to determine the existence of a relationship can be both time-consuming and challenging.

The interaction between form- and function-based approaches is complex, especially considering that it has been argued that 'form' has two distinct meanings ('formalised relationship' and 'relationship type'). Figure 2 illustrates the element of circularity of discussion about 'form'-based and function-based approaches:

Figure 2



The exclusivity of the current form-based approach leads us to consider whether a function-based approach would better respond to family diversity. But, an analysis of some function-based approaches from the literature suggests that they continue to rely on a reference to relationship 'form', in the second sense of relationship type, to determine which relationships are included and excluded. In this way, function-based recognition leads back to a version of form-based recognition based on recognising some relationship types and not others. Another element of circularity lies in considering the benefits and difficulties of both mechanisms of relationship recognition. The administrative efficiency of form-based systems is attractive because of its simplicity and convenience, but to benefit under such a system a person must opt-in; function-based systems do not require opting-in, and so appear best placed to fulfil family law's protective function. But function-based recognition appears to be more uncertain than form-based systems because the nature of the relationship will need to be established before a relationship can be legally recognised. In this way, a difficulty with one approach leads to a benefit of the other and so on.

The second research question explored in the thesis is a consideration of what factors have supported and constrained the development of form-based and function-based approaches to relationship recognition. The discussion in this chapter has already hinted at some such factors. For example, the administrative efficiency and respect for choice offered by form-based systems were reasons given by the then government in support of introducing civil



partnerships,<sup>147</sup> and could be viewed as factors that constrain the development of function-based systems because they are not considered to share these benefits. It was also suggested that the symbolic function of family law has supported the development of some form-based frameworks, such as by creating civil partnership and introducing same-sex marriage. Additionally, the literature advocating function-based reforms often refers to the need to protect the vulnerable partner within a relationship. For example, Barlow and others emphasised that the functional similarities between married and unmarried couples means that the same relationship generated need arises on the breakdown of both types of relationship, and so partners in informal relationships should also be protected by the law.<sup>148</sup> The value of care to society has also been advanced as rationales to support the introduction of radical function-based reforms by Fineman. The thesis will question how influential these factors have been in the development of form-based and function-based recognition as well as exploring whether there are any other influential factors that have also proved significant in practice.

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<sup>147</sup> See above, 2.2.1.1 and 2.2.1.2.

<sup>148</sup> See above, 2.3.3.1.

### **Chapter 3 – Marriage: the “traditional” approach to relationship recognition**

This chapter draws on legislation, case law and Hansard debates to explore the concept of marriage, by discussing its meaning in legal and social terms. The chapter will be structured around the three elements of Barker’s ‘marriage model’: the legal structure, the legal consequences and the ideology of marriage. The discussion will show that marriage, as a form-based system of relationship recognition, is inherently flexible, because both the legal structure and the legal consequences of marriage are adaptable when there is social and political will for change. But, it will be argued that this inherent flexibility is limited by the powerful marriage ideology which informs ideas of what marriage is expected to be and thereby shapes the development of the legal structure of marriage. The concluding section will suggest that, while inconsistencies between elements of the legal structure of marriage and the accompanying ideology may be unproblematic for the administratively efficient formalised relationship of marriage, they pose difficulties for the development of other models of relationship recognition.

#### **3.1 The concept of the ‘marriage model’**

Marriage is more than a contract or a legal arrangement because marriage has both a legal and a social status,<sup>1</sup> and its significance varies from one person to the next.<sup>2</sup> As Fineman explains,

*Marriage, to those involved in one, can mean a legal tie, a symbol of commitment, a privileged sexual affiliation, a relationship of hierarchy and subordination, a means of self-fulfillment, a social construct, a cultural phenomenon, a religious mandate, an economic relationship, the preferred unit for reproduction, a way to ensure against poverty and dependence on the state, a way out of the birth family, the realization of a romantic ideal, a natural or divine connection, a commitment to traditional notions of morality, a desired status that communicates one’s sexual desirability to the world, or a purely contractual relationship in which each term is based on bargaining. Of course, this is not an exhaustive list...<sup>3</sup>*

Due to the varied meanings of marriage, this chapter will draw on Barker’s ‘marriage model’ framework, because it allows for discussion of marriage as an idea and a social status, as well as a legal arrangement. Barker uses the marriage model ‘to recognize that marriage is much

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<sup>1</sup> For discussion of the status of marriage, see Chapter 2, 2.2.1.3.

<sup>2</sup> For discussion of the negative connotations of marriage for some, and their reasons for preferring civil partnership as an alternative form-based model of recognition, see Chapter 4, 4.3.2.2.

<sup>3</sup> M Fineman *The Autonomy Myth: A Theory of Dependency* (New Press, 2004), 99.

more of an ideology than a fixed definition' and 'to highlight the ways in which this ideology may be extended to forms of relationship that are not called marriage, such as... civil partnerships.'<sup>4</sup> For Barker, three elements make up the marriage model, and although these elements are connected and overlapping, dealing with them separately helps identify the 'key features of marriage'.<sup>5</sup> The first element is the 'legal structure,' which refers to the 'entry and exit requirements', or, 'in other words, who may marry and dissolve a marriage, under what circumstances and according to what formalities.' Barker feels this element is particularly significant because 'these rules are often regarded as integral to, even definitional of,' marriage.<sup>6</sup> The second element, the 'legal consequences', is significant because the state decides on the legal consequences of marriage, not the parties, and the 'consequences that the state chooses to attach to marriage may provide an indication of the type of relationship it is intended to be.'<sup>7</sup> The third element identified by Barker is the marriage ideology. Barker acknowledges that there is 'disagreement amongst theorists on the meaning of 'ideology' as a term and a concept, as well as with regard to its role in relation to law,'<sup>8</sup> but explains that she uses the term in a particular way,

*...to refer to the beliefs and discourses that underpin judicial understandings of marriage as natural and universal. Ideology here is the manifestation of an 'ideal' image of marriage... The ideologies of marriage would be those pronouncements that tell us about the marriages we live by, our collective image of what marriage ought to be. This may bear little relation to the actual marriages that we live with but, through its incorporation into what have generally been accepted as judicial definitions... what marriage 'ought to be' becomes what marriage is. In this way, ideologies of marriage form part of its (perceived) essence.<sup>9</sup>*

In the same way that Gillis and Diduck explain that our ideas of what family is, and should be, are informed by the mythical families we live by,<sup>10</sup> Barker explains that the marriage ideology refers to our imagined view of what marriage should be, rather than focusing on the reality of

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<sup>4</sup> N Barker *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan, 2013), 21.

<sup>5</sup> *ibid* 24.

<sup>6</sup> *ibid* 22.

<sup>7</sup> *ibid* 22.

<sup>8</sup> *ibid* 23, where Barker notes that, for example, T Eagleton, in *Ideology: An Introduction* (Verso, 1991), 28, 31, 'outlines six possible definitions from a "general material process of production of ideas, beliefs and values in social life" to deceptive or false beliefs that arise from the material structure of society as a whole'.

<sup>9</sup> Barker (n4) 23-4.

<sup>10</sup> See Chapter 1, 1.3.2.

actual marriages. Just as the mythical family we live by is an integral part of the concept of 'family', the marriage ideology cannot be separated from the legal structure of marriage, because they inform each other, and so any discussion of the concept of marriage must also explore the ideology. The discussion that follows is therefore structured under Barker's three headings.

### **3.2 The legal structure of marriage**

Upon examination, it is clear that the entry and exit requirements for marriage have shifted over time in a way that reveals both continuity and change in the legal structure of marriage and shows that marriage, as a form-based method of recognition, is inherently flexible. This will be demonstrated here by exploring firstly the continuity and change in the capacity rules of marriage, and secondly by exploring the changing divorce provisions. Although forming a valid marriage involves complying with particular formalities prescribed by law,<sup>11</sup> they will not be discussed here because they are procedural issues that do not contribute to an understanding of the type of relationship the legal structure of marriage provides for.

#### **3.2.1 The legal structure of marriage: forming a valid marriage**

The capacity requirements for a valid marriage in both England and Wales and Australia can be discerned by exploring the grounds on which a marriage may be annulled. In both jurisdictions, a failure to comply with particular capacity requirements means that the purported marriage is void,<sup>12</sup> and additionally in England and Wales, a decree of nullity may be awarded where the marriage is voidable.<sup>13</sup> A marriage is void in both jurisdictions where,

- Either party is under the minimum marriageable age;
- If the parties are within the prohibited degrees of family relationship; or,
- If either party is already married.

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<sup>11</sup> For an account of the difficulties with the present law relating to the formality requirements of marriage, see Law Commission *Getting Married: A Scoping Paper* (2015), Chapter 2.

<sup>12</sup> Matrimonial Causes Act 1973, s11; Marriage Act 1961 (Cth), s23B.

<sup>13</sup> Matrimonial Causes Act 1973, s12. The Family Law Act 1975 (Cth) repealed the Matrimonial Causes Act 1959 (Cth), s21(1), which contained provision for voidable marriages that included matters such as 'that either party to the marriage is incapable of consummating the marriage'; or that 'either party to the marriage is suffering from a venereal disease in a communicable form'; or that 'the wife is pregnant by a person other than the husband'. The second reading speech introducing the Family Law Bill 1974 into the Australian Senate did not explain why the concept of a voidable marriage was to be removed from the law, only that the purpose of the reforms was to replace the previous legislation 'with an up-to-date, comprehensive set of provisions': see Senate Deb 3 April 1974, 640 (Senator Murphy, NSW Attorney General and Minister for Custom and Excise).

Additionally, a marriage will be void in Australia if either party has not given real consent. A marriage may be voidable in England and Wales if,

- The marriage has not been consummated because of incapacity or wilful refusal to consummate (for opposite-sex couples only);<sup>14</sup>
- Consent was not validly given;
- The respondent was suffering from venereal disease at the time of the marriage;
- The respondent was pregnant by some person other than the petitioner;
- An interim gender recognition certificate has been issued to either party after the commencement of the marriage;
- The respondent acquired their gender under the Gender Recognition Act 2004.<sup>15</sup>

It is only the parties to the marriage who can petition for nullity on the grounds that the marriage is voidable, and this must be done while both parties are alive and within particular time limits.<sup>16</sup> These limitations help ensure the administrative efficiency of marriage in that they attempt to ensure certainty about who is married to whom at any given time.

Probert has noted that, while the grounds that make a marriage void are 'inimical' to the concept of marriage, those which make it voidable are less fundamental.<sup>17</sup> In *Re Roberts (Deceased)*,<sup>18</sup> Walton J explained how public policy concerns have influenced the grounds of nullity:

*If a marriage is declared void it is declared void on social and public policy grounds which must of necessity take priority over anything that the parties themselves wish; but where a marriage is voidable the matter is left entirely in the hands of the parties, and the parties may not wish to take advantage of their undoubted right to have the marriage declared void.*<sup>19</sup>

A different significance attaches to the grounds that make a marriage void and those that make it voidable. The parties to the marriage can decide for themselves whether to bring a voidable marriage to an end, but the grounds on which a purported marriage is void are so offensive on

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<sup>14</sup> Matrimonial Causes Act 1973, s12(2).

<sup>15</sup> Matrimonial Causes Act 1973, s12.

<sup>16</sup> See Matrimonial Causes Act 1973, s13.

<sup>17</sup> R Probert 'When are we Married? Void, Non-existent and Presumed Marriages' (2002) 22(3) Legal Studies 398, 403. SH Blake *Law of Marriage* (Barry Rose Publishers, 1982), 3-4, makes a similar point, and suggests that the grounds of nullity are central to the concept of marriage with the grounds for a void marriage being 'vital' to the concept, and the voidable grounds considered 'important'.

<sup>18</sup> [1978] 1 WLR 653.

<sup>19</sup> *ibid* 656.

the grounds of public policy that it must be considered invalid from its inception. The main focus here is on the grounds for finding a marriage void because they illustrate the legal structure of marriage, or the *type* of relationship a marriage has to be according to law.

#### 3.2.1.1 Dyadic relationships

One element of continuity in the capacity requirements is that marriage in England and Wales and Australia continues to be limited to dyadic relationships, which is in keeping with dominant cultural views of marriage as a monogamous union. It is not possible to be married to more than one person at a time and bigamy is a crime in both the jurisdictions under consideration, punishable by imprisonment for up to 7 years or a fine, or both, in England and Wales<sup>20</sup> or 5 years imprisonment in Australia.<sup>21</sup> Additionally, a person can only be in one formalised relationship at a time, so, for example, in England and Wales it is not possible to be both married and in a civil partnership simultaneously.<sup>22</sup> There may be a practical reason for this limitation, which is administrative efficiency: a system where only one formalised dyadic relationship is recognised by law is easier to administer than a system where an individual may be in a series of formalised relationships simultaneously, and where these relationships may be between two or more people.<sup>23</sup>

#### 3.2.1.2 Lack of consent

Consent has always been an important element of marriage and so shows an element of continuity in the capacity requirements. In Australia, a lack of 'real consent' by one or both parties means that the purported marriage is void. Factors which vitiate consent are that,

- The consent was obtained by duress or fraud;
- Either party was mistaken as to the identity of the other or the nature of the ceremony performed;
- Or that either party is mentally incapable of understanding the nature and effect of the ceremony.<sup>24</sup>

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<sup>20</sup> Offences against the Person Act 1861, s57.

<sup>21</sup> Marriage Act 1961 (Cth), s94.

<sup>22</sup> Matrimonial Causes Act 1973, s11(b); see also Civil Partnership Act 2004, s80. For the Australian provision: see Marriage Act 1961 (Cth), s23B(1)(a). Additionally, marrying in Australia automatically terminates a registered relationship: see for example Relationships Act 2008 (Vic), s11(b); Relationships Act 2003 (Tas), s15(1)(b). See discussion in Chapter 4, 4.1.2.2.

<sup>23</sup> For further discussion on the administrative efficiency of dyadic formalised relationships in the context of the registered couple relationships, see Chapter 4, 4.2.1.

<sup>24</sup> Marriage Act 1961 (Cth), s23B(1)(d).

Prior to 1971, lack of consent made a marriage void in England and Wales,<sup>25</sup> and after 1971 a marriage will be voidable if consent was given because of ‘duress, mistake, unsoundness of mind or otherwise’, or that either party was suffering from a mental disorder that meant they were incapable of consenting to marriage.<sup>26</sup>

One of the main arguments against function-based recognition is that it fails to respect individual autonomy and choice because it imposes unwanted legal consequences onto relationships,<sup>27</sup> and some feel that formalised relationships are preferable because they better respect choice and autonomy due to the fact that couples choose to formalise their relationship and have it legally recognised.<sup>28</sup> In light of this, it is necessary to explore what ‘consent’ to marriage means to understand what couples need to know in order to consent to marriage and so be said to be exercising their choice and autonomy. The discussion will show that while consent must be freely given, valid consent does not require an individual to appreciate the legal consequences of marriage in either England and Wales or Australia. This serves to undermine the idea that formalised relationships better respect choice and autonomy than function-based recognition. Consent to marriage merely requires a person to have the capacity to have some understanding of the social meaning of marriage, and not the legal consequences. As a person who has limited understanding of the legal consequences of marriage will still be forming a valid marriage, it is difficult to see how such a person would truly be ‘choosing’ those legal consequences, as opposed to having those consequences ‘imposed’ on them.

### 3.2.1.2a What does ‘consent’ mean?

The underlying aim of requiring a party to consent to a marriage is to protect vulnerable people from being forced into marriage, and so in this way these requirements may help family law fulfil its protective function.<sup>29</sup> Forced marriage cases,<sup>30</sup> where a young or vulnerable person

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<sup>25</sup> This change was made following a proposal by the Law Commission. See, Law Commission *Family Law: Report on Nullity of Marriage* (No 33, 1970), [11-2], where it is explained that under the previous law, the non-consenting party to a marriage could subsequently choose to ratify the marriage, and, because the party had a choice as to whether to accept the marriage, lack of consent was better suited as a means of finding a marriage voidable.

<sup>26</sup> Matrimonial Causes Act 1973, s12(c) and (d). S12(d) states: ‘that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage’.

<sup>27</sup> See Chapter 2, 2.3.2.3.

<sup>28</sup> See Chapter 2, 2.2.1.2.

<sup>29</sup> For discussion of family law’s protective function, see Chapter 2, 2.1.1.

<sup>30</sup> It is possible to obtain a forced marriage prevention order under the Family Law Act 1996, s63A, and breach of such an order is a criminal offence under the Anti-Social Behaviour Act 2014, s121. For discussion of the effect of criminalizing the breach of forced marriage protection orders, see R Gaffney-Rhys ‘The Criminalisation of Forced Marriage in England and Wales: One Year On’ (2015) 45(11) Family

from a minority ethnic community is compelled to enter a marriage, show that individuals should freely consent to marriage, or in other words, that they have not entered the marriage as a result of duress. Whether behaviour amounts to 'duress' is a matter of degree however, because there are several factors at play when making a decision to marry.<sup>31</sup> As Simmons and Burn explain, 'forced marriage exists along a continuum of coercive practices where the pressure to fulfil expected gendered roles may, in some cases, deprive women and men of the opportunity to fully and freely consent to marriage.'<sup>32</sup> Duress is not limited to physical threats of violence in either jurisdiction,<sup>33</sup> but rather involves an assessment of whether the pressure on the victim is such that they could not be said to be consenting.

In *Hirani v Hirani*,<sup>34</sup> when the parents of the petitioner, of Hindu Indian origin, discovered that she had formed a relationship with a Muslim, they arranged for her to marry another man. The petitioner was told that if she refused the marriage, she should 'pack up [her] belongings' and leave the family home.<sup>35</sup> She consequently married and later petitioned for nullity. Ormrod J explained that the 'crucial question... is whether the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual.'<sup>36</sup> Similarly in *In the Marriage of S*,<sup>37</sup> a case where a 16 year old girl felt compelled to marry under parental pressure,<sup>38</sup> Watson SJ stressed that although third parties may encourage, persuade or arrange a marriage, the decision of whether and who to marry is solely down to the individual.<sup>39</sup> The applicant's consent was vitiated because she acted out of love, a sense of family loyalty, religious commitment and she belonged to a 'culture that demanded filial obedience'. According to Watson SJ,

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Law 1378. Similarly, in Australia legislation was passed in 2013 creating two new criminal offences, 1) causing a person to enter into a forced marriage and 2) being party to the forced marriage when that party is not a victim: Criminal Code Act 1995 (Cth), s270.7b. For discussion, see F Simmons and J Burn 'Without Consent: Forced Marriage in Australia' (2013) 36 Melbourne University Law Review 970.

<sup>31</sup> See also Berman J in *Dave v Karia* [2016] FamCA 414, [38]: 'I find that whilst the parties brought to account in their decision to marry a range of considerations, not just in respect of their own personal relationship but also in respect of the concerns expressed by the husband's family, in doing so, they acted no differently than many people do in terms of the decisions that they bring to bear that finally determines that parties will marry.'

<sup>32</sup> Simmons and Burn (n30) 973.

<sup>33</sup> It appears that this was once the position in English and Welsh law: *Szechter v Szechter* [1971] P 286, 297-8 (Simon P).

<sup>34</sup> (1983) 4 FLR 232.

<sup>35</sup> *ibid* 233.

<sup>36</sup> *ibid* 234.

<sup>37</sup> (1980) 5 Fam LR 831.

<sup>38</sup> *ibid* 833-4.

<sup>39</sup> *ibid* 837.



*...a sense of mental oppression can be generated by causes other than fear or terror. If there are circumstances which taken together lead to the conclusion that because of oppression a particular person has not exercised a voluntary consent to marriage, that consent is vitiated by duress and is not real consent.*<sup>40</sup>

Consent must be 'freely' given, and so in this sense people can be said to be exercising their autonomy by choosing to form a marriage and are to be protected from being coerced into marriage.

While it is clear that consent must be freely given, this does not explain what is being consented to. In *Vervaeke v Smith*,<sup>41</sup> which involved a sham marriage,<sup>42</sup> the House of Lords approved Ormrod J's first instance comments that knowledge of the consequences of marrying, or even whether parties intended to 'live together as husband and wife', were irrelevant when deciding whether the parties consented. All that is necessary is that they were aware that they were going through a marriage ceremony, and had some understanding of the effect of the ceremony,

*Where a man and a woman consent to marry one another in a formal ceremony, conducted in accordance with the formalities required by law, knowing that it is a marriage ceremony, it is immaterial that they do not intend to live together as man and wife... it is immaterial that they intend the marriage to take effect in some limited way or that one or both of them may have been mistaken about or unaware of some of the incidents of the status which they have created. To hold otherwise would impair the effect of the whole system of law regulating marriages in this country, and gravely diminish the value of the system of registration of marriages upon which so much depends in a modern community.*<sup>43</sup>

This leads to consideration of what is the bare minimum a person needs to understand in order to consent, and the capacity cases suggest that all that is necessary is some understanding

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<sup>40</sup> *ibid* 839. This decision was followed by Foster J in *Radtko v Pagano* [2016] FamCA 784 (who at [40] also approved of Ormrod J's decision in *Hirani v Hirani* (n34)); see also *Nagri v Chapal* [2012] FamCA 464 (Collier J).

<sup>41</sup> [1983] 1 AC 145.

<sup>42</sup> In this case, a Belgian prostitute married a UK national to gain British nationality and a passport. The marriage took place in 1954, and the parties only saw each other once after the wedding to ensure the petitioner got her passport. In 1970, the petitioner married a wealthy Italian man who died on their wedding day. He owned property in England, which the petitioner believed she should inherit, and so she needed to prove her first marriage was invalid. She argued that she was not aware of the nature of the 1954 proceedings and so did not consent to the marriage.

<sup>43</sup> *Vervaeke (formerly Messina) v Smith and others* (n41) 151-1 (Lord Hailsham).

of the social meaning of marriage. McCall J in *Brown v Brown*<sup>44</sup> explained that all that is necessary for capacity to consent is that an individual is 'capable of understanding the nature of the contract into which he was entering'.<sup>45</sup> This involves an understanding of the effect that marriage will have on the individual and their intended spouse. The court was satisfied in *Brown* that the husband, who was in ill health and suffering from dementia, understood he was getting married, and the fact that he was marrying his de facto partner<sup>46</sup> of 15 years was an important factor in coming to the conclusion that he consented because the marriage was merely 'regularising [the] fact' of their long-term informal relationship. McCall J suggested that had the husband been marrying someone else, he may not have had capacity to consent to that marriage.<sup>47</sup> Similarly, in *Sheffield City Council v E*<sup>48</sup> Munby J explained that a person must appreciate that they are 'taking part in a marriage ceremony', and 'understand the nature of the marriage contract'. This means that they 'must be mentally capable of understanding the duties and responsibilities that normally attach to marriage.' The contract of marriage is, according to Munby J, 'a simple one'<sup>49</sup> and involves conferring on the parties,

*...the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance.*<sup>50</sup>

These comments about what a person needs to understand to consent to marriage suggest that a person need not appreciate the legal consequences, but rather they need to have an appreciation of the social understanding of marriage. As Chisholm J noted in the Australian context, the law does not require a person to have a 'detailed and specific understanding of the legal consequences' of marriage, and 'if there were such a requirement, few if any marriages would be valid.'<sup>51</sup> Taken together, this goes some way to negating the concerns of commentators who argue against function-based recognition because it imposes legal

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<sup>44</sup> (1982) 8 Fam LR 1.

<sup>45</sup> Quoting the words of Singleton J in *In Re Park* [1954] P 89, 127.

<sup>46</sup> As will be made clear in Chapter 6, a 'de facto' relationship is an informal marriage-like couple relationship.

<sup>47</sup> *Brown v Brown* (n44) 9.

<sup>48</sup> [2005] Fam 326.

<sup>49</sup> *ibid* [68].

<sup>50</sup> *ibid* [132]. See also *Luton BC v B* [2015] EWHC 3534 (Fam), [27-30] (Mr Justice Hayden).

<sup>51</sup> *AK v NC* [2003] FamCA 1006, [21].

consequences onto relationships; consenting to marriage does not require an understanding of the legal effects of marrying.

### 3.2.1.3 Age requirements

A marriage between persons where one or both are under the minimum age will be void in both England and Wales and Australia. The minimum age requirements have been subject to change, which suggests there is flexibility to amend the relationship type that marriage provides for when social norms change. In England and Wales, it was historically possible for females to marry at 12 and males at 14.<sup>52</sup> The minimum age was increased to 16 for both sexes in 1929<sup>53</sup> because of changes to the minimum age of consent to sexual relations. Lord Buckmaster in the House of Lords questioned the logic of the law that a female under 16 could not consent to sexual intercourse, yet could consent to sex 'in perpetuity' if she were to marry.<sup>54</sup> The government agreed that the law was illogical, and referred to the situation as 'indefensible'.<sup>55</sup> Today, persons aged 16 and 17 may marry if they have parental consent or the consent of the court.<sup>56</sup> Similarly, in Australia prior to 1961, the minimum age of marriage in most of the Australian states and territories was that prescribed by common law, 12 for females and 14 for males.<sup>57</sup> This was raised to 16 for females and 18 for males in 1961<sup>58</sup> partly because 'various women's organizations' had petitioned to get the minimum age increased.<sup>59</sup> This was later increased to 18 for females in 1991,<sup>60</sup> because the then government felt that it was 'discriminatory' to differentiate between males and females.<sup>61</sup> Today in Australia, persons aged

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<sup>52</sup> JH Baker *An Introduction to English Legal History* (2<sup>nd</sup> ed, Butterworths, 1979), 403.

<sup>53</sup> Marriage Act 1929. See Baker (n52) 403.

<sup>54</sup> HL Deb 19 February 1929, Vol 72, Col 962.

<sup>55</sup> HL Deb 19 February 1929, Vol 72, Col 969 (The Lord Privy Seal, The Marquess of Salisbury). Additionally, Lord Buckmaster also argued that other countries, such as Norway, China and Sweden had also increased the minimum age for marriage: HL Deb 19 February 1929, Vol 72, Col 961-3. See also AH Manchester *Modern History of England and Wales 1750-1950* (Butterworths, 1980), 367; and S Cretney *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003), 57-62.

<sup>56</sup> Marriage Act 1949, s3.

<sup>57</sup> This was not the case in Tasmania, Western Australia and South Australia. Tasmania increased the minimum age to 18 for males and 16 for females following the Marriage Act 1942 (Tas), s18; Western Australia raised the minimum age in the same way with the Marriage Act Amendment Act 1956 (WA); South Australia followed suit with the Marriage Act Amendment Act 1957 (SA), s4. For discussion of the position in Australia prior to the federal reforms, see G Barwick 'The Commonwealth Marriage Act 1961' (1962) 3 Melbourne University Law Review 277, 284-288.

<sup>58</sup> Marriage Act 1961 (Cth), s11 (as originally enacted).

<sup>59</sup> Australian Senate Deb 23 March 1961, 371 (Senator Gorton, Minister for the Navy).

<sup>60</sup> Sex Discrimination Amendment Act 1991 (Cth), s12, amending s11 of the Marriage Act 1961 (Cth). For discussion of how the minimum age of marriage may fail to take into account cultural differences see P Parkinson 'Multiculturalism and the Regulation of Marital Status in Australia' in N Lowe and G Douglas (eds) *Families across Frontiers* (Kluwer Law International, 1996), 315-8.

<sup>61</sup> See the Sex Discrimination Amendment Act 1991 (Cth) Explanatory Memoranda, [41].

16 or 17 may marry with the permission of the court if the circumstances are 'exceptional and unusual.'<sup>62</sup> This shows that changing social norms will change the legal structure of marriage.

#### 3.2.1.4 Prohibited degrees

In England and Wales, two people related by consanguinity cannot marry. This includes relationships such as those between parents and children, grandparents and grandchildren and aunts/uncles and nieces/nephews.<sup>63</sup> Since 1949, the parent-child relationship created by adoption is also within the prohibited degrees, which shows development in the prohibited degrees requirements.<sup>64</sup> Marriages between some relations of affinity, or those related by marriage, are also prohibited,<sup>65</sup> and these too have been changed. For example, following *B v UK*,<sup>66</sup> the European Court of Human Rights (ECHR) found that the prohibition on a former daughter-in-law marrying her former father-in-law while the ex-spouses were alive was found to violate Article 12, the right to marry. The ECHR found that despite the government's reasoning that the prohibited degrees requirements were necessary to protect the 'integrity of the family', the government's refusal to allow a former a parent-in-law to marry their former child-in-law did not prevent such a relationship from forming in the first place.<sup>67</sup> The Court also referred to the fact that the ban on marriages between relatives of affinity was not absolute because they could petition for a personal act of parliament to allow them to marry.<sup>68</sup> This suggests that there was always a degree of flexibility within this essential element of marriage for those willing and able to petition parliament.<sup>69</sup>

The Australian 'prohibited relationships' have also been subject to considerable change.<sup>70</sup> Historically, the prohibited relationships requirements varied between the states. South Australia adopted English and Welsh law provisions relating to the prohibited degrees contained

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<sup>62</sup> Marriage Act 1961 (Cth), s12. For an illustration of a case where the circumstances were 'exceptional and unusual' see *Ex Parte Willis* (1997) 21 Fam LR 479.

<sup>63</sup> Marriage Act 1949, s1 and sch 1 part 1 as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986, sch 1.

<sup>64</sup> Cretney (n55) 56-7. It must be remembered that other relationships created via adoption, such as those between an adopted brother and sister, are not prohibited from marrying which suggests that there is an incoherent rationale behind the way in which the prohibited relationships have been drawn up.

<sup>65</sup> Marriage Act 1949, sch 1 part 2.

<sup>66</sup> (2006) 42 EHRR 11.

<sup>67</sup> For example, these relationships were not contrary to the criminal law: *B v UK* (n66) [37-8].

<sup>68</sup> *ibid* [40].

<sup>69</sup> See, *ibid* [35]: 'This is an exceptional and relatively costly procedure which is at the total discretion of the legislative body and subject to no discernable rules or precedent.'

<sup>70</sup> For a history of the changes made to the prohibited relationships requirement prior to 1976 in Australia, see HA Finlay 'Farewell to Affinity and the Calculus of Kinship' (1975-7) 5(1) University of Tasmania Law Review 16.

in the Marriage Act 1835, while Tasmania<sup>71</sup> provided that marriages within the prohibited degrees of consanguinity and affinity were void, unless in the cases of affinity the court gave permission for the couple to marry.<sup>72</sup> Following federal reforms in 1959 to standardize the capacity requirements across Australia, marriages between relations of consanguinity and affinity were prohibited and any such marriages would be void,<sup>73</sup> unless, again, in the case of affinity, a judge granted permission for a couple to marry.<sup>74</sup> This was later amended in 1976,<sup>75</sup> and today the only ‘prohibited relationships’ are those between a person and their ancestor or descendant, and those between brother and sister, whether the familial link is biological or created through adoption.<sup>76</sup> This shows the flexibility of marriage, where an integral element of the capacity requirements now looks very different in both jurisdictions.

#### 3.2.1.4a A sexual relationship?

In her discussion of the marriage model, Barker suggests that there are indications in the Matrimonial Causes Act 1973 that marriage is a sexual relationship, and that ‘*sexuality* forms an integral part of the structure of marriage.’<sup>77</sup> These are that a marriage between those within the prohibited degrees is void, and the voidable grounds relating to consummation and venereal disease.<sup>78</sup> It is submitted here that while marriage is often expected to be a sexual relationship,<sup>79</sup> and marriage has a history of being used as a tool to control sexual behaviours,<sup>80</sup> the law does not require spouses to actually have a sexual relationship and so the legal structure of marriage does not require a sexual relationship. A sex-less marriage that complies with the capacity requirements will be a valid marriage in both England and Wales and Australia, and the spouses themselves may wish to bring the marriage to an end via divorce (i.e. bring a valid marriage to an end) if this situation is unsatisfactory. Additionally, in England and Wales, the consummation

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<sup>71</sup> Marriage Act 1942 (Tas).

<sup>72</sup> Barwick (n57) 282-4.

<sup>73</sup> Matrimonial Causes Act 1959 (Cth), s18(1)(b).

<sup>74</sup> Matrimonial Causes Act 1959 (Cth), s20: see sch 2 of the 1959 Act for a complete list of the then prohibited family relationships.

<sup>75</sup> By the Marriage Amendment Act 1976 (Cth), s12. No reasons were given by the then Attorney General to explain why this change had been made in the second reading speech: see Australian House of Representatives Deb 3 June 1976 (Mr Ellicott) (available from <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=HANSARD80;id=hansard80%2Fhansardr80%2F1976-06-03%2F0128;query=id%3A%22hansard80%2Fhansardr80%2F1976-06-03%2F0000%22> – last accessed 17/03/2017).

<sup>76</sup> Marriage Act 1961 (Cth), s23B(2).

<sup>77</sup> Barker (n4) 24 (emphasis in original).

<sup>78</sup> *ibid* 24-5.

<sup>79</sup> See below, 3.4, for discussion of how the ideology of marriage is shifting and that the sexual aspect of the relationship is now less of a concern for some.

<sup>80</sup> For example, the Book of Common Prayer of 1662 stated that two of the purposes of marriage were the procreation of children and the avoidance of fornication: see Manchester (n55) 362.

grounds for nullity do not apply to the marriages of same-sex couples, which suggests that the idea of a sexual relationship is part of the ideology of marriage rather than a requirement of the legal structure, and, in any case, consummation is only a one-off optional event for opposite-sex couples. The presence of the prohibited degrees requirements in both jurisdictions are cogent suggestions that marriage is expected to be a sexual relationship that results in a couple having children, but the fact remains that an otherwise valid marriage will not be invalidated because the spouses do not have a sexual relationship with each other. This is one way in which the legal structure of marriage does not correspond with expectations as to the nature of the relationship. This point will become more significant later in the thesis in light of discussion about function-based recognition of informal couple relationships, where the court will inquire into whether the relationship was a sexual one.<sup>81</sup>

#### 3.2.1.5 Same-sex marriage

The change in England and Wales to allow marriage between couples of the same-sex is especially significant because it opens up marriage to a new type of relationship that has historically been excluded from marriage. Support for same-sex marriage has not been unanimous, and some opponents stated in the parliamentary debates on the Marriage (Same Sex Couples) Bill 2013 that the bill would ‘change the structure of society by changing the definition of marriage.’<sup>82</sup> Similarly, Sir Tony Baldry, the Second Church Estates Commissioner, proclaimed that same-sex marriage would ‘end the concept of marriage as it has been understood by society in general and by almost all faith groups in particular for recorded time’.<sup>83</sup>

While marriage law has finally been amended to become more inclusive of family diversity in England and Wales, the Australian legislature took steps to ensure that marriage remains the exclusive preserve of opposite-sex couples in 2004 by introducing an explicit<sup>84</sup> heterosexual definition of marriage into the law.<sup>85</sup> There have been several attempts at introducing same-sex

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<sup>81</sup> For discussion, see Chapter 6, 6.1.2.2.

<sup>82</sup> HL Deb 15 July 2013, Vol 747, Col 542 (Lord Cormack).

<sup>83</sup> HC Deb 05 February 2013, Vol 558, Col 143. For discussion of some of the arguments against same-sex marriage, see below, 3.4.1.

<sup>84</sup> Prior to 2004, there was no express provision in Australian legislation stating that a marriage between a couple of the same-sex was prohibited. Rather, the Marriage Act 1961 (Cth), s46(1) provided that the marriage celebrant should use words such as ‘marriage... is the union of a man and a woman’ during the wedding; and the Family Law Act 1975 (Cth), s43(a) calls for a need to preserve and protect ‘the institution of marriage as a union of a man and a woman.’ For comment, see *Re Kevin: Validity of Marriage of Transsexual* [2001] FamCA 1074, [7] (Chisholm J).

<sup>85</sup> Marriage Act 1961 (Cth), s5 as amended by the Marriage Amendment Act 2004 (Cth), sch 1. S5 provides that marriage in Australia is ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.’ Perhaps this is best thought of as a description rather than a definition, because while it is only possible to be married to one person at a time, being in an informal relationship while married will not invalidate the marriage, and additionally divorce is available in Australia.

marriage in Australia at both state<sup>86</sup> and federal<sup>87</sup> level, but the federal government continues to oppose such a reform because they believe that changing the type of relationship that marriage provides for changes the very essence of marriage. In 2004, the then Attorney General justified the decision to legislate to provide a heterosexual definition of marriage on the basis that it was necessary 'to take steps to reinforce the basis of' marriage and to protect the institution<sup>88</sup> due to 'significant community concern about the possible erosion of' marriage,<sup>89</sup> partly as a result of developments in other jurisdictions that were legalising same-sex marriage.<sup>90</sup>

The Australian Capital Territory (ACT) attempted to provide marriage equality in 2013,<sup>91</sup> but their attempt was swiftly struck down by the Australian High Court.<sup>92</sup> The High Court held that, in accordance with the Australian constitution, only federal law can legislate to amend marriage and the states and territories cannot enact legislation that is incompatible with federal law.<sup>93</sup> The Court made it clear however that the federal parliament *does* have the power to amend marriage in this way<sup>94</sup> because 'the status of marriage... and the rights and obligations which attach to that status never have been, and are not now, immutable.'<sup>95</sup> As Parkinson notes, the 'real effect' of the High Court case, whilst not taking a position in the same-sex marriage

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<sup>86</sup> For example, Same Sex Marriage Bill 2005 (NSW); Same Sex Marriage Bill 2012 (Tas); Marriage Equality Bill 2012 (SA); Same Sex Marriage Bill 2013 (NSW).

<sup>87</sup> Marriage Equality Amendment Bills of 2009 and 2010 (Cth); Marriage Equality Amendment Bill 2012 (Cth); Marriage Amendment Bill 2012 (Cth); Marriage Equality Amendment Bill 2013 (Cth); Recognition of Foreign Marriages Bill 2014 (Cth); Freedom to Marry Bill 2014 (Cth); Marriage Amendment (Marriage Equality) Bill 2015 (Cth); Marriage Legislation Amendment Bill 2015 (Cth).

<sup>88</sup> This need to protect marriage was also mentioned by Senator Coonan when summing up the second reading debates for the government in the Senate: Australian Senate Deb 12 August 2004, 26555.

<sup>89</sup> See also concerns by some that same-sex marriage would lead to the recognition of polygamy, and arguments that same-sex marriage would deny children a mother and a father: see, for example, Australian Senate Deb 12 August 2004, 26522 (Senator Harradine).

<sup>90</sup> Australian House of Representatives Deb 24 June 2004, 3149-50 (Mr Ruddock, Attorney General). Others however believe that the change in other countries makes the need for allowing same-sex marriage in Australia all the more pressing: see Australian House of Representatives Deb 08 February 2016, 957 (Tanya Plisbersek, Deputy Leader of the Opposition); Australian Senate Deb 12 November 2015, 8387 (Robert Simms).

<sup>91</sup> Marriage Equality (Same Sex) Act 2013 (ACT).

<sup>92</sup> P Parkinson 'The Territory of Marriage: Constitutional Law, Marriage and Family Policy in the ACT Same Sex Marriage Case' (2014) 28(2) Australian Journal of Family Law 160, 161. The ACT's Marriage Equality (Same Sex) Act 2013 (ACT) was passed on 22<sup>nd</sup> of October 2013, with the first marriages taking place on the 7<sup>th</sup> of December 2013. The High Court struck down the legislation on 12<sup>th</sup> December 2013.

<sup>93</sup> *Commonwealth v Australian Capital Territory* [2013] HCA 55, [4]. The marriage powers are contained in the Commonwealth of Australia Constitution Act 1900 (Cth), s51(xxii) and (xxiii). The Australian Capital Territory cannot legislate inconsistently with federal law: Australian Capital Territory (Self-Government) Act 1988 (Cth), s28.

<sup>94</sup> *Commonwealth v ACT* (n93) [56].

<sup>95</sup> *ibid* [16]. Prior to the High Court decision in 2013, there was considerable uncertainty in Australia as to whether the federal parliament, or indeed the states and territories, could legislate for same-sex marriage. For discussion see, K Walker 'The Same Sex Marriage Debate in Australia' (2007) 11(1-2) The International Journal of Human Rights 109, 110-121.

debate, 'is to say that the definition of marriage is an issue for the politicians', because the legal structure of marriage can be adapted to allow same-sex couples to marry.<sup>96</sup>

Allowing same-sex couples to marry arguably represents a change that is more fundamental than any other to the legal structure of marriage. Prior to the commencement of the Marriage (Same Sex Couples) Act 2013 a marriage between two people of the same sex would have been void. This change in England and Wales, and the potential for this change in Australia, demonstrates that even elements that have been historically considered central to marriage are adaptable and may be changed if there is the political will to do so, and shows that marriage is a highly flexible and adaptable institution.

### 3.2.2 Ending a marriage

Introducing divorce was a major change in the legal structure of marriage. Historically it was felt that marriage was an indissoluble union created by God, and so could only end following the death of one party.<sup>97</sup> Spouses could only obtain a judicial separation that allowed them to live separately, but they could not re-marry.<sup>98</sup> Prior to the introduction of the courts' jurisdiction to grant divorces,<sup>99</sup> there was some flexibility because it was possible for those with the means to do so to divorce via act of parliament.<sup>100</sup> This shows that even those elements that were once fundamental to marriage were fairly flexible in practice, at least for the wealthy.<sup>101</sup>

Up until the 1970s, the development of divorce law was similar in England and Wales and Australia and divorce was allowed when one party was at 'fault' for the breakdown of the marriage. For example, in England and Wales the Matrimonial Causes Act 1857 permitted a husband to obtain a divorce if he could prove his wife's adultery, or where a wife could prove a husband's adultery as well as an aggravating factor such as cruelty or desertion.<sup>102</sup> Equal access

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<sup>96</sup> Parkinson 'The Territory of Marriage' (n92) 162.

<sup>97</sup> For discussion see Baker (n52) 401-2.

<sup>98</sup> The ecclesiastical courts could grant a divorce *a mensa et thoro* which was an early form of judicial separation: for details see Baker (n52) 404. It is still possible for the courts to award judicial separation: Matrimonial Causes Act 1973, s17-8.

<sup>99</sup> Matrimonial Causes Act 1857.

<sup>100</sup> Parliament began to award divorces in 1670, almost 190 years before the courts were given the jurisdiction to grant divorces. For an analysis of the first parliamentary divorces see R Probert 'The Roos Case and Modern Family Law' in S Gilmore, J Herring and R Probert (eds) *Landmark Cases in Family Law* (Hart Publishing, 2011).

<sup>101</sup> Another example of how marriage was more flexible for the wealthy is given by Shanley, where she suggests that only the one court was set up in London in 1857 to put divorce out of the reach of the poor: ML Shanley *Feminism, Marriage and the Law in Victorian England: 1850-1895* (Princeton University Press, 1989), 41-2.

<sup>102</sup> Matrimonial Causes Act 1857, sXXVII: a wife could obtain a divorce on the grounds of the husband's 'incestuous Adultery, or of Bigamy with Adultery, or of Rape, or of Sodomy or Bestiality, or of Adultery coupled with... Cruelty... or of Adultery coupled with Desertion, without reasonable Excuse, for Two Years



to divorce was granted in 1923,<sup>103</sup> and additional grounds for divorce were introduced in 1937, namely cruelty, desertion for three years and incurable insanity.<sup>104</sup> Similar legislation to the Matrimonial Causes Act 1857 was passed in the Australian colonies between 1858 and 1873.<sup>105</sup> The content of the divorce law varied between the jurisdictions,<sup>106</sup> and divorce was possible based on grounds such as adultery; habitual drunkenness; frequent conviction for crime; insanity; and, separation for five years.<sup>107</sup> The federal government passed the Matrimonial Causes Act 1959 to provide uniform divorce law across Australia,<sup>108</sup> and this Act provided no fewer than 14 grounds for the dissolution of marriage, including adultery; cruelty; one party committing 'rape, sodomy or bestiality'; or that one party had been convicted of the attempted murder of the other.<sup>109</sup>

Following reforms in the 1970s, divorce law in both jurisdictions is very different. No-fault divorce was introduced in Australia by the Family Law Act 1975, so as 'to eliminate as far as possible the high costs, the delays and indignities experienced by so many parties to divorce proceedings under' the previous fault-based procedure.<sup>110</sup> Divorce is possible after two years of marriage,<sup>111</sup> on the sole ground that the relationship has irretrievably broken down. Breakdown is proved if the parties have lived separately and apart for 12 months,<sup>112</sup> which suggests that

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or upwards'. Shanley suggests that parliamentarians were eager to preserve unequal access to divorce as they did not want to change the nature of the marital relationship: see Shanley (n101) 44.

<sup>103</sup> Matrimonial Causes Act 1923, s1.

<sup>104</sup> Matrimonial Causes Act 1937, s2. See also Matrimonial Causes Act 1950, s1: divorce was available based on the respondent's adultery, desertion for three years, or that the respondent was of incurably unsound mind. Wives could also obtain divorce on the additional grounds of the husband being found guilty of rape, sodomy or bestiality.

<sup>105</sup> See K Enderby 'The Family Law Act: Background to the Legislation' (1975) 1(1) University of New South Wales Law Journal 10, 11-2.

<sup>106</sup> *ibid* 12.

<sup>107</sup> See Australian House of Representatives Deb 14 May 1959, 2233 (Garfield Barwick, Attorney General) for a complete table.

<sup>108</sup> Australian House of Representatives Deb 14 May 1959, 2222 (Garfield Barwick, Attorney General).

<sup>109</sup> Matrimonial Causes Act 1959 (Cth), s28. The other grounds were desertion for two years; wilful refusal to consummate; one party has been habitually drunk or otherwise intoxicated for two years; the husband has been frequently convicted of crimes or habitually left the wife without 'reasonable means of support'; the other spouse has been in prison for three years and continues to be imprisoned; one spouse has failed to pay maintenance to the other for two years; a failure to comply with a decree of restitution of conjugal rights; that one party is of unsound mind; or, one party has been absent for so long it was reasonable to presume they were dead.

<sup>110</sup> Australian Senate Deb 1 August 1974, 758 (Senator Murphy, Attorney General). A Senate Standing Committee approved of the reform to introduce no-fault divorce: Senate Standing Committee on Constitutional and Legal Affairs 'Report on the Administration of Divorce and Related Matters and the Family Law Bill 1974' (Paper No 133, 1974).

<sup>111</sup> Family Law Act 1975 (Cth), s44

<sup>112</sup> This must be a continuous period of 12 months preceding the date of the application to divorce: Family Law Act 1975 (Cth), s48(2). During this separation period the legislation allows for parties to resume cohabitation for one period of up to three months, and does not discount the period spent living

cohabitation, which is not necessary for a valid marriage, is nonetheless viewed as an expectation for spouses. The court will determine whether the relationship has broken down on a case by case basis<sup>113</sup> by examining the circumstances of the marriage both before and after separation.<sup>114</sup>

Contemporary divorce law in England and Wales is found in the Matrimonial Causes Act 1973. Divorce is possible after one year of marriage on the sole ground that the marriage has irretrievably broken down,<sup>115</sup> but, fault has not been completely removed from the provision, and one of five facts must be proven to satisfy the sole ground,

- The respondent committed adultery and the petitioner finds it intolerable to live with the respondent;<sup>116</sup>
- The respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent;
- The respondent has deserted the petitioner for a period of at least two years;
- The parties have lived apart for two years and both consent to the divorce;
- The parties have lived apart for a period of five years.<sup>117</sup>

The Matrimonial Causes Act requires the court 'to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.'<sup>118</sup> In defended divorce cases, the party petitioning for divorce must submit evidence to prove the fact that they are relying on. If the court finds that evidence to be insufficient, the court will not grant a

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separately and apart prior to that cohabitation: Family Law Act 1975 (Cth), s50(1). For discussion on the meaning of living separately and apart see: *In the Marriage of Pavey* (1976) 10 ALR 259, 261-2 (Evatt CJ, Demack and Watson JJ); *In the Marriage of Falk* (1977) 15 ALR 189, 194-5 (Evatt CJ, Fogarty and Bulley JJ); *In the Marriage of Caretti* (1977) 30 FLR 257 (Murray J); *Price v Underwood* [2008] FamCAFC 46, [42] (May, Boland and Ryan JJ).

<sup>113</sup> See *In the Marriage of Pavey* (n112) 263 ((Evatt CJ, Demack and Watson JJ) agreeing with the comments of Watson J in *Todd's Case (No 2)* (1976) 9 ALR 401, 403. See also *In the Marriage of Falk* (n112) 199 (Evatt CJ, Fogarty and Bulley JJ).

<sup>114</sup> *In the Marriage of Pavey* (n112) 265-6 (Evatt CJ, Demack and Watson JJ).

<sup>115</sup> Matrimonial Causes Act 1973, s1(1).

<sup>116</sup> Matrimonial Causes Act 1973, s1(6), as added by the Marriage (Same Sex Couples) Act 2013, sch 4, Part 3: 'Only conduct between the respondent and a person of the opposite sex may constitute adultery for the purposes of this section.' For a definition of adultery see *Dennis v Dennis and Spillett* [1953] P 153, 160 (Singleton J): 'I do not think that it can be said that adultery is proved unless there be some penetration. It is not necessary that the complete act of sexual intercourse should take place'; and 163 (Hodson LJ): '...there must at least be partial penetration for the act of adultery to be proved... A man may commit adultery in his heart, but what the courts are dealing with is the physical act which has to be proved in order that a divorce be obtained... I think that the word has not been extended to include such a form of what may be described as lesser sexual gratification'.

<sup>117</sup> Matrimonial Causes Act 1973, s1(2).

<sup>118</sup> Matrimonial Causes Act 1973, s1(3).

divorce, even where it is apparent to the court that this means that an unhappy situation will subsist.<sup>119</sup>

Since the extension of the special procedure to all undefended divorces in 1977<sup>120</sup> it is not important in practical terms which fact is pleaded because divorces are rarely defended.<sup>121</sup> This approach has been subject to criticism.<sup>122</sup> For example, in the recent case of *Owens v Owens*,<sup>123</sup> involving a husband who successfully defended a divorce petition, Sir James Munby P was critical of the current divorce provisions:

*The simple fact, to speak plainly, is that in this respect the law which the judges have to apply and the procedures which they have to follow are based on hypocrisy and lack of intellectual honesty. The simple fact is that we have, and have for many years had, divorce by consent, not merely in accordance with [the separation for two years and consent to the divorce fact, and], for those unwilling or unable to wait for two years, by means of a consensual, collusive, manipulation of [the behaviour fact].*<sup>124</sup>

The current divorce provisions were criticised by Munby J for the inconsistency between the statutory provision and actual practice, where the statute claims that a fact must be proven but this usually does not happen. Additionally, it is submitted that it is possible to further criticise the provisions. In undefended cases, the different facts have symbolic significance. Firstly, many of these facts refer to the idea of the spouses no longer being able to live together. But, the duty on spouses to cohabit was abolished in 1970 and can no longer be enforced,<sup>125</sup> which suggests

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<sup>119</sup> See *Owens v Owens* [2017] 4 WLR 74, [83] (Sir James Munby P), and [99], [102] (Hallett LJ).

<sup>120</sup> For discussion of the introduction of the special procedure see, Cretney (n55) 381-3.

<sup>121</sup> See Sir James Munby P's comments in *Owens v Owens* (n119) [98]: 'In the year to January 2017, there were 113,996 petitions for divorce. The details are not published, but I understand that, over the same period, notice of intention to defend was given in some 2,600 acknowledgements of service (some 2.28% of all petitions) while actual answers filed were about 760 (some 0.67% of all petitions). There are no available statistics, but one can safely assume that the number of petitions which proceed to a final contested hearing is minute, probably little more than a handful.'

<sup>122</sup> See for example: Law Commission *The Ground for Divorce* (Law Com No 192, 1990), [2.8-2.12]; Sir Nicholas Wall (Former President of the Family Division) – speech to the Annual Resolution Conference, (Annual Resolution Conference, The Queens Hotel, Leeds, 24 March 2012), [6], available from <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/pfd-speech-resolution-annual-conference-240312.pdf>> accessed 12/05/2017; Resolution, an organisation of family lawyers and other professionals in England and Wales, also argues in favour of reforming divorce law to introduce a no-fault approach: see for example, <[http://www.resolution.org.uk/editorial.asp?page\\_id=984&displayMode=preview](http://www.resolution.org.uk/editorial.asp?page_id=984&displayMode=preview)> accessed 12/05/2017.

<sup>123</sup> [2017] 4 WLR 74.

<sup>124</sup> *Owens v Owens* (n119) [94]; see also [99], [102] (Hallett LJ).

<sup>125</sup> By the Matrimonial Proceedings Act 1970, s20. cf also s18 of the Matrimonial Causes Act 1973 which states that the effect of a decree of judicial separation is that spouses are no longer obliged to cohabit.

that, as is the case in Australia, traditional views on the expectations of the nature of marriage continue to have a place in law. This shows incoherence within the legal structure of marriage, where factors irrelevant to validity become relevant on divorce, and is one way in which the ideology and legal structure of marriage are intertwined: the ideology becomes imprinted on the structure in inconsistent ways. This shows internal inconsistency within the provisions. The significance of this point will become more apparent later, in the context of informal cohabiting couple relationships where couples are required to cohabit.<sup>126</sup> Secondly, as Diduck explains, the provisions of modern divorce law are a 'compromise' that reflect 'both a traditional, obligation-based *and* a modern, individualistic' view of marriage.<sup>127</sup> Adultery, unreasonable behaviour and desertion apportion blame to one party, representing continuity in the law and ideas relating to the traditional family, whereas the separation facts represent change in that they are not indicative of fault, and so reflect modern family values. This suggests that the development of divorce is constrained by the conflicting values of the traditional and modern families, and, significantly, points at the way in which the development of marriage (and divorce) is constrained by ideology.

### **3.3 The legal consequences of marriage**

The discussion so far demonstrates that the legal structure of marriage is not immutable and has been subjected to considerable and continual change. But the evolving nature of marriage goes even further than this. As Maria Miller, the then Minister for Women and Equalities who introduced the Marriage (Same Sex Couples) Bill into parliament in 2013, explained, the history of marriage is a history of change:

*Some say that the Bill redefines marriage, but marriage is an institution with a long history of adaptation and change. In the 19th century, Catholics, Baptists, atheists and many others were allowed to marry only if they did so in an Anglican Church, and in the 20<sup>th</sup> century, changes were made to recognise married men and married women as equal before law. Suggestions that the Bill changes something that has remained unchanged for centuries simply do not recognise the road that marriage has travelled as an institution.<sup>128</sup>*

In this quote, Miller is referring firstly to the reforms brought about by the Marriage Act 1836 that introduced the option of a civil ceremony of marriage. Secondly, Miller refers to the changes in the legal consequences of marriage that took place during the 20<sup>th</sup> century. To refer to but a

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<sup>126</sup> See Chapter 6, 6.1.2.1.

<sup>127</sup> A Diduck *Law's Families* (Lexis Nexis/Butterworths, 2003), 50 (emphasis in original text).

<sup>128</sup> HC Deb 05 February 2013, Vol 558, Col 126.

few of the legal consequences of marriage, historically husbands and wives were seen as one person, or 'one flesh' following marriage, which meant that women lost all legal identity<sup>129</sup> and there was a common law duty to cohabit.<sup>130</sup> Married women could not own property or create contracts in their own names,<sup>131</sup> and any torts committed by a wife were the liability of the husband.<sup>132</sup> Husbands had a right to their wives' services, both domestic and sexual<sup>133</sup> and could use force to consummate the marriage.<sup>134</sup> This position gradually changed and by 1882 married women could own property and sue in their own names.<sup>135</sup> By 1935 married women were liable for their own torts and could deal with property and contract as a single person.<sup>136</sup> The duty to cohabit was abolished in 1970,<sup>137</sup> and a House of Lords ruling in 1991 confirmed that a husband could be guilty of raping his wife.<sup>138</sup>

It is the state that decides on the legal consequences of marriage, and the changes in the legal consequences of marriage are significant because, as Barker has noted, they indicate the type of relationship marriage is expected to be by the state.<sup>139</sup> There are two areas of change in the legal consequences of marriage that are particularly important for the thesis and merit detailed examination. These are financial remedies on divorce and the position of pre-nuptial agreements. They are important because they highlight the tensions between family law's protective function and a desire to respect individual autonomy, which are both factors that are significant in developing different frameworks of relationship recognition. In financial remedies, the courts recognise that spouses perform different roles that can leave one partner in a vulnerable economic position, which should be acknowledged on relationship breakdown, whereas pre-nuptial agreements are recognised to protect individual autonomy, which assumes that both parties are in equal bargaining positions.

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<sup>129</sup> See G Williams 'The Legal Unity of Husband and Wife' (1947) 10 *Modern Law Review* 16; S Bridge 'Marriage and Divorce: The Regulation of Intimacy' in J Herring (ed) *Family Law: Issues, Debates and Policy* (Willan Publishing, 2001), 14; Cretny (n55) 90.

<sup>130</sup> If one party left the marital home, the other could apply to the ecclesiastical court for a decree of restitution of conjugal rights. Refusal to comply with such a decree could result in imprisonment until the enactment of the Matrimonial Causes Act 1884.

<sup>131</sup> Blake (n4) 22.

<sup>132</sup> O Kahn-Freud 'Inconsistencies and Injustices in the Law of Husband and Wife' (1952) 15(2) *Modern Law Review* 133, 137.

<sup>133</sup> Bridge (n129) 15.

<sup>134</sup> See *R v Clarke (James)* (1949) 33 Cr App R 216, 218 (Mr Justice Byrne); Manchester (n55) 362.

<sup>135</sup> Married Women and Property Acts 1870 and 1882.

<sup>136</sup> Law Reform (Married Women and Tortfeasors) Act 1935, s1-3.

<sup>137</sup> Matrimonial Proceedings Act 1970, s20.

<sup>138</sup> *R v R* [1992] 1 AC 599.

<sup>139</sup> Barker (n4) 22.

### 3.3.1 The development of financial remedies

As Thompson explains, '[f]inancial provision [in England and Wales] previously depended on the good and moral behaviour of the spouses'.<sup>140</sup> The purpose of maintenance was to give 'relief where a wrong had been done'.<sup>141</sup> For example, in *M v M*,<sup>142</sup> the wife was denied maintenance payments because she failed to disclose her adultery<sup>143</sup> to either her husband or solicitors. Hewson J suggested that had the wife been forthcoming about her adultery, then the court may have granted her some limited award of maintenance.<sup>144</sup>

Following changes in the divorce provisions in England and Wales,<sup>145</sup> there was a corresponding change in the provision for financial remedies. The Matrimonial Causes Act 1973 gives the English and Welsh courts broad discretionary powers to award financial relief and property adjustment orders upon divorce.<sup>146</sup> When exercising their discretion, the court must firstly have regard to the welfare of any minor child of the marriage, and then consider the appropriateness of a 'clean break', where the financial obligations of the spouses towards each other will be terminated if this is 'just and reasonable'.<sup>147</sup> Following this, the 1973 Act lists several factors for the court to consider, including,

- The income, earning capacity, property and other resources of the parties;
- The financial needs and obligations which the parties have or will have in the future;
- And any contributions made, or which will be made, to the welfare of the family including any contribution made by looking after the home and children.<sup>148</sup>

The 1973 Act fails to state an overriding objective for property and financial orders, and so these principles have been developed through case law.<sup>149</sup> According to Douglas, the courts'

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<sup>140</sup> S Thompson *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Bloomsbury, 2015), 51.

<sup>141</sup> Law Commission *The Financial Consequences of Divorce: The Basic Policy* (No. 103, 1980), [13].

<sup>142</sup> [1962] 1 WLR 845.

<sup>143</sup> The adultery took place 11 years after she had separated from her husband.

<sup>144</sup> *M v M* (n142) 851. See also 851-2 where it was stated that the fact that the wife was not to blame for the breakdown of the marriage meant that the husband had to pay the costs of the hearing. See similar comments about the availability of maintenance for "guilty" wives in *Sydenham v Sydenham and Illingworth* [1949] 2 All ER 196, 198 (Lord Denning); *Clear v Clear* [1958] 1 WLR 467, 473 (Hodson LJ).

<sup>145</sup> For details see above, 3.2.2.

<sup>146</sup> Matrimonial Causes Act 1973, ss21, 23 and 24. This includes orders such as periodical or lump sum payments and orders to transfer property. Maintenance payments are rarely awarded in divorce settlements, and even though it is possible to impose life-long maintenance, this is rare in practice: see G Douglas 'Towards an Understanding of the Basis of Obligation and Commitment in Family Law' (2016) 36(1) *Legal Studies* 1, 5, 7.

<sup>147</sup> Matrimonial Causes Act 1973, ss25 and 25A.

<sup>148</sup> Matrimonial Causes Act 1973, s25(2).

<sup>149</sup> Thompson (n140) 54.

approach can be categorised into three phases that reflect ‘a shift in our understanding of what marriage is fundamentally about’.<sup>150</sup> In the first phase, the court felt that the objective of financial remedies was to ensure that the wife remained in the same position after divorce as she would have been in had the marriage not broken down. In practice this meant that the wife was awarded a 1/3 share of the assets. This took a traditional approach towards the marriage relationship as being that of a breadwinner-homemaker relationship.<sup>151</sup> The second phase, from around 1984-1990, took a ‘view of marriage as a freely terminable and autonomous’ relationship that led to the court favouring clean break settlements. In practice, in ‘big money’ cases the wife would only get her “reasonable requirements” met.<sup>152</sup> The third phase began in the late 1990s ‘when married women’s increasing involvement in employment and other economic activity began to produce a new wifely model: the wife who played a significant part in generating the wealth enjoyed by the family.’<sup>153</sup> This third phase views marriage as a partnership of equals, where both spouses have equally valuable, if different, contributions to make. As Lord Nicholls explained in *White v White*,<sup>154</sup> fairness should be the guiding principle for the court in exercising its discretion,<sup>155</sup> which involves ensuring that there is ‘no bias in favour of the money-earner and against the home-maker and the child-carer’.<sup>156</sup> Lord Nicholls did not establish a presumption of equal division,<sup>157</sup> but did suggest that there should be good reason for departing from equality and so in practice every judge should ‘check his tentative views against the yardstick of equality of division’.<sup>158</sup>

In *Miller; McFarlane*<sup>159</sup> the House of Lords elaborated on the fairness principle and explained that it consists of three strands: needs, compensation and sharing. Lord Nicholls explained that ‘needs’,

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<sup>150</sup> G Douglas ‘Women in English Family Law: When is Equality Equity?’ (2011) 1 Singapore Journal of Legal Studies 18, 22.

<sup>151</sup> *ibid* 2.

<sup>152</sup> *ibid* 22-3.

<sup>153</sup> *ibid* 23.

<sup>154</sup> [2001] 1 AC 596.

<sup>155</sup> *ibid* 605.

<sup>156</sup> *ibid* 605.

<sup>157</sup> *ibid* 606.

<sup>158</sup> *ibid* 605.

<sup>159</sup> *Miller v Miller; McFarlane v McFarlane*, [2006] 2 AC 618.

*...reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support.*<sup>160</sup>

The second strand, 'compensation' often overlaps with needs,<sup>161</sup> and 'is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage'.<sup>162</sup> For example, the compensation strand serves to compensate one partner who may have taken time out of the work force to look after children. The third strand, 'sharing', requires the court to view marriage as a partnership of equals:

*The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less.*<sup>163</sup>

Monetary and non-monetary contributions are deemed of equal worth. The courts recognise that the parties to a marriage may be in unequal economic positions, and the economic disadvantage suffered by one partner should be acknowledged through any property or financial orders so that in theory at least, an economically vulnerable partner is protected.

Historically, Australian law took the same approach grounded in blame towards financial remedies as did England and Wales.<sup>164</sup> Changes were made following the commencement of the Family Law Act 1975 and the introduction of no-fault divorce. Similarly to the English and Welsh provisions, the 1975 Act provides the family court with wide discretionary powers to make

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<sup>160</sup> *ibid* [11]. See also [12], where Lord Nicholls makes the point that for most couples only this first strand is relevant as there will not be enough assets to 'provide adequately for two homes'.

<sup>161</sup> *ibid* [15] (Lord Nicholls).

<sup>162</sup> *ibid* [13] (Lord Nicholls).

<sup>163</sup> *ibid* [16] (Lord Nicholls).

<sup>164</sup> See HA Finlay 'Family Law, Family Courts and Federalism: An Opportunity for Reform' (1974) 9(4) *Melbourne University Law Review* 567, 578.



property<sup>165</sup> and maintenance orders.<sup>166</sup> The Australian courts have a duty to bring an end to the financial relationship between the parties, as far as this is practicable.<sup>167</sup>

The Australian courts follow three steps to determine whether to adjust property interests or award maintenance. The first is to identify the parties' existing legal and equitable interests in property.<sup>168</sup> The second is to consider whether it is 'just and equitable'<sup>169</sup> to adjust those interests.<sup>170</sup> The third step is to assess the extent to which any property interests ought to be adjusted by considering the parties' contributions to the marriage.<sup>171</sup> This involves an assessment of the different factors listed in s79(4) of the 1975 Act, which include matters such as the financial and non-financial contributions made to property or towards the welfare of the family. The court may also consider factors listed in s75(2) where these are relevant, which include the parties' future needs and consideration of their income, property and financial resources.<sup>172</sup> The 1975 Act does not state the order in which these factors should be considered and so the court has the freedom to make decisions on a case by case basis.<sup>173</sup> Although how parties live is irrelevant for the purposes of legal validity of a marriage, 'how parties have organised and lived within the marriage are factors which may be relevant in the exercise of discretion pursuant to' the provisions in the 1975 Act.<sup>174</sup>

The initial approach of the Australian courts is summed up well by Evatt CJ in *Rolfe*,<sup>175</sup> where she explains that the parties' financial and non-financial contributions were of equal worth:

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<sup>165</sup> Family Law Act 1975 (Cth), s79. 'Property' now includes superannuation - Family Law Act 1975 (Cth), s90MC. The Family Law Legislation Amendment (Superannuation) Act 2001 (Cth) inserted a new Part VIII B into the Family Law Act 1975 (Cth).

<sup>166</sup> Maintenance is only awarded in limited circumstances such as where one party is unable to support themselves adequately due to their caring for a child under 18, and is only available for a limited time. See Family Law Act 1975 (Cth), s72. Oldham and Parkinson note that maintenance orders are uncommon in Australia: JT Oldham and P Parkinson 'Evaluating Judicial Discretion – Family Property Law in Australia and the USA Compared' (2016) 30(2) Australian Journal of Family Law 134, 146, referring to J Behrens and B Smyth 'Spousal Support in Australia: A Study of Incidence and Attitudes' (Working Paper No. 16, Australian Institute of Family Studies, 1999).

<sup>167</sup> Family Law Act 1975 (Cth), s81.

<sup>168</sup> *Stanford v Stanford* [2012] HCA 52, [37]; *Bevan v Bevan* [2013] FamCAFC 116 [74]; *Pilch v Pilch* [2016] FamCA 740, [40] (Johns J).

<sup>169</sup> Family Law Act 1975 (Cth), s79(2).

<sup>170</sup> *Stanford v Stanford* (n168) [39]; *Bevan v Bevan* (n168) [80]; *Pilch v Pilch* (n168) [40] (Johns J).

<sup>171</sup> *Stanford v Stanford* (n168) [40]; *Bevan v Bevan* (n168) [81]; *Pilch v Pilch* (n168) [40] (Johns J).

<sup>172</sup> For the complete list of matters see s75(2) of the Family Law Act 1975 (Cth).

<sup>173</sup> See *Mallett v Mallett* [1984] HCA 21, [4] (Gibbs CJ).

<sup>174</sup> *Pilch v Pilch* [2016] FamCA 740, [41] (Johns J).

<sup>175</sup> *Rolfe* [1977] 34 FLR 518.

*The purpose of s 79(4)(b), in my opinion, is to ensure just and equitable treatment of a wife who has not earned income during the marriage, but who has contributed as a homemaker and parent to the property... the Act clearly intends that her contribution should be recognized not in a token way but in a substantial way. While the parties reside together, the one earning and the other fulfilling responsibilities in the home, there is no reason to attach greater value to the contribution of one than to that of the other. This is the way they arrange their affairs and the contribution of each should be given equal value<sup>176</sup>.*

The High Court in *Mallett*<sup>177</sup> explained that the 1975 Act does not allow for any assumptions that different contributions are of equal worth, or that the starting point should be an equal division of property.<sup>178</sup> Parkinson explains that following *Mallett*, the courts' approach was that 'while it was forbidden to have a starting point of equality, there was no reason why equality of contribution during the course of the marriage should not be a conclusion in most cases.'<sup>179</sup>

In light of the discussion in chapter two about the protective function of family law, and the focus of commentators who write in favour of moderate function-based reforms on protecting the economically vulnerable partner on relationship breakdown,<sup>180</sup> the way the courts use their discretion in the area of financial remedies is significant. The courts in both jurisdictions use their discretionary powers to protect the economically weaker spouse on relationship breakdown, (at least to the extent that the other spouse has the funds so that property adjustment and/or maintenance are possible),<sup>181</sup> by viewing financial and non-financial contributions as being of equal worth. This suggests that the courts in both jurisdictions acknowledge that when spouses make different (gendered) contributions to their marriage, and that relationship generated need occurs, this should be recognised on divorce. This shows that the protective function of family law has been influential in developing marriage. But, alongside this protective role, the courts also appear to try and achieve a conflicting goal, which is to respect individual autonomy by enforcing pre-nuptial agreements.

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<sup>176</sup> *ibid* 519. See also *Wardman v Hudson* (1978) FLC 90-466.

<sup>177</sup> *Mallett v Mallett* (n173).

<sup>178</sup> *ibid* [4] (Gibbs CJ).

<sup>179</sup> P Parkinson 'The Yardstick of Equality: Assessing Contributions in Australia and England' (2005) 19(2) *International Journal of Law, Policy and the Family* 163, 169.

<sup>180</sup> See Chapter 2, 2.1.1 and 2.3.3.1.

<sup>181</sup> R Auchmuty 'The Limits of Marriage Protection in Property Allocation when a Relationship Ends' (2016) 28(4) *Child and Family Law Quarterly* 303, 318.

### 3.3.2 Recognising pre-nuptial agreements

Traditionally in England and Wales, pre-nuptial agreements were considered void on the grounds of public policy,<sup>182</sup> but following the decision of the Supreme Court in *Radmacher v Granatino*,<sup>183</sup> while an agreement cannot oust the courts' jurisdiction, a pre-nuptial agreement will be enforced in particular circumstances. Similarly, In Australia, pre-nuptial agreements could not historically oust the courts' jurisdiction to redistribute property on divorce,<sup>184</sup> but, since 2000, following statutory reform, pre-nuptial agreements are enforceable by the court.<sup>185</sup> The increasing weight attached to pre-nuptial agreements in England and Wales, and their enforceability in Australia, means that marriage, as a formalised relationship, is becoming more like its informal counterpart, because unmarried cohabitants, or de facto couples as they are known in Australia, can draw up legally enforceable contracts between themselves to determine the consequences of relationship breakdown.<sup>186</sup> The developments in the recognition of pre-nuptial agreements are significant because it appears that the notion of respecting individual autonomy takes precedence over protecting the economically weaker partner, which has been an influential theme in the area of financial remedies.

According to the then Australian government, introducing binding financial agreements was necessary 'to provide greater choice for parties in property settlements and to provide a more efficient and less costly means of dispute resolution... than that which is currently available through the Family Court.'<sup>187</sup> Parties may enter into binding financial agreements<sup>188</sup> before or during the marriage or following divorce,<sup>189</sup> and the agreements may deal with property and/or maintenance issues as well as 'incidental and ancillary matters'.<sup>190</sup> Both parties must receive

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<sup>182</sup> See for example *Cocksedge v Cocksedge* (1844) 14 Sim 244; *Cartwright v Cartwright* (1853) 3 de GM & G 982. For a history of the position of pre-nuptial agreements before 2010, see Thompson (n140) 14-20.

<sup>183</sup> [2011] 1 AC 534.

<sup>184</sup> See B Fehlberg and B Smyth 'Binding Pre-Nuptial Agreements in Australia: The First Year' (2002) 16(1) *International Journal of Law, Policy and the Family* 127, 127.

<sup>185</sup> Family Law Act 1975 (Cth), Part VIIIA as introduced by the Family Law Amendment Act 2000 (Cth), sch 2.

<sup>186</sup> For the position in England and Wales see, *Sutton v Mischon de Reya and Gawor & Co* [2004] 1 FLR 837, [22] (Hart J). Note, it is not possible for cohabitants to agree that one partner will not pay child support obligations: *Morgan v Hill* [2006] 3 FCR 620. For the Australian provision see, Family Law Act 1975 (Cth), s90UB, 90UC and 90UD.

<sup>187</sup> Australian House of Representatives Deb 22 September 1999, 10152 and 10154 (Mr Williams, Attorney General).

<sup>188</sup> Following the amendments made to the Family Law Act 1975 (Cth) by the Family Law Amendment Act 2000 (Cth). Prior to this, spouses could enter into financial agreements following separation only, and these agreements were only valid if they were registered by the court. See Fehlberg and Smyth (n184).

<sup>189</sup> Family Law Act 1975 (Cth), s90B (before marriage); s90C (during marriage); s90D (after divorce).

<sup>190</sup> Family Law Act 1975 (Cth), s90B(3).

independent legal advice prior to signing the agreement.<sup>191</sup> Once created, an agreement cannot be varied, but can be terminated,<sup>192</sup> or it will be set aside if obtained by fraud, if the agreement is void, voidable or unenforceable or if the parties engaged in unconscionable conduct when the agreement was made. The agreements may also be set aside if there is such a change in the circumstances of the parties that enforcement is 'impracticable' or if a 'material change in the circumstances has occurred' relating to the care, welfare and development of a child of the marriage which would lead to hardship if the agreement was not set aside.<sup>193</sup>

In England and Wales, the majority of the Supreme Court in *Radmacher* identified three issues to be taken into account when determining the weight to attach to a pre-nuptial agreement. Firstly, the circumstances surrounding the making of the agreement must be assessed to determine whether the parties entered the agreement of their own free will, without duress, and both spouses must be informed of the implications of the agreement.<sup>194</sup> Similarly to consent to marriage,<sup>195</sup> being 'informed' in this context means having an appreciation of the implications of the agreement and not the 'detailed particulars'. For example, knowing that your prospective spouse is wealthy is sufficient without knowing the full extent of their wealth.<sup>196</sup> Secondly, the court should consider if there are any circumstances that mean that the agreement should be given enhanced weight, such as if the agreement was entered into in a country where pre-nuptial agreements are the norm.<sup>197</sup> The third issue is to consider whether it is fair to enforce the agreement in light of the circumstances existing at the time of the proceedings. An agreement will be unfair where it leaves one of the parties in a situation of 'real need', which appears to mean that the parties cannot contract out of the 'need' and 'compensation' strands identified in *Miller/McFarlane*,<sup>198</sup> but could contract out of the third strand of 'sharing'.<sup>199</sup> The majority suggested that 'parties are unlikely to have intended that

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<sup>191</sup> Family Law Act 1975 (Cth), s 90G. Fehlberg and Smyth (n184) 135-7 explain that lawyers were concerned that they would be held professionally liable should a financial agreement not be upheld, and so this may lead lawyers to refuse to act for clients.

<sup>192</sup> Effectively then if the parties wish to vary the terms of the agreement they must follow the procedure in s90J of the Family Law Act 1975 (Cth) to jointly terminate the agreement, and then draft a new agreement. Should one party wish to unilaterally terminate the agreement they must seek to establish that the agreement is not binding due to a failure to meet the formalities. For commentary see Fehlberg and Smyth (n184) 133.

<sup>193</sup> Family Law Act 1975 (Cth), s90K. The burden of proof relating to the validity of the agreement is with the person seeking to rely on it – see *Balzia v Covich* [2009] FamCA 1357, [21].

<sup>194</sup> *Radmacher v Granatino* (n183) [67].

<sup>195</sup> Discussed above, 3.2.1.2.

<sup>196</sup> As was the case in *Radmacher: Radmacher v Granatino* (n183) [114-17].

<sup>197</sup> *ibid* [74].

<sup>198</sup> Discussed above, 3.3.1.

<sup>199</sup> *Radmacher v Granatino* (n183) [81-2].

their [pre-]nuptial agreement should result... in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more', and so such an agreement would not be enforced on the basis of unfairness.<sup>200</sup> The majority did not explain what a situation of 'real need' means, but the fact that they mention this at all is important to show that there is some acknowledgment of the need to protect the economically weaker partner in this area.

But, in determining the issue of fairness, the court must respect individual autonomy,

*The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best.*<sup>201</sup>

Thompson argues that power imbalances in personal relationships mean that the majority's approach is problematic: while the majority implied that power imbalances 'may differ depending on one's perspective', they felt 'that in most cases "we must assume that each party... is able to look after him- or herself".'<sup>202</sup> Lady Hale on the other hand, in her powerful dissenting judgment, 'recognises that there are economic, social and gendered dimensions to power in the context of prenups, which make these agreements collectively problematic, and the court should not lose sight of this.'<sup>203</sup> Thompson's analysis of case law following *Radmacher* suggests that 'power inequalities, unless fairly extreme, do not appear to weigh heavily with the courts when considering whether a prenup should be considered unfair.' She goes on to suggest that the rejection of 'an approach based on protecting the interests of the non-moneyed spouse' in favour of 'the current autonomy-based stance might consequentially favour the party with the greater bargaining power.'<sup>204</sup> This means that respect for autonomy is the prominent concern of the courts, and not the need to protect a vulnerable partner.

The Law Commission have proposed that 'qualifying nuptial agreements' should be binding, as long as the parties' needs are met. Although the Commission were building on the

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<sup>200</sup> *ibid* [81].

<sup>201</sup> *ibid* [78]. For cases following *Radmacher*, see, for example: *V v V (Prenuptial Agreement)* [2011] EWHC 3230 (Fam); *Kremen v Agrest (Financial Remedy: Non-Disclosure: Post-Nuptial Agreement)* [2012] EWHC 45 (Fam).

<sup>202</sup> Thompson (n140) 24-5, quoting from *Radmacher v Granatino* (n183) [51].

<sup>203</sup> Thompson (n140) 25. See also J Herring, P Harris and R George 'Ante-Nuptial Agreements: Fairness, Equality and Presumptions' (2011) 127(3) *Law Quarterly Review* 335, 338.

<sup>204</sup> Thompson (n140) 29-30.

existing law, rather than suggesting radical reform,<sup>205</sup> the Commission did highlight some difficulties associated with the current focus on autonomy. The Commission accepted that within personal relationships, people may agree ‘to things that they would not otherwise contemplate’ and may feel pressured into signing an agreement,<sup>206</sup> and so this presumably affects whether a party could be said to be exercising their autonomy when entering the agreement. To counteract some of this pressure, the Commission suggested that certain ‘pre-conditions’ should be met, such as that parties must take independent legal advice following disclosure of assets and that the agreement should be signed at least 28 days prior to the wedding.<sup>207</sup> The Commission did not recommend that a pre-nuptial agreement should oust the courts’ jurisdiction because ‘there may be pressure on one party to sign an agreement, and that that party may enter the agreement unwillingly or with unrealistic optimism’.<sup>208</sup> Perhaps the Law Commission’s suggestion provides an alternative way forward in this area, which strikes a better balance between respecting autonomy and protecting the vulnerable partner.

These developments in the context of pre-nuptial agreements show an increasing awareness from the judiciary in England and Wales and policymakers in Australia that people should be able to decide on some of the legal consequences of marriage for themselves. This suggests that modern family values of negotiation and autonomy are developing the legal structure of marriage, even when this may be detrimental to an economically weaker partner. Further, it suggests that the enforceability of pre-nuptial agreements demonstrates an acceptance that the legal consequences of marriage should not be accepted without question. The significance of this point will become clearer in the next chapter which challenges the appropriateness of transplanting the legal consequences of marriage onto other formalised relationships.<sup>209</sup>

### **3.4 The ideologies of marriage**

The final element of the ‘marriage model’ as used by Barker is the ideology, which looks at social understandings of the ideal marriage and the functions that this relationship is expected to perform. The legal structure and the ideology of marriage are so intertwined that it can be difficult to separate them, but it is important to distinguish those elements that are necessary for a valid marriage, and which belong to the legal structure, and those elements that are part

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<sup>205</sup> E Cooke ‘The Law Commission’s Report on Matrimonial Property, Needs and Agreements’ (2014) 44(3) Family Law 304, 308.

<sup>206</sup> Law Commission *Matrimonial Property, Needs and Agreements* (No. 343, 2014), [5.30-5.31].

<sup>207</sup> *ibid* [5.32].

<sup>208</sup> *ibid* [5.34].

<sup>209</sup> See Chapter 4, 4.1.2.3.

of the ideal view of marriage, which form the ideology, because the ideology often extends beyond the requirements of the legal structure.

An examination of the marriage ideology shows that it is highly adaptable; there is no fixed set of functions that marriage is assumed to perform, and developments in the ideology often lead to changes in the legal structure of marriage. In fact, the 'ideology' of marriage is best referred to as the 'ideologies' of marriage to highlight the fact that there is no single, universal set of meanings attached to marriage. To demonstrate the adaptability of the marriage ideologies, comments from policymakers will firstly be examined. This is useful because policymakers create and influence the law-making process and so their views on marriage affect the development of the legal structure. Secondly, a selection of judicial comments will be analysed. As Diduck explains, this is helpful because they not only represent 'the judicial point of view, but [they] also [signpost] what is thought to be the legitimate public point of view.'<sup>210</sup>

### **3.4.1 Policymakers**

The introduction of same-sex marriage was arguably the most controversial change made to the legal structure of marriage in recent times. In the parliamentary debates on the issue, policymakers have had to engage with the meaning of marriage for today's society and consider what elements they believe are central to the relationship. Exploring the parliamentary debates on this issue in both jurisdictions shows how changes in the ideology can lead to changes in the legal structure of marriage.

Maria Miller, the then Minister for Women and Equalities, began her second reading speech introducing the Marriage (Same Sex Couples) Bill 2013 into parliament by stating:

*Mr Speaker, you and I know that every marriage is different... but what marriage offers us all is a lifelong partner to share our journey, a loving stable relationship to strengthen us and mutual support throughout our lives. I believe that that should be embraced by more couples. The depth of feeling, love and commitment between same-sex couples is no different from that depth of feeling between opposite-sex couples. The Bill enables society to recognise that commitment in the same way, too, through marriage.<sup>211</sup>*

She concluded by stating that she supported the bill because 'marriage is one of the most important institutions we have; it binds families and society together,<sup>212</sup> and it is a building block

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<sup>210</sup> A Diduck 'What is Family Law For?' (2011) 64(1) Current Legal Problems 287, 289.

<sup>211</sup> HC Deb 05 February 2013, Vol 558, Col 125.

<sup>212</sup> cf the discussion on the meaning of 'family' in Chapter 1, 1.3.2.2b which suggests that 'family' is a concept which extends beyond marriage for many people.

that promotes stability.<sup>213</sup> Baroness Stowell, introducing the bill into the House of Lords, commented that by marrying, a couple ‘choose to declare their commitment publicly and permanently to the person they love’ and ‘commit to the kind of values that we associate with the special enterprise of shared endeavour—loyalty, trust, honesty and forgiveness’.<sup>214</sup> Other supporters of the bill mentioned how ‘couples who love each other should be able to get married’<sup>215</sup> and make a ‘long-term commitment’<sup>216</sup> because the ‘happiness, fulfilment and status’ of marriage should not be denied to same-sex couples.<sup>217</sup> For these politicians, marriage is a relationship characterised by stability, love and commitment between two people who seek to be in a long-term if not life-long relationship.<sup>218</sup>

Similarly, in Australia, supporters of same-sex marriage also referred to the idea that marriages are loving relationships where partners support ‘each other financially and emotionally’<sup>219</sup> as well as emphasising that ‘marriage is the best way to protect committed, monogamous relationships’<sup>220</sup> that are intended to be life-long commitments.<sup>221</sup> For many, ‘marriage is a simple statement of love and commitment’<sup>222</sup> that ‘strengthens families’.<sup>223</sup> One Senator explains the significance of marriage as a ‘commitment offered by a couple to each other through which the value and dignity of a couple's love is formally recognised by their community.’<sup>224</sup>

Opponents of same-sex marriage in England and Wales emphasised that for them marriage is ‘an enduring and exclusive union between one man and one woman, not least for

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<sup>213</sup> HC Deb 05 February 2013, Vol 558, Col 133.

<sup>214</sup> HL Deb 03 June 2013, Vol 745, Col 938.

<sup>215</sup> HC Deb 05 February 2013, Vol 558, Col 134 (Yvette Cooper).

<sup>216</sup> HC Deb 05 February 2013, Vol 558, Col 135 (Yvette Cooper); see also HL Deb 03 June 2013, Vol 745, Col 948, 949 (Baroness Royall); HL Deb 03 June 2013, Vol 745, Col 955 (Lord Fowler); HL Deb 03 June 2013, Vol 745, Col 957 (Baroness Kennedy); HL Deb 04 June 2013, Vol 745, Col 1061 (Lord Alli); HL Deb 03 June 2013, Vol 745, Col 941 (Baroness Stowell).

<sup>217</sup> HL Deb 03 June 2013, Vol 745, Col 960 (Lord Pannick).

<sup>218</sup> See also HL Deb 03 June 2013, Vol 745, Col 969 (Lord Harries); HC Deb 05 February 2013, Vol 558, Col 154-5 (Nick Herbert); HC Deb 05 February 2013, Vol 558, Col 162 (Steve Reed); HC Deb 05 February 2013, Vol 558, Col 177 (Stephen Williams); HC Deb 05 February 2013, Vol 558, Col 177 (Helen Goodman).

<sup>219</sup> Australian House of Representatives Deb 15 June 2015, 6039 (Tanya Plibersek, Deputy Leader of the Opposition).

<sup>220</sup> Australian House of Representatives Deb 22 June 2016, 7191 (Graham Perrett).

<sup>221</sup> Australian House of Representatives Deb 17 August 2015, 8410 (Warren Entsch). See also Australian House of Representatives Deb 14 September 2015, 10123 (Cathy McGowan); Australian House of Representatives Deb 12 October 2015, 10902 (Andrew Wilkie).

<sup>222</sup> Australian House of Representatives Deb 07 September 2015, 9357 (Teresa Gambaro). See also similar comments about the nature of marriage: Australian Senate Deb 12 November 2015, 8393 (Anne Urquhart).

<sup>223</sup> Australian Senate Deb 12 November 2015, 8406 (Nicholas McKim).

<sup>224</sup> Australian Senate Deb 12 November 2015, 8412 (Lisa Singh).



the raising and nurturing of children.<sup>225</sup> One MP stated that marriage ‘is not simply about love and commitment’, but rather is ‘about the union of a man and a woman for the creation and care of children’<sup>226</sup> and many others stressed that marriage is a monogamous sexual relationship between heterosexuals.<sup>227</sup> For some, the fact that non-consummation is not a ground for finding a same-sex marriage voidable, and that adultery has retained its heterosexual definition, means that same-sex couples would not be subject to these essential ‘criteria’ of marriage and so could not truly be regarded as married.<sup>228</sup> For many opponents, marriage at its core is about sex and procreation. They could not comprehend that the ‘definition’ of marriage could be extended in such a way as to permit same-sex marriages,<sup>229</sup> because, for them, the essence of marriage was a sexual relationship between a man and a woman.<sup>230</sup> The same arguments have been expressed by opponents of same-sex marriage in Australia. They argue that marriage is not ‘only about love’, it is about ‘family’ and the ‘begetting of children’ otherwise any two related adults would be able to marry one another:<sup>231</sup>

*It is disingenuous to pretend that it is only about love. After all, consider what marriage, through history, has been. At its essence, it is about providing the woman, the mother of the children, with the security that the father will be there for the duration of the upbringing of the children.*<sup>232</sup>

Marriage for this group is confined to a union of a man and a woman<sup>233</sup> who can naturally create a child<sup>234</sup> and is the best environment in which to bring up children.<sup>235</sup> For the opponents,

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<sup>225</sup> HC Deb 05 February 2013, Vol 558, Col 143 (The Second Church Estates Commissioner, Sir Tony Baldry). See also comments at HC Deb 05 February 2013, Vol 558, Col 161 (Edward Leigh) about the expected procreative nature of marriage, and at HC Deb 05 February 2013, Vol 558, Col 169 (Craig Whittaker) where it is suggested that the ‘true purpose’ of marriage is to raise children; see also similar sentiments at HC Deb 05 February 2013, Vol 558, Col 172-3 (Stephen Timms); HC Deb 05 February 2013, Vol 558, Col 193 (Fiona Bruce); HL Deb 03 June 2013, Vol 745, Col 959 (Lord Waddington).

<sup>226</sup> HC Deb 05 February 2013, Vol 558, Col 145 (Robert Ffello): Ffello goes on to question why the state would have any interest in marriage if it were not about children: Col 146. See also HC Deb 05 February 2013, Vol 558, Col 190 (John Glen); HC Deb 05 February 2013, Vol 558, Col 220 (Therese Coffey).

<sup>227</sup> See for example: HC Deb 05 February, Vol 558, Col 147 (Nadine Dorries); HC Deb 05 February 2013, Vol 558, Col 158 (Tim Loughton); HC Deb 05 February 2013, Vol 558, Col 161 (Edward Leigh); HC Deb 05 February 2013, Vol 588, Col 197 (David Burrowes); HC Deb 05 February 2013, Vol 558, Col 204-5 (Ian Paisley).

<sup>228</sup> HL Deb 03 June 2013, Vol 745, Col 966 (Lord Anderson). This chapter has argued of course that the existence of a sexual relationship is not necessary for a valid marriage, see above, 3.2.1.4a.

<sup>229</sup> See for example HC Deb 05 February 2013, Vol 558, Col 152 (Sir Roger Gale); HC Deb 05 February 2013, Vol 558, Col 164-5 (Jim Shannon).

<sup>230</sup> HL Deb 04 June 2013, Vol 745, Col 1065 (Lord Mackay).

<sup>231</sup> Australian House of Representatives Deb 22 June 2015, 7192 (Dennis Jensen).

<sup>232</sup> Australian House of Representatives Deb 22 June 2015, 7193 (Dennis Jensen).

<sup>233</sup> Australian Senate Deb 12 November 2015, 8393 (David Fawcett).

<sup>234</sup> Australian Senate Deb 12 November 2015, 8399-8400 (Matthew Canavan).

<sup>235</sup> Australian Senate Deb 17 March 2016, 24 (Bob Day).

marriage is a relationship that performs the function of raising children within a stable heterosexual union, as well as being about love and commitment.

The same-sex marriage debates show how the marriage ideologies are adaptable and how they can be used to influence, or resist, the development of the legal structure of marriage. Both supporters and opponents of same-sex marriage assume that marriage is a useful institution that should be wholeheartedly supported by the state: they agree that marriage is a form of public expression of the commitment between a loving couple who are in a stable life-long, monogamous relationship that provides a measure of personal fulfilment and support for the couple. The idea that marriage is a committed relationship is especially prevalent, although precisely what 'commitment' means in this context or how it is measured is not elaborated upon. Opponents of same-sex marriage go further and emphasize the expected sexual and procreative nature of the relationship by claiming that marriage has always been about procreation and raising children. The debates also show how the ideologies go beyond the legal structure. The policymakers fail to appreciate that many of the characteristics, or functions, they refer to, such as love, support and sex, are irrelevant for the purposes of legal validity of a marriage, because the legal structure of marriage, in England and Wales at least, only requires that the relationship be between two unrelated adults, who have given adequate consent to enter the marriage.<sup>236</sup>

#### **3.4.2 Judicial comments**

Sir James Hannen P in a judgment from 1885, in a case involving the mental capacity to marry, described marriage as,

*...an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman.*<sup>237</sup>

Hannen P viewed marriage as a monogamous cohabiting union of a heterosexual couple who love each other in which the male and female had different 'natural' or gendered roles to fulfil: the meaning of 'love one another' is not elaborated upon, but may be a reference to a sexual

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<sup>236</sup> A lack of love, support or commitment could however ground a divorce, but, the fact that divorce is the process of bringing a valid marriage to an end means that the performance of these functions remains irrelevant for the question of determining the validity of a marriage. For discussion of the divorce provisions, see above, 3.2.2.

<sup>237</sup> *Durham v Durham* (1885) 10 PD 80, 82 (Sir J Hannen).

relationship. Karminski J's comments in a 1954 case involving the capacity to marry echoes Hannen P's comments,

*...the essence of the contract [of marriage] is an engagement between a man and a woman to live together and to love one another as husband and wife to the exclusion of all others. It may be in the present times that submission on the part of the woman is no longer, as it was in 1885, an essential part of the contract.*<sup>238</sup>

Continuity in the ideology of marriage is apparent, with another judge assuming that marriage is a monogamous, cohabiting relationship between a heterosexual couple who love each other, with the husband taking a 'protective' role, again with no elaboration of what loving one another as husband and wife means. There is also an element of change as Karminski J explains that submission on the part of the wife is no longer essential to marriage, which coincides with changes made to the legal consequences of marriage.<sup>239</sup> Ormrod J in a 1971 case involving nullity proceedings where one party to the marriage was a transsexual, explained that marriage is characterised by 'companionship and mutual support', but that it is in essence a sexual relationship, because 'the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.'<sup>240</sup>

These cases suggest that marriage was expected to be a monogamous, sexual, cohabiting relationship, with some unclear reference to the expectation that spouses should love each other 'as husband and wife'. More recent cases suggest that the marriage ideologies have moved on, and that there is less of a focus on the sexual nature of the relationship and a shift towards other functions of marriage such as emotional support and interdependence. Lord Nicholls explained in a 2003 English case involving the validity of a marriage of a transsexual person that while marriage may have once been about procreation, 'there is much more emphasis now on the "mutual society, help and comfort that the one [spouse] ought to have of the other".'<sup>241</sup> Similarly, Baroness Hale in a 2004 case determining whether a same-sex couple could be living as spouses explained that marriage-like relationships are ones that exhibit 'intimacy, stability, and social and financial interdependence'<sup>242</sup> with no fixed gender-roles for

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<sup>238</sup> *In the Estate of Park (deceased)* [1954] P 89, 99.

<sup>239</sup> See above, 3.3.

<sup>240</sup> *Corbett v Corbett* [1971] P 83, 105-6.

<sup>241</sup> *Bellinger v Bellinger* [2003] 2 AC 467, [46].

<sup>242</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [139].

the couple,<sup>243</sup> and she recognised that ‘the capacity to bear or beget children has never been a prerequisite of a valid marriage in English law.’<sup>244</sup>

In stark contrast to Baroness Hale’s comments, Lord Millett in the same case claimed that marriage is a ‘gender specific’ relationship’ that can be defined as,

*...a legal relationship between persons of the opposite sex. A man’s spouse must be a woman; a woman’s spouse must be a man. This is of the very essence of the relationship, which need not be loving, sexual, stable, faithful, long-lasting or contented. Although it may be brought to an end as a legal relationship by death or an order of the court, its demise as a factual relationship will usually have ended long before it is ended by the court.*<sup>245</sup>

These comments are markedly different from others about marriage because they look at marriage as a purely legal arrangement. In the same way that opponents of same-sex marriage focussed on the sexual and procreative nature of marriage,<sup>246</sup> Barker suggests that heterosexuality and procreation are often brought up by judges as the essential elements of marriage in cases involving the recognition of same-sex couples.<sup>247</sup> This can be seen again in a 2006 case involving a petition by a lesbian couple who had married in Canada and wished to have their marriage recognised as a marriage in England and Wales. Potter P noted that marriage is almost universally recognised as a heterosexual relationship<sup>248</sup> which is a ‘means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit’.<sup>249</sup>

The Australian judiciary do not elaborate on the expected functions of marriage in the same way as the judiciary in England and Wales, and often their focus is on the requirements for legal validity. In a 1962 case involving legitimacy, the High Court stated that ‘the essence of marriage, from a legal point of view’ is ‘that it produces, or provides a pre-requisite for, the legal recognition of family relationships’.<sup>250</sup> This treats marriage as a means of acquiring legal recognition of a relationship only. In a 2006 case concerning paternity, the High Court referred to the ideology of marriage by suggesting that marriage in Western society has developed to be

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<sup>243</sup> *ibid* [144].

<sup>244</sup> *ibid* [141].

<sup>245</sup> *ibid* [78].

<sup>246</sup> See above, 3.4.1.

<sup>247</sup> Barker (n4) 35.

<sup>248</sup> *Wilkinson v Kitzinger* [2006] EWHC 202, [88].

<sup>249</sup> *ibid* [118]. For further discussion of this case, see Chapter 4, 4.3.2.1.

<sup>250</sup> *Attorney-General (Victoria) v Commonwealth* [1962] HCA 37, 554.

the exclusive, life-long, voluntary union of a man and a woman, 'partly as a means of involving males in the nurture and protection of their offspring' because 'the structure of marriage and the family is intended to sustain responsibility and obligation'.<sup>251</sup> But, following on from these comments, the Court acknowledges that 'the status of marriage may exist even when the parties to it are completely at arm's length' and that people may be 'happily or unhappily' married.<sup>252</sup> This is an acknowledgment that, although particular expectations may surround marriage, the reality of married life may not always live up to them – but this does not affect the validity of the relationship. The High Court in a case concerning the ACT's attempt to legislate for same-sex marriage, explained that the concept of marriage should be understood as,

*...a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.*<sup>253</sup>

The court goes on to explain that the concept of marriage varies between cultures,

*The social institution of marriage differs from country to country. It is not now possible (if it ever was) to confine attention to jurisdictions whose law of marriage provides only for unions between a man and a woman to the exclusion of all others, voluntarily entered into for life. Marriage law is and must be recognised now to be more complex. Some jurisdictions outside Australia permit polygamy. Some jurisdictions outside Australia, in a variety of constitutional settings, now permit marriage between same sex couples.*<sup>254</sup>

The High Court recognises that marriage is flexible because it means different things in different cultures, and this suggests that identifying all the expected characteristics and functions of marriage is a difficult, if not impossible, task.

### **3.5 Conclusion**

The chapter has identified two conflicts embedded in the institution of marriage. The first is internal to the ideology, or ideologies, with competing versions of what marriage is for clashing at key points in the developments of the legal structure and legal consequences of marriage. The second is a conflict between the marriage ideology and the legal structure. The discussion has shown that the qualities that inform the competing ideologies of marriage are irrelevant

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<sup>251</sup> *Magill v Magill* [2006] HCA 51, [24].

<sup>252</sup> *ibid* [28].

<sup>253</sup> *Commonwealth v Australian Capital Territory* (n93) [33].

<sup>254</sup> *Commonwealth v Australian Capital Territory* (n93) [35].

when it comes to the question of determining the legal validity of a marriage. In this sense, the ideology is superimposed on the institution rather than being an integral part of it. This does not mean that the ideologies are not important – on the contrary, it appears that the ideology is definitive of marriage for some. The fact that the precise content of the marriage ideology varies from one person to the next is significant because of the effect of the ideology on the development of the legal structure of marriage. The legal structure is malleable according to prevailing ideology, and as new versions of the ideology attract broad consensus, the legal structure (and legal consequences) of marriage can change.

The discrepancies between the legal structure and the ideologies, and the different views of which elements comprise the ideologies, are not problematic for marriage: boundaries have to be drawn on who may form a marriage with whom, and the administrative efficiency of marriage is ensured via a system that does not concern itself with the actual functions performed within a marriage. But, the influence of the marriage ideology may be problematic for the development of other systems of recognition. For example, chapter two showed that supporters of a moderate function-based approach believe that married and unmarried cohabitants should be treated in the same way by law because their relationships function in the same way.<sup>255</sup> If there is no agreement of the expected functions of marriage, then it may be difficult to determine whether an informal relationship is ‘marriage-like’. The next chapters will explore the influence of the marriage model on the development of other systems of relationship recognition to determine whether the inconsistencies between the ideologies and the legal structure pose difficulties in practical terms.

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<sup>255</sup> See Chapter 2, 2.3.3.1.

## **Chapter 4 – Extending ‘form’ beyond marriage: registered couple relationships**

This chapter explores how formalised relationships can be extended beyond marriage by exploring England and Wales’ civil partnerships and the registration options for de facto couples in Australia. Different Australian states and territories have adopted different terminology to describe the registration options. Tasmania uses ‘significant relationships’; Victoria refers to ‘domestic relationships’; New South Wales (NSW) calls them ‘registered relationships’; both Queensland and the Australian Capital Territory (ACT) have ‘civil partnerships’; and the ACT has an additional registration option called ‘civil unions’. The registration options will be collectively referred to here as ‘registered couple relationships’. It will be argued that, as predicted in chapter three, while formalised relationships are inherently flexible, the extent of this flexibility is restricted by the influence of marriage. As a result, attempts to create alternatives to marriage have instead created replicas that are often deemed inferior in symbolic terms.

First, the chapter will explain why the registered couple relationships were introduced and the legal structure and legal consequences of these relationships. It will be demonstrated that *functional* arguments have been influential in developing form-based systems of relationship recognition, and that this may explain why the registered couple relationships are so like marriage in terms of legal structure and legal consequences. Secondly, it will be shown that marriage and the registration options share some benefits, namely respect for choice and autonomy and administrative efficiency, and that there is freedom to live as you choose following the formalising of a relationship because the quality of formalised relationships are irrelevant for the purposes of legal validity. Thirdly, it will be argued that not all the benefits of marriage attach to other form-based systems, and that the most significant difference is social rather than legal; registered couple relationships do not bestow the same social status as marriage. The conclusion will suggest that, without a willingness to think beyond the confines of the legal structure of marriage, form-based relationships will do little to address concerns about recognising a diversity of family relationships.

### **4.1 The development of the registered couple relationships**

At first glance, the fact that registered couple relationships exist suggests that relationship recognition has moved away from marriage, albeit through the introduction of new form-based relationships. But, on closer examination, it becomes apparent that they are not that different from marriage and that the ideological pull of marriage is a key reason for the similarity.

#### 4.1.1 Why introduce the registered couple relationships?

In England and Wales, the introduction of civil partnership in 2004 provided an option for same-sex couples to gain legal recognition of their relationships. The creation of civil partnership meant that same-sex couples could gain access to a package of legal rights and responsibilities that previously only applied to (opposite-sex) married couples. One reason why civil partnerships were thought necessary was because same-sex couples' relationships were assumed to *function* in the same way as opposite-sex couples' relationships, and so same-sex couples should also have an option to formalise their relationships.

The comments about the expected nature of same-sex relationships during the parliamentary debates about civil partnership were similar to those made about marriage by policy-makers during the 2013 same-sex marriage debates.<sup>1</sup> For example, Jacqui Smith, then Deputy Minister for Women and Equalities, explained that the Civil Partnership Bill 2004 was necessary because,

*Across this country today thousands of same-sex couples have made the decision to share their lives, their home, their finances and the care of their children or of older relatives. They may have loved and cared for each other for many years, yet their relationship is invisible in the eyes of the law. The Bill sends a clear message about the importance of stable and committed same-sex relationships.*<sup>2</sup>

She further explained that the bill made 'an important statement about this country's support for stable, long-term committed relationships'<sup>3</sup> and 'sends a clear and unequivocal message that same-sex couples deserve recognition and respect.'<sup>4</sup> These are similar to Smith's comments in the government's consultation document, where she stated that same-sex relationships 'span many years with couples looking after each other, caring for their loved ones and actively participating in society; in fact, living in exactly the same way as any other family.'<sup>5</sup> Similarly, Baroness Smith, who was responsible for the passage of the bill through the House of Lords, explained that same-sex couples faced hardship and difficulties prior to the option to register a civil partnership because their 'long-term, mutually supportive relationships are, at the moment, invisible in law.'<sup>6</sup>

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<sup>1</sup> See Chapter 3, 3.4.1.

<sup>2</sup> HC Deb 12 October 2004, Vol 425, Col 174.

<sup>3</sup> HC Deb 12 October 2004, Vol 425, Col 175.

<sup>4</sup> HC Deb 12 October 2004, Vol 425, Col 182.

<sup>5</sup> Women and Equality Unit 'Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples' (2003), 9 (ministerial foreword).

<sup>6</sup> HL Deb 10 May 2004, Vol 661, Col GC5.



The position in Australia was different from England and Wales because informal ‘de facto’ relationships, or marriage-like couple relationships, were already treated almost identically with marriage when the Australian registration options were created.<sup>7</sup> Consequently, registration did not create access to legal rights and responsibilities for the first time as did England and Wales’ civil partnership.<sup>8</sup> This different starting position means that different reasons were advanced as rationales for the creation of the different registered couple relationships in Australia. Pragmatic reasons were advanced in Australia that focussed on the benefits of formalised relationships over function-based recognition. These benefits will be discussed in detail below.<sup>9</sup> This does not mean that functional arguments like those advanced in England and Wales were not important. Such arguments were apparent in the earlier Australian debates on the legal recognition of couples in informal de facto relationships, which were a precursor to the registration options. Arguments that couples whose relationships function in similar ways should be treated similarly by law were advanced to support treating de facto couples in informal relationships in the same way as married couples. For example, the fact that economic need could arise from a de facto relationship in the same way as a marriage was advanced as a reason why de facto couples should be treated in the same way as spouses upon relationship breakdown.<sup>10</sup> These arguments will be discussed in detail in a later chapter.<sup>11</sup>

To summarise, one reason why registered couple relationships were introduced in both jurisdictions is because unmarried couples’ relationships, especially same-sex couples, were assumed to perform similar functions to married relationships, namely that both married and unmarried couples’ relationships are expected to be loving, committed, long-term relationships where partners support each other. It is suggested here that this expectation of functional similarity between married and unmarried couples’ relationships is one reason why these registration options are so similar to marriage.

#### **4.1.2 What are the registered couple relationships?**

##### **4.1.2.1 Relationship type: the legal structure**

Chapter three established that the legal structure of marriage is a relationship between two unrelated adults who have given adequate consent, and that same-sex couples are

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<sup>7</sup> For discussion of the position of informal de facto relationships, see Chapter 6, 6.3.

<sup>8</sup> Note that Tasmania legislated to change the definition of ‘significant’ relationship in 2003 to include same-sex couples. So, 2003 was the first time that same-sex couples, either in an informal or registered relationship, were legally recognised in Tasmania: Relationships Act 2003 (Tas).

<sup>9</sup> See below, 4.2.

<sup>10</sup> See New South Wales Law Reform Commission *Report on De Facto Relationships* (LRC 36, 1983).

<sup>11</sup> See Chapter 6, 6.2.1.

permitted to marry in England and Wales, but not in Australia.<sup>12</sup> The type of relationship, or the legal structure of the registered couple relationships, is virtually identical to marriage, and as Stychin bluntly puts it in the English and Welsh context, civil partnership ‘should not be seen as an achievement of the legal imagination.’<sup>13</sup>

In the same way that marriage is a dyadic relationship that is expected to be monogamous, the registered couple relationships in both jurisdictions are dyadic relationships and any person may only be in one formalised relationship at a time.<sup>14</sup> The reasons for this dyadic requirement appear to be partly practical. The government in England and Wales explained that it is necessary to ensure that people ‘will not find themselves subject to various sets of competing legal obligations’.<sup>15</sup> Similarly, the Victorian government in Australia explained that ‘legal and practical difficulties would arise if a person has more than one registered partner or both a registered partner and a spouse’.<sup>16</sup> Another reason for this dyadic requirement may be symbolic, as Rundle suggests, to ‘reflect a desire to maintain the ideal of monogamy’ in the law.<sup>17</sup>

Similar minimum age requirements apply for marriage,<sup>18</sup> and the registered couple relationships. For a valid civil partnership in England and Wales, partners must be aged over 16,<sup>19</sup> with those aged 16 and 17 needing the consent of an appropriate person to enter a civil partnership.<sup>20</sup> In Australia, couples wishing to register their relationships must be ‘adults’, which

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<sup>12</sup> See Chapter 3, 3.2.1.

<sup>13</sup> CF Stychin ‘Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004’ (2006) 14(1) *Feminist Legal Studies* 79, 79.

<sup>14</sup> Civil Partnership Act 2004, s3(1)(b); Relationships Act 2003 (Tas), s11(1); Relationships Act 2008 (Vic), s6; Relationships Register Act 2010 (NSW), s5(3); Civil Partnership Act 2011 (Qld), s5; Domestic Relationships Act 1994 (ACT), s37C; Civil Unions Act 2012 (ACT), s7(b). Additionally, in Australia, entering a marriage will automatically end a registered couple relationship, see: Relationships Act 2003 (Tas), s15(1)(b); Relationships Act 2008 (Vic), s11(1)(b); Relationships Register Act 2010 (NSW), s10(b); Civil Partnership Act 2011 (Qld), s14(1)(b); Civil Unions Act 2012 (ACT), s11(1)(b); Domestic Relationships Act 1994 (ACT), s37H(1)(b).

<sup>15</sup> Women and Equality Unit (n5) [3.5].

<sup>16</sup> Victorian Legislative Assembly Deb 6 December 2007, 4390, (Mr Hulls, Attorney General). The Attorney General explained that a difficult situation may arise, for example ‘where a doctor needs to discuss a person’s medical treatment with the next of kin in an emergency situation’. Note however, as will be made clear in Chapter 6, that being married or in a registered couple relationship is not a barrier to a finding that a de facto relationship exists, and so in this way the Australian courts are already dealing with competing claims where there may be a spouse/registered partner and an informal de facto partner.

<sup>17</sup> O Rundle ‘An Examination of Relationship Registration Schemes in Australia’ (2011) 25(2) *Australian Journal of Family Law* 121, 139.

<sup>18</sup> See Chapter 3, 3.2.1.3.

<sup>19</sup> Civil Partnership Act 2004, s3.

<sup>20</sup> Civil Partnership Act 2004, s4. For details of the persons who may consent to the civil partnership for those aged 16 and 17 see schedule 2, part 1.

means they must be 18 or over.<sup>21</sup> There is no provision, as there is with marriage,<sup>22</sup> to allow 16 and 17 year olds to register in exceptional and unusual circumstances. Additionally, it is not possible to enter a civil partnership or a registered couple relationship with a person who is within the prohibited degrees of family relationship. The list of the prohibited family relationships in the English and Welsh civil partnership legislation is identical to that of marriage,<sup>23</sup> and the prohibited relationships in Australia also mirror those of marriage.<sup>24</sup> Additionally, just as consent is an important element of marriage, parties to registered couple relationships must also consent to registration. A civil partnership in England and Wales is voidable if either party does not give adequate consent to registration,<sup>25</sup> and a lack of consent will make a registered couple relationship void in NSW<sup>26</sup> and the ACT,<sup>27</sup> while Tasmania, Victoria and Queensland require parties to make a statutory declaration that they are consenting to registration.<sup>28</sup>

One area of difference between the various registered couple relationships is whether the registration option is available to both opposite- and same-sex couples. Currently in England and Wales, despite a judicial review challenge,<sup>29</sup> civil partnerships are only an option for same-sex couples.<sup>30</sup> This means that opposite-sex couples only have the option to marry to formalise their relationships. Similarly, the ACT's 'civil unions' are only available for couples who cannot marry under federal law – in other words, same-sex couples.<sup>31</sup> Opposite-sex couples in the ACT have the option to marry or register a civil partnership however, and all other registration options for

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<sup>21</sup> Relationships Act 2003 (Tas), ss4, 11; Relationships Act 2008 (Vic), ss5, 7; Relationships Register Act 2010 (NSW), s5; Civil Partnership Act 2011 (Qld), ss4, 6; Civil Unions Act 2012 (ACT), s7 and Domestic Relationships Act 1994 (ACT), s37E.

<sup>22</sup> See Chapter 3. 3.2.1.3.

<sup>23</sup> Civil Partnerships Act 2004, sch1, part 1. cf Marriage Act 1949, sch 1.

<sup>24</sup> Relationships Act 2003 (Tas), ss4, 7; Relationships Register Act 2010 (NSW), s5. The other jurisdictions have a similar list, but omit relationships that can be traced through adoption: Civil Partnership Act 2011 (Qld), s5; Civil Unions Act 2012 (ACT), s7 and Domestic Relationships Act 1994 (ACT), s37C. This is not the case in Victoria where the legislation only specifies that a 'domestic relationship' is the relationship between a couple: Relationships Act 2008 (Vic), s5. Note however that Victoria also recognises registered caring relationships, and the provision states that caring partners may be related by family (Relationships Act 2008 (Vic), s5) which suggests that the domestic relationship category is reserved for marriage-like relationships. Furthermore, under the corresponding laws provision, only registered relationships between partners who are not related by family may be considered as 'domestic relationships' in Victoria: see Relationships Act 2008 (Vic), s33B. cf Marriage Act 1961 (Cth), s23B.

<sup>25</sup> Civil Partnership Act 2004, s50(1)(a) and (b).

<sup>26</sup> Relationships Register Act 2010 (NSW), s14(1)(b) and (c).

<sup>27</sup> Civil Unions Act 2012 (ACT), s21(b); Domestic Relationships Act 1994 (ACT), s37L(b).

<sup>28</sup> Relationships Act 2003 (Tas), s4(2)(a); Relationships Act 2008 (Vic), s7(a); Civil Partnerships Act 2011, s2(a).

<sup>29</sup> For discussion, see below, 4.3.2.2.

<sup>30</sup> Civil Partnership Act 2004, s1.

<sup>31</sup> Civil Unions Act 2012 (ACT), s7(c).

couples in Australia are open to both same- and opposite-sex couples.<sup>32</sup> The Australian registration options are more inclusive than England and Wales in that both opposite- and same-sex couples may register, and provide the only option for same-sex couples in that jurisdiction to formalise their relationships.

#### 4.1.2.2 Ending a registered relationship: the legal structure

Like marriage,<sup>33</sup> registered couple relationships may only end in the way prescribed by law. Different approaches taken in England and Wales and Australia indicate that there is some flexibility in assigning the process by which a formalised relationship may end. However, both jurisdictions' approaches to the breakdown of registered relationships nonetheless mimic their approach to ending a marriage.

In England and Wales, a civil partnership ends<sup>34</sup> by the death of one partner, by the dissolution or annulment procedure or, following the same-sex marriage reforms, where the civil partners choose to convert their civil partnership into a marriage.<sup>35</sup> As Barker notes, dissolution orders, 'in their likeness to divorce, clearly illustrate the similarity of civil partnership and marriage.'<sup>36</sup> Application for dissolution is possible after 1 year,<sup>37</sup> on the sole ground that the relationship has broken down irretrievably,<sup>38</sup> which must be proven by reference to one of four facts,

- The respondent has behaved in such a way that the petitioner cannot be expected to live with the respondent;
- The respondent has deserted the petitioner for a period of at least two years;
- The parties have lived apart for two years and consent to the dissolution;
- The parties have lived apart for a period of five years.<sup>39</sup>

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<sup>32</sup> Relationships Act 2003 (Tas), s4; Relationships Act 2008 (Vic), s5; Relationships Register Act 2010 (NSW), s5(1); Civil Partnerships Act 2011 (Qld), s4(1); Domestic Relationships Act 1994 (ACT), s37D.

<sup>33</sup> For discussion of the divorce provision in both jurisdictions, see Chapter 3, 3.2.2.

<sup>34</sup> It is also possible to obtain a separation order without having to prove the irretrievable breakdown of a relationship: Civil Partnership Act 2004, s56. This is similar to the provision under the Matrimonial Causes Act 1973, s17 for judicial separation.

<sup>35</sup> Civil Partnership Act 2004, s1. The conversion provisions were provided by the Marriage (Same Sex Couples) Act 2013, s9. The Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014/3181 provided the details of the conversion procedure, and this became available on the 10<sup>th</sup> December 2014.

<sup>36</sup> N Barker 'For Better or for Worse? The Civil Partnership Bill [HL] 2004' (2004) 26(3) Journal of Social Welfare and Family Law 313, 318.

<sup>37</sup> Civil Partnership Act 2004, s41(1). cf Matrimonial Causes Act 1971, s3.

<sup>38</sup> Civil Partnership Act 2004, s44(1). cf Matrimonial Causes Act 1973, s1(1).

<sup>39</sup> Civil Partnership Act 2004, s44(5).

Adultery was not included in the civil partnership legislation because the government believed 'it would not be possible nor desirable to read across' the heterosexual definition of adultery into dissolution law' and that any infidelity could be considered under the behaviour ground.<sup>40</sup> In the same way as for marriage, the four facts for dissolution all refer to the civil partners either living together or living apart. This suggests that, in the same way as spouses, civil partners are expected to cohabit and, should that cohabitation cease, or should one party be at fault in making it intolerable for the other to live with them, then the relationship may end. The law is again used to send a message about the expected nature of formalised relationships, i.e. that they are cohabiting relationships, even though cohabitation, or a lack thereof, has no effect on the validity of the relationship.

The process of ending a registered couple relationship in Australia is simpler than that in England and Wales, and does not require the parties to state any reasons as to why the relationship has ended, or indeed establish that they have lived separately and apart for 12 months as is the case with divorce. This appears to protect party autonomy, as Rundle notes,

*...there is no scrutiny applied to the circumstances around the dissolution of a formalised relationship. It is sufficient that revocation is what one of the parties wants. The state and territory relationship registration systems require less factual investigation and provide more autonomy to the parties than marriage. Parties are free to decide both the beginning and end of their formalised relationship at will.*<sup>41</sup>

All registered couple relationships in Australia end following the death of one partner as well as when one partner chooses to marry,<sup>42</sup> and a 'civil partnership' in the ACT will also end if the parties enter into a 'civil union' with each other.<sup>43</sup> Parties to registered relationships may also choose to end the relationship at any time, and revocation takes place 90 days after making an application in most states,<sup>44</sup> although it takes 12 months for a civil union or civil partnership to end in the ACT.<sup>45</sup> Where one partner chooses to end the relationship unilaterally, they must

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<sup>40</sup> Women and Equality Unit 'Responses to Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples' (2003), 36. For a definition of adultery, see Chapter 3, 3.2.2, n116.

<sup>41</sup> Rundle (n17) 144.

<sup>42</sup> Relationships Act 2003 (Tas), s15; Relationships Act 2008 (Vic), s12; Relationships Register Act 2010 (NSW), s10; Civil Partnerships Act 2011 (Qld), s14; Domestic Relationships Act 1994 (ACT), s37H; Civil Unions Act 2012 (ACT), s11.

<sup>43</sup> Domestic Relationships Act 1994 (ACT), s37H(1)(c).

<sup>44</sup> Relationships Act 2003 (Tas), s15; Relationships Act 2008 (Vic), s15; Relationships Register Act 2010 (NSW), s12; Civil Partnerships Act 2011 (Qld), s15.

<sup>45</sup> Domestic Relationships Act 1994 (ACT), s37I; Civil Unions Act 2012 (ACT), s12(3).

serve notice of their intention to do so on the other party,<sup>46</sup> although there is no corresponding provision to serve notice should one party decide to marry.

#### 4.1.2.3 The legal consequences

Registered couple relationships attract broadly the same legal consequences as marriage both during and after the breakdown of the relationship in both jurisdictions.<sup>47</sup> In England and Wales, the government felt that civil partners make a 'strong commitment to each other' and so they 'should gain rights and responsibilities to reflect the roles they play in each other's lives.'<sup>48</sup> This identical treatment includes transplanting the financial remedies provision of divorce onto civil partners. The financial provisions for civil partnership and marriage are contained in different legislation, but this is of little importance, because, as the Court of Appeal made clear in *Lawrence v Gallagher*,<sup>49</sup> 'it is common ground that the language of schedule 5 of the Civil Partnership Act 2004 is identical to the language of s25 of the Matrimonial Causes Act 1973.'<sup>50</sup> Similarly in Australia, the courts have jurisdiction to resolve the property and financial disputes of separating registered couples in the same way as for married couples. The actual principles for property and financial orders<sup>51</sup> are the same for both married and the registered couple relationships,<sup>52</sup> although they are dealt with in separate provisions of the Family Law Act.<sup>53</sup> This separate but identical provision was thought necessary because the federal

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<sup>46</sup> Relationships Act 2003 (Tas), s16; Relationships Act 2008 (Vic), s13; Relationships Register Act 2010 (NSW), s11; Civil Partnerships Act 2010 (Qld), s15; Domestic Relationships Act 1994 (ACT), s371; Civil Unions Act 2012 (ACT) s12.

<sup>47</sup> See L Glennon 'Strategizing for the Future through the Civil Partnership Act' (2006) 33(2) *Journal of Law and Society* 244, 245; Rundle (n17) 123; N Witzleb 'Marriage as the 'Last Frontier'? Same-Sex Relationship Recognition in Australia' (2011) 25(2) *International Journal of Family Law* 135, 135.

<sup>48</sup> Women and Equality Unit (n5) [6.1].

<sup>49</sup> [2012] EWCA Civ 394.

<sup>50</sup> *ibid*, 2 (Thorpe LJ). For discussion of this decision see R George '*Lawrence v Gallagher* [2012] EWCA Civ 394 – Playing a Straight Bat in Civil Partnership Appeals?' (2012) 34(3) *Journal of Social Welfare and Family Law* 357.

<sup>51</sup> Property and financial provision for the breakdown of de facto relationships, including registered couple relationships, are dealt with under federal law provisions, and will be discussed in detail in Chapter 6, 6.3.2.2.

<sup>52</sup> G Watts 'De Facto Relationships Legislation' (2009) 23(2) *Australian Journal of Family Law* 122, 122-3: there is one slight difference of treatment noted by Watts, parties to an intact marriage may apply for an order during the relationship, whereas de facto couples may only apply after the breakdown of the relationship. Maintenance orders during an intact marriage are rare, but Watts notes some examples (in fn2) such as *Eliades and Eliades* (1980) 6 Fam LR 916 where Nygh J 'made a maintenance order in favour of a spouse where the couples had not separated.'

<sup>53</sup> Family Law Act 1975 (Cth), Part VIII deals with property, spousal maintenance and maintenance agreements for married couples. As J Millbank 'De Facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms' (2009) 23(3) *Australian Journal of Family Law* 1, 9 notes they are 'rather confusingly... placed' in different parts of the 1975 Act, 'and numbered in a way that does not reflect the numbering of the pre-existing provisions – so, for example, the s 79 factors appear for de facto couples under s 90SM, while s 75(2) is replicated in s 90SF(3).'

government felt that there was ‘a pre-eminence accorded to marriage’ in Australia<sup>54</sup> and so this separate treatment was indicative of a symbolic distinction between the different relationship types.

This identical treatment on relationship breakdown suggests that the courts are using their discretionary powers to redistribute property to better protect the economically vulnerable partner on relationship breakdown, and thus performing family law’s protective function, in the same way as they do for spouses. But, additionally, in the same way as with marriage, partners to the registered couple relationships can opt-out of the legal consequences of relationship breakdown in a way that presumably respects party autonomy. Civil partners may create financial agreements to determine what happens on the breakdown of their relationship,<sup>55</sup> and registered partners in Australia may create binding financial agreements<sup>56</sup> that can be drawn up before,<sup>57</sup> during<sup>58</sup> or after the breakdown of the registered relationship.<sup>59</sup> Even though the same formality requirements apply for both spouses and registered partners in relation to financial agreements, a financial agreement will cease to have effect if the parties marry each other.<sup>60</sup> The same issues regarding power imbalances within personal relationships are thus of potentially equal concern in the context of the registered couple relationships as they are with marriage.<sup>61</sup>

#### *4.1.2.3a The problematic influence of the marriage model*

So far, it has been established that the registered couple relationships are essentially replicas of marriage in terms of both legal structure and legal consequences. Transferring the marriage model onto other form-based relationships, via different nomenclature, assumes that this model is unproblematic, and arguably undermines the whole point of legislating for alternatives if they are essentially replicas of marriage. But, the marriage model is problematic in a number of ways.

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<sup>54</sup> Australian Senate Deb 14 October 2008, 39 (Senator George Brandis). See also Australian House of Representatives Deb 28 August 2008, 6529 (Julie Bishop).

<sup>55</sup> See *Radmacher v Granatino* [2010] UKSC 42, [131] where Baroness Hale notes that although the judgement refers to married couples, the ‘conclusions must apply to couples who have entered into a civil partnership.’

<sup>56</sup> Family Law Act 1975 (Cth), Part VIIIAB, Division 4.

<sup>57</sup> Family Law Act 1975 (Cth), s90UB.

<sup>58</sup> Family Law Act 1975 (Cth), s90UC.

<sup>59</sup> Family Law Act 1975 (Cth), s90UD.

<sup>60</sup> Family Law Act 1975 (Cth), s90UJ(3). This is consistent with the clarification provided in the Family Law Act 1975 (Cth), s90SC that the de facto provisions no longer apply if the de facto partners marry each other.

<sup>61</sup> cf Chapter 3, 3.3.2.

Leckey is one author who has raised concerns about transplanting the marriage model onto same-sex relationships.<sup>62</sup> He argues that the rights and responsibilities of marriage are most apparent upon separation and there is an absence of data looking at the post-separation arrangements of same-sex couples.<sup>63</sup> This makes it difficult to assess whether current divorce law could provide an adequate remedy in the same-sex context,<sup>64</sup> given that this provision has developed in the context of female economic dependency.<sup>65</sup> Leckey refers to research by Giddings<sup>66</sup> that points out that same-sex relationships range from ‘the purposefully egalitarian’ to those mirroring ‘the most unequal heterosexual stereotypes.’<sup>67</sup> This illustrates that he is aware that not all same-sex relationships function in the same way. Nevertheless, Leckey concludes that same-sex couples are generally more egalitarian because they are more likely to keep finances separate and are less likely to have children than opposite-sex couples. These differences are relevant because the argument that same-sex couples are the same as opposite-sex couples has been used to argue for equal legal rights for same-sex couples.<sup>68</sup>

Perhaps Leckey is guilty of making generalisations: it is difficult to definitively determine the quality of any relationship based on the sexual orientation of the partners alone. As Lind explains, lived lives are more complicated than generalisations may suggest<sup>69</sup> and as Auchmuty notes, relationships of ‘dominance and subordination can exist in any coupling’.<sup>70</sup> This suggests that Leckey’s observations are not only a concern for same-sex couples because there is reason to question the application of the financial remedies provision for *all* couples; not all formalised

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<sup>62</sup> See also C Bendall ‘Some are more ‘Equal’ than Others: Heteronormativity in the Post-White era of Financial Remedies’ (2014) 36(3) *Journal of Social Welfare and Family Law* 260, who argues that in financial remedies judgments, judges continue to be influenced by heteronormative ideas of the roles of husbands and wives.

<sup>63</sup> R Leckey ‘Marriage and the Data on Same-Sex Couples’ (2013) 35(2) *Journal of Social Welfare and Family Law* 179, 179. Since the publication of Leckey’s article, Auchmuty has conducted such a study looking at the experience of civil partners of the dissolution process. See R Auchmuty ‘The Experience of Civil Partnership Dissolution: *Not* ‘Just like Divorce’’ (2016) 38(2) *Journal of Social Welfare and Family Law* 152.

<sup>64</sup> Leckey (n63) 183.

<sup>65</sup> *ibid* 182. He refers to work by authors such as A Esmail ‘Negotiating Fairness’: a Study on how Lesbian Family Members Evaluate, Construct and Maintain “fairness” with the Division of Household Labor’ (2010) 57 *Journal of Homosexuality* 591; M Burns, C Burgoyne and V Clarke ‘Financial Affairs? Money Management in Same-Sex Relationships’ (2008) 37(2) *Journal of Socio-Economics* 481; LA Kurdek ‘The Allocation of Household Labor by Partners in Gay and Lesbian Couples’ (2007) 28 *Journal of Family Issues* 132.

<sup>66</sup> LA Giddings ‘Political Economy and the Construction of Gender: The Example of Housework within Same-Sex Households’ (1998) 4 *Feminist Economics* 97.

<sup>67</sup> Leckey (n63) 182.

<sup>68</sup> *ibid* 188.

<sup>69</sup> C Lind ‘Sexuality and Same-Sex Relationships in Law’ in B Brooks-Gordon and others (eds) *Sexuality Repositioned: Diversity and the Law* (Hart Publishing, 2004), 117-8.

<sup>70</sup> R Auchmuty ‘What’s so Special about Marriage? The Impact of *Wilkinson v Kitzinger*’ (2008) 20(4) *Child and Family Law Quarterly* 475, 492.



relationships will be identical in terms of the quality of the relationship. It should not be taken as a given that the legal consequences of marriage are suitable for marriage, let alone assume that they are also suitable for other relationships. Transplanting the legal consequences of marriage in their entirety onto other formalised relationships demonstrates a lack of willingness to challenge the marriage model and a failure of imagination to conceive of the possibility of looking beyond the confines of that model. This is important for the thesis because it suggests that the influence of the marriage model is a factor that constrains the development of form-based recognition.

#### **4.2 Shared benefits of formalised relationships**

An analysis of the registered couple relationships shows that there are three benefits that are common to both marriage and the registration options. Firstly, formalised relationships are administratively efficient, and part of the reason for this is that the quality of the relationship is irrelevant for the purposes of legal validity. This is significant because it highlights a difference between form-based and function-based recognition, namely that partners in informal relationships must prove that their relationships function in a particular way before that relationship will be legally recognised.<sup>71</sup> Secondly, the supposed respect for choice and autonomy that is offered by form-based recognition is also a shared benefit of the formalised relationships that have been discussed so far.<sup>72</sup> Thirdly, it is apparent that formalising a relationship performs the valuable function of allowing couples to attach a label to their relationship.

##### **4.2.1 Practical benefits: administrative efficiency**

The convenience and simplicity of form-based recognition as opposed to function-based recognition was a non-contentious issue in the parliamentary debates in Australia introducing the registered couple relationships. The administrative efficiency of form-based relationships was seen as a reason to introduce registration options because of the difficulties in identifying which relationships qualify for legal recognition under a function-based approach.<sup>73</sup> In Tasmania, it was noted during consultation that registration allows the practical benefit of enabling partners to 'voluntarily assume a range of legal rights and obligations'.<sup>74</sup> In Victoria, the

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<sup>71</sup> This will be demonstrated fully in Chapters 6 and 7.

<sup>72</sup> The next chapter will explore whether the registered caring relationships also share these benefits.

<sup>73</sup> For comment on these difficulties, see Chapter 2, 2.3.2 and Chapter 6, 6.1.3.

<sup>74</sup> Tasmanian House of Assembly Deb 25 June 2003, 32 (Mrs Jackson, Attorney General, Minister for Justice and Industrial Relations). See also Tasmanian Legislative Council Deb 27 August 2003, (Mr Aird, Leader of the Government in the Council). See also Tasmanian House of Assembly Deb 25 June 2003, 90, (Mr Rockliff); Tasmanian House of Assembly Deb 25 June 2003, 111 (Mr Green, Minister for Primary Industries, Water and Environment) and Tasmanian Legislative Council Deb 27 August 2008, 10 (Mr Hall).

government went as far as to note that registration provides the practical benefit<sup>75</sup> of ensuring that partners would not 'be put to the indignity'<sup>76</sup> of having to prove the existence of their relationship in court.<sup>77</sup> The NSW government felt that registration allows easier access to existing 'legal entitlements'.<sup>78</sup> As noted in chapter two, the government in England and Wales explained that the administrative efficiency of civil partnership, offering 'legal certainty about who had opted in and who had not, and when the legal relationship began and ended',<sup>79</sup> was a benefit of introducing this new formalised relationship.<sup>80</sup> This suggests that administrative efficiency, due to the registration process providing a record of when a relationship began and the formal dissolution process providing a formal record of when a relationship ends, is common to marriage and the registered couple relationships.

Another element of the administrative efficiency of formalised relationships lies in the fact that there is no need to prove the quality of the relationship for legal recognition; all that is necessary is that the required formalities are met and that the relationship is of a particular structure. There is no need, for example, for a couple to prove that they cohabit or that they have a sexual relationship in order for the registered relationship to be valid. So, in Victoria, the legislation provides an unnecessary description of a 'registrable domestic relationship' as,

*A relationship between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof.*<sup>81</sup>

As Rundle observes, this definition is 'somewhat superfluous' because any two adults who fulfil the eligibility criteria may register; there is no need to prove, for example, that either partner

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<sup>75</sup> Or a 'practical mechanism' as was said by Victorian Legislative Assembly Deb 12 March 2008, 756 (Ms Marshall).

<sup>76</sup> This idea of 'indignity' was also expressed by others such as, Victorian Legislative Assembly Deb 12 March 2008, 762 (Mr Hudson).

<sup>77</sup> Relationships Bill 2007 – Explanatory Memorandum, 1. Note also the comments of the Attorney General, Mr Hulls, in the Statement of Compatibility with the Charter of Human Rights and Responsibilities Act 2006 (Vic), in Victorian Legislative Assembly Deb 6 December 2007, 4390 – 'Registration is conclusive proof of the relationship.'

<sup>78</sup> NSW Legislative Assembly Deb 23 April 2010, 22240 (Mr Barry Collier, Parliamentary Secretary). Similar comments were made by others such as NSW Legislative Assembly Deb 11 May 2010, 22410 (Mr Gerard Martin); NSW Legislative Assembly Deb 11 May 2010, 22412 (Mr Barry O'Farrell, Leader of the Opposition); NSW Legislative Assembly Deb 12 May 2010, 22498 (John Robertson).

<sup>79</sup> Women and Equality Unit (n5) [2.3].

<sup>80</sup> See Chapter 2, 2.2.1.1.

<sup>81</sup> Relationships Act 2008 (Vic), s5.

provides ‘personal or financial commitment to the other.’<sup>82</sup> Much opposition to the registration systems in Australia focussed on a perceived lack of ‘commitment’ involved in registering a relationship as opposed to the ‘commitment’ involved in marrying.<sup>83</sup> What these opponents failed to see is that there is no prior test of ‘commitment’ when marrying or registering a couple relationship. The legislators may have intended the parties to be in a committed relationship, or to expect commitment following registration but, as Rundle notes, ‘the actual nature of the commitment between the couple is defined by the couple themselves and is not subject to any external test.’<sup>84</sup> Similarly, Baroness Scotland in the Civil Partnership Bill debates noted that introducing a clause that civil partners must be in a ‘mutually committed’ relationship was unnecessary because, ‘all same-sex couples will make their own decision about how they choose to live out their obligations to one another. If we included the words "mutually committed"... there would be a real question as to how it would be possible to set a common standard to define what the phrase means.’<sup>85</sup>

#### **4.2.2 Respect for choice and autonomy**

Respect for a choice and autonomy was given as a reason to favour the creation of a registration system in both jurisdictions. In England and Wales, the government emphasised that the lack of choice for same-sex couples regarding an option to formalise their relationships in the same way as opposite-sex couples was problematic. An opt-in system, such as civil partnership, allowed couples choice over whether or not to register, so that responsibilities would not be imposed where the parties did not want them.<sup>86</sup> This was made especially clear by Baroness Scotland, who introduced the Civil Partnership Bill into the House of Lords: ‘the important thing is that those people who have committed long-term relationships should have the choice to consolidate that relationship and have it formally recognised if they so choose.’<sup>87</sup> It seems that the government felt that an opt-in system was preferable to one where rights are imposed regardless of any choice on the part of the parties, and so supposedly would be seen as a benefit of a form-based system over one in which recognition is bestowed on the basis of the functions of the relationship.

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<sup>82</sup> Rundle (n17) 135.

<sup>83</sup> For example, Victorian House of Assembly Deb 12 March 2008, 739 (Mr Clark); Victorian House of Assembly Deb 12 March 2008, 762 (Mr Weller).

<sup>84</sup> Rundle (n17) 133.

<sup>85</sup> HL Deb 24 June 2004, Vol 662, Col 1358.

<sup>86</sup> Women and Equality Unit (n5) [2.2-2.3].

<sup>87</sup> HL Deb 22 April 2004, Vol 660, Col 392 (Baroness Scotland of Asthal). See also HC Deb 12 October 2004, Vol 425, Col 179 (Jacqui Smith, Deputy Minister for Women and Equalities).

The benefit of respecting choice was also mentioned in the debates leading to the creation of the registration options in Australia, but the context of the arguments was different because as already explained, unmarried couples were already treated almost identically to married couples under Australian law. Respect for choice in England and Wales is about allowing couples to choose to be legally recognised, or to otherwise ‘choose’ not to be legally recognised. In Australia the respect for choice is different because registration allows couples to be certain that legal consequences will be bestowed on their relationship,<sup>88</sup> as opposed to risking that their relationships would not be legally recognised under a function-based approach. In Victoria for example, the government made it clear that registration was a means to ‘recognise and dignify the free choice of human beings to order their own lives and relationships in freedom, and respects that choice in terms of equality’.<sup>89</sup> But, it cannot be stressed enough that these ideas about form-based systems respecting choice are subject to the same concerns as those identified in chapter two: assuming that people know the legal consequences of their legal decisions and so will act accordingly to remedy any difficulties makes a ‘rationality mistake’.<sup>90</sup> In addition to this (misguided) idea that form-based relationships respect a couple’s choice to have legal consequences bestowed on their relationships, a couple could also be said to be choosing to attach a label to their relationship when they register.

#### **4.2.3 The symbolic importance of ‘recognition’**

Form-based systems are well placed to perform family law’s symbolic function because the act of formalising a relationship attaches a label to that relationship, which allows both the state and third parties to understand the familial nature of that registered relationship. As the discussion of ‘family display’ in chapter one showed,<sup>91</sup> legal recognition of a relationship helps validate the nature of that relationship as ‘family’. The government made it clear in the initial civil partnership consultation that the symbolic role of recognition was an important benefit of the reforms:

*It would provide for the legal recognition of same-sex partners and give legitimacy to those in, or wishing to enter into, interdependent, same-sex couple relationships that are intended to be permanent. Registration would provide a framework whereby same-sex*

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<sup>88</sup> For discussion of the uncertainty of whether an informal relationship will be legally recognised or not under a function-based system, see Chapter 6, 6.1.3.

<sup>89</sup> Victorian Legislative Assembly Deb 6 December 2007, 4393 (Mr Hulls, Attorney General).

<sup>90</sup> See Chapter 2, 2.3.2.3.

<sup>91</sup> See Chapter 1, 1.3.2.2c.

*couples could acknowledge their mutual responsibilities, manage their financial arrangements and achieve recognition as each other's partner.*<sup>92</sup>

Similarly, the Tasmanian Attorney General explained that registration would provide 'a framework in which couples can express their commitment to each other and can receive public recognition and support' for their relationships.<sup>93</sup> In Victoria, it was argued that registration would allow for the 'dignity of formal recognition' of a 'loving' and 'committed' relationship, ensuring that partners 'have the security of knowing that their decision to commit to a shared life with each other is respected in Victoria.'<sup>94</sup>

#### **4.3 Distinguishing features: symbolism and social status**

While it's clear that formalised relationships allow couples to attach a familial label to their relationship, what is not yet clear is how the alternative label of a registered couple relationship measures up against the label, or the social status, provided by marriage. The registered couple relationships, while generating a legal status,<sup>95</sup> fail to generate the same social status as marriage, and this is partly because of the difficult balancing exercise faced by policymakers: they wanted to achieve a measure of equality between same- and opposite-sex couples without legislating for same-sex marriage. It will be argued here that the registration options do generate *some* social significance, and so a social status does attach to these relationships, although it is debatable whether this social status should be considered as inferior, akin or preferable to the social status of marriage.

##### **4.3.1 A symbolic intent: equal, but distinct?**

Alongside the functional arguments, outlined above, that were part of the rationale behind the introduction of the registered couple relationships<sup>96</sup> were concerns about equality, or the desire to achieve symbolic equality between same- and opposite-sex couples. In England and Wales, the government made it clear in the consultation document for civil partnership that the reforms were 'an important equality measure for same-sex couples... who cannot marry'.<sup>97</sup>

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<sup>92</sup> Women and Equality Unit (n5) [1.2].

<sup>93</sup> Tasmanian House of Assembly Deb 25 June 2003, 32 (Mrs Jackson, Attorney General, Minister for Justice and Industrial Relations). See also Tasmanian Legislative Council Deb 27 August 2003, 4 (Mr Aird, Leader of the Government in the Council); Tasmanian House of Assembly Deb 25 June 2003, 90 (Mr Rockliff); Tasmanian House of Assembly Deb 25 June 2003, 111 (Mr Green, Minister for Primary Industries, Water and Environment) and Tasmanian Legislative Council Deb 27 August 2008, 10 (Mr Hall).

<sup>94</sup> Victorian Legislative Assembly Deb 6 December 2007, 4393 (Mr Hulls, Attorney General). See also Victorian Legislative Council Deb 8 April 2008, 874 (Ms Lovell).

<sup>95</sup> For a discussion of the meaning of legal status, see Chapter 2, 2.2.1.3.

<sup>96</sup> See above, 4.1.1.

<sup>97</sup> Women and Equality Unit (n5) [1.2].

The Victorian government emphasised their commitment to promoting ‘the values of equality, respect<sup>98</sup> and dignity’ because registration ensures that a ‘decision to commit to a shared life’ is respected within the state.<sup>99</sup> ‘Civil partnerships’ were necessary according to the Queensland government because this was ‘a step towards equality’ so same-sex couples could enjoy the ‘same rights’ as heterosexual couples.<sup>100</sup> Similarly, the ACT government stressed that ‘civil unions’ were necessary to provide equal treatment for same-sex couples in order to fulfil the government’s intention of providing a symbolic means of recognition for those couples.<sup>101</sup>

Instead of opening up marriage to same-sex couples as a means of achieving equality, which of course the Australian states and territories are prohibited from doing because of constitutional limitations,<sup>102</sup> both jurisdictions opted for creating new formalised relationships that were intended to be similar to, *and* distinct from, marriage. Jacqui Smith, then Deputy Minister for Women and Equality, explained that by introducing civil partnerships the government were attempting,

*...to create a parallel but different legal relationship that mirrors as fully as possible the rights and responsibilities enjoyed by those who can marry, and that uses civil marriage as a template for the processes, rights and responsibilities that go with civil partnership. We are doing this for reasons of equality and social justice... civil partnership is not civil marriage, for a variety of reasons, such as the traditions and history - religious and otherwise - that accompany marriage. It is not marriage, but it is, in many ways - dare I say it? - akin to marriage. We make no apology for that.<sup>103</sup>*

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<sup>98</sup> Others also expressed that the Relationships Bill 2007 was about respect, see: Victorian Legislative Assembly Deb 12 March 2008, 760 (Ms Baillieu (Leader of the Opposition)) and Victorian Legislative Assembly Deb 12 March 2008, 769 (Ms Thompson).

<sup>99</sup> See also Victorian Legislative Council Deb 8 April 2008, 874 (Ms Lovell). Note the concerns of some who opposed the reforms on the grounds that the bill was ‘about symbolism’ such as Victorian Legislative Council Deb 8 April 2008, 863 (Mr Rich-Phillips).

<sup>100</sup> Queensland Parliament Deb 25 October 2011, 3363 (A.P Fraser, Deputy Premier, Treasurer and Minister for State Development and Trade). See also the comments of the then Premier of Queensland, A.M Bligh, Premier and Minister for Reconstruction, (Queensland Parliament Deb 11 November 2011, 3977) that the bill is about removing discrimination and about ‘dignity and respect for relationships that are precious in their own right’. Equality arguments in favour of the legislation were also referred to by others such as: Queensland Parliament Deb 11 November 2011, 3980 (Ms Male).

<sup>101</sup> See ACT Legislative Assembly Deb 18 December 2011, 5913 (Mr Corbell, Attorney General, Minister for Police and Emergency Services and Minister for the Environment and Sustainable Development).

<sup>102</sup> The Australian federal parliament has the constitutional power to legislate for marriage, divorce and matrimonial causes under Commonwealth of Australia Constitution Act 1900, s51(xxi) and (xxii). S109 of the Constitution declares that if a statute in a state is incompatible with federal law, then the state statute will be invalid. Additionally, the ACT Government did attempt to legislate for marriage equality in 2013, but the legislation was overturned by the High Court, see discussion in Chapter 3, 3.2.1.5.

<sup>103</sup> HC Deb 09 November 2004, Vol 436, Col 776.

The desire for equality meant that marriage was used as a model for civil partnership, because anything too different from marriage would not have been 'equal'. But, there was also a desire to keep marriage and civil partnership distinct because of the value ascribed to marriage as a heterosexual institution and to placate opponents of same-sex relationship recognition reforms. While opponents of civil partnerships argued that the bill 'undermined marriage' because of the similarities between marriage and civil partnership,<sup>104</sup> supporters argued that the two relationships were distinct. For example, Baroness Scotland, Minister of State, emphasised that the bill did not undermine marriage because it was only open to 'same-sex couples who cannot marry'.<sup>105</sup> As Glennon explains, the Civil Partnership Act had 'a specific agenda',

*As an equality-based initiative its purpose was to give same-sex couples the opportunity to formalise their relationship in law through a civil registration process... The underlying rationale was 'relational equality', that is, to equalize the status of opposite- and same-sex couples in terms of choice over relationship formalisation, while at the same time preserving the heterosexual definition of marriage. This agenda is highly conformist in nature, designed to create a state-sanctioned relationship structure for same-sex relationships. Thus the obligations created by registration are modeled on marriage with provisions for financial relief on dissolution mirroring ancillary relief provisions.*<sup>106</sup>

The result of this balancing exercise between the desire to create something equal but distinct from marriage, was the creation of registered couple relationships that mirrored the legal structure and legal consequences of marriage but were symbolically different. One contentious area of difference, especially in Australia, related to the question of whether a ceremony akin to a marriage ceremony should be required to register a couple relationship.

#### 4.3.1.1 The symbolism of a ceremony

A marriage is created following a ceremony in which a couple exchange vows in front of witnesses, followed by registration of the marriage.<sup>107</sup> Rundle, writing in the Australian context, explains the significance of ceremonies in this way:

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<sup>104</sup> For example, see Baroness O'Cathain's comments at HL Deb 22 April 2004 Vol 660, Col 404, that, '[t]he fact that marriage is so important is sufficient reason to oppose this Bill. The Bill sends out the message that marriage—as the fundamental foundation for raising children—can be equated to a homosexual relationship. Marriage is profoundly undermined by this Bill.'

<sup>105</sup> HL Deb 22 April 2004 Vol 660, Col 388.

<sup>106</sup> L Glennon 'Obligations between Adult Partners: Moving from Form to Function?' (2008) 22(1) *International Journal of Law, Policy and the Family* 22, 27.

<sup>107</sup> See R Gaffney-Rhys 'Same-Sex Marriage but not Mixed-Sex Partnership: Should the Civil Partnership Act 2004 be extended to Opposite-Sex Couples?' (2014) 26(2) *Child and Family Law Quarterly* 173, 175.

*The marriage ceremony is a significant point of difference between the means of commencing a marriage and other formalised partnerships... There is symbolism in official recognition of a ceremony to celebrate the registration of a relationship whether it be marriage or a non-married registration form. It signifies that the relationship is valued by society.*<sup>108</sup>

The ceremony, or the wedding, itself is an important symbolic event, and, as identified in chapter one, is one possible means by which people display their family practices: family display is important because this is how we establish to ourselves and others that our relationship practices are familial in nature.<sup>109</sup> While legal recognition of a relationship by the state is itself a means by which our family practices are legitimated, a ceremony to mark the formation of a registered couple relationship is important in a symbolic sense of allowing couples to display their family practices to other people – when there is no ceremony, couples miss out on an important opportunity of family display.

In England and Wales, a civil partnership is formed when two people sign the civil partnership document in the presence of a registrar and two witnesses,<sup>110</sup> and the process of signing the document must be a secular event, even though it is possible to hold the signing on religious premises.<sup>111</sup> Although some MPs felt that a ceremony akin to a wedding was appropriate to mark the formation of a civil partnership,<sup>112</sup> the government felt that one of the distinctions between marriage and civil partnership was that spoken words were not necessary to form a civil partnership and that the ‘administrative procedure’ was ‘simple, clear and all that [was] necessary.’ It was further noted that there is always an option for a couple to choose to hold their own ceremony or religious blessing to mark the occasion.<sup>113</sup>

The issue of ceremonies proved to be more contentious in Australia. For example, in Victoria, there is no statutory requirement that a ceremony is held to mark the formation of a registered relationship, but there is also no prohibition on a couple choosing to hold their own ceremony. The Victorian government explained that it was appropriate to allow couples to decide for themselves whether to hold a ceremony and to decide on the nature and content of

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<sup>108</sup> Rundle (n17) 140-1.

<sup>109</sup> See Chapter 1, 1.3.2.2c.

<sup>110</sup> Civil Partnership Act 2004, s2.

<sup>111</sup> Civil Partnership Act 2004, s6 as amended by the Equality Act 2010, s202.

<sup>112</sup> HC Deb 12 October 2004, Vol 425, Col 227 (Chris Bryant); HC Deb 21 October 2004 Standing Committee D, Col 066 (Alan Duncan).

<sup>113</sup> HL Deb 24 June 2004 Vol 662, Col 1359.



that ceremony.<sup>114</sup> It was suggested that ‘the precise definition of marriage’ includes reference to a ceremony,<sup>115</sup> and so the Victorian government could not legislate for a ceremony because this would infringe on federal jurisdiction.<sup>116</sup> In fact, the definition of marriage in the federal legislation is that of a ‘union of a man and a woman to the exclusion of all others, voluntarily entered into for life’,<sup>117</sup> which makes no reference at all to the need for a ceremony.

The reluctance of the Victorian government to include provision for a ceremony is understandable when considering the context in which they were legislating. Two years prior to the Victorian reforms, the federal government overturned legislation in the ACT creating ‘civil unions’ for being too similar to marriage, partly because of a provision involving the making of a declaration, or in other words a ceremony, to mark the formation of a civil union.<sup>118</sup> While the federal government opposed any system of registering a relationship that provided for a ceremony, because this was seen to mimic marriage,<sup>119</sup> the ACT government believed that a legally prescribed ceremony was important *because* of the symbolism that attaches to such events. The comments of one ACT politician in the 2008 debates leading to the introduction of ‘civil partnerships’,<sup>120</sup> the ACT’s compromise solution before legislating again for ‘civil unions’ in 2012,<sup>121</sup> sum up the arguments in this way:

*There is no logic in opposing civil unions whilst encouraging registration. The federal government apparently does not object to gay couples or object to legally recognising them. It just objects to ceremonies. As one commentator has observed, apparently this is a problem with symbolism, not practicalities... The question I would ask is: why shouldn't same-sex partners be able to stand up in front of their family and friends and receive the blessing of the state for their union? The federal government is effectively saying that some relationships are more legitimate than others and that some loving, committed, long-term relationships are, for some inexplicable reason, of lesser value.<sup>122</sup>*

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<sup>114</sup> Victorian Legislative Council Deb 10 April 2008, 1055-6 (JM Madden).

<sup>115</sup> Victorian Legislative Council Deb 10 April 2008, 1056 (Mrs Peulich).

<sup>116</sup> Victorian Legislative Council Deb 10 April 2008, 1056 (JM Madden).

<sup>117</sup> Marriage Act 1961 (Cth), s5.

<sup>118</sup> Civil Unions Act 2006 (ACT), s11. See A Stafford ‘Commonwealth Quashes ACT in Battle Over Civil Union Laws’ (The Age, June 14 2006) - <<http://www.theage.com.au/news/national/commonwealth-quashes-act-in-battle-over-civil-union-laws/2006/06/13/1149964534754.html>> accessed 16/06/15.

<sup>119</sup> See R Croome ‘Solemnising Same-Sex Unions: Why the Australian Capital Territory Government Wants to, and the Australian Federal Government Pointedly Doesn’t’ (2007) 3(1) Gay and Lesbian Issues and Psychology Review 61, 63 – as referred to by Rundle (n17) 140-1.

<sup>120</sup> Civil Partnerships Act 2008 (ACT).

<sup>121</sup> Civil Unions Act 2012 (ACT). For some discussion of the ACT position, see Rundle (n17) 129-131.

<sup>122</sup> ACT Legislative Assembly Deb 8 May 2008, 1754 (Mr Barr, Minister for Education and Training, Minister for Planning, Minister for Tourism, Sport and Recreation, Minister for Industrial Relations).

This picks up on the key reasons why ceremonies were such a contentious issue: holding a ceremony is a symbolic event of family display that marks the formation of a formal relationship. Any option to formalise a relationship which omits a ceremony can then be perceived as something 'less' than, or inferior to, marriage, in symbolic terms.

These issues about the importance of symbolism and ceremonies can also be seen in Queensland's journey from 'civil partnerships', to 'registered relationships' and back again. Their original civil partnerships could be entered into via a ceremony, and this was intended to enhance the symbolic aspects of the provision.<sup>123</sup> Following a change of government in 2012 however, this symbolic aspect was removed from the legislation, renaming 'civil partnerships' 'registered relationships' and removing the option of a ceremony, so as to remove the symbolic elements of the legislation to 'more accurately reflect the purpose and objectives of the Act, which [were] to provide for a legislative scheme to register relationships'.<sup>124</sup> One MP commented that this meant couples could choose whether or not to hold a ceremony, 'without unnecessary interference from the state'.<sup>125</sup> The legislation was amended again in 2015<sup>126</sup> following another change of government to allow for an optional ceremony to mark the beginning of a 'civil partnership'.<sup>127</sup> The then Attorney General explained that,

*...for many people there is more to acknowledging a relationship than assigning it a particular legal status. It is about making a formal commitment to our significant other in front of our loved ones and celebrating the love and value we bring to each other's lives... the bill provides couples who are not married with an opportunity to hold an official ceremony to acknowledge and celebrate their commitment.*<sup>128</sup>

This quote encapsulates the reason why ceremonies were such a contentious issue: when no ceremony is required to create a registered relationship, this sends out the message that these relationships are inferior to marriage in a symbolic sense. The 'distinct but equal' discourse of the registered couple relationships has created a situation where these relationships are identical to marriage in terms of legal structure and consequences, but are different in terms of

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<sup>123</sup> Queensland Parliament Deb 25 October 2011, 3363 (A.P Fraser, Deputy Premier, Treasurer and Minister for State Development and Trade).

<sup>124</sup> Relationships Act 2011 (Qld), as amended by the Civil Partnerships and Other Legislation Amendment Bill 2012. See Queensland Parliament Debates 20 June 2012, 858 (J.P Bleijie, Attorney-General and Minister for Justice).

<sup>125</sup> Queensland Parliament Deb 21 June 2012, 982 (Mr Berry).

<sup>126</sup> Relationships (Civil Partnerships) and Other Acts Amendment Act 2015 (Qld).

<sup>127</sup> Civil Partnership Act 2011 (Qld), ss5, 11-2.

<sup>128</sup> Queensland Parliament Deb 17 September 2015, 2009 (YM D'ath, Attorney General and Minister for Justice and Minister for Training and Skills).

symbolism. This does not mean that the registered couple relationships generate *no* social status; rather it just means that the perceived value of this social status relative to the marriage status is open to debate.

#### **4.3.2 A different social status?**

Marriage has a long history of legal and social recognition and is 'deeply embedded in the religious and social culture' of both England and Wales<sup>129</sup> and Australia. The relatively new registration options do not share this long history and do not generate the same social status. Rundle explains it this way,

*There is a raft of social understandings attached to marriage. This social status comes with a shared understanding of the terminology of relationships (husband, wife, mother-in-law, brother-in-law etc) and the exclusive committed nature of the relationship. Given that the legal rights and responsibilities attached to marriage, registered relationships and non-formalised relationships are almost identical, it is this social status that differentiates marriage from other relationship recognition forms. By contrast, the alternative relationship registration options are not widely understood.<sup>130</sup>*

A long history of recognition has led to the development of common, if sometimes divergent,<sup>131</sup> understandings of the expected nature of marriage and an accompanying universally understood terminology. The registration options have not had centuries to generate these popular meanings. As Auchmuty explains, the 'highest social status and approval' that 'marriage confers upon individuals' is what makes the registered relationships qualitatively different from marriage, even if, legally speaking, they guarantee the same rights.<sup>132</sup> While the law can generate a legal status by creating a new registration option and attaching legal consequences to it, the law cannot generate a social status and significance by itself.

##### 4.3.2.1 An inferior status?

For some, the social status that attaches to the registration options will always be considered inferior to marriage, especially where same-sex couples are prevented from marrying. This sense of the inferiority of the civil partnership status was keenly felt by Wilkinson and Kitinger, who, prior to the introduction of same sex marriages, unsuccessfully fought for their same-sex marriage conducted in British Columbia to be recognised as a marriage rather

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<sup>129</sup> *Bellinger v Bellinger* [2003] 2 AC 467, [46] (Lord Nicholls).

<sup>130</sup> Rundle (n17) 148.

<sup>131</sup> See Chapter 3, 3.4.

<sup>132</sup> R Auchmuty 'Same-Sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14(1) *Feminism and Psychology* 101, 102.

than a civil partnership in England and Wales.<sup>133</sup> They referred to civil partnership as a 'consolation prize' that was 'offensive and demeaning' to same-sex couples and argued that there is a symbolic difference between civil partnership and marriage.<sup>134</sup> While marriage 'represents the highest form of recognition for a committed relationship', civil partnership paled in comparison.<sup>135</sup>

*This symbolic status of marriage as a fundamental social institution is, in many ways, as important as its formal legal status. It provides for social recognition of key relationships, and to have our relationship denied that symbolic status devalues it relative to the relationships of heterosexual couples.*<sup>136</sup>

Sir Mark Potter P, dismissing their case, referred to civil partnership as a status,<sup>137</sup> but made clear that this status is different from that of marriage, as was the government's intention when legislating.<sup>138</sup> He claimed that the law does not view civil partnerships as inferior<sup>139</sup> and that same-sex couples enjoy 'all the rights, responsibilities, benefits and advantages of marriage save the name'.<sup>140</sup> He also claimed that many same-sex couples were 'content with the status of same-sex partnership'<sup>141</sup> although he cited no evidence to prove this statement. This judgment can be criticised for blurring the boundaries between the legal concept of marriage and the marriage ideology. Potter P stated that marriage is an 'age-old institution' that is 'valued and valuable, respectable and respected'<sup>142</sup> and that is it 'primarily, though not exclusively,'<sup>143</sup> procreative in nature.<sup>144</sup> As Auchmuty notes, this was a 'case about the meaning of marriage in contemporary Britain', and it was not necessary for the judge to 'go beyond the legal definition of marriage in English law to dismiss the claim: if marriage is the union of a man and a woman,

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<sup>133</sup> *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam).

<sup>134</sup> *ibid* [5]. See also C Kitzinger and S Wilkinson 'The Re-Branding of Marriage: Why we got Married instead of Registering a Civil Partnership' (2004) 14(1) *Feminism and Psychology* 127, 132 where they describe marriage as 'a lynchpin of social organization: its laws and customs interface with almost every sphere of social interaction' and that 'systematic exclusion of any group of people from the institution of marriage has been (and continues to be) a powerful way of oppressing that group in terms both of concrete rights and responsibilities – and more crucially still – in terms of the symbolic message that the group so discriminated against is unworthy of equality, and is less than 'human'.'

<sup>135</sup> *Wilkinson v Kitzinger* (n33) [6].

<sup>136</sup> *ibid* [5].

<sup>137</sup> See for example, *ibid* [116].

<sup>138</sup> *ibid* [49].

<sup>139</sup> *ibid* [121].

<sup>140</sup> *ibid* [122].

<sup>141</sup> *ibid* [116].

<sup>142</sup> *ibid* [118].

<sup>143</sup> *ibid* [120].

<sup>144</sup> *ibid* [118].

then a union of two women cannot be “marriage” – end of story.<sup>145</sup> The outcome of the case was regrettable: it is somewhat ironic that the symbolic social status of marriage was expressly referred to by Potter P, yet somehow he concluded that a denial of this special status for same-sex couples does not ‘devalue’ those relationships relative to the position of opposite-sex couples.

The perception of civil partnerships as something inferior to marriage is not unique to Wilkinson and Kitzinger. A YouGov poll in 2013 found that only 1 in 20 Brits would like to be in a civil partnership, compared with ¾ who would like to be married.<sup>146</sup> The greatest indicator that the substantive equality of civil partnerships was never enough is the fact that same-sex marriage has now been legalised<sup>147</sup> on the basis of ensuring formal equality. The consultation documents issued by the government looking into the introduction of same-sex marriage not only had the word ‘equal’ in the titles (such as ‘Equal Civil Marriage: a Consultation’), but also use phrases such as ‘equal opportunities’<sup>148</sup> and ‘we are all equal’.<sup>149</sup> As Fineman explains, ‘in its simplest form, equality demands sameness of treatment, and differentiation in any sphere may be considered a concession of inferiority.’<sup>150</sup> The government perceived civil partnership as inferior to marriage because of the different social status. Maria Miller, the Minister for Women and Equalities, stated that the time had come for Parliament to ‘value people equally before the law’,<sup>151</sup> and went on to note that,

*To those who argue that civil partnerships exist and contain very similar rights, that marriage is “just a word” and that this Bill is unnecessary, I say that that is not right. A legal partnership is not perceived in the same way and does not have the same promises of responsibility and commitment as marriage. All couples who enter a lifelong commitment together should be able to call it marriage.*<sup>152</sup>

The Minister does not appreciate that ‘responsibility’ and ‘commitment’ are not necessary components of a valid marriage, and rather are part of the ideologies that reflect popular

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<sup>145</sup> Auchmuty ‘What’s so special about Marriage?’ (n70) 479.

<sup>146</sup> W Jordan ‘Only 1 in 20 want a Civil Partnership’ (2013) available from: <http://yougov.co.uk/news/2013/05/19/public-supports-civil-partnerships-all/> accessed 13/09/13.

<sup>147</sup> Marriage (Same Sex Couples) Act 2013. For discussion, see Chapter 3, 3.2.1.5.

<sup>148</sup> Government Equalities Office ‘Equal Civil Marriage: A Consultation’ (2012), [2.10].

<sup>149</sup> HM Government ‘Equal Marriage: the Government’s Response’ (2012), 4.

<sup>150</sup> M Fineman *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (University of Chicago Press 1991), 28. See also M Fineman ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) *Yale Journal of Law and Feminism* 1, 3.

<sup>151</sup> HC Deb 05 February 2013, Vol 558, Col 125.

<sup>152</sup> HC Deb 05 February 2013 Vol 558, Col 127. See also Lord Harries, HL Deb 03 June 2013 Vol 745 Col 968: ‘marriage is a profounder and richer form of relationship than a civil partnership’.

notions of the expected nature of marriage.<sup>153</sup> Instead, what we see here is that despite the similarities between marriage and civil partnership in legal terms, the latter institution is perceived as a lesser form of ‘commitment’ due to the difference of nomenclature and consequently, the social status of civil partnership is assumed to be inferior to that of marriage.

Similarly, in the Australian context, where the fight for same-sex marriage continues, a 2010 study found that almost 55% of same-sex couples who had registered their relationships in a state or territory would prefer to be married.<sup>154</sup> Witzleb notes that ‘the institution of marriage retains a special cultural and social significance’ for many and that the ‘partnership registration schemes... lack comparable symbolic value’. This in turn has led to demands for allowing same-sex marriage.<sup>155</sup> Also, in the same way that civil partnerships have been deemed inferior to marriage by the government in England and Wales because of a lack of formal equality, the status of registered relationships in Australia is also viewed as inferior by the ACT government. The ACT legislated for same-sex marriage in 2013, and the then ACT government’s reasons for legislating highlight the perceived deficiencies of the registration options. The then ACT Attorney General explained that the 2013 reform was ‘about equality’, ‘which says people in a same-sex relationship are able to have their love and commitment to each other legally recognised in the same way that people in a heterosexual relationship are able to through a legally recognised marriage’.<sup>156</sup> A representative of the Green party made the point that there is a different social status between marriage and registered relationships even more explicitly,

*The passage of the Marriage Equality Bill is a landmark moment for this Assembly, for the ACT community and, indeed, for all the people across the nation who have been waiting so long for equal recognition and equal legal status for same-sex attracted Australians. This is the beginning of governments in Australia saying no to the historical institutionalised discrimination that relegated same-sex couples to a second-class status. Denying equal marriage rights to same-sex couples is an affront to human rights that says, “You are not allowed to express or formalise your love in the same way as other couples in our society.”<sup>157</sup>*

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<sup>153</sup> See Chapter 3, 3.4.

<sup>154</sup> SK Dane and others ‘Not so Private Lives: National Findings on the Relationships and Well-Being of Same-Sex Attracted Australians’ (Version 1.1, 2010), 42.

<sup>155</sup> Witzleb (n47) 136; see also 153.

<sup>156</sup> ACT Assembly Deb 19 September 2013, 3429 (Mr Corbell, Attorney General, Minister for Police and Emergency Services, Minister for Workplace Safety and Industrial Relations and Minister for the Environment and Sustainable Development).

<sup>157</sup> ACT Assembly Deb 22 October 2013, 3559 (Mr Rattenbury).

The reference to an 'equal legal status' is misguided, in that the registered couple relationships mirror marriage and attract identical legal consequences, and do generate an equal legal status; the difficulty with the registered relationships is that they fail to generate the same *social* status as marriage. But, the overall point made remains significant: while marriage remains out of reach for same-sex couples, the registration options will be viewed by many as inferior to marriage.

#### 4.3.2.2 A valuable status?

Although for many the social status of the registered couple relationships is inferior to that generated by marriage, for some the alternative social status is preferable: not everyone views marriage in a positive light. Rundle is one commentator who has emphasised that the 'symbolic social recognition' offered by the registered couple relationships is a means by which the 'state sends a message to couples that "your relationship matters"'.<sup>158</sup> The registration options in Australia are more socially inclusive than marriage in that jurisdiction because, with the exception of the ACT's civil unions, they are open to both same- and opposite-sex couples. For opposite-sex couples in Australia there is a choice between marriage and the registered relationships, and many couples have chosen to register a relationship rather than marry. Rundle noted that in 2011, 330 same-sex couples and 211 opposite-sex couples had registered a relationship in Victoria, whereas 128 same-sex and 68 opposite-sex couples had registered their relationships in Tasmania. In NSW, 298 same-sex and, significantly, 719 opposite-sex couples had registered their relationships.<sup>159</sup> As Rundle explains, considering that these opposite-sex couples could have married, 'it is reasonable to deduce that those couples have chosen the alternatives in preference to marriage', and so this suggests that there are 'attractive features of the alternatives for many of the couples who have opted into them.'<sup>160</sup>

Initial attempts at introducing civil partnership in England and Wales by two private members' bills were open to both same- and opposite-sex couples,<sup>161</sup> and a current bill before parliament by Tim Loughton MP attempts to open up civil partnership to opposite-sex couples.<sup>162</sup> But, the government chose to legislate in 2004 for same-sex couples only because opposite-sex couples had the option of marriage.<sup>163</sup> Furthermore, following the introduction of

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<sup>158</sup> Rundle (n17) 151.

<sup>159</sup> *ibid* 145.

<sup>160</sup> *ibid* 146.

<sup>161</sup> Relationships (Civil Registration) Bill 2001 (presented to the House of Commons by Jane Griffith MP); Civil Partnerships Bill 2002 (presented to the House of Lords by Lord Lester).

<sup>162</sup> Civil Partnership Act 2004 (Amendment) Bill 2016-17.

<sup>163</sup> Women and Equality Unit (n5) [1.4].

same-sex marriage<sup>164</sup> the government issued a consultation into the future of civil partnership. They found there was a lack of consensus as to the appropriate way forward regarding whether civil partnership should be retained, abolished or opened up to opposite-sex couples. As a result of the inconclusive consultation, the government has decided to wait, for an unspecified period of time, to see what effect same-sex marriage has on the number of same-sex couples who remain in and choose to form civil partnership.<sup>165</sup>

Steinfeld and Keidan have challenged unsuccessfully the current ban on opposite-sex civil partnership in the courts. Steinfeld and Keidan are a heterosexual couple who, as the trial judge put it, are in a 'committed long-term relationship',<sup>166</sup> who have 'deep-rooted and genuine ideological objections to the institution of marriage, based upon what they consider to be its historically patriarchal nature'.<sup>167</sup> While the couple acknowledge that there are no 'substantial differences between civil marriage and civil partnerships in terms of the legal rights and responsibilities they accord' and 'that they could continue to conduct their relationship, once married, as equals', the symbolic differences between marriage and civil partnership meant that, for them, civil partnership is a preferable status. As such, it is worth exploring their judicial review challenge further to determine why the case was unsuccessful.

Steinfeld and Keidan claimed that having created civil partnership, and alternative institution to marriage, the UK government could not exclude opposite-sex couples from it because of their sexual orientation. They argued that following the introduction of same-sex marriage, the fact that opposite-sex couples are prohibited from entering a civil partnership is incompatible with Article 14 of the European Convention on Human Rights, taken in conjunction with Article 8, right to family life: opposite-sex couples are denied a choice, one that is available for same-sex couples, in how they formalise their relationships, and there is no legitimate aim for this difference of treatment on the basis of sexual orientation.

Andrews J in the High Court recognised that 'there will be many people who sympathise' with the claimants<sup>168</sup> but nevertheless dismissed the claim and found that the case did not fall within the ambit of Article 8. Denying the status of civil partners to the claimants did not 'interfere with their love, trust, confidence, or mutual dependence and has placed no constraints

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<sup>164</sup> Marriage (Same Sex Couples) Act 2013.

<sup>165</sup> Department for Culture, Media and Sport 'Civil Partnership Review (England and Wales) – Report on Conclusions' (2014), [3.9-3.10].

<sup>166</sup> *R (Steinfeld and Keidan) v Secretary of State for Education* [2016] EWHC 128 (Admin), [1] (Andrews J).

<sup>167</sup> *ibid* [2].

<sup>168</sup> *ibid* [22].



on their social intercourse' and so did not affect their ability to live as a family;<sup>169</sup> they could marry to obtain formal recognition of their relationship. Andrews J stated that,

*The only obstacle to the claimants obtaining the equivalent legal recognition of their status and the same rights and benefits as a same-sex couple is their conscience... Whilst their views are of course to be afforded respect, it is their choice not to avail themselves of the means of state recognition that is open to them. The state has fulfilled its obligations under the Convention by making a means of formal recognition of their relationship available. The denial of a further means of formal recognition which is open to same-sex couples, does not amount to unlawful state interference with the claimants' right to family life or private life, any more than the denial of marriage to same-sex couples did prior to the enactment of the 2013 Act.<sup>170</sup>*

Steinfeld and Keidan's appeal to the Court of Appeal was dismissed on different reasoning to the High Court decision. Contrary to Andrews J's judgment, all three judges agreed that the civil partnership regime does fall within the ambit of Article 8.<sup>171</sup> Arden LJ explained that 'couples in a stable relationship enjoy "family life", and 'states have a positive obligation to ensure respect for family life, and the registration of civil unions is a mean of, or modality for, promoting family life.'<sup>172</sup> The 'non-availability' of civil partnerships to opposite-sex couples means that same- and opposite-sex couples are 'treated differently in a relevant respect' and so, 'the availability of the option of civil or religious marriage is not a good answer to the appellants' appeal.'<sup>173</sup> Briggs LJ elaborated on this point and noted that the discrimination is not simply that same-sex couples have two options to formalise and opposite-sex couples only have one; but, that there is a group of people who object to marriage because of its 'supposedly patriarchal origins' and that same-sex couples belonging to this group may enter a civil partnership instead of a marriage while opposite-sex couples have no such choice.<sup>174</sup>

The government argued that this was a case about legal rights and not 'labels', and so because the only difference between marriage and civil partnership was the nomenclature the

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<sup>169</sup> *ibid* [37].

<sup>170</sup> *ibid* [39] (emphasis in original). For criticism of Andrews J's decision see, L Ferguson 'The Denial of Opposite-Sex Couples' Access to Civil Partnership as Discrimination?' (2016) 38(4) *Journal of Social Welfare and Family Law* 450; R Wintemute 'Civil Partnership and Discrimination in *R (Steinfeld) v Secretary of State for Education*: should the Civil Partnership Act 2004 be Extended to Different-sex Couples or Repealed?' (2016) 28(4) *Child and Family Law Quarterly* 365.

<sup>171</sup> See *Steinfeld and Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [18], [74] (Arden LJ); [137] (Beatson LJ).

<sup>172</sup> *ibid* [25] (Arden LJ).

<sup>173</sup> *ibid* [37] (Arden LJ); see also [147] (Beatson LJ).

<sup>174</sup> *ibid* [167-169].

appellants had no complaint.<sup>175</sup> Arden LJ convincingly dismissed this line of argument and acknowledged that even in questions about legal rights, 'labels' are important,

*The [Marriage (Same Sex Couples) Act 2013] gave same-sex couples the same rights as they could obtain by entering [civil partnerships] but through an institution with the name of "marriage". To same-sex couples, the name "marriage" was important in removing the implication that their relationship was less worthy than that of opposite-sex couples. The appellants hold a view about the term "marriage" being patriarchal and inconsistent with equality between the sexes. The presence in Parliament of a proposal to extend [civil partnerships] to opposite-sex couples suggests that the appellants are not alone in their view. If the name of an institution for recognition of their relationship is treated by Parliament as significant for same-sex couples, the name of another institution for that purpose may have significance for other couples too.*<sup>176</sup>

This approach towards civil partnership is to be welcomed because it gives proper consideration to the issues of social status and symbolism that are so significant in this area, and which Potter P failed to acknowledge in *Wilkinson v Kitzinger*. In the same way that some will choose to marry because of the status of marriage, others will prefer an alternative option with an alternative status.

The regrettable aspect of the case is that the majority felt that the discrimination was justified because it served a legitimate and proportionate aim. Beatson J explained that the difference in treatment of same- and opposite-sex couples was 'justified by the Government's legitimate aim of undertaking a proper assessment of the optimum way forward in light of the demand by couples (whether same-sex or different-sex) for civil partnerships as well as marriage, and *inter alia* avoiding unnecessary expenditure of taxpayers' money as well as wasted time and effort in making a change that might have to be reversed.'<sup>177</sup> Beatson LJ made it clear however that the government must make a decision about the future of civil partnerships within a 'reasonable timescale', but declined to offer a deadline because it is not 'the function of the court' to 'micro-manage areas of social and economic policy.'<sup>178</sup> It is submitted that Arden LJ's dissent is more convincing. She argued that the government's 'wait and see' policy, while initially serving a legitimate aim,<sup>179</sup> was not a proportionate response, because the government had not

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<sup>175</sup> *ibid* [45] (Arden LJ).

<sup>176</sup> *ibid*.

<sup>177</sup> *ibid* [164] (Beatson LJ); see also [173] (Briggs LJ).

<sup>178</sup> *ibid* [162].

<sup>179</sup> *ibid* [105].

explained how long they would need to come to a decision about the future of civil partnerships, or what number of civil partnerships formations would be regarded as sufficient to constitute the 'virtual disappearance' of the formalised relationship.<sup>180</sup> She further explained that gathering data on the number of same-sex couples who form civil partnerships gives information about that group only and not about the number of opposite-sex couples who may choose to enter a civil partnership,<sup>181</sup> and that gathering data does not take into account the wider public policy issues relating to giving opposite-sex couples 'the freedom to have a legal framework of their choice.'<sup>182</sup>

Despite the regrettable outcome, the Court of Appeal judgement is significant in that it suggests that there is value in the alternative status of civil partnership. There are cogent reasons to extend civil partnership to opposite-sex couples because civil partnership offers an opportunity to display family practices and attach a label to the relationship, and the distinct social status is sometimes preferable to that of marriage. Formalised relationships are well-placed to fulfil family law's symbolic function, partly because of the malleable nature of the social status that attaches to these relationships. In the same way that chapter three showed that the marriage ideology means different things to different people, the social status of civil partnership carries different significance for different people.

#### **4.4. Conclusion**

Registered couple relationships are best thought of as quasi-marriages. The registration options and marriage are similar in terms of both legal structure and legal consequences, and it has been shown that both types of formalised relationship share many of the same benefits. But, it has also been shown that there is one important difference between marriage and the registered couple relationships, which is social rather than legal. The legal status generated by marriage and the registered couple relationships are much the same, but the social status appears to be different. It has been argued that, while some may idealise marriage and argue that the retention of other relationship registration options is unnecessary, these arguments fail to appreciate that the marriage ideology does not carry the same, positive, significance for everyone. The registration options can provide valuable marriage alternatives for some couples by allowing them to gain the protection of the law as well as attaching a familial label to their relationship by avoiding the negative connotations they attach to marriage. This suggests that

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<sup>180</sup> *ibid* [111-113].

<sup>181</sup> *ibid* [115-116].

<sup>182</sup> *ibid* [117].

the social status of formalised relationships is malleable and is something that is judged subjectively with different people valuing different formalisation options.

Other than the different social status, this chapter has shown that the registered couple relationships mimic marriage. Chapter two suggested that form-based systems have the potential to be used in innovative ways,<sup>183</sup> but the potential flexibility of the registration options appears to have been restricted by the influence of marriage. This is understandable in the context of the couple relationships, because the registration options were intended to provide same-sex couples an option to formalise their relationships that was akin to marriage. But, without a willingness to move beyond the marriage model, form-based recognition does little to address the fact that family relationships are diverse, or to address the fact that many different types of family relationship may perform valuable functions akin to those expected to be performed by spouses and partners in registered couple relationships. The next chapter will explore attempts to expand on form-based recognition in ways that respond to family diversity.

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<sup>183</sup> See Chapter 2, 2.2.2.1.

## **Chapter 5 – Extending ‘form’ beyond couples: registered caring relationships**

This chapter will explore how form-based recognition can be used to respond to the increasing diversity of relationships formed by adults today by exploring attempts to extend civil partnerships to particular family relationships in England and Wales and the introduction of registered caring relationships in the Australian states of Tasmania and Victoria. It will be argued that the attempts at using form-based recognition to provide for relationship types other than marriage-like couples in both jurisdictions only hints at the potential of form-based recognition to be used in radical ways. The conservative nature of the registration options is partly due to the complex reasons behind the reforms, but is also attributable to a failure to challenge the dominance of the marriage model. In other words, the influence of marriage has constrained the development of attempts to introduce more radical form-based frameworks of relationship recognition, as well as the more moderate frameworks discussed in chapter four.

Firstly, the attempts at reform in England and Wales will be discussed. While there are complex reasons at play, it will be argued that the real reason behind the attempts at reform was to distract from the opposition of same-sex relationship recognition. It will be shown that attempts at reform in England and Wales have focussed solely on the position of same-sex couples, and have not challenged the legal privileging of marriage. Secondly, the discussion will turn to the reforms in Tasmania and Victoria. It will be shown that similar arguments to those used unsuccessfully in England and Wales have been advanced successfully in Australia. But, the Australian reforms are not as radical as they may first appear because, upon inspection, the registered caring relationships are not that different from marriage. Additionally, the discussion will confirm the findings of the last chapter that there are some benefits common to all formalised relationships, and that generating a legal status does not automatically generate a social status. The chapter will conclude by suggesting that form-based recognition has the potential to be used in more radical ways, but this will only be possible with a willingness to move beyond the marriage model.

### **5.1 Calls for reform in England and Wales**

In England and Wales, marriage and civil partnership are the only options to formalise a relationship, but there have been attempts to change this position. Firstly, there was an attempt to amend the Civil Partnership Bill 2004 to allow relationships between certain relatives to register as civil partners. Secondly, following the enactment of the Civil Partnership Act 2004, two unmarried sisters challenged the provision that prohibits those in certain family

relationships from entering a civil partnership in the European Court of Human Rights. These will be discussed in turn.

### 5.1.1 Civil partnerships for (some) relations of consanguinity

Some opponents of the Civil Partnership Bill claimed that the introduction of civil partnership would create more injustice than would be remedied because many family relationships would be excluded from the bill's remit.<sup>1</sup> Baroness O'Cathain introduced an ultimately unsuccessful amendment to the bill in the House of Lords. She claimed that if the government were not legislating for 'gay marriage', and were truly attempting to remedy injustices facing couples who cannot marry, then they should extend the recognition offered by civil partnerships beyond same-sex couples and onto other relationships.<sup>2</sup> Baroness O'Cathain believed the bill did nothing to protect those friends and family members who lived together and faced the same hardship as same-sex couples. She gave the examples of two friends who 'share a rented house for 20 years', and if one died, the other would face eviction because they would have 'no right to inherit the tenancy', or two widowed sisters who lived together, and on the death of one sister the survivor would have to pay inheritance tax.<sup>3</sup> She further explained,

*The Bill sends out the message that long-term caring family relationships do not matter as much as same-sex relationships, irrespective of their duration. Ministers have argued that same-sex couples in long-term relationships—loving, committed, celibate and so on...were discriminated against in law and suffered serious hardship. However, the cases of hardship... applying to same-sex couples also apply for the most part to family members who live together.<sup>4</sup>*

The original amendment would have opened up civil partnerships to 'families, friends who care for each other and elderly people who spend their twilight years looking after each other'.<sup>5</sup> O'Cathain later narrowed the ambit of the amendment so that only close relatives aged over 30 who have lived together for 12 years<sup>6</sup> were included because these were the 'relationships where much of the real hardship arises', and so relationships between carers and friends would not be included.<sup>7</sup> Supporters of Baroness O'Cathain's amendment claimed that the bill failed to

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<sup>1</sup> For example – see HL Deb 10 May 2004, Vol 661, Col GC10 and HL Deb 24 June 2004, Vol 662, Col 1363 (Baroness O'Cathain); HL Deb 24 June 2004, Vol 662, Col 1366 (Lord Tebbit).

<sup>2</sup> HL Deb 24 June 2004, Vol 662, Col 1363.

<sup>3</sup> HL Deb 10 May 2004, Vol 661, Col GC10.

<sup>4</sup> HL Deb 24 June 2004, Vol 662, Col 1364.

<sup>5</sup> HL Deb 10 May 2004, Vol 661, Col GC11 (Baroness O'Cathain).

<sup>6</sup> HL Deb 24 June 2004 Vol 662, Col 1362.

<sup>7</sup> HL Deb 24 June 2004, Vol 662, Col 1365.

provide 'for the significant number of close relatives' who lived together and provided 'mutual support' and 'care' for one another.<sup>8</sup> As Glennon sums up, the arguments of the amendments supporters focussed,

*...on the financial consequences on the death of a person who had been cared for by a relative and thus while it was recognised that relations currently have rights in relation to hospital visiting and on intestacy, the crux of the 'injustice' was their lack of exemption from inheritance and capital gains tax. It was the extension of these benefits to same-sex registered partners that was said to create new inequalities and which led critics to describe the Bill as 'cruel... suffused with unfair discrimination'.<sup>9</sup>*

The amendment was passed in the House of Lords at Report Stage by 148 votes to 130,<sup>10</sup> but was later removed from the bill in the House of Commons.

#### 5.1.1.1 The difficulties with the amendment

As Glennon explains, there are two possible interpretations of the motives behind Baroness O'Cathain's amendment,

*On a generous construction one could say that advocates were opportunistic in their genuine attempt to address the issue of care-giving in the absence of the political will to do so directly. However, on a more cynical interpretation, the inclusion of family members was a tactic to disturb the passage of the legislation, or failing that, to make it easier to digest by displacing its central objective of extending the legal incidents of marriage to same-sex couples and, instead, making it about the value of care-giving responsibilities.<sup>11</sup>*

To adopt Glennon's 'generous construction', it is possible that genuine concern about the position of people in long-term caring relationships were behind the amendments, and so in this way the desire to extend family law's protection onto a more diverse range of relationship types may have been influential in the attempt at reform. Baroness O'Cathain and her supporters did refer to ideas of the committed loving relationships and mutual support<sup>12</sup> provided by partners in caring relationships, which echo the ideas about the expected nature of same-sex

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<sup>8</sup> HL Deb 24 June 2004, Vol 662, Col 1367 (Lord Bishop of Rochester).

<sup>9</sup> L Glennon 'Displacing the Conjugal Family in Legal Policy: A Progressive Move?' (2005) 17(2) Child and Family Law Quarterly 141, 144.

<sup>10</sup> For details of the vote see: HL Deb 24 June 2004, Vol 662, Col 1389.

<sup>11</sup> Glennon (n9) 146.

<sup>12</sup> See for example HL Deb 24 June 2004, Vol 662, Col 1364 (Baroness O'Cathain); HL Deb 12 May 2004 Vol 661, Col GC118 (Baroness Wilcox); HL Deb 24 June 2004, Vol 662, Col 1368 (Lord Tebbit); HL Deb 24 June 2004 Vol 662, Col 1371-2 (Lord Maginnis).

relationships in the same debates<sup>13</sup> (and are similar to the ideas expressed about the expected nature of marriage in the later same-sex marriage debates.)<sup>14</sup> It is logical to argue that if same-sex couples should be treated in the same way as opposite-sex couples because both relationship types perform similar functions, then caring relationships that perform the same functions should also be treated in the same way. These arguments are often used to justify the need for a functional system of recognition,<sup>15</sup> but here we see them employed to justify extending form-based recognition to different types of relationship.

Arguably, however, it is Glennon's 'cynical interpretation' that sheds light on the genuine rationale behind the amendment. The amendment was described by some members of parliament as a 'wrecking amendment'<sup>16</sup> because it would have made the bill unworkable. Civil partnerships are an inappropriate model to recognise a wider range of family relationships because the legal structure of civil partnership is modelled on marriage. For example, to legally dissolve a civil partnership, the irretrievable breakdown of a relationship by reference to one of four facts must be proved, and this is based on the divorce process, designed for couples.<sup>17</sup> The grounds for finding a civil partnership void or voidable are also based on marriage. So, for example, a civil partnership may be found voidable if the 'respondent was pregnant by some other person than the applicant'.<sup>18</sup> It is doubtful whether such provisions are appropriate for relationships between close relatives, and they were certainly not created with such relationships in mind. Jacqui Smith, the Deputy Minister for Women and Equalities, noted that the amendment would lead to 'myriad legal absurdities' such as the fact that 'a woman who formed a civil partnership with her grandfather would have her own mother as her stepdaughter. A grandfather could leave a survivor's pension to a civil-partner grandson.'<sup>19</sup>

There are reasons to suppose that the apparent concern over the position of relatives was merely a smokescreen to distract from the fact that Baroness O'Cathain and her supporters were opposed to the legal recognition of same-sex relationships. For example, O'Cathain commented that the bill would give 'same-sex couples in a civil partnership... a higher status than family relationships', that civil partners would 'be able to obtain many more rights than those in family

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<sup>13</sup> See Chapter 4, 4.1.1.

<sup>14</sup> See Chapter 3, 3.4.1.

<sup>15</sup> See Chapter 2, 2.3.3.1.

<sup>16</sup> HL Deb 10 May 2004 Vol 661 Col GC15 (Lord Goodhart); see also HL Deb 24 June 2004, Vol 662, Col 1370 (Lord Alli) and HL Deb 1 July 2004, Vol 663, Col 392 (Lord Lester).

<sup>17</sup> N Barker 'Why Care? 'Deserving Family Members' and the Conservative Movement for Broader Family Recognition' in J Wallbank and J Herring *Vulnerabilities, Care and Family Law* (Routledge, 2014), 61.

<sup>18</sup> Civil Partnership Act 2004, s50(1)(c).

<sup>19</sup> HC Deb 12 October 2004, Vol 425, Col 177 (Jacqui Smith, Deputy Minister for Women and Equalities).



relationships', and that the difficulties faced by same-sex couples because they could not marry were the same as those affecting 'ordinary families', who 'are no less deserving.'<sup>20</sup> This suggests that Baroness O'Cathain did not view same-sex couples as 'ordinary families', or perhaps as family in any way (let alone in the same category as spouses), and that same-sex relationships are consequently not as worthy of legal recognition as 'family' relationships.<sup>21</sup> In this way, the symbolic function of legal recognition in labelling a same-sex relationship as 'family' was unacceptable to O'Cathain and her supporters, and this is what they truly opposed.

Additionally, it is only the extension of the legal consequences of marriage to same-sex couples that was a cause of concern, and not the historic legal privileging of spouses. Glennon notes that the 'injustice' that was apparently 'created' by the civil partnership legislation, was 'inherently bound with and, in fact, contingent upon the perceived benefits accorded to same-sex civil partners'. Ensuring that same-sex couples were not placed above "'ordinary family members"' in the newly aligned hierarchy of family' was the real concern of O'Cathain and her supporters.<sup>22</sup> This can be clearly discerned from some of O'Cathain's comments. For example,

*If a daughter gives up her job to look after her elderly mother for 20 years, should she be denied the same rights, including the financial benefits, which the Bill gives to same-sex couples? If a niece goes to live with her disabled aunt and looks after her for 15 years, is her love and commitment for her close relation considered to be less important than that of a same-sex couple? The niece has to pay inheritance tax if she inherits her aunt's estate, but the survivor of a same-sex couple in a registered partnership would not. Is this situation fair and just? I think not.*<sup>23</sup>

Even if the amendment was partly motivated by a genuine concern that more family relationships should be recognised by the law, these relationships should not be legally recognised simply as an attempt to diminish the value of recognising same-sex relationships in a similar way to opposite-sex relationships. The amendment would have led to a situation where neither the concerns of same-sex couples nor relationships between close relatives would receive appropriate recognition.<sup>24</sup> The amendment ultimately failed because it attempted to achieve a goal that there was no support for and was not in line with the reform that was being

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<sup>20</sup> HL Deb 24 June 2004, Vol 662, Col 1366 (Baroness O'Cathain).

<sup>21</sup> Barker also makes the point that this suggests that same-sex couples were not as worthy as other family members: Barker 'Why Care?' (n17) 62.

<sup>22</sup> Glennon (n9) 147.

<sup>23</sup> HL Deb 24 June 2004, Vol 662, Col 1363 (Baroness O'Cathain).

<sup>24</sup> This was acknowledged by the government during the parliamentary debates. See HC Deb 12 October 2004, Vol 425, Col 175 (Jacqui Smith, Deputy Minister for Women and Equalities).

sought. The government introduced civil partnership to give same-sex couples a measure of equality, and Baroness O’Cathain and her supporters attempted to hijack this reform to achieve a different aim, of legally recognising a broader variety of family relationships, without considering whether the marriage-model of relationships is suitable for transplanting onto other types of relationship.

### 5.1.2 The Burden sisters’ case

The second challenge to the scope of civil partnerships involved the Burden sisters in *Burden and Burden v United Kingdom*.<sup>25</sup> The Burdens had lived together all their lives and jointly owned property. Each had made a will leaving all her property to the surviving sister. Their complaint was that when one sister died, the survivor would be faced with an inheritance tax bill that might cause her to have to sell the family home. The sisters felt that they were discriminated against: although they lived in an analogous position to same-sex couples, and ‘had chosen to live together in a loving, committed and stable relationship for several decades, sharing their only home, to the exclusion of other partners’,<sup>26</sup> they could not enter a civil partnership to take advantage of the inheritance tax exemption. Prima facie, this is an argument about the exclusion of some family relationships from family law’s protective function: were the sisters able to formalise their relationship, the surviving sister would have been protected on the other’s death by not having to sell their home. But, on closer examination, and similarly to the civil partnership debates discussed above, it seems that it was family law’s protection of same-sex couples that was the true issue for the sisters. For example, Joyce Burden was quoted in the media as saying that the ‘government is always going out of its way to give rights to people who have done nothing to deserve them. If we were lesbians we would have all the rights in the world. But we are sisters and it seems we have no rights at all.’<sup>27</sup>

The sisters took their case to the European Court of Human Rights, and relied on Article 14 of the European Convention on Human Rights, taken in conjunction with Article 1 of Protocol 1.<sup>28</sup> As Auchmuty puts it, the sisters’ argument was that,

*There was no sexual obligation in a civil partnership, unlike marriage, and that the only reason they did not bear the legal obligations of spouses and civil partners was that they*

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<sup>25</sup> (2007) 44 EHRR 51.

<sup>26</sup> *ibid* [50].

<sup>27</sup> As quoted by Barker (n17) 64.

<sup>28</sup> For a summary of the facts see *Burden and Burden v United Kingdom* (n25) [H1-H2], [8-11]; P Baker ‘Burden v Burden: The Grand Chamber of the ECtHR Adopts a Restrictive Approach on the Question of Discrimination – Case Comment’ (2008) *British Tax Review* 329, 329; R Auchmuty ‘Beyond Couples’ (2009) 17(2) *Feminist Legal Studies* 205, 205-6; Barker (n17) 64.

*were prohibited from marrying or registering a civil partnership. If the aim of the [Civil Partnership Act] was to promote stable and committed relationships, there could be no legitimate reason to exclude the Burden sisters, since their relationship could equally be described in this way.<sup>29</sup>*

It should be made clear that in the same way there is no 'sexual obligation' for civil partnership, chapter three showed that there is also no 'sexual obligation' for marriage because the existence of a sexual relationship is not necessary for legal validity and is better thought of as part of the ideology of marriage.<sup>30</sup> Perhaps acknowledging that sex is not a requirement of either civil partnership or marriage would have strengthened the sisters' argument: their relationship functions in a similar way to those of spouses and civil partners, and so should be treated in a similar way.

Auchmuty goes on to explain that following the creation of civil partnership, which extended many of the benefits of marriage to same-sex couples,

*...it was inevitable that other groups would call for similar rights. The civil partnership was a useful legal tool for the Burdens precisely because it was a new status potentially susceptible to manipulation in a way that marriage, in this country, has proved not to be. It would have been inconceivable for the Burdens to have argued that they deserved to be counted as married under the Matrimonial Causes Act 1973 in order to avail themselves of the inheritance tax exemption.<sup>31</sup>*

In fact, chapter three showed that marriage, as a form-based model of relationship recognition, is inherently flexible and that it has changed considerably over the past 100 years; even elements once considered fundamental to the institution, such as the prohibition on marriage between same-sex couples, have been subject to change.<sup>32</sup> But, Auchmuty is correct insofar as she suggests that the Burden sisters would not have claimed that they should be allowed to marry. The marriage ideology is powerful and, despite the fact that different people focus on different elements of the ideology,<sup>33</sup> the idea that two sisters could marry would be inconceivable as the ideologies surrounding marriage currently stand, and so the legal structure of marriage is highly unlikely to be changed in this way. In the same way that Baroness O'Cathain

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<sup>29</sup> Auchmuty (n28) 208.

<sup>30</sup> See Chapter 3, 3.2.1.4a.

<sup>31</sup> Auchmuty (n28) 211.

<sup>32</sup> See Chapter 3, 3.2.

<sup>33</sup> For example, Chapter 3, 3.4.1 showed that while supporters of same-sex marriage focus on the loving, supportive, caring nature of marriage, opponents focus on issues of sex and procreation.

and her supporters failed to challenge the privileged position of marriage in the civil partnership debates, the Burden's case only challenged the extension of the legal consequences of marriage onto civil partners while the legal privileging of marriage remains unquestioned.

#### 5.1.2.1 The Lower Chamber's decision: an objectively justifiable difference of treatment

The decision of the Lower Chamber of the European Court of Human Rights was unanimous with respect to determining that the sisters' case was admissible, but opinion was divided 4:3 about whether there had been a violation of article 14 taken in conjunction with Article 1 of Protocol 1. The majority found that the UK had not exceeded its margin of appreciation when extending the inheritance tax exemption to civil partners only. They accepted that marriage confers 'a particular status on those who' enter it and, therefore, the UK did not exceed its margin of appreciation because the different treatment 'pursues a legitimate aim, namely to promote stable, committed heterosexual and homosexual relationships by providing the survivor with a measure of financial security'.<sup>34</sup> The majority believed it was not possible to criticise the UK 'for pursuing, through its taxation system, policies designed to promote marriage; nor can it be criticised for making available fiscal advantages attendant on marriage to committed homosexual couples'.<sup>35</sup> The majority did not consider whether the sisters were in an analogous position with civil partners, as would be expected in a case involving discrimination,<sup>36</sup> because even 'if the applicants can be compared to such a couple, the difference in treatment is not incompatible with Article 14'.<sup>37</sup>

Judge Pavlovski disagreed, and thought that the majority decision was 'legal, but unfair'<sup>38</sup> because they failed 'to adduce a reason or argument' as to why the UK had not exceeded its margin of appreciation.<sup>39</sup> Judges Bonello and Garlicki in a joint dissenting judgment stated that the majority did not give sufficient reasons as 'to why and how such injustice [could] be justified' as a 'mere reference to the margin of appreciation is not enough'.<sup>40</sup> They argued that the tax exemption for spouses only was justifiable, but that when that exemption was extended to other

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<sup>34</sup> *Burden and Burden v United Kingdom* (n25) [59].

<sup>35</sup> *ibid* [59].

<sup>36</sup> N Barker 'Rethinking Conjuality as the Basis for Family Recognition: A Feminist Rewriting of the Judgement in *Burden v United Kingdom*' (2016) 6(6) *Onati Socio-Legal Series* 1249, 1257.

<sup>37</sup> *Burden and Burden v United Kingdom* (n25) [58].

<sup>38</sup> *ibid* [O-II2-3].

<sup>39</sup> *ibid* [O-II4]. See also [O-II8-9]: Judge Pavlovski was concerned that the house was 'not simply a piece of property' but was 'something with which they have a special emotional bond' and it was 'absolutely awful' that the surviving sister might have to sell the home to pay the inheritance tax bill. Auchmuty (n28) 212 and Baker (n28) 330 both point out that the surviving sister would not have needed to sell the home to pay the inheritance tax bill.

<sup>40</sup> *Burden and Burden v United Kingdom* (n25) [O-I1].

groups, the state had to justify the extension of that privilege to *only* that group and not beyond them. Bonello and Garlicki in a similar vein to the Burden sisters and Baroness O’Cathain believed that the positions of ‘permanently cohabiting same-sex couples’ and ‘permanently cohabiting siblings’ were similar:

*The situation of permanently cohabiting siblings is in many respects – emotional as well as economical – not entirely different from the situation of other unions, particularly as regards old, or very old people. The bonds of mutual affection form the ethical basis for such unions and the bonds of mutual dependency form the social basis for them. It is very important to protect such unions, like any union of two persons, from financial disaster resulting from the death of one partner.<sup>41</sup>*

They go on to argue that the UK position meant that the sisters had no choice as to whether to formalise their relationship,

*The situation of permanently cohabiting siblings under the UK legislation has also been negatively affected by the fact that – being within prohibited degrees of relationship – they cannot form a civil partnership, In other words, they have been deprived of the possibility of choice offered to other couples.<sup>42</sup>*

According to the majority, the status of marriage allows the state to treat spouses differently so as to encourage ‘stable’ and ‘committed’ relationships. Presumably then, even though they do not make the point expressly, the majority feel that due to the way in which civil partnership is modelled on marriage, and generates a similar legal status, it is legitimate to extend this privilege to civil partners. The minority accept that privileging marriage is a legitimate aim but believe that extending the benefits of marriage to some relationships but not others requires justification. They made the point that the sisters’ relationship was one that exhibited emotional and financial interdependency in the same way as ‘other unions’, and so any difference of treatment between the relationship types required cogent justification. So, the starting point for all the judges was that privileging marriage is legitimate and acceptable.

#### 5.1.2.2 The Grand Chamber’s decision: a qualitative difference between couples and siblings

The Burdens appealed to the Grand Chamber, which ruled against them with a majority decision of 15:2. The majority followed the lower court’s decision, although gave different reasons. Unlike the lower court, the Grand Chamber stated that the sisters were not in an

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<sup>41</sup> *ibid* [O-13].

<sup>42</sup> *ibid* [O-13].

analogous position with spouses and civil partners because ‘the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners.’<sup>43</sup> What made these relationships ‘qualitatively’ different was the fact that consanguinity bound the sisters together, and people related by consanguinity cannot marry or enter a civil partnership,<sup>44</sup> whereas marriage is an institution that ‘confers a special status on those who enter into it’,<sup>45</sup> and spouses and civil partners exercise a choice to formalise their relationship:

*Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature.*<sup>46</sup>

This legally binding agreement sets marriage and civil partnership apart from other forms of ‘cohabitation’.<sup>47</sup>

This reasoning was criticised by four judges, two of whom ultimately agreed with the majority’s decision<sup>48</sup> while the other two dissented. Judge Bjorgvinsson’s concurring opinion employed functional arguments to establish that the sisters were in an analogous position with spouses and civil partners and that ‘for most practical purposes...’ the sisters’ relationship had ‘more in common with the relationship between married or civil partnership couples, than there [were] differences between them’.<sup>49</sup> He noted that it is for the government to decide whether to extend the benefits of marriage to other relationships and that the different treatment in this instance was ‘reasonably and objectively justified’<sup>50</sup> because extending the benefits of marriage may ‘potentially’ have ‘important and far reaching consequences for the social structure of society’.<sup>51</sup> Although Bjorgvinsson notes that those relationships that are similar by their nature should be treated similarly, he still concludes that there is something distinctive about marriage and civil partnership that makes different treatment legitimate.

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<sup>43</sup> *Burden v United Kingdom* (2008) 47 EHRR 38, [62].

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid* [63].

<sup>46</sup> *ibid* [65].

<sup>47</sup> *ibid.* But, Chapter 3 explained that married couples do not have to live together for the purposes of validity of the relationship, and neither do civil partners as has been explained in Chapter 4.

<sup>48</sup> Judge Bratza also issued a concurring opinion and preferred the reasoning of the lower court: *Burden v United Kingdom* (n43) [O-12].

<sup>49</sup> *ibid* [O-115].

<sup>50</sup> *ibid* [O-116].

<sup>51</sup> *ibid* [O-117].

Judge Borrego Borrego in a dissenting judgment rightly criticises the majority's reasoning for being 'circular': the sisters are related by family, which makes them different because they have not formalised their relationship, but they could not formalise because they are related. Similarly, Judge Zupancic's believed the majority reasoning was 'logically inconsistent'.<sup>52</sup> Zupancic accepted that giving tax benefits to spouses is legitimate,<sup>53</sup> but that once this benefit has been given to other relationships, 'the door is open for reconsideration of the question whether the denial of tax advantage to other modes of association is rationally related to a legitimate government interest.'<sup>54</sup> He asked,

*...why would consanguinity be any less important than the relationship between married and civil partners? Of course, the quality of consanguinity is different from sexual relationships but this has no inherent bearing on the proximity of the persons in question... So what does the qualitative difference referred to by the majority come to? Is it having sex with one another that provides the rational relationship to a legitimate government interest?*<sup>55</sup>

For Judge Zupanic, treating relationships differently because one is a sexual relationship and the other is a relationship between relatives is 'simply arbitrary'.<sup>56</sup> Perhaps one problem with the *Burden* case was that the focus on the inheritance tax exemption meant that the European Court of Human Rights was not required to address the broader issue of the rationale for formal recognition of some relationships but not others. Barker has explained that the *Burden* case,

*...highlights the need for a principled re-evaluation of the legal benefits associated with marriage: is there good reason why legal protections of various kinds must be sexually transmitted, or could they be disaggregated from the institution of marriage and distributed in a different way, or could they be abolished?*<sup>57</sup>

To take issue with some of what Barker says, it may be more accurate to say that the legal benefits associated with marriage are bestowed on that relationship because of its formal nature, rather than because of any requirement that marriage be a sexual relationship. But the point remains that despite the mixed reasons behind the *Burden* sisters' case, and Baroness O'Cathain's amendment to the Civil Partnership Bill, there is a case for considering why

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<sup>52</sup> *ibid* [O-III1].

<sup>53</sup> *ibid* [O-III12].

<sup>54</sup> *ibid* [O-III13].

<sup>55</sup> *ibid* [O-III14-O-III15].

<sup>56</sup> *ibid* [O-III20].

<sup>57</sup> Barker (n17) 68.

relationships that function in similar ways are treated differently by the law. This is especially so in light of the discussion in the last chapter showing that functional arguments have been influential in the development of new registered couple relationships,<sup>58</sup> and chapter one showed that it is often the functions that relationships perform that mean they are ‘family’ relationships.<sup>59</sup>

Although these attempts to argue that the provisions of the Civil Partnership Act were discriminatory failed to change the structure of civil partnership they are important because they suggest that form-based recognition can be used in ways that provides for family diversity. Similar arguments to those advanced in England and Wales have been used successfully in Australia to create a new type of formalised relationship: the registered caring relationships.

## **5.2 The Australian experience: ‘caring relationships’**

Tasmania legislated for registered caring relationships in 2003,<sup>60</sup> and Victoria followed suit in 2009.<sup>61</sup> Although these reforms appear radical at first glance, a closer examination reveals that they are not particularly radical because they are based on the marriage model. To show this, it will be argued firstly that the main reason why the caring relationships were introduced was to placate opponents of same-sex relationship recognition. It will be suggested that the lack of genuine concern for those in caring relationships is a reason why the reforms are conservative in nature. Secondly, the legal structure and the legal consequences of these relationships will be explored to show that, although there are differences between the caring relationships and marriage, the reforms are not as radical as they could have been. Thirdly, and building on the arguments in the last chapter, it will be argued that while there are some benefits common to all formalised relationships, one of the most important differences between them is social rather than legal.

### **5.2.1 Why were registered caring relationships introduced?**

According to Graycar and Millbank, there was no empirical evidence to suggest that legal recognition of non-couple relationships was necessary in Australia.<sup>62</sup> Due to this lack of evidence, it is necessary to analyse the parliamentary debates to discern why this reform was

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<sup>58</sup> See Chapter 4, 4.1.1.

<sup>59</sup> See Chapter 1, 1.3.2.2b.

<sup>60</sup> Relationships Act 2003 (Tas).

<sup>61</sup> Relationships Act 2008 (Vic), as amended by the Relationships Amendment (Caring Relationships) Act 2009 (Vic).

<sup>62</sup> R Graycar and J Millbank ‘From Functional Family to Spinster Sisters: Australia’s Distinctive Path to Relationship Recognition’ (2007) 24 Washington University’s Journal of Law and Policy 121, 153.



believed to be necessary. This is important because it gives insight into the rationales that are behind the development of new types of formalised relationship.

On examination, it becomes apparent that the precise rationale for the introduction of the registered caring relationships is unclear. Like Glennon's comments about the differing interpretations of Baroness O'Cathain's attempt to amend the Civil Partnership Bill,<sup>63</sup> a 'generous construction' of the Australian debates hints at a need to recognise a diversity of families and recognise the value of caring relationships, and bring these relationships under family law's protection. But, a more 'cynical interpretation' leads to the conclusion that the true purpose of the reforms was to undermine the significance of allowing same-sex couples to register their relationships and have their relationships recognised as 'family', by moving the focus away from same-sex couples and onto caring relationships.

#### 5.2.1.1 The generous interpretation: recognising diversity and valuing care

The Tasmanian Parliamentary Joint Standing Committee on Community Development produced a report that formed the basis of the 2003 reforms and acknowledged that 'the traditional family is but one of many different family types, all sharing similar values and confronting the same difficulties as traditional families'. These different types of family may live in 'marriage-like' or 'non-sexual' relationships where partners 'share their lives in a mutually supportive relationship involving emotional and economic interdependence.'<sup>64</sup> Partners to non-sexual relationships were 'disadvantaged in areas of property rights, intestacy and other entitlements'<sup>65</sup> because their relationships were not recognised by law. This suggests that there were practical reasons behind the reforms relating to a need to access certain legal consequences that would benefit partners in non-sexual relationships, or in other words a need for more family relationships to enjoy family law's protective function.

The Tasmanian government did not give an explicit reason why caring relationships were included in the 2003 reforms and they were rarely mentioned in the parliamentary debates.<sup>66</sup> The focus of the debates was on the reforms to allow the recognition of same-sex couples as 'significant partners', which meant that same- and opposite-sex couples would be treated

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<sup>63</sup> Discussed above, 5.1.1.1.

<sup>64</sup> Joint Standing Committee on Community Development 'Report on the Legal Recognition of Significant Personal Relationships' (Parliament of Tasmania, 2001), 22-3.

<sup>65</sup> *ibid* 25.

<sup>66</sup> Mr Jim Bacon (Premier) (Tasmanian House of Assembly Deb 25 June 2003, 92) was an exception to this general observation however, as he emphasised that the reforms were 'about relationships' and 'not specifically or only about same-sex relationships' as was Mrs Smith (Tasmanian Legislative Council Deb 27 August 2003, 19) who comments on the 'very little cursory comment on caring relationships.'

identically. The government did note, however, that they had a responsibility to recognise the changing nature of family relationships and this includes people who may live with a carer or a companion.<sup>67</sup> The Attorney General gave the example of ‘two elderly companions who may have lived together for many years and who have supported each other in practical and emotional ways’ as a type of relationship that could benefit from legal recognition.<sup>68</sup> This suggests that the government intended to recognise a wider variety of family relationships when those relationships performed particular functions that are reminiscent of those expected of marriage and the registered couple relationships.<sup>69</sup>

Similarly, the Victorian government believed that creating registered caring relationships was necessary to provide a ‘broader concept of relationship’ that could ‘for example, include two adult companions, or two adult siblings’.<sup>70</sup> The then government acknowledged ‘that people form a diverse range of relationships’ and so the option to register a caring relationship, or a couple relationship, allows individuals to ‘define which of their personal relationships is most important’ to them.<sup>71</sup> ‘Caring relationships’ were to provide the legal recognition of a relationship between two adults ‘who have a mutual commitment to support each other in practical and emotional ways’,<sup>72</sup> echoing the sentiments of the Tasmanian Attorney-General relating to the functions performed by caring partners that means that their relationships are worthy of legal recognition.

In addition to notions of recognising different family relationships where they are characterised by care, it was also apparent from the Victorian debates that the function of caring itself was seen as particularly valuable for society.<sup>73</sup> Mr Noonan in the Legislative Assembly Debates explained that the 2009 reforms,

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<sup>67</sup> Tasmanian House of Assembly Deb 25 June 2003, 29-32 (Mrs Jackson (Minister for Justice and Industrial Relations)).

<sup>68</sup> Tasmanian House of Assembly Deb 25 June 2003, 32 (Mrs Jackson, Minister for Justice and Industrial Relations).

<sup>69</sup> See Chapter 3, 3.4 and Chapter 4, 4.1.1.

<sup>70</sup> Victorian Legislative Assembly Deb 12 November 2008, 4572 (Mr Hulls, Attorney General). See also the comments of Ms Thomson (Victorian Legislative Assembly Deb 4 December 2008, 4938) that as society ages, ‘recognising and understanding the significance of these relationships and what they mean to the individuals involved in them is important.’ See also Victorian Legislative Assembly Deb 4 December 2008, 4940 (Mr Noonan).

<sup>71</sup> Victorian Legislative Assembly Deb 12 November 2008, 4574 (Mr Hulls, Attorney General).

<sup>72</sup> Victorian Legislative Assembly Deb 12 November 2008, 4572 (Mr Hulls, Attorney General).

<sup>73</sup> The 2009 reforms saw very little opposition with all the parties supporting the legislation. Mr Finn (Legislative Council Deb 3 February 2009, 40) did oppose the reforms, claiming that ‘this bill is not an immoral bill and it is not an unethical bill — it is just a very stupid bill... For years we have been told by various groups around the community that we should stay out of their lives, that we should stay out of their bedrooms, that we should leave them alone and that we should just let them live their lives. Now

*...recognised that a valuable relationship can be based in the act of giving ongoing care and/or mutual support to another, regardless of whether the relationship has a sexual aspect to it... the bill recognises the inherent value to society in caring relationships. It acknowledges that despite the absence of a sexual element that is present in domestic relationships, caring relationships are similar in that either one person is reliant upon the other or both rely upon each other in the course of their day-to-day lives.*<sup>74</sup>

Similarly, Mr Kavanagh in the Legislative Council Debates noted that ‘caring relationships are extremely valuable; they are central to the quality of life of many people.’<sup>75</sup> There were also references to the need to allow partners in caring relationships to ‘gain legal protection for each other’ by registering,<sup>76</sup> and the selfless nature of a caring relationship where partners commit to caring for one another, not for ‘monetary return’, but simply because they love each other.<sup>77</sup>

Taken together, this all suggests that prima facie, the caring relationships were thought necessary to allow relationships characterised by care and support to be legally recognised, and be protected by family law. But, on a closer examination of the context surrounding the reforms, it becomes apparent that the true rationale is rather more complicated.

#### 5.2.1.2 A cynical interpretation: mitigating the significance of equality for same-sex couples?

A more cynical rationale cannot be ruled out,<sup>78</sup> and arguably the reforms were introduced to placate opponents of same-sex relationship recognition. Tasmania created a registration option for partners in caring relationships in 2003 at the same time as they introduced a registration option for same- and opposite-sex couples,<sup>79</sup> and Victoria legislated to provide for registered caring relationships in 2009<sup>80</sup> to fulfil a government promise when legislating to create a registration option for same- and opposite-sex couples in 2008.<sup>81</sup> During the 2010 parliamentary debates in New South Wales (NSW) to create an option to register a couple

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we have a government that wants to register every relationship that anybody could ever have with anybody else.’

<sup>74</sup> Victorian Legislative Assembly Deb 4 December 2008, 4940 (Mr Noonan).

<sup>75</sup> Victorian Legislative Council Deb 3 February 2009, 36 (Mr Kavanagh).

<sup>76</sup> Victorian Legislative Assembly Deb 4 December 2008, 4941 (Mr Howard). See also Victorian Legislative Council Deb 3 February 2009, 37 (Ms Pulford); Victorian Legislative Council Deb 3 February 2009, 38 (Mr Scheffer); Victorian Legislative Council Deb 3 February 2009, 39 (Ms Darveniza).

<sup>77</sup> Victorian Legislative Assembly Deb 4 December 2008, 4938 (Ms Thomson).

<sup>78</sup> Chapter 7 will also explain that there was dubious reasoning behind the introduction of function-based recognition of informal caring relationships: see Chapter 7, 7.2.2.

<sup>79</sup> Relationships Act 2003 (Tas).

<sup>80</sup> Relationships Act 2008 (Vic), as amended by the Relationships Amendment (Caring Relationships) Act 2009 (Vic). There is no legal recognition of informal caring relationships in Victoria.

<sup>81</sup> Victorian Legislative Assembly Deb 6 December 2007, 4393 (Mr Hulls, Attorney General); Victorian Legislative Assembly Deb 12 November 2008, 4572 (Mr Hulls, Attorney General).

relationship, an amendment was proposed in Committee to allow the registration of ‘carers’ relationships’.<sup>82</sup> The NSW government would not support the amendment because the purpose of the relationships register was to allow de facto couples to register their relationships and gain easier access to legal rights and responsibilities under state and federal law and so the benefit of registering for carers was ‘zero’.<sup>83</sup> The then NSW Attorney General made the following comments about the rationale behind the reforms in Tasmania and Victoria to create registered caring relationships,

*...the circumstances in which the Tasmanian and Victorian legislation led to having those provisions was very much as a result of political compromise in order to be able to secure the support of some MPs who otherwise would not have supported the legislation at the request of various stakeholders.<sup>84</sup>*

If this was the case, registered caring relationships were not truly introduced because of a need to recognise a broad variety of family relationships; rather, they were introduced to diminish the significance of granting a measure of equality to same-sex couples. In the same way as happened in England and Wales, the calls for protecting partners in caring relationships were merely a distraction from the opposition to the legal recognition of same-sex couples as family relationships.

Graycar and Millbank explain that when LGBT groups began campaigning for the legal recognition of different types of family relationship in the early 1990s, they envisaged that the ‘non-couple’ category would represent ‘a progressive gesture, to make a break from a hierarchical pattern of relationship rights with marriage at the top’.<sup>85</sup> But, in recent years the non-couple category ‘has been, arguably, completely “captured” by conservative opponents of gay and lesbian equality movements who now promote it - in a very different light - as their own reform agenda.’<sup>86</sup> Graycar and Millbank point out that the attempt to amend the civil partnership bill in England and Wales and the promotion of the non-couple category by opponents of same-sex recognition in Australia are both indicative of the same trend,

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<sup>82</sup> NSW Legislative Council Deb 12 May 2010, 22514-6 (Fred Nile).

<sup>83</sup> NSW Legislative Council Deb 12 May 2010, 22519 (Mr Hulls, Attorney General). But, as will be explained in Chapter 7, 7.1.2, NSW does have function-based recognition of informal ‘close personal relationships’. The Attorney General did not mention why it was not beneficial for partners in close personal relationships to have easier access to the legal consequences of those relationships.

<sup>84</sup> NSW Legislative Council Deb 12 May 2010, 22518 (John Hatzistergos, Attorney General).

<sup>85</sup> Graycar and Millbank (n62) 150; cf Lesbian and Gay Legal Rights Service ‘The Bride wore Pink: The Legal Recognition of our Relationships (A Discussion Paper)’ (1993) 3 Australian Gay and Lesbian Law Journal 67.

<sup>86</sup> Graycar and Millbank (n62) 150.

*What these debates reveal is the way in which the non-couple category has been co-opted by opponents of equality using formal equality rhetoric and false comparators (same-sex couples with same-sex non-couples) in order to position themselves as the ultimate equality seekers....what is remarkable about this particular strategy is that it reconfigures same-sex relationship reforms as actually worsening rather than alleviating inequality and discrimination, through the construction of another (more) deserving and unrecognized group, the "domestic co-dependants."<sup>87</sup>*

Even though it appears likely that expansion of form-based recognition to include registered caring relationships has come about for reasons not truly related to promoting inclusivity and evolving ideas about family relationships, they nonetheless provide an example of formalised relationships being used in new ways to recognise diverse relationships. As such, it is worth exploring the nature of the relationships in more depth.

### **5.2.2 Australia's registered caring relationships**

Upon examination, it is clear that the registered caring relationships only hint at the potential of form-based recognition to be used in radical ways because the legal structure and legal consequences of these relationships are very similar to those of marriage and the registered couple relationships. To show this, the legal structure of the relationships, in terms of entry and exit requirements, will be discussed, followed by a discussion of the legal consequences that are bestowed on the caring relationships.

#### 5.2.2.1 Relationship type – the legal structure of the caring relationships

There is a statutory definition of caring relationships in both Tasmania and Victoria. The Tasmanian legislation defines a caring relationship as,

*...a relationship other than a marriage or significant relationship between two adult persons whether or not related by family, one or each of whom provides the other with domestic support and personal care.<sup>88</sup>*

Similarly, the Victorian legislation defines caring relationships as a relationship,

*...between two adult persons who are not a couple or married to each other and who may or may not otherwise be related by family where one or each of the persons in the*

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<sup>87</sup> Graycar and Millbank (n62) 152-3.

<sup>88</sup> Relationships Act 2003 (Tas), s5(1).

*relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, whether or not they are living under the same roof.*<sup>89</sup>

These definitions are in part superfluous, and could be viewed as statements of the intention of the governments when legislating that the relationships registered as caring relationships are those that exhibit the particular functions of 'domestic support and personal care' in Tasmania and 'personal or financial commitment and support of a domestic nature' in Victoria. As has been shown in previous chapters,<sup>90</sup> while functional arguments relating to a desire to treat relationships that perform similar functions in similar ways are influential in the development and creation of form-based recognition, in questions about the legal validity of formalised relationships the state bypasses the actual functions performed by the relationship and focusses instead on whether the relationship complies with the legal structure and formalities. In this way, discussion of the expected functions of the relationship is irrelevant.

The definitions are in part reflective of what is actually necessary for a valid registered caring relationship. Caring relationships in both jurisdictions may only be formed between two adults, regardless of whether they are related by family, who consent to enter the union and are unmarried, are not in another registered relationship, and are not party to another relationship that could be registered.<sup>91</sup> Caring relationships are very similar to marriage and the registered couple relationships in that they are dyadic, monogamous unions between adults who consent to registration. The main differences in terms of legal structure are that a relationship cannot be registered where one partner provides care for a fee or on behalf of an organisation,<sup>92</sup> and there is no prohibition on forming caring relationships between particular relatives. This is of course a significant difference in that it shows the flexibility of form-based recognition in its ability to provide a means of recognising various types of relationship, but other than this, caring relationships remain based on the marriage model.<sup>93</sup>

#### 5.2.2.2 Exit requirements

Legislation prescribes the ways in which caring relationships may legally end, and these are identical to the formal processes for ending registered couple relationships in Tasmania and

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<sup>89</sup> Relationships Act 2008 (Vic), s5.

<sup>90</sup> See for example Chapter 4, 4.2.1.

<sup>91</sup> Relationships Act 2003 (Tas), s11; Relationships Act 2008 (Vic), s6-7. Note however that entering another relationship that could be registered following entering a caring relationship will not invalidate the caring relationship.

<sup>92</sup> Relationships Act 2003 (Tas), s5; Relationships Act 2008 (Vic), s5.

<sup>93</sup> cf Chapter 7 which looks at the extent to which the informal caring relationships also mimic the marriage model.

Victoria. Caring relationships are automatically revoked by the death of either party, or the marriage of either partner, whether to the caring partner or someone else,<sup>94</sup> or may end by court order.<sup>95</sup> They may also end following an application by one or both parties,<sup>96</sup> and unlike marriage the relationship does not have to be of any minimum duration prior to making an application to revoke the relationship. Revocation usually takes place within 90 days unless the application is withdrawn.<sup>97</sup> If a partner is unilaterally ending the relationship, they must serve notice of their intention on the other partner,<sup>98</sup> although there is no similar requirement to give notice should one partner decide to marry. The fact that this process is identical to that to end a registered relationship is not problematic as was extending the civil partnership provision to particular family relationships in England and Wales.<sup>99</sup> The Australian process is administratively simple and does not involve any questions about the nature of the relationship as would the process for dissolution of civil partnership where one of the four facts would need to be proven to establish the irretrievable breakdown of the relationship.<sup>100</sup> As is the case with the registered couple relationships in Australia, the nature of the relationship is irrelevant when both registering and revoking a relationship.

#### 5.2.2.3 Legal consequences of a registered caring relationship

The legal consequences attaching to caring relationships are far less numerous and far-reaching than those which attach to marriage and the registered couple relationships. This shows that the legal consequences of marriage do not have to be transferred in their entirety onto new form-based relationships. The Tasmanian government intended caring relationships to be given wide recognition,<sup>101</sup> and accordingly registered caring relationships were recognised in around 43 pieces of legislation.<sup>102</sup> Legal consequences include, for example, that partners to registered caring relationships are recognised as 'senior next of kin' under both the Burial and

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<sup>94</sup> Relationships Act 2003 (Tas), s15(1); Relationships Act 2008 (Vic), s11.

<sup>95</sup> Relationships Act 2003 (Tas), s15(2); Relationships Act 2008 (Vic), s16.

<sup>96</sup> Relationships Act 2003 (Tas), s12(2); Relationships Act 2008 (Vic), s11(2), s12.

<sup>97</sup> Relationships Act 2003 (Tas), s17; Relationships Act 2008 (Vic), s15.

<sup>98</sup> Relationships Act 2003 (Tas), s16; Relationships Act 2008 (Vic), s13.

<sup>99</sup> See above, 5.1.1.1.

<sup>100</sup> For discussion of dissolution provisions for civil partnership, see Chapter 4 4.1.2.2.

<sup>101</sup> It was the intention of the then government that caring relationships in Tasmania were to be recognised in more areas than the non-couple relationships in other jurisdictions, such as 'domestic relationships' in the ACT and 'close personal relationships' in NSW - Tasmanian House of Assembly Deb 25 June 2003, 31-2 (Mrs Jackson, Attorney General, Minister for Justice and Industrial Relations). These non-formalised non-couple relationships and the legal consequences of such recognition will be discussed in Chapter 7.

<sup>102</sup> For a full list see the Social Development Committee 'Statutes Amendment (Relationships) Bill 2005' (Parliament of South Australia, Report No. 21, 2005), 127-8.

Cremation Regulations 2015<sup>103</sup> and the Coroners Act 1995<sup>104</sup> and are considered as a 'related person' under the Land Tax Act 2000.<sup>105</sup> Caring partners are included as 'members of the family' under the Constitution Act 1934<sup>106</sup> and the Witness Protection Act 2000.<sup>107</sup> It is also noteworthy that registration of a caring relationship, in the same way as marrying or registering a 'significant relationship' in Tasmania, revokes any wills made prior to registration, unless that will was made in contemplation of registration.<sup>108</sup> Registered caring partners are able to inherit on intestacy,<sup>109</sup> but they cannot apply for financial provision out of the estate where the deceased's will fails to make adequate provision for their maintenance and support.<sup>110</sup>

The Victorian government took a different approach, and rather than attempt to give caring relationships wide legal recognition they decided to only recognise caring relationships when this was deemed 'appropriate'. For example, different treatment between caring partners and partners to 'domestic relationships', the Victorian registered couple relationships, in the areas of superannuation and judicial pensions was justified on the basis that recognising caring relationships in this area would be a 'fundamental change' in policy, and therefore was deemed inappropriate.<sup>111</sup> The 2009 reforming legislation creating the option to register a caring relationship did not follow the Tasmanian approach to reform by amending several pieces of legislation at once to include caring relationships. Rather, the Victorian legislation amended 29 Victorian statutes to expressly exclude caring relationships.<sup>112</sup> Registered caring partners may apply for financial provision from the estate of their deceased partner where there is a will,<sup>113</sup> and following proposals by the Victorian Law Reform Commission,<sup>114</sup> and subject to the amendments being passed in the Legislative Council, registered caring partners will succeed on

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<sup>103</sup> Burial and Cremation Regulations 2015 (Tas), s3. It is interesting to note however that the list of 'senior next of kin' provided for is hierarchical: a spouse, including a significant (de facto) partner, has priority, followed by a child over 18 years of age, followed by a registered caring partner.

<sup>104</sup> Coroners Act 1995 (Tas), s3A.

<sup>105</sup> Land Tax Act 2000 (Tas), s3.

<sup>106</sup> Constitution Act 1934 (Tas), s32.

<sup>107</sup> Witness Protection Act 2000 (Tas), s3.

<sup>108</sup> Wills Act 2008 (Tas), s16.

<sup>109</sup> Intestacy Act 2010 (Tas), s6(b) defines a 'spouse' as including a person in a registered personal relationship under the Relationships Act 2003. The Relationships Act 2003 (Tas), s6, defines a personal relationship as being either a significant (de facto) relationship or a caring relationship.

<sup>110</sup> Testator's Family Maintenance Act 1912 (Tas), s3 limits application for financial provision to 'spouses' (and children and parents), and s2 defines spouse as including a partner to a significant relationship only.

<sup>111</sup> Victorian Legislative Assembly Deb 12 November 2008, 4572 (Mr Hulls, Attorney General).

<sup>112</sup> See, Relationships Amendment (Caring Relationships) Act 2009, sch 1.

<sup>113</sup> Administration and Probate Act 1958 (Vic), s90.

<sup>114</sup> Victorian Law Reform Commission *Succession Laws: Report* (2013), [5.53-5.56].



intestacy in the same way as a spouse and both registered and unregistered 'domestic' partners.<sup>115</sup>

### *5.2.2.3a Financial and property orders on relationship breakdown*

While the legal consequences attaching to the registered caring relationships are far fewer than those that are bestowed on marriage and the registered couple relationships, both Tasmania and Victoria have given the courts powers to make property and financial orders on the breakdown of a caring relationship<sup>116</sup> in a similar way to that applying for the formalised couple relationships.<sup>117</sup> Perhaps the concerns identified by Leckey, discussed in chapter four,<sup>118</sup> relating to the transferring of the provision for financial relief on divorce onto same-sex couples' relationships are a greater concern in the context of caring relationships. Leckey argued that same-sex couples' relationships are qualitatively different than opposite-sex couples because the former are more likely to be egalitarian relationships than the latter; for him, this means that the financial remedies provision may be unsuitable for same-sex relationships. The fact that caring relationships can be formed between any two adults means that the possible differences between the quality of the caring relationships and relationships between spouses is even greater, and so transferring the financial remedies provision, intended for couples, onto caring relationships may be inappropriate. A later chapter will question whether partners in caring relationships need financial remedies provision on relationship breakdown.<sup>119</sup> For now it is sufficient to provide an overview of the legislative provision in Tasmania and Victoria.

Partners to caring relationships must apply to the court within two years of the breakdown of the relationship for property and financial orders.<sup>120</sup> The court has discretion to grant leave to apply after this period if refusing to do so would cause hardship.<sup>121</sup> The court should, as far as is practicable, finally determine the financial relationship between the parties and avoid further proceedings between them.<sup>122</sup> Partners can avoid the court's jurisdiction and

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<sup>115</sup> Administration and Probate Act 1958 (Vic), s70B is, at the time of writing, in the process of being amended by the Administration and Probate and Other Acts Amendment (Succession and Related Matters) Bill 2017 (Vic).

<sup>116</sup> Relationships Act 2003 (Tas), s36; Relationships Act 2008 (Vic), s41.

<sup>117</sup> The provision for the caring relationships is most similar to that which applied in the states for de facto relationships prior to the 2009 federal reforms. For discussion of the state provision see Chapter 6, 6.3.2.2c.

<sup>118</sup> See Chapter 4, 4.1.2.3a.

<sup>119</sup> See Chapter 7, 7.3.1.

<sup>120</sup> Relationships Act 2003 (Tas), s38(1); Relationships Act 2008 (Vic), s43(1).

<sup>121</sup> Relationships Act 2003 (Tas), s38(2): 'A court... may grant leave to a partner to apply to the court for an order if greater hardship would be caused to the applicant if that leave were not granted than would be caused to the respondent if that leave were granted'; Relationships Act 2008 (Vic), s43(2) has similar wording.

<sup>122</sup> Relationships Act 2003 (Tas), s39; Relationships Act 2008 (Vic), s44.

make their own arrangements, in the same way as partners to registered couple relationships,<sup>123</sup> and can enter into 'personal relationship agreements' or 'separation agreements' in Tasmania, or 'relationship agreements' in Victoria. Independent legal advice is necessary for the creation of a valid agreement.<sup>124</sup>

The factors that the court may take into account when determining property orders vary slightly between the jurisdictions. The Victorian legislation caters specifically for caring relationships separately from the couple relationships. This is appropriate as both formalised relationships are aimed at different types of family relationship, and the factors that the court may take into account for couple relationships include contributions made as parents.<sup>125</sup> When deciding on a property adjustment order, the court must consider the financial and non-financial contributions of the partners towards property, as well as the contributions one partner has made towards the welfare of the other and the nature and duration of the caring relationship.<sup>126</sup> The court may also consider other matters when considering adjusting interests in property that apply for both caring and couple relationships in the same way, such as the financial needs and obligations of the partners and the responsibilities either partner has towards another person.<sup>127</sup> The court is able to take into account a broad range of factors when making property orders, similarly to the approach taken for couple relationships.<sup>128</sup>

In Tasmania, the legislation does not deal with caring relationships separately from couple relationships, which suggests that caring relationships were not the main focus of the reforms. In Tasmania, the court may take into account a variety of factors including the financial and non-financial contributions of either partner towards property; the financial resources of the parties; contributions made as homemaker or parent to the welfare of the family;<sup>129</sup> as well as any relevant matter such as the 'financial needs and obligations of each partner' as well as 'any other fact or circumstance the court considers relevant'.<sup>130</sup>

Maintenance payments are available for partners to broken down caring relationships upon application to the court in both jurisdictions. In Tasmania, the court may consider granting

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<sup>123</sup> See Chapter 4, 4.1.2.3.

<sup>124</sup> Relationships Act 2003 (Tas), ss60, 61, 62; Relationships Act 2008 (Vic), ss35A(3), 59.

<sup>125</sup> Relationships Act 2008 (Vic), s45(1)(b).

<sup>126</sup> Relationships Act 2008 (Vic), s45(1A).

<sup>127</sup> Relationships Act 2008 (Vic), s51.

<sup>128</sup> For discussion of the position in the states prior to the federal reforms for de facto couples, see Chapter 6, 6.3.2.2c.

<sup>129</sup> Relationships Act 2003 (Tas), s40.

<sup>130</sup> Relationships Act 2003 (Tas), s40(1)(e) allows the court to take into account any of the listed factors contained in s47.

maintenance orders where one partner is unable to support themselves adequately because their 'earning capacity has been adversely affected by the circumstances of the personal relationship', or because 'of any other reason arising in whole or in part from the circumstances of the personal relationship.'<sup>131</sup> The Victorian legislation takes a similar approach, and may grant maintenance payments if the 'partner's earning capacity has been adversely affected by the circumstances of the domestic relationship or registered caring relationship' or for 'any other reason arising in whole or part from the circumstances of the... registered caring relationship.'<sup>132</sup>

### **5.2.3 Shared and distinctive features of formalised relationships**

An analysis of the registered caring relationships confirms some of the findings of the last chapter that there are some features that are common to all formalised relationships, as well as confirming that there are some differences. Consideration of these findings is important at this point to give a clear picture of what formalised relationships have to offer, before moving on in the next two chapters to look at function-based frameworks for relationship recognition.

#### 5.2.3.1 Shared elements

Administrative efficiency appears to be a shared benefit of all form-based models because the formal process of entering and exiting formalised relationships provides a simple means of knowing who is in a relationship with whom at any given time. The Tasmanian government highlighted that registration of a caring relationship will 'be evidence of the relationship's existence for legal purposes'<sup>133</sup> and the Relationships Act 2003 provides that registration is conclusive proof of the existence of the relationship.<sup>134</sup> Administrative efficiency was referred to implicitly as a benefit of registration in Victoria, where the Attorney General said that the registration option for de facto couples gives them 'easier access to existing entitlements without having to argue repeatedly that they are in a committed partnership, or to have to prove this in court' and that the amendments to include caring relationships within the legislation were intended to 'enhance' this provision.<sup>135</sup>

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<sup>131</sup> Relationships Act 2003 (Tas), s47.

<sup>132</sup> Relationships Act 2008 (Vic), s51.

<sup>133</sup> Tasmanian House of Assembly Deb 24 June 2003, 29 (Mrs Jackson, Minister for Justice and Industrial Relations).

<sup>134</sup> Relationships Act 2003 (Tas), s5(4).

<sup>135</sup> Victorian Legislative Assembly Deb 12 November 2008, 4572 (Mr Hulls, Attorney General). See also Victorian Legislative Assembly Deb 12 November 2008, 4935 (Mr Clark): 'Of course, those matters could already be dealt with under existing law through the making of a will or through a suitable authorisation such as one under the Guardianship and Administration Act in relation to making medical treatment and other health-care decisions. Nonetheless, this bill would enable that to be done in a range of different contexts by the single registration of the caring relationship.'

Respect for choice and autonomy was also apparent as a supposed benefit of introducing the caring relationships in a similar way as for the other form-based models. In Tasmania, informal caring relationships are recognised on a functional basis<sup>136</sup> alongside the registration option for caring relationships, and so the ‘choice’ here is whether to be certain that the relationship is legally recognised, or live with the uncertainty of function-based recognition of the relationship. The Tasmanian government<sup>137</sup> and the report on which the reforms were based<sup>138</sup> emphasised that a ‘positive aspect of registered relationship recognition is that it is up to the individuals involved to determine the status of their relationship, rather than having the law presume its significance based on arbitrary criteria.’<sup>139</sup> In Victoria, it is only registered caring relationships that are legally recognised and so the choice here is about whether or not to have the relationship legally recognised, and so caring partners could be said to be ‘choosing’ the legal consequences when they register.<sup>140</sup> The Victorian Attorney General explained that ‘only partners who have registered their caring relationship will be able to access rights and obligations under Victorian law’, and this ‘provides certainty about who Victorian law applies to and ensures that only people who intend to have their caring relationship legally recognised as their primary relationship are captured by the registration scheme.’<sup>141</sup> Of course, the idea that formalised relationships respect choice and autonomy is subject to the same concerns as those expressed in earlier chapters;<sup>142</sup> respecting choice in this context is only meaningful when people are aware of the legal consequences of their relationship choices.

### 5.2.3.2 Distinguishing features

#### *5.2.3.2a The independent legal advice requirement and the respect for choice*

One difference between the formalities relating to entering a caring relationship compared with the other formal relationships is that partners to caring relationships must receive independent legal advice prior to applying to register. This advice should outline the effects, advantages and disadvantages of registration.<sup>143</sup> No reason was given by the Tasmanian

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<sup>136</sup> These relationships will be discussed in Chapter 7.

<sup>137</sup> Tasmanian House of Assembly Deb 24 June 2003, 29 (Mrs Jackson, Minister for Justice and Industrial Relations).

<sup>138</sup> As mentioned by: Tasmanian House of Assembly Deb 24 June 2003, 29 (Mrs Jackson, Minister for Justice and Industrial Relations).

<sup>139</sup> Joint Standing Committee on Community Development (n64) 47-8.

<sup>140</sup> In the parliamentary debates, some members of the Victorian parliament did refer however to the idea that registration meant that caring partners would not need to prove their relationships on a daily basis, such as next of kin decisions when one partner is critically ill in hospital. See for example, Victorian Legislative Council Deb 3 February 2009, 39 (Ms Darveniza).

<sup>141</sup> Victorian Legislative Assembly Deb 12 November 2008, 4573 (Mr Hulls, Attorney General).

<sup>142</sup> See Chapter 2, 2.3.2.3 and Chapter 3, 3.2.1.2a and Chapter 4, 4.1.2.3.

<sup>143</sup> Relationships Act 2003 (Tas), s11(3); Relationships Act 2008 (Vic), s7(ba).

government as to why legal advice should be necessary prior to registration of a caring relationship, but the Victorian Attorney General gave two reasons for this requirement.

One reason was that legal advice should operate as a safeguard to protect the vulnerable from the ‘unscrupulous’ who may seek to take advantage of registration.<sup>144</sup> This provision was viewed as a positive aspect of the legislation because it would protect vulnerable people<sup>145</sup> and was seen as an ‘important safeguard’.<sup>146</sup> Rundle notes that the requirement of legal advice operates to ‘protect potentially vulnerable people from exploitation by being pressured or tricked into registering a caring relationship’.<sup>147</sup> There is no requirement in the legislation that the caring partners have the capacity to understand the legal advice given to them, however, which may limit the utility of this requirement to protect vulnerable people from exploitation. The second reason given by the Attorney General was that caring relationships were a new concept introduced into Victorian law in 2009 and therefore partners to such relationships may not expect legal consequences to attach to this particular type of relationship.<sup>148</sup>

#### 5.2.3.2b *The issue of social status?*

It is clear that the registered caring relationships do have a *legal* status, because they are treated as a distinct category by law and particular legal consequences attach to the relationship, and so in this way are similar to marriage and the registered couple relationships. But, this does not mean that the caring relationships also generate a *social* status akin to that of the other formalised relationships. While it’s clear that marriage and the registered couple relationships generate a (different) social status, there is no evidence to suggest that the registered caring relationships generate a social status. Rundle, writing in 2011, noted that there were only four registered caring relationships in Tasmania, and none in Victoria.<sup>149</sup> Rundle argues that these low take-up rates are ‘not an adequate indicator of whether or not the system should be made available to people’. She refers to a Community Engagement Project<sup>150</sup> in Tasmania about registered relationships, and states that audiences in that project ‘demonstrated a keen interest in the legal scheme, little prior knowledge of its existence and a

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<sup>144</sup> Victorian Legislative Assembly Deb 12 November 2008, 4573 (Mr Hulls, Attorney General).

<sup>145</sup> See Victorian Legislative Assembly Deb 4 December 2008, 4935 (Mr Clark); Victorian Legislative Council Deb 3 February 2009, 34 (Mr Rich Phillips).

<sup>146</sup> Victorian Legislative Council Deb 3 February 2009, 36 (Ms Pulford).

<sup>147</sup> O Rundle ‘An Examination of Relationship Registration Schemes in Australia’ (2011) 25(2) Australian Journal of Family Law 121, 140.

<sup>148</sup> Victorian Legislative Assembly Deb 12 November 2008, 4573 (Mr Hulls, Attorney General).

<sup>149</sup> Rundle (n147) 145.

<sup>150</sup> Rundle notes that the project was entitled ‘Legal Recognition of Relationships in Tasmania’, conducted by R Croome and O Rundle, in 2010: Rundle (n47) 147, fn154.

desire to learn about it.<sup>151</sup> This suggests that, with time, as people learn about the existence of the registered caring relationships, they may generate a social status. Perhaps this suggests that the further away we move from marriage in terms of relationship type, the less likely it is that a form-based relationship will generate a social status, at least until the time comes when people are aware of their existence.

### **5.3 Conclusion**

While form-based recognition is flexible enough to provide for different relationship types, so far, England and Wales has not provided any recognition for caring relationships, and the reforms introducing registered caring relationships in Australia have not been particularly radical. The registered caring relationships do not demonstrate the full potential of form-based recognition to be used in innovative ways to respond to family diversity, and are nowhere near as radical as Brake's 'minimizing marriage' proposal, discussed in chapter two.<sup>152</sup> The conservative nature of the reforms may stem from the fact that, so far, there has been no genuine call for the legal recognition of caring relationships. Rather, the introduction of caring relationships was merely a smokescreen to distract from the significance of giving same-sex couples a registration option akin to marriage. While policymakers talked about an apparent need to treat similar relationships in similar ways, implicitly suggesting that relationship types other than couples should also be protected by family law, what appeared to concern them the most was the symbolic recognition of same-sex relationships as 'family'. The reforms were not truly attempts at using form-based recognition to respond to family diversity, and the legal and social privileging of marriage remains unchallenged by policy makers in both jurisdictions. Perhaps the hold that marriage, or more specifically the marriage ideology, has is responsible for limiting the radical potential of the registered caring relationships reforms. Until the time there is a genuine call for legally recognising a wider variety of family relationships, it may be difficult for people to conceive of a new way of thinking about relationships that does not use marriage as the starting point. The next part of the thesis will explore function-based recognition of informal relationships to determine how they measure up against form-based recognition, and whether the influence of marriage and the marriage model influences their development in any way.

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<sup>151</sup> Rundle (n147) 146-7.

<sup>152</sup> See Chapter 2, 2.2.2.1.

## **Chapter 6 – Informal couple relationships: the moderate function-based approach**

This chapter will focus on what chapter two described as ‘moderate’ function-based approaches<sup>1</sup> and will discuss recognition of ‘cohabitants’ in England and Wales and ‘de facto’ relationships in Australia. The chapter will show that function-based recognition shares many benefits with form-based recognition, and has the additional benefit of acting as a safety net because function-based recognition does not require a couple to opt-into legal recognition. But, function-based recognition is not without difficulties: it is inherently uncertain and can be difficult to administer, which stands in sharp contrast with the administrative efficiency of form-based systems.

Firstly, an exploration of the definitions of the informal relationships shows that, as predicted in chapter two, defining relationships for function-based recognition is problematic, but that it is possible to create a flexible system that can overcome some of these issues. Secondly, the discussion will give an account of why recognition of these informal relationships was thought necessary to show that, as is the case with the development of form-based recognition,<sup>2</sup> functional arguments have been influential, and additionally that function-based frameworks act as a safety-net that protects vulnerable partners. Thirdly, the legal consequences of these relationships will be discussed to show that function-based recognition can generate a legal status but that the social status attaching to these informal relationships is likely to be considered inferior to that generated by marriage. The conclusion will suggest that the moderate function-based approach only begins to hint at the possible flexibility of function-based frameworks to respond to family diversity.

### **6.1 What is a ‘cohabiting’ or a ‘de facto’ relationship?**

An analysis of the current definitions of ‘cohabiting’ and ‘de facto’ relationships shows that in practice, function-based recognition is uncertain and inquiries into the quality of a relationship are often intrusive. These difficulties are unavoidable because they stem from the way legal recognition is triggered under a function-based approach: unlike the position of formalised relationships, the characteristics and functions of a relationship must be proved before a relationship will be legally recognised.

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<sup>1</sup> See Chapter 2, 2.3.3.1.

<sup>2</sup> See Chapter 4, 4.1.1 and Chapter 5, 5.1; 5.2.1.

### 6.1.1 Difficulties of definition

As Barlow and James point out, there is no one common definition of a cohabiting relationship in England and Wales,<sup>3</sup> but there are some common elements between the definitions. They note that ‘broadly speaking’, legal recognition of cohabitation has been reserved ‘almost exclusively... for the most marriage-like relationships, where a man and woman are living together “as husband and wife” usually within a shared household, often for a minimum prescribed period and where there is or has been sexual intimacy.’<sup>4</sup> Originally, recognition of informal relationships was limited to opposite-sex couples, but, the House of Lords in *Ghaidan v Godin-Mendoza*<sup>5</sup> held that a same-sex couple can also live together ‘as husband and wife’<sup>6</sup> and so can be cohabitants. Following the introduction of the Civil Partnership Act 2004, the definition of cohabitant was amended in many different statutory provisions to expressly include same-sex couples who may be living together ‘as civil partners’. In this way, the development of a new form-based system via statute also developed function-based recognition. Although there is ‘no universal definition’<sup>7</sup> of cohabitation, an example of how it is currently defined in England and Wales is found in the Rent Act 1977:

*(a) a person who was living with the original tenant as his or her wife or husband...*

*(b) a person who was living with the original tenant as if they were civil partners...<sup>8</sup>*

Similarly, Graycar and Millbank note that there is no one common definition of a ‘de facto’ relationship<sup>9</sup> in Australia. But, originally, they were defined as being marriage-like. In NSW, for example, the first state in Australia to legislate for the financial consequences of relationship breakdown of informal relationships, they defined ‘de facto relationships’ as,

*...the relationship of living, or having lived together as husband and wife on a bona fide domestic basis although not married to each other.<sup>10</sup>*

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<sup>3</sup> A Barlow and G James ‘Regulating Marriage and Cohabitation in 21<sup>st</sup> Century Britain’ (2004) 67(2) *Modern Law Review* 143, 147.

<sup>4</sup> *ibid* 145.

<sup>5</sup> [2004] 2 AC 557.

<sup>6</sup> *ibid* [20] (Lord Nicholls).

<sup>7</sup> Barlow and James (n3) 145.

<sup>8</sup> Rent Act 1977, sch 1 [2], as amended by the Civil Partnerships Act 2004, sch 8, para 13.

<sup>9</sup> See R Graycar and J Millbank ‘The Bride Wore Pink... to the Property (Relationships) Legislation Amendment Act 1999: Relationship Law Reform in New South Wales’ (2000) *Canadian Journal of Family Law* 227, 239-243.

<sup>10</sup> De Facto Relationships Act 1984 (NSW), s3(1) (as originally enacted).



This marriage analogy was chosen because there was recognition 'that any statutory definition of a de facto relationship necessarily involves a comparison with marriage',<sup>11</sup> presumably because they involve the same type of relationship, that of the unrelated adult couple.

Although it seems logical to define cohabiting and de facto relationships as marriage-like because the moderate function-based approach is intended to provide for those couples who could, but, for whatever reason, do not marry, this definition is not without difficulties. As chapter three showed, there is no universally accepted list of the functions of marriage,<sup>12</sup> and it is difficult to know what would be sufficient as evidence of the performance of some of these functions. For example, Ward LJ suggested that,

*...at its heart, marriage is a serious public commitment... in essence always to love and to cherish until death do us part. A married couple share their lives and make their home together... They offer each other love, commitment and support.*<sup>13</sup>

How would a couple evidence that they 'love' and 'cherish' one another, especially when Beck and Beck-Gernsheim have suggested that it is impossible to define 'love'?<sup>14</sup> What is sufficient as evidence of 'commitment' and 'support'? These difficulties are irrelevant for marriage, because all that is necessary for validity is that the spouses have the capacity to marry (and that they comply with the procedural requirements). But it is problematic for function-based recognition where a third party must assess the nature of the relationship to determine whether it 'crosse[s] the invisible line'<sup>15</sup> to become a legally recognised relationship.

Neuberger J, as he then was, summed up the difficulties in this way:

*...when considering whether two people are living together as husband and wife, it would be wrong to conclude that they do so simply because their relationship is one which a husband and wife could have. If the test were as wide as that, then, bearing in mind the enormous variety of relationships that can exist between husband and wife, virtually every relationship between a man and a woman living in the same household would fall within [the ambit of the legislation]... the court should ask itself whether, in the opinion of a reasonable person with normal perceptions, it could be said that two people in question*

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<sup>11</sup> New South Wales Law Reform Commission *Report on De Facto Relationships* (LRC 36, 1983), [1.10].

<sup>12</sup> See Chapter 3, 3.4.

<sup>13</sup> *Amicus Horizon Ltd v Estate of Judy Mabbott and Brand* [2012] HLR 42, [16].

<sup>14</sup> See Chapter 1, 1.3.1.

<sup>15</sup> *Keaton v Aldridge* [2009] FMCAfam 92, [112] (Pascoe CFM). See also Tyrer J in *Kimber v Kimber* 1 FLR 383, 389: 'a marriage certificate proves itself; cohabitation has to be inferred.'

*were living together as husband and wife; but, when considering that question, one should not ignore the multifarious nature of marital relationships.*<sup>16</sup>

This same 'enormous variety of relationships' exists between couples in informal relationships. Barlow and Smithson have helpfully categorised cohabitants into four groups, the ideologues, the romantics, the pragmatists and the uneven couples. One or both partners in the ideologue group have an ideological objection to marriage, and so purposefully avoid it, whereas the romantics view marriage as a 'serious commitment' and plan to marry eventually. The pragmatists make decisions based on pragmatic reasoning relating to the legal and factual situation. These groups share a characteristic of 'mutual commitment' to the relationship. The uneven couples are different in that one partner wishes to marry whilst the other does not, or one partner is more 'committed' to the relationship than the other.<sup>17</sup> A moderate function-based framework may attempt to recognise all four diverse groups of cohabitants. As highlighted in chapter two,<sup>18</sup> drawing the parameters of a moderate function-based approach is challenging because there is a need to strike the right balance between not recognising all relationships between two unrelated adults, and thus being too inclusive, and not imposing overly stringent standards that are difficult to fulfil and risk requiring couples to assimilate with a particular view of family, which would make functional recognition too exclusive.

### **6.1.2 The current definitions**

'Cohabiting' relationships in England and Wales are often defined as two people living together 'as husband and wife' or 'as civil partners'. This suggests that a cohabiting relationship may only exist between two unrelated adults, as is the case with marriage and civil partnership.<sup>19</sup> To assist the decision-maker to determine whether a relationship between two unrelated adults is by its nature akin to that between spouses or civil partners, a list of indicia have been developed by the courts. In *Crake v Supplementary Benefits Commission*,<sup>20</sup> Woolf J recognised that there are many different reasons why two people may live together, such as when one person looks after another when they 'are ill or incapable for some other reason of managing their affairs', but merely living together is not enough<sup>21</sup> without the relationship being of a particular quality. Woolf J identified six 'admirable signposts':

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<sup>16</sup> *Re Watson* [1999] 1 FLR 878, 883 (Neuberger J).

<sup>17</sup> A Barlow and J Smithson 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' (2010) 22(3) *Child and Family Law Quarterly* 328, 335.

<sup>18</sup> See Chapter 2, 2.3.2.2.

<sup>19</sup> See Chapter 3, 3.2.1 and Chapter 4, 4.1.2.1.

<sup>20</sup> [1982] 1 ALL ER 498.

<sup>21</sup> *Crake v Supplementary Benefits Commission* (n20) 502.

*...whether they are members of the same household; ...stability; ... the question of financial support; ...the question of sexual relationship; the question of children; and public acknowledgment.*<sup>22</sup>

It is interesting to consider that these signposts are matters that can be proved, and are not focused on ideas such as 'love', which is often viewed as central to marriage but would be difficult to evidence.

The signposts identified in *Crake* have proved influential and similar indicia have been applied in later cases, although they should not be viewed as criteria that must all be met prior to finding that a couple are living together as husband and wife. Mr Mark Rowland, Social Security Commissioner, made clear in *Re J*<sup>23</sup> that,

*...the 'admirable signposts' place a wholly inadequate emphasis on the significance of the parties' 'general relationship'. Indeed, it is arguable that it is the parties' 'general relationship' that is of paramount importance and that their sexual relationship and their financial relationship are only relevant for the light they throw upon the general relationship.*<sup>24</sup>

The dangers of a formulaic approach were also made clear in *Kimber v Kimber*,<sup>25</sup> where Tyrer J cautioned against any 'attempt to reduce to a judicial soundbite a comprehensive list of criteria' for determining whether a relationship is marriage-like<sup>26</sup> because it is 'both foolish and impossible to offer any definition that will cover all circumstances' considering the 'modern complexities of inter-personal relationships'.<sup>27</sup> He nevertheless sets out a list of eight 'signposts', similar to those identified in *Crake*, to determine the existence of a cohabiting relationship:

- Living together in the same household;
- A sharing of daily life;
- Stability and a degree of permanence;
- Financial arrangements;
- Sexual relationship;
- Care of children;
- Intention and motivation of the parties;

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<sup>22</sup> *ibid* 504.

<sup>23</sup> [1995] 1 FLR 660.

<sup>24</sup> *ibid* 665.

<sup>25</sup> [2000] 1 FLR 383.

<sup>26</sup> *ibid* 391-3.

<sup>27</sup> *ibid* 388.

- Third party perceptions of the relationship.

Tyrer J notes that ‘such factors cannot be complete nor comprehensive’, which suggests there is some flexibility as to whether all these criteria, or only these criteria, need to be proved to indicate the existence of a cohabiting relationship.

The original Australian definition of a ‘de facto’ relationship was the same as that currently used in England and Wales because it focussed on the marriage-like nature of the relationship. This definition changed in NSW following reforms to allow same-sex couples to be recognised as de facto partners,<sup>28</sup> and this served as a basis for the current federal family law provisions, which define a de facto relationship as a relationship between two people who,

*...are not legally married to each other; and... are not related by family... and having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.*<sup>29</sup>

The requirements that the couple are not married to each other and are not related by family have been referred to as ‘statutory preconditions’ in some of the case law.<sup>30</sup> This means that a couple must first establish that they meet these preconditions, and then prove that their relationship was that of ‘a couple living together on a genuine domestic basis’ before their relationship will be considered a de facto relationship. It is important to note that a de facto relationship can exist where one or both parties are married, or where one or both parties are also in another de facto relationship.<sup>31</sup>

Graycar and Millbank argue that the changing definition in Australia may be indicative of a new way of thinking about relationships because marriage is displaced as the benchmark against which informal couple relationships must be compared.<sup>32</sup> But, upon closer examination

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<sup>28</sup> This served as a ‘prototype’ for changes in other jurisdictions: D Kovacs ‘A Federal Law of De Facto Property Rights: The Dream and the Reality’ (2009) 23(2) Australian Journal of Family Law 104, 108. It is worth noting that both the Northern Territory (NT) and Western Australia (WA) chose to define a de facto relationship as a ‘marriage-like relationship’ following reforms to include same-sex couples as de facto partners. In the NT it was noted that this definition was chosen because it was ‘non-gender specific’: NT Legislative Assembly 15 October 2003, Parliamentary Record No. 15 (Dr Toyne, Justice and Attorney General). The differences are unlikely to be of any practical concern however because all the jurisdictions adopted a similar non-exhaustive list of circumstances for the court to consider.

<sup>29</sup> Family Law Act 1975 (Cth), s4AA.

<sup>30</sup> *Jonah v White* [2011] FamCA 221, [33].

<sup>31</sup> Family Law Act 1975 (Cth), s4AA(5).

<sup>32</sup> R Graycar and J Millbank ‘From Functional Family to Spinster Sisters: Australia’s Distinctive Path to Relationship Recognition’ (2007) 24 Washington University’s Journal of Law & Policy 121, 145-6: note that the authors mistakenly refer to a change in the terminology employed in NSW from ‘de facto spouses’ to ‘de facto relationships’ following the 1999 reforms: the term ‘de facto spouse’ did not actually appear in

it becomes apparent than the 'nature of the inquiry'<sup>33</sup> undertaken by the court has not changed to a significant extent following the changing terminology. The new definition is accompanied by a list of circumstances to assist the court in determining the existence of a de facto relationship that derives from case law interpretations of the phrase 'living together as husband and wife' under the original NSW provisions.<sup>34</sup> Master Macready has commented that the inclusion of this list of circumstances in the legislation 'merely reflects the existing state of the law as it has been developed under the previous law',<sup>35</sup> which suggests that the expected functions of marriage remain central to the definition of a de facto relationship.

According to the federal Family Law Act 1975, when determining whether a relationship is that of 'a couple living together on a genuine domestic basis', the court should consider 'all of the circumstances of the relationship', including the following non-exhaustive<sup>36</sup> list:<sup>37</sup>

- a) The duration of the relationship;
- b) The nature and extent of common residence;
- c) Whether a sexual relationship exists;
- d) The degree of financial dependence or interdependence and any arrangements for financial support between them;
- e) The ownership, use and acquisition of property;
- f) The degree of mutual commitment to a shared life;
- g) Whether the relationship is or was registered under a prescribed under a law of a state or territory;
- h) The care and support of children;
- i) The reputation and public aspects of the relationship.<sup>38</sup>

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the De Facto Relationships Act 1984. See also, J Millbank and K Sant 'A Bride in her Everyday Clothes: Same-sex Relationship Recognition in NSW' (2000) 22(2) Sydney Law Review 181, 190.

<sup>33</sup> Millbank and Sant (n32) 190.

<sup>34</sup> *D v McA* (1986) 11 Fam LR 214, 227 (Powell J): there was one additional factor listed in the case which is absent from the legislation, 'the procreation of children'. Campbell J in *Sullman v Sullman* [2002] NSWSC 169, [46] presumes that this particular circumstance is now absent because of the inclusion of same-sex partners into the definition of de facto relationship.

<sup>35</sup> *Dridi v Fillmore* [2001] NSWSC 319, [12]; and in *Jurd v Public Trustee* [2001] NSWSC 632, [21]; and in *Bogan v Macorig* [2004] NSWSC 993, [18]. See also similar comments by Bryson AJ in *Dion v Reiser* [2010] NSWSC 50, [10].

<sup>36</sup> Kovacs (n28), 107 describes the list as 'unavoidably vague and open-ended'.

<sup>37</sup> This list is similar to those used in the states and territories: Property (Relationships) Act 1984 (NSW), s4(2); Legislation Act 2001 (ACT), s169; Relationships Act 2003 (Tas), s4; De Facto Relationships Act 1991 (NT), s3A; Acts Interpretation Act 1954 (Qld), s32DA; Interpretation Act 1984 (WA), s35(2); Family Relationships Act 1975 (SA), s11B.

<sup>38</sup> Family Law Act 1975 (Cth), s4AA(2).

To determine how the courts go about deciding whether a cohabiting or de facto relationship exists it is necessary to explore some case law. An exploration of the interpretations of the definitions shows that the courts must explore all aspects of a relationship which leads to intrusive inquiries, and this contrasts with the administrative efficiency of form-based systems where the functions performed within a relationship are effectively irrelevant. That said, it turns out that the flexible approach adopted by the courts means that the concerns identified in chapter two about the prevailing ideologies of traditional views about family limiting the inclusivity of function-based recognition<sup>39</sup> are somewhat alleviated. The Australian approach has proven to be particularly flexible, and is consequently more inclusive of family diversity than the English and Welsh approach.

#### 6.1.2.1 A requirement of 'living together'?

Chapter three showed that cohabitation is not a necessary requirement for a valid marriage, and so forms part of the ideologies of marriage as opposed to the legal structure.<sup>40</sup> But, for informal relationships, the issue of 'living together' is significant in proving the nature of the relationship. The jurisdictions take different approaches towards the idea of 'living together'. It stands to reason that when a type of relationship is commonly referred to as 'cohabitants', there is an expectation that the parties cohabit. As Wall J puts it in *G v F*,<sup>41</sup> 'if the applicant and the respondent had never lived in the same household, they could not be former cohabitants.'<sup>42</sup> There is limited flexibility to take into account time spent apart due to 'illness, holidays, work and other periodical absences apart'.<sup>43</sup> For example, in *Re Dix*<sup>44</sup> a three month period of a 27 year relationship where the couple lived apart was seen to be an 'abnormal situation', and so was not fatal to an inheritance claim.<sup>45</sup> Ward LJ commented in *Re Dix* that a couple who are living apart temporarily will be deemed to continue sharing a household, as long as they regard their relationship as subsisting.<sup>46</sup> A relationship where parties are unable to live together due to work and other commitments, such as in *Kotke v Saffarini*,<sup>47</sup> will not be regarded as a relationship where the couple live together as husband and wife. It is clear that spending only weekends in the same household is insufficient to amount to cohabitation,<sup>48</sup> but it is unclear

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<sup>39</sup> See Chapter 2, 2.3.2.2.

<sup>40</sup> See Chapter 3, 3.2.2.

<sup>41</sup> [2000] Fam 186.

<sup>42</sup> *ibid* 197.

<sup>43</sup> *Kimber v Kimber* (n15) 391.

<sup>44</sup> [2004] 1 WLR 1399.

<sup>45</sup> *ibid* [16] (Ward LJ).

<sup>46</sup> *ibid* [24] (Ward LJ). See also *Baynes v Hedger* [2008] EWHC 1587 (Ch), [121] (Lewison J).

<sup>47</sup> [2005] EWCA Civ 221.

<sup>48</sup> *Baynes v Hedger* (n46) [149] (Lewison J). See also *Kotke v Saffarini* (n47).

what the minimum duration of the cohabitation should be. The position of living-apart-together, or LAT, couples is precarious in England and Wales because a couple who have never shared a household are highly unlikely to be recognised as cohabitants, regardless of how marriage-like their relationship may be in other respects.<sup>49</sup>

Some of the earlier Australian cases took the view that sharing residence at some point was vital to a finding of the existence of a de facto relationship. In the 1989 case of *Hibberson v George*,<sup>50</sup> it was noted that sharing a common residence was an essential component of being in a de facto relationship.<sup>51</sup> Following the change in definition from 'living as husband and wife' to 'living as a couple', with a non-exhaustive statutory list of indicia, the judges started taking a more flexible approach. The 'nature and extent of common residence' is only one circumstance that the court *may* consider, and Burchett AJ explained in *Greenwood v Merkel*<sup>52</sup> that 'living together' is not confined to 'common residence', and that couples may live together in a way 'that suited them'.<sup>53</sup> De facto relationships were established in *S v B*,<sup>54</sup> where the couple chose to reside in their own parts of the house and in *Houston v Butler*,<sup>55</sup> where the couple lived apart for fear of social disapproval of their relationship. Sharing a common residence is a 'strong indicator' of the existence of a de facto relationship,<sup>56</sup> but although it may be a 'relevant' and 'significant factor',<sup>57</sup> and a 'good starting point in [the] endeavour' of establishing a de facto relationship,<sup>58</sup> it is not vital.<sup>59</sup> This means that LAT couples may be included within the de facto provisions, because the courts have taken a flexible view towards the meaning of 'living together' and are increasingly willing to consider a variety of living arrangements.<sup>60</sup> The

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<sup>49</sup> There is a growing body of literature highlighting a need to consider the legal position of couples in LAT relationships. See, for example: S Duncan and M Phillips 'People who Live Apart Together (LATs) – How Different are they?' (2010) 58(1) *Sociological Review* 112; S Duncan and others 'Legal Rights for People who 'Live Apart Together'' (2012) 34(4) *Journal of Social Welfare and Family Law* 443.

<sup>50</sup> (1989) 12 Fam LR 725.

<sup>51</sup> *ibid* 740 (Mahoney JA)

<sup>52</sup> [2004] NSWSC 43.

<sup>53</sup> *ibid* [15] (Burchett AJ). See also Powell JA's comments in *Lipman v Lipman* (1989) 13 Fam LR 1 that 'the concept of a "de facto relationship" does not involve the notion that the parties to it must always be together under the same roof', as quoted in *Dridi v Fillmore* (n35) [23] (Master Maccready), and similar comments by McDougall J in *Przewoznik v Scott* [2005] NSWSC 74, [15].

<sup>54</sup> [2004] QSC 80, [41] (Philippides J).

<sup>55</sup> [2007] QSC 284, [72-3].

<sup>56</sup> *FO v HAF* [2006] QCA 555, [25] and see [26] (Keane JA).

<sup>57</sup> *PY v CY* [2005] QCA 247, [7], [22]: de Jersey CJ goes on here to explain that 'in the particular circumstances of this case, the separate residency of the parties did not mean that their de facto commitment had ceased'.

<sup>58</sup> *Keaton v Aldridge* (n15) [67] (Pascoe CFM).

<sup>59</sup> See *Jonah v White* (n30) [39-40].

<sup>60</sup> See J Millbank 'The Changing Meaning of De Facto Relationships' (2006) 12 *Current Family Law* 82, available from <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=910137](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=910137)> accessed 20/12/2016.

Australian provision is more inclusive of a diversity of family forms than the current approach in England and Wales.

#### 6.1.2.2 Confined to sexual relationships?

While chapter three showed that the legal structure of marriage does not require the spouses to have a sexual relationship,<sup>61</sup> it appears that without a sexual relationship at some point, it is unlikely that a relationship will fulfil the definition of 'living as husband and wife' or 'living as a couple'. In the English case of *Re Watson*,<sup>62</sup> Neuberger J, as he then was, commented that 'it is not unusual for a happily married husband and wife in their mid-fifties... not merely to have separate bedrooms, but to abstain from sexual relations.'<sup>63</sup> Similarly, Mr Rowland explained in *Re J* that 'the absence of [a sexual] relationship suggests that the parties may be living together for reasons other than a particularly strong personal relationship', and so 'strong alternative grounds' would need to be presented to evidence that a couple were living together as husband and wife.<sup>64</sup> He suggested that one such rare case may be where the parties have shared a bed for many years, without having had a sexual relationship.<sup>65</sup> Similarly, in the Australian case of *Sharpless v McKibbin*,<sup>66</sup> Brereton J recognised that the existence of a sexual relationship is merely one circumstance to be considered, and 'is no longer an essential element', but 'it must be a rare case in which there could be a de facto relationship without there having been, at some stage, a sexual relationship.'<sup>67</sup> The Australian approach is that a sexual relationship is only indicative, and not determinative, of the nature of the relationship.<sup>68</sup>

#### 6.1.2.3 Day-to-day sharing of life

The courts in both jurisdictions will examine the day-to-day life of the parties to determine the nature of the relationship, and they take flexible approaches as to what level of sharing is necessary for a cohabiting or de facto relationship. In England and Wales, there appears to be an expectation that cohabitants should share daily tasks and duties, but this does not mean that

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<sup>61</sup> See Chapter 3, 3.2.1.4a.

<sup>62</sup> [1999] 1 FLR 878.

<sup>63</sup> *ibid* 884.

<sup>64</sup> *Re J* (n23) 666 (Mr M Rowland).

<sup>65</sup> *ibid* 668 (Mr M Rowland).

<sup>66</sup> [2007] NSWSC 1498.

<sup>67</sup> *ibid* [38]: Brereton J did not give any examples as to when a de facto relationship may be found where the parties have never had a sexual relationship.

<sup>68</sup> See further, *Locke v Norton* [2014] FamCa 811, [100] (Rees J); *Barry v Dalrymple* [2009] FamCA 1271, [257]. The fact that a sexual relationship has ended is not sufficient evidence that a de facto relationship has broken down. See *Vine v Carey* [2009] FMCAfam 1017, [30] (Slack FM): the sexual relationship ended in 2008, but the de facto relationship continued for another year because the parties continued to live together with their existing financial arrangements, they still socialised together and continued to support one another both 'inside and outside the household'.



everything must be shared. For example, some intermingling of finances is indicative of a relationship akin to that between husband and wife, but it was suggested in *Amicus*<sup>69</sup> that remaining financially independent is not fatal to a finding that a couple are living together as if they were husband and wife. In this case, however, Ward LJ found that, '[i]t is not so much a case of her cherishing financial independence as it is of her failure to commit herself to accept [the defendant] wholeheartedly as her partner with whom she was prepared to share her life'<sup>70</sup> that meant the relationship was not akin to that between husband and wife.

Financial independence is not fatal to a finding of a de facto relationship<sup>71</sup> in Australia because the courts recognise that many couples, including spouses, choose to remain financially independent.<sup>72</sup> But the way that couples manage their finances, and how they jointly use property, whilst not determinative, is indicative of the nature of the relationship. In *Moby v Schulter*<sup>73</sup> for example, a de facto relationship was found partly on the basis that the couple shared finances and property; they both made financial contributions towards furnishing the respondent's property, which they both used, and the applicant sold some of her personal items in order to help the respondent pay for repairs to his car.<sup>74</sup> Similarly, in *Dakin v Sansbury*<sup>75</sup> a de facto relationship was found partly on the basis that there was evidence of financial dependency during the relationship as well as the shared use of property. In this case, the respondent had paid the applicant's rent for roughly seven years as well as contributing to the applicant's living expenses and supporting her son.<sup>76</sup>

Another aspect of the day-to-day life of couples that is examined is the care of children. In the English case of *Kimber* the relationship between the petitioner's child and the petitioner's partner was indicative of a cohabiting relationship: the partner was involved with parents' evenings, entered a 'father and son' golf tournament and helped the child learn to play the keyboard. Tyrer J believed it was 'inconceivable' that the petitioner would allow a bond to develop with a man she did not intend to 'become a second father-figure', or for a man to make 'laudable efforts if he were not like-minded'.<sup>77</sup> Similarly, in the Australian case of *Baker v*

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<sup>69</sup> [2012] HLR 42.

<sup>70</sup> *ibid* [25].

<sup>71</sup> *Barry v Dalrymple* (n68) (Coleman J).

<sup>72</sup> *Aldridge v Delamarre* [2013] FamCA 214 [75] (Cleary J). The Full Court of the Family Court agreed with these observations in *Delamarre v Aldridge* [2014] FamCAFC 218, [19] (Faulks DCJ, Finn and Strickland JJ).

<sup>73</sup> [2010] FamCA 748.

<sup>74</sup> *ibid* [149-152].

<sup>75</sup> [2010] FMCAfam 628.

<sup>76</sup> *ibid* [167], (Bender FM). See too similarly, *Gissing v Sheffield* [2012] FMCAfam 628, [168], [173] (O'Sullivan FM).

<sup>77</sup> *Kimber v Kimber* (n15) 392.

*Landon*,<sup>78</sup> a de facto relationship was found partly on the basis that the ‘applicant had a relationship with, and commitment to, the respondent’s first child’ and that the applicant treated this child ‘like a son’.<sup>79</sup> The applicant bought the child a quad bike, and spent time with him playing video games and so on, and told the court that the child ‘rarely saw his father and that he has taken a role in the nature of a parent with’ the child.<sup>80</sup>

#### 6.1.2.4 Commitment and intention towards the relationship

While chapter three showed that many people assume that marriage is a relationship between a committed couple who intend to stay together for life,<sup>81</sup> couples in informal relationships must be able to evidence a similar commitment and intention. The parties’ intention and commitment towards the relationship is an important factor and may prevent those relationships categorised by Barlow and Smithson as ‘uneven couples’ from being legally recognised. More weight seems to attach to the parties’ commitment and intention towards the relationship than some of the other factors such as a sexual relationship or sharing of property. Perhaps this is because the level of commitment shown towards the relationship is a cogent suggestion that the relationship between the parties is a relationship that they themselves view as significant, rather than merely a casual relationship.<sup>82</sup>

In *Crake*, there was no relationship of living together as husband and wife because it was not the intention of the parties to have that kind of relationship. Although one party was caring for the other following an accident, in a way which a husband and wife may care for one another in those circumstances, they did not intend to live together as husband and wife and were living together solely for the purpose of helping the applicant get back on her feet.<sup>83</sup> Likewise in *Kimber* the court focussed on the intention of the parties to maintain their relationship, with the American partner seeking permission to stay in the country and continue the relationship with the applicant proving significant.<sup>84</sup> In *Nutting*<sup>85</sup> it was suggested that ‘without a lifetime commitment at least at some point in the relationship there is no sufficient similarity to marriage’.<sup>86</sup> The ‘emotional’ and ‘mutual lifetime commitment’ must be ‘objectively assessed by

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<sup>78</sup> [2010] FMCAfam 280.

<sup>79</sup> *ibid* [121].

<sup>80</sup> *ibid* [58].

<sup>81</sup> See Chapter 3, 3.4.1.

<sup>82</sup> See *Ricci v Jones* [2010] FMCAfam 1425, [55] where Riley FM commented that there is ‘a difference between presenting as people who are going out together, people who are in a romantic relationship and people who are in a de facto relationship.’

<sup>83</sup> *Crake v Supplementary Benefits Commission* (n20) 504 (Woolf J).

<sup>84</sup> *Kimber v Kimber* (n15) 392-3.

<sup>85</sup> [2005] HLR 25.

<sup>86</sup> *ibid* [17] (Evans-Lombe J).

reference to what the outside world can see' as well as 'by reference to the viewpoint of the parties themselves'. This requirement of 'commitment' is deemed important because this is what would differentiate a relationship of a couple living as husband and wife with a relationship 'of convenience, friendship, companionship or the living together of lovers'.<sup>87</sup> In *Amicus*, it was found that the couple were not living together as husband and wife because the deceased had deliberately decided to remain 'independent'. The deceased has failed 'to commit herself... wholeheartedly' to the relationship, which was taken as an indication that she was 'not prepared to commit herself in a way which characterises the commitment made by husband and wife.'<sup>88</sup>

The Australian case law provides some examples of how 'commitment' can be demonstrated. In *Baker v Landon*, for example, the parties' plans to marry, the applicant's involvement in the life of the respondent's child and their statements to the IVF programme of their 'significant commitment to each other and a life together raising children' indicated 'a significant commitment to a shared life'.<sup>89</sup> There were also signs of emotional commitment as the applicant had tattooed the names of the applicant and her child on his arms.<sup>90</sup> In *Spencer v Speight*<sup>91</sup> it was suggested that the applicant's involvement in the lives of the respondent's children was indicative of commitment, as was the fact that the applicant's dog was left at the respondent's home.<sup>92</sup> In Australia, the commitment between the partners must be mutual, but 'does not need to be an absolute nor possibly a wholehearted commitment',<sup>93</sup> which appears to be a lower threshold than that which the English court required in *Nutting*. In *Locke v Norton*<sup>94</sup> the judge decided there was no degree of mutual commitment because both parties were committed to different types of relationship: the applicant saw the respondent as her de facto partner and future husband, whereas the respondent viewed the applicant as his 'girlfriend'.<sup>95</sup> Similarly in *McMaster v Wyhler*<sup>96</sup> the fact that the respondent had treated the applicant in the same manner as all her other friends throughout the relationship, and that the parties made no plans for a future together suggested that there was no mutual commitment, which was

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<sup>87</sup> *ibid* [36-7].

<sup>88</sup> *Amicus Horizon* (n13) [25-6].

<sup>89</sup> *Baker v Landon* (n78) [117-8] (Riethmuller FM).

<sup>90</sup> *ibid* [119] (Riethmuller FM).

<sup>91</sup> [2014] FamCA 436.

<sup>92</sup> *ibid* [137], [138] (Benjamin J).

<sup>93</sup> *Smyth v Pappas* [2011] FamCA 434, [114] (Cronin J).

<sup>94</sup> [2014] FamCA 811.

<sup>95</sup> *ibid* [163], [165], [205-7] (Rees J). See also *McMaster v Wyhler* [2013] FamCA 989, [109-111] (Tree J), where there was no de facto relationship as the respondent had treated the applicant in the same manner as all her other friends throughout the relationship, and the parties made no plans for a future together.

<sup>96</sup> [2013] FamCA 989.

indicative of a friendship and not a de facto relationship.<sup>97</sup> This suggests that while ‘uneven couples’ may be more likely to be legally recognised in Australia than England and Wales, they are in a precarious position and so may not be able to avail themselves of family law’s protection.

#### 6.1.2.5 Third party perceptions of the relationship

The views of third parties are given substantial weight in some cases. In the English case of *Nutting*, Evans-Lombe J emphasised that whether the relationship is ‘openly and unequivocally displayed to the outside world’ so that it appears as a lifelong commitment is ‘an entirely adequate test’ for determining the existence of a cohabiting relationship.<sup>98</sup> This may be difficult for some couples in some communities, especially same-sex couples, who may not feel able to present their relationship as a couple to the outside world. This poses a risk that partners to such a relationship would be left outside the law’s protection. For example, in *Baynes v Hedger*<sup>99</sup> a same-sex couple were found to not be living ‘as civil partners’ because many of their family and friends did not know about the true nature of their relationship. As a civil partnership, in the same way as marriage, is a public relationship, such a private arrangement meant that the couple could not be seen to be living in the same household as civil partners.<sup>100</sup> Similarly, in the Australian case of *Jonah v White*<sup>101</sup> a 17 year relationship between an opposite-sex couple was held not to be a de facto relationship, partly because of the ‘clandestine’ nature of the relationship, which was necessary because the respondent was married throughout the 17 years.<sup>102</sup> In *Jonah*, the claimant was left without the option of any financial provision, even though she had been financially dependent upon the respondent for many years.<sup>103</sup> These decisions suggest that couples who keep their relationship secret may face difficulty proving that their relationship is akin to a relationship between husband and wife, or that they are living together as a couple on a genuine domestic basis, and so will be left without protection.

In some instances, one or both parties to the relationship will have claimed to a government agency that they are single so that their claim for benefits is not affected. In England and Wales, it appears that making representations of being single to a government agency suggests that the couple are not living together as husband and wife. For example, in *Amicus*, both parties had been careful to claim benefits as single people, which according to the court

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<sup>97</sup> *ibid* [109-111] (Tree J).

<sup>98</sup> *Nutting* (n85) [17] (Evans-Lombe J).

<sup>99</sup> [2008] EWHC 1587 (Ch).

<sup>100</sup> *ibid* [150].

<sup>101</sup> [2011] FamCA 221.

<sup>102</sup> *ibid* [69] (Murphy J).

<sup>103</sup> M Fernando and O Rundle ‘Love ‘em, Keep ‘em, Leave ‘em – (Non)Application of De Facto Relationship Laws to Clandestine Intimate Relationships’ (2016) 41(1) *Alternative Law Journal* 93, 96.

‘was not a public affirmation of the unity which characterises husband and wife’.<sup>104</sup> Similarly, in *G v F* the court said that a person cannot ‘be permitted to say to a court that she is living with the respondent as husband and wife... whilst maintaining to the Department of Social Security that she is not.’<sup>105</sup> The Australian courts take a different approach, and focus on the purpose of the legislation that they are dealing with. As Behrens explains, ‘while social security provides support for basic living expenses, the [financial remedies provision] is in part concerned to recognise the contributions (financial and non-financial) which a party has made to the benefit of the other party.’<sup>106</sup> In *Baker v Landon*, the couples’ families ‘understood them to be in a de facto relationship and intending to marry’, and they had represented themselves as a couple to obtain IVF treatment,<sup>107</sup> but the respondent ‘continued to claim a single person’s benefit from the Department of Social Security’.<sup>108</sup> Despite the fact that the respondent made claims that she was single, a de facto relationship was found because of the other circumstances present such as cohabitation, financial interdependence and their plans to marry and have another child.<sup>109</sup> Similarly in *Hayes v Marquis*,<sup>110</sup> McColl J stated that it ‘was understandable’ that the respondent claimed to be single to claim benefits, ‘because she was bearing all the expenses of the appellant residing at her house.’<sup>111</sup> This again shows the flexibility of the Australian provision, where judges are able and willing to explore all aspects of the relationship before determining whether a de facto relationship exists.

### 6.1.3 The challenges of a function-based approach

The courts in both jurisdictions take a similar approach to determining the existence of an informal couple relationship and examine all of the circumstances before taking a ‘step back’, to ‘consider the matter as a whole.’<sup>112</sup> In *Barry v Dalrymple*,<sup>113</sup> Coleman J stated that ‘no gendered assumptions or stereotyping can impact upon the [court’s] determination’ on the existence of a relationship.<sup>114</sup> This suggests a willingness to accept that couples arrange their lives together in

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<sup>104</sup> *Amicus Horizon* (n13) [25].

<sup>105</sup> *G v F* (n41) 195 (Wall J).

<sup>106</sup> J Behrens ‘De Facto Relationship?’ Some Early Case Law Under the Family Law Act’ (2010) 24(3) *Australian Journal of Family Law* 350, 353.

<sup>107</sup> *Baker v Landon* (n78) [123].

<sup>108</sup> *ibid* [124].

<sup>109</sup> *ibid* [111], [114], [117], [121-1]. cf *Locke v Norton* (n68) where the applicant had represented herself as single to Centrelink without the respondent’s knowledge, and it was found that there was no de facto relationship (because the parties were committed to different types of relationship).

<sup>110</sup> [2008] NSWCA 10.

<sup>111</sup> *ibid* [99] (McColl J). See also, *Barlevy v Nadolski* [2011] NSWSC 129, [113] (Slattery J); *C, K v O, J* [2014] SADC 87, [108] (Cole J); *Brady v Harris* [2012] FamCA 420, [83] (Faulks DCJ).

<sup>112</sup> *Baker v Landon* (n78) [126].

<sup>113</sup> [2010] FamCA 1271.

<sup>114</sup> *ibid* [236].

different ways. The courts examine both public and private aspects of a relationship, and look for ‘a continuing course of conduct and behaviour, not an event at a fixed point of time.’<sup>115</sup> As Murphy J noted in the Australian case of *Jonah v White*, while none of the statutory indicia are necessary for a finding of a de facto relationship, what is needed is an exploration of,

*...the nature of the union rather than how it manifests itself in quantities of joint time. It is the nature of the union – the merger of two individual lives into life as a couple – that lies at the heart of the statutory considerations and the non-exhaustive nature of them and, in turn, a finding that there is a “de facto relationship”.*<sup>116</sup>

This flexible approach is commendable because it allows judges the freedom to assess each case on its individual facts, and alleviates the concerns discussed in chapter two that function-based recognition would focus on a narrow vision of family only. But, as predicted in chapter two,<sup>117</sup> this is not entirely unproblematic.

As Pascoe CFM noted in *Keaton v Aldridge*,<sup>118</sup> determining when a de facto relationship begins and ends is difficult because these relationships ‘are fluid in the sense that it is difficult... to discern’ when they begin or end.<sup>119</sup> Determining when a relationship began and ended can be a challenging and time consuming task,<sup>120</sup> and it can be difficult for lawyers to advise clients as to whether their relationship will be legally recognised.<sup>121</sup> In *Gissing v Sheffield*,<sup>122</sup> excluding the evidence that the parties themselves gave in court, the parties relied on eleven affidavits from witnesses and 24 exhibits to evidence the nature of their relationship.<sup>123</sup> Determining whether facts alleged by either party to the relationship are true can also lead to intrusive inquiries. For example, in *S v B*, there was some dispute between the parties as to when a sexual relationship ended. Dutney J commented that,

*In the second half of 1999 the appellant began to make remarks that the respondent was “fat”. In the early years of their relationship the respondent alleged that she and the appellant had had an active sex life. By 1999, however, the appellant was experiencing erection dysfunction. The appellant initially tried injections to sustain an erection but*

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<sup>115</sup> *Thompson v The Public Trustee of New South Wales* [2010] NSSC 1137, [78] (Hallen AsJ).

<sup>116</sup> *Jonah v White* (n30) [66].

<sup>117</sup> See Chapter 2, 2.3.2.

<sup>118</sup> [2009] FMCAfam 92.

<sup>119</sup> *ibid* [121].

<sup>120</sup> See J Millbank ‘If Australian Law Opened Its Eyes to Lesbian and Gay Families, what would it see?’ (1998) 12(2) *Australian Journal of Family Law* 1, 33.

<sup>121</sup> *Behrens* (n106) 360.

<sup>122</sup> [2012] FMCAfam 1111.

<sup>123</sup> *ibid* [9-11].

*ultimately sexual activity ceased. The appellant blamed his failure to obtain and sustain an erection on the respondent being fat.*<sup>124</sup>

Dutney J then went on to remark that when the sexual relationship ceased was not ‘particularly relevant to whether the relationship continued in this case’.<sup>125</sup> If the issue of when, or why, the sexual relationship ceased was not relevant to a determination of when the de facto relationship ceased, it is questionable why the judge needed to refer to these personal details at all. Behrens comments that the ‘intrusive’ nature of the inquiries ‘takes us back to the days before no-fault divorce, when the details of parties’ private lives were laid bare in court,’ but that ‘there is probably no alternative’ under a function-based system. She explains that lawyers will need to advise clients of ‘the kind of evidence which will need to be brought if the question of the nature of the relationship is to be litigated, and to the costs, both financial and emotional of such evidence.’<sup>126</sup> These intrusive inquiries have been referred to as ‘undignified’ in the parliamentary debates on the introduction of registered couple relationships in Australia<sup>127</sup> and this was proffered as a reason to prefer form-based recognition over function-based recognition. The intrusive inquiries and the inherent uncertainty of function-based frameworks of relationship recognition, appear to be unavoidable. But this is not a reason to favour form-based recognition because there is a benefit that applies only to function-based recognition, as can be seen by exploring the rationales behind the moderate function-based reforms.

## **6.2 Rationales for the moderate function-based approach**

There are two reasons why the legal recognition of cohabitants and de facto relationships under a function-based framework was thought necessary in both jurisdictions under consideration. Firstly, parliamentary debates have focussed on the functional similarities between the nature of married and unmarried relationships, which lead policymakers to conclude that unmarried partners should be similarly protected by family law. This is important because it shows that a desire to protect the economically vulnerable partner has influenced the development of both form-based and function-based recognition. Secondly, function-based systems are best placed to protect the economically vulnerable partner because there is no need to opt-in for legal recognition of the relationship as is the case with form-based recognition.

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<sup>124</sup> *S v B (No2)* [2004] QCA 449, [38].

<sup>125</sup> *ibid* [46].

<sup>126</sup> Behrens (n106) 360.

<sup>127</sup> NSW Legislative Council Deb 12 May 2010, 22513 (John Hatzistergos, Attorney General). See also Relationships Bill 2007 – Explanatory Memorandum, 1; Victorian Legislative Assembly Deb 12 March 2008, 762 (Mr Hudson).

### 6.2.1 Functional arguments: protecting the vulnerable

Recognition of informal marriage-like relationships has developed ad hoc in both England and Wales and Australia. These ad hoc changes have been largely justified because unmarried couples' relationships are assumed to perform similar functions to marriage, and so unmarried couples require similar legal protection. For example, in England and Wales the Inheritance (Provision for Family and Dependents) Act 1975<sup>128</sup> originally provided that a person who was dependant on the deceased could claim financial provision. This was intended to include, as the then Solicitor-General put it, 'common law wives'. The purpose of the provision was to cater for those 'tragic cases' where a cohabiting partner has 'devoted years to the deceased and, perhaps, helped him to build up a business and who then finds that she is deprived of any benefit or redress because she cannot produce a marriage certificate.'<sup>129</sup> The focus was on the dependency and vulnerability of the selfless cohabiting (female) partner who had made sacrifices for the deceased, and this was used as a justification for allowing her to make a claim for provision in a similar way to a wife. The 1975 Act was amended in 1995<sup>130</sup> to specifically include a partner who lived in the same household as the deceased as their 'husband or wife', to allow a non-dependant long-term cohabiting partner to make a claim.<sup>131</sup> The then Lord Chancellor explained that this was necessary because it was unfair to leave a 'long-term cohabitant who contributed fully to the household without provision and unable to even use [the] safety net' of the dependant provision. Significantly, the change was intended to reflect the contribution made by the female cohabitant, but cohabitants and spouses were not treated identically to 'preserve the distinction between the respective claims of married and unmarried partners.'<sup>132</sup>

Similarly, the Fatal Accidents Act 1976 was amended in 1983<sup>133</sup> to include a cohabitant who lived as the husband or wife of the deceased. This was necessary because of the increase in the number of cohabitants and changing social attitudes towards unmarried relationships.<sup>134</sup> The focus again was on the role of the dependant female who had 'acted as a wife for perhaps very many years'.<sup>135</sup> These arguments about the need to recognise the vulnerability of a selfless

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<sup>128</sup> Inheritance (Provision for Family and Dependents) Act 1975, s1.

<sup>129</sup> HC Deb 16 July 1975, vol 895, col 1686 (Peter Archer, Solicitor-General).

<sup>130</sup> Law Reform (Succession) Act 1995, s2. These reforms were based on the Law Commission *Family Law: Distribution on Intestacy - Report* (Law Com No 187, 1989), [59].

<sup>131</sup> HL Deb 13 February 1995, vol 561, col 503-4 (Lord Mackay, Lord Chancellor).

<sup>132</sup> *ibid.*

<sup>133</sup> Administration of Justice Act 1982, s3.

<sup>134</sup> See Administration of Justice Bill Deb, HL, 30 March 1982, vol 428, col 1287-8 (Lord Kaldor).

<sup>135</sup> Administration of Justice Bill Deb, HL, 30 March 1982, vol 428, col 1283 (Lord Mishcon). See also the comments of Lord Elwyn-Jones about the 'many sad cases of poor old things who have looked after the man they were living with... who indeed devoted their lives to looking after him...': Administration of Justice Bill Deb, HL, 30 March 1982, vol 428, col 1286.



female cohabitant are functional arguments: they recognise that relationship-generated need can occur in both cohabiting and married relationships because they function in similar ways, and consequently they should be treated similarly by law. The same arguments relating to economic vulnerability have been advanced in England and Wales in support of a legislative scheme dealing with the financial consequences of the breakdown of cohabiting relationships. For example, the Law Commission in its 2007 report on the financial consequences of the breakdown of cohabiting relationships referred to ‘the findings of recent empirical research’<sup>136</sup> that reinforces ‘the view that the current law can produce unfair outcomes for cohabitants, in particular for the primary carer of children who may experience significant economic disadvantage following separation.’<sup>137</sup> These arguments have so far been unsuccessful in convincing successive governments that they should legislate in England and Wales to give unmarried couples divorce-like provision on relationship breakdown, but similar arguments have been successful in Australia.

Three reasons were advanced by the then New South Wales (NSW) government and NSW Law Reform Commission to justify the introduction of a legislative system dealing with the property and financial consequences of the breakdown of de facto relationships. These were 1) the deficiencies of the current law; 2) the increasing number of de facto partners;<sup>138</sup> and 3) the general acceptance of the need for change within the legal profession.<sup>139</sup> Property law provisions did not consider the nature of the relationship between the parties and the non-financial contributions that are made in relationships. This situation was unsatisfactory, because as the then Attorney General explained,

*The Law Reform Commission found that as the range of financial arrangements made by de facto partners is similar to the range of arrangements made by married couples,*

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<sup>136</sup> The Law Commission cite for example, G Douglas, J Pearce, H Woodward ‘A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown’ (2007), [10.2-10.7] – for access see, <[http://www.lawcom.gov.uk/wp-content/uploads/2015/06/Cohabitation\\_Cardiff\\_Research.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/06/Cohabitation_Cardiff_Research.pdf)> accessed 19/12/2016.

<sup>137</sup> Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007), [2.13]; see also [4.26].

<sup>138</sup> New South Wales Law Reform Commission (n11) [3.8-3.9], see also [5.4-5.6]. This point was raised several times in the parliamentary debates: see for example NSW Legislative Assembly Deb 17 October 1984, 2001 (David Paul Landa, Attorney-General); NSW Legislative Assembly Deb 24 October 1984, 2494 (Ken Gabb); NSW Legislative Council Deb 30 October 1984, 2691 (Barrie John Unsworth, Minister for Transport and Vice-President of the Executive Council); NSW Legislative Council Deb 31 October 1984, 2858 (Ronald David Dyer).

<sup>139</sup> See New South Wales Law Reform Commission (n11) [3.9], see Chapter 3 Part V on ‘The Nature of Legal Problems’.

*analogous legal principles ought to be applied to the resolution of financial affairs of de facto partners.*<sup>140</sup>

The increasing number of de facto relationships meant that these difficulties were becoming problems for a wider section of society and so some legal remedy, which stopped short of identical treatment with marriage,<sup>141</sup> was necessary. Similarly, the 2008 federal reforms dealing with the breakdown of de facto relationships were thought necessary partly<sup>142</sup> because of equality arguments. The reforms achieved equality of treatment on relationship breakdown between married and unmarried couples, as well as achieving substantive equality between same- and opposite-sex couples by amending the definition of 'de facto' to include same-sex couples.<sup>143</sup> Similarly to the protection argument, the substantive equality arguments can also be considered functional arguments because they are concerned with treating relationships that function similarly in a similar way. In this way, it is apparent that function-based recognition of informal couples has developed in both jurisdictions on the basis that the functional similarity between marriage and the informal couples means that both types of relationship need family law's protection.

### **6.2.2 Function as a 'safety net'**

Another reason advanced to support the introduction of function-based recognition is that there is no need to opt-in to a scheme to gain legal recognition and so function-based frameworks operate as a safeguard or a safety net. The Law Commission specifically rejected the creation of an opt-in scheme for cohabitants in England and Wales because 'it would do nothing for those who, for whatever reason, failed to opt in'. This would undermine the objective of the consultation process, which was to '[alleviate] the financial hardship of those who have not married or registered a civil partnership'.<sup>144</sup> Similarly, the Tasmanian government felt that introducing function-based recognition alongside registration options, 'provide[s] the

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<sup>140</sup> NSW Legislative Assembly Deb 17 October 1984, 2002 (David Paul Landa, Attorney General). See also New South Wales Law Reform Commission (n11) [5.57].

<sup>141</sup> See New South Wales Law Reform Commission (n11) [1.8], [4.9], [5.8]; NSW Legislative Assembly Deb 17 October 1984, 2001 (David Paul Landa, Attorney General).

<sup>142</sup> Practical concerns relating to enabling the courts 'to deal with both financial and child-related matters arising for separated de facto couples in the one proceeding' were also advanced – see Standing Committee on Legal and Constitutional Affairs *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 [Provisions]* (The Senate, 2008), [3.2]. Note however that not all child-related proceedings are able to be dealt with by the federal courts – parents (married or de facto) who are involved in a dispute over children which involve child protection issues may still find themselves with proceedings in both federal and state courts – see B Fehlberg and others *Australian Family Law: The Contemporary Context* (2<sup>nd</sup> ed, Oxford University Press, 2015), 10.

<sup>143</sup> See, Australian Senate Deb 14 October 2008, 41 (Senator Louise Pratt). See also Australian House of Representatives Deb 28 August 2008, 6521 (Shayne Neumann).

<sup>144</sup> Law Commission *Cohabitation* (n137) [1.28]; see also [2.82-2.95].

safety net required to deliver equitable treatment under the law' to particular eligible relationships.<sup>145</sup> A report that formed the basis of the 2003 Tasmanian reforms found that a function-based system 'will not only provide a safety net for all parties to significant relationships, but will also ensure that the more vulnerable partners in such relationships are protected.'<sup>146</sup> The efficiency of function-based recognition as a safeguard will depend on the interpretation of the definitions of cohabiting and de facto relationships: if the standards are overly stringent there is the potential that vulnerable partners will be left without legal protection, and this undermines the rationales advanced for recognising these relationships in the first place. Nevertheless, it should be remembered that this safety net benefit is not shared with formalised relationships, and for formalised relationships to protect partners, steps must be taken to opt-in.

### **6.3 The consequences of a moderate function-based reform**

So far, it has been shown that legal recognition of informal couple relationships is based on a desire to treat functionally similar relationships alike, and consequently to ensure that informal couple relationships are protected by law. It is necessary next to explore the legal consequences that attach to these relationships to discover in what ways they are being protected. Following a brief overview of the general legal consequences, the discussion will focus on the provision for relationship breakdown in both jurisdictions because this is an area that has been subject to much debate in both jurisdictions and continues to be the focus of reform efforts in England and Wales.<sup>147</sup> The discussion will conclude with some observations on the value of the social status of these relationships compared with that of marriage.

#### **6.3.1 General legal consequences**

The legal position of cohabitants in England and Wales is complicated. Barlow and others note that 'sometimes the law treats cohabitants as married, sometimes ignores the relationship altogether and treats them as individuals, and in other instances treats them as a couple, but a couple which is inferior to their married counterparts.'<sup>148</sup> For example, a cohabiting partner is included among those who can claim a tenancy on the tenant's death under the Housing Acts of 1985 and 1988 in the same way as spouses.<sup>149</sup> The Family Law Act 1996 allows for occupation or

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<sup>145</sup> Tasmanian House of Assembly Deb 25 June 2003, 30 (Mrs Jackson, Attorney General and Minister for Justice and Industrial Relations).

<sup>146</sup> Joint Standing Committee on Community Development *Report on the Legal Recognition of Significant Personal Relationships* (Parliament of Tasmania, 2001), 50.

<sup>147</sup> See Chapter 2, 2.3.3.1.

<sup>148</sup> A Barlow and others *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21<sup>st</sup> Century* (Hart Publishing, 2005), 6.

<sup>149</sup> Housing Act 1985, s86A(5); Housing Act 1988, s17(4).

non-molestation orders to be made for cohabitants,<sup>150</sup> although occupation rights in the family home are not automatically extended to cohabitants in the same way as for spouses.<sup>151</sup> Cohabitants are entitled to certain social security benefits in the same way as spouses, although, importantly, cohabitants do not have a right to redress should one partner fail to share this income with the other.<sup>152</sup> A person who has lived in the same household as the deceased for two years as 'the husband or wife' or 'the civil partner' of the deceased can apply for financial provision from the deceased's estate in a similar way to a spouse.<sup>153</sup>

Legal recognition of de facto relationships in Australia developed ad hoc under both state and federal law during the twentieth century. For example, the Australian Soldiers' Repatriation Act 1920 'provided a pension to the wife of a deceased or incapacitated member of the Armed Forces', including a woman who cohabited with and was dependent upon that person.<sup>154</sup> 'De facto widows' were provided for under the Widows' Pensions Act 1942 if they cohabited with the deceased for at least three years and were maintained by him.<sup>155</sup> In New South Wales the Crimes (Domestic Violence) Amendment Act 1982<sup>156</sup> gave de facto partners and married couples who were victims of domestic violence access to similar remedies<sup>157</sup> and the Workers Compensation Act 1987 also recognised de facto partners in a similar way to spouses where the partner was dependant on the worker.<sup>158</sup> In South Australia, the Residential Tenancies Act 1995 and the Housing Improvement Act 1940 gave opposite-sex de facto partners the same rights as married couples in relation to some issues regarding housing.<sup>159</sup> De facto partners are exempt from paying stamp duty in Victoria in the same way as spouses,<sup>160</sup> and de facto partners in Victoria will inherit their partners' property in the same way as spouses.<sup>161</sup> This ad hoc recognition developed into comprehensive recognition, and today, de facto couples, which

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<sup>150</sup> Family Law Act 1996, s36 and s42.

<sup>151</sup> Family Law Act 1996, s30.

<sup>152</sup> For further details see Barlow and James (n3) 146-7, and Barlow and others (n148) 8-9.

<sup>153</sup> Inheritance (Provision for Family and Dependants) Act 1975, s1(1A)(1B).

<sup>154</sup> Australian Soldiers' Repatriation Act 1920 (Cth), s36.

<sup>155</sup> For further details of Commonwealth legislation which recognised de facto partners in some way see New South Wales Law Reform Commission (n11), Chapter 4.

<sup>156</sup> The Crimes (Domestic Violence) Amendment Act amended the Crimes Act 1900 (NSW).

<sup>157</sup> See New South Wales Law Reform Commission (n11) [4.9]; [14.42] notes there were slight differences of treatment – no court in NSW has 'a specific statutory jurisdiction to provide, *in civil proceedings*, a remedy in the nature of an injunction' and the Local Courts' powers did not extend to 'molestation and harassment falling short of actual or threatened violence'.

<sup>158</sup> Workers Compensation Act 1987 (NSW), s37.

<sup>159</sup> Social Development Committee *Statutes Amendment (Relationships) Bill 2004* (Parliament of South Australia, Report 21, 2005), 20.

<sup>160</sup> Duties Act 2000 (Vic), s43-4.

<sup>161</sup> Administration and Probate Act 1958 (Vic), s51.

include couples of the same- and opposite-sex, are treated almost identically to spouses under Australian law.<sup>162</sup>

### **6.3.2 Relationship breakdown provisions for informal couple relationships**

In Australia, de facto couples are subject to a discretionary statutory scheme that gives the courts powers to adjust property interests and award maintenance payments in the same way as for married couples. There is no 'divorce law equivalent'<sup>163</sup> in England and Wales, and so separating cohabitants are subject to the ordinary provisions of property and trusts law. This means there is no possibility of maintenance payments between former cohabitants,<sup>164</sup> and the court cannot adjust property interests as they can for married couples.<sup>165</sup> This position has been criticised by the Law Commission for being uncertain, illogical and complex.<sup>166</sup> An exploration of the current law proves that the Law Commission's claims are not unfounded. It will be argued that the judiciary have developed function-based recognition of cohabitants as far as they are able without statutory intervention, and this has been done because, similarly to what has happened with financial remedies for spouses,<sup>167</sup> the courts recognise that relationship generated need arises in cohabiting relationships and that an economically vulnerable partner needs family law's protection on relationship breakdown.

#### 6.3.2.1 Relationship breakdown in England and Wales

##### *6.3.2.1a Developing trusts law*

The common intention constructive trust has been developed by the courts 'in response to changing social and economic conditions'<sup>168</sup> where an increasing number of couples choose to live together without marrying. It also responds to the inadequacies of the presumed resulting trust as a vehicle for dealing with property interests, such as its failure to consider contributions other than direct financial contributions to the purchase price. The common intention

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<sup>162</sup> O Rundle 'An Examination of Relationship Recognition Schemes in Australia' (2011) 25(2) Australian Journal of Family Law 121, 123; N Witzleb 'Marriage as the 'Last Frontier'? Same-Sex Relationship Recognition in Australia' (2011) 25(2) International Journal of Law Policy & the Family 135.

<sup>163</sup> Barlow and others (n148) 9.

<sup>164</sup> Barlow and James (n3) 148.

<sup>165</sup> Matrimonial Proceedings Act 1970 as consolidated by the Matrimonial Causes Act 1973.

<sup>166</sup> See Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown – a Consultation Paper* (No 179, 2006), Part 4; Law Commission *Cohabitation* (n137) [2.4].

<sup>167</sup> See Chapter 3, 3.3.1.

<sup>168</sup> *Stack v Dowden* [2007] AC 432, [60].

constructive trust effectively originated<sup>169</sup> in the House of Lords decisions in *Pettit v Pettit*<sup>170</sup> and *Gissing v Gissing*.<sup>171</sup> The current law is found in *Stack v Dowden*<sup>172</sup> and *Jones v Kernott*.<sup>173</sup>

Whereas the starting point in marriage is equal division,<sup>174</sup> the starting point for cohabitants is to determine the parties' common intention in relation to the beneficial interests in property. Baroness Hale explained in *Stack* that 'the starting point where there is sole legal ownership is sole beneficial ownership' and 'the starting point where there is joint legal ownership is joint beneficial ownership.'<sup>175</sup> As Gardner and Davidson summarise, there are two questions for the court to ask.<sup>176</sup> In sole ownership cases, the first question is whether the claimant should have any beneficial interest in the property, which means that the claimant must be able to adduce evidence that it was the parties' common intention that they have a beneficial interest.<sup>177</sup> The claimant can rely on express agreement about the beneficial ownership to establish they have a beneficial interest,<sup>178</sup> or otherwise they can show that they made direct financial contributions to the purchase price or to the mortgage payments.<sup>179</sup> In joint legal ownership cases, there is a presumption that 'the parties intended a joint tenancy both in law and in equity'.<sup>180</sup> So for spouses, the court has the jurisdiction to adjust property interests; for cohabitants the court can only declare already existing interests in property on the basis of the parties' common intention.

If a common intention to share the beneficial interest is established, the court must then ask a second question, which is to determine in what shares the beneficial interest should be divided.<sup>181</sup> This should be answered by reference to the parties' actual intention, but if this is not possible then the court may impute an intention to achieve a fair outcome. This concept of imputing an intent to the parties has proved controversial,<sup>182</sup> but, Lord Walker and Baroness Hale explained in *Jones v Kernott* that 'the court has a duty to come to a conclusion on the

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<sup>169</sup> G Virgo *The Principles of Equity and Trusts* (2<sup>nd</sup> ed, Oxford University Press, 2016), 340.

<sup>170</sup> [1970] AC 777.

<sup>171</sup> [1971] AC 886.

<sup>172</sup> [2007] 2 AC 432.

<sup>173</sup> [2012] 1 AC 776.

<sup>174</sup> See discussion of *White v White* in Chapter 3, 3.3.1.

<sup>175</sup> *Stack v Dowden* (n168) [56].

<sup>176</sup> S Gardner and K Davidson 'The Supreme Court on Family Homes' (2012) 128(2) *Law Quarterly Review* 178, 178.

<sup>177</sup> See *Jones v Kernott* (n173) [52] (Lord Walker and Baroness Hale).

<sup>178</sup> *Gissing v Gissing* (n171).

<sup>179</sup> *Lloyds Bank v Rossett* [1990] 1 AC 107, 132-3 (Lord Bridge).

<sup>180</sup> *Jones v Kernott* (n173) (Lord Walker and Baroness Hale).

<sup>181</sup> Gardner and Davidson (n176) 178.

<sup>182</sup> *ibid* 179; see also S Gardner 'Problems in Family Property' (2013) 72(2) *Cambridge Law Journal* 301.

dispute put before it'.<sup>183</sup> When determining the beneficial interests, the court may consider 'all manner of relevant evidence' that relates to the parties' 'whole course of conduct',<sup>184</sup> including,

*...any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses.*<sup>185</sup>

#### 6.3.2.1b *The limitations of property law and the case for statutory reform*

The courts have developed the common intention constructive trust because the judiciary recognise that cohabiting relationships are qualitatively different from commercial relationships and so benefit from different treatment.<sup>186</sup> As Lord Hope notes in *Stack*, 'where the parties have dealt with each other at arms length it makes sense to start from the position that there is a resulting trust according to how much each party contributed',<sup>187</sup> but this is not an appropriate outcome for cohabitants because,<sup>188</sup>

*...cohabiting couples are in a different kind of relationship. The place where they live together is their home. Living together is an exercise in give and take, mutual co-operation and compromise. Who pays for what in regard to the home has to be seen in the wider context of their overall relationship. A more practical, down-to-earth, fact-based approach is called for in their case. The framework which the law provides should be simple, and it should be accessible.*<sup>189</sup>

This process of developing trusts law to take into account the distinctive nature of family as opposed to commercial relationships has been referred to by Hayward, building on the earlier

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<sup>183</sup> *Jones v Kernott* (n173) [47].

<sup>184</sup> *Stack v Dowden* (n168) [60].

<sup>185</sup> *ibid* [69].

<sup>186</sup> *ibid* [42] (Baroness Hale).

<sup>187</sup> *ibid* [3].

<sup>188</sup> For discussion of the inadequacies of the dismissal of the application of the presumed resulting trust in *Stack*, see R George 'Stack v Dowden – Do as we say and not as we do?' (2008) 30(1) *Journal of Social Welfare and Family Law* 49, 56-7; W Swaddling 'The Common Intention Constructive Trust in the House of Lords: An Opportunity Missed' (2007) 123(4) *Law Quarterly Review* 511.

<sup>189</sup> *Stack v Dowden* (n168) [3].

arguments of Dewar,<sup>190</sup> as ‘familialisation’; the ‘process by which’ judges ‘have modified general principles of land law or trusts to accommodate the specific needs of family members’.<sup>191</sup> Hayward explains that the decisions in *Stack* and *Jones* are significant because they ‘illustrate the judiciary intensifying their use of “familialisation”.’ *Stack* was significant because the courts’ recognised for the first time the cogent presumption that beneficial ownership should follow legal ownership,<sup>192</sup> and *Jones* explained that the rationale behind this presumption ‘was not the equitable maxim of ‘equity follows the law’, but rather recognition that a joint purchase of residential property was ‘a strong indication of emotional and economic commitment to a joint enterprise.’<sup>193</sup> Hayward argues that the development of the common intention constructive trust shows how ‘the courts are utilising the creativity of equity to further develop the trusts framework’ in a way that takes into account the nature of family relationships.<sup>194</sup> Moreover, there are indications in the *Stack* judgment, as pointed out by George, that future cases may be able to move further and that indirect financial contributions to property may be sufficient to establish beneficial ownership in sole legal owner cases.<sup>195</sup> This suggests that the process of familialisation of property law is ongoing.

Despite these developments, the law following *Stack* and *Jones* has been subject to criticism from academics, and it appears to be anything but ‘simple’ as Lord Hope explained it should be in *Stack*. For example, George notes that although *Jones* has given guidance as to ‘how the quantification process works’ in terms of deciding on the beneficial shares, it remains uncertain precisely when beneficial ownership will be different from legal title.<sup>196</sup> Mee believes that the discussion of imputed intent in *Jones* has ‘confused matters greatly without bringing any greater theoretical coherence to the common intention doctrine.’<sup>197</sup> The accessibility and affordability of the current system is also in doubt. Baroness Hale in *Stack* made the point that ‘the costs of pursuing the argument to [the House of Lords] will have been quite disproportionate’ to the worth of the property in question.<sup>198</sup>

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<sup>190</sup> J Dewar ‘Land, Law and the Family Home’ in S Bright and J Dewar *Land Law: Themes and Perspectives* (Oxford University Press, 1998).

<sup>191</sup> A Hayward ‘Family Property’ and the Process of ‘Familialisation’ of Property Law’ (2012) 24(3) *Child and Family Law Quarterly* 284, 286, quoting Dewar (n190) 327, 328 (Dewar also noted that the legislature is also part of the familialisation process).

<sup>192</sup> Hayward (n191) 297.

<sup>193</sup> *ibid* 297, quoting Lady Hale and Lord Walker in *Jones v Kernott* (n173) [19]; see also Hayward, 301.

<sup>194</sup> Hayward (n191) 299.

<sup>195</sup> George (n188) 53, referring to Baroness Hale’s comments at [2007] 2 AC 432, [63] that *Rossett* may have set the standard too high.

<sup>196</sup> *ibid* 41-2.

<sup>197</sup> J Mee ‘Inferring and Imputing in Essex’ (2012) 76 *Conveyancer and Property Lawyer* 167, 175.

<sup>198</sup> *Stack v Dowden* (n168) [85]. See also Law Commission *A Consultation Paper* (n166) [4.9].



Arguably, statutory intervention is necessary for a principled reform.<sup>199</sup> Baroness Hale in *Gow v Grant*<sup>200</sup> called for statutory reform because this ‘would be less costly and more productive of settlements as well as achieving fairer results than the present law.’<sup>201</sup> Baroness Hale felt that a statutory scheme would ‘not impose upon unmarried couples the responsibilities of marriage but [would redress] the gains and losses flowing from their relationship.’<sup>202</sup> This suggests that the contributions made by the economically weaker partner should be acknowledged on relationship breakdown. Lord Neuberger’s dissenting judgement in *Stack* cautioned against the courts developing specific property law principles for particular types of relationship because the courts develop the law on a case by case basis, whereas parliamentary reform benefits from a consultation period and ‘input from the democratically elected legislature.’<sup>203</sup> Similarly, the Law Commission noted that the courts can only develop the law as it relates to the facts of the case before them.<sup>204</sup> The Commission also criticised the current system because, ‘since the parties’ shares are to be determined by reference to their intentions, the court cannot substitute its own view of what is the fair outcome on separation.’<sup>205</sup>

#### 6.3.2.1c *The Law Commission proposals*

Due to the inadequacies of the current law, the Law Commission has recommended the introduction of a statutory scheme dealing with the financial consequences of relationship breakdown as an alternative to the current property provisions. They did not feel that cohabitants should be treated in the same way as spouses, because cohabitants ‘have not given each other the legal commitment, or accepted the status, of marriage’,<sup>206</sup> and such a scheme was likely to be ‘politically unattainable’.<sup>207</sup> Instead, they proposed the creation of a scheme that would give the courts discretion to adjust the property interests of cohabitants, but this discretion would be more limited than that available for spouses and civil partners.<sup>208</sup> The Commission felt that such an approach was necessary because,

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<sup>199</sup> But, see R Auchmuty ‘The Limits of Marriage Protection: in Defence of Property Law’ (2016) 6(6) *Onati Socio-Legal Series* 1196, for an argument that the problems facing cohabitants are not because of a lack of a family law-style scheme which applies on relationship breakdown, but rather because of gendered inequality within relationships.

<sup>200</sup> *Gow v Grant* [2012] UKSC 29; 2013 SC (UKSC) 1.

<sup>201</sup> *ibid* [47].

<sup>202</sup> *ibid* [56].

<sup>203</sup> *Stack v Dowden* (n168) [102].

<sup>204</sup> Law Commission *Cohabitation* (n137) [2.14].

<sup>205</sup> *ibid* [2.15].

<sup>206</sup> *ibid* [4.2].

<sup>207</sup> *ibid* [4.8].

<sup>208</sup> See *ibid* [4.2], [4.9-4.10].

*...hardship following separation often arises because the gains and losses arising from the parties' contributions to the relationship have not been shared fairly.<sup>209</sup> Decisions taken during the relationship about the allocation of the parties' resources or of their respective roles may leave one party in need on separation, or, if not actually in need, at least bearing an unequal share of the costs of the relationship. Equally, one party may be left with an economic gain from the relationship.<sup>210</sup>*

The Law Commission's proposals recognise that personal relationships can generate economic disadvantage for one partner and economic gain for another, and so this should be remedied by law.<sup>211</sup>

The Commission's scheme would only apply to eligible cohabitants. The Commission decided against a statutory checklist of indicia, akin to that in place in Australia, because their preferred definition of a 'living as a couple in a joint household' was, apparently, easily 'understood as a matter of plain English'.<sup>212</sup> To be eligible, the couple would need to have a child, or alternatively, must have lived together for a period of 2-5 years, to be determined by statute.<sup>213</sup> The Commission's recommendation, similarly to Baroness Hale's comments above about redressing gains and losses, was that relief would only be granted based on the economic impact of the relationship on the applicant: an eligible cohabitant would need to prove that 'qualifying contributions' made by the applicant have the effect that either, i) 'the respondent has retained a benefit', or ii) that the 'applicant has an economic disadvantage'.<sup>214</sup> A qualifying contribution is defined broadly to include non-financial contributions.<sup>215</sup> It was recommended that the court should not be able to make periodical payment orders, but should be able to award lump sum payments, property transfers, orders for sale and pension sharing.<sup>216</sup> An applicant would need to bring a case within two years of the breakdown of the relationship, unless there were exceptional circumstances that led the court to believe that an extension to this period was necessary.<sup>217</sup> The Commission recommended that an opt-out provision would

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<sup>209</sup> For further discussion, see Law Commission *A Consultation Paper* (n166) Chapter 4.

<sup>210</sup> Law Commission *Cohabitation* (n137) [4.26].

<sup>211</sup> See the discussion above, at 6.2.1, relating to the functional arguments advanced as reasons to recognise unmarried couples in different areas.

<sup>212</sup> Law Commission *Cohabitation* (n137) [3.17]. cf however where it is argued that determining whether two people are 'living as a couple' or 'living together as husband and wife' is not always straightforward; see above, 6.1.2.

<sup>213</sup> *ibid* [3.63].

<sup>214</sup> *ibid* [4.33], [8.10].

<sup>215</sup> *ibid* [4.34].

<sup>216</sup> *ibid* [4.40].

<sup>217</sup> *ibid* [4.151], [4.155].

preserve the freedom of cohabitants to make their own decisions, but that the court would have discretion to set aside the agreement if enforcing it would cause unfairness.<sup>218</sup>

Legislating for the Law Commission's proposals would be a considerable change in England and Wales because it would create a scheme applicable for the breakdown of informal relationships that is similar but more limited than that applying on divorce. Arguably, legislating for such a scheme is a logical move because cohabitants are already recognised in many areas of law because of a desire to protect the economically vulnerable partner. Providing a scheme for financial remedies, akin to the Law Commission's, could better protect that vulnerable partner on relationship breakdown than current property law provision. Implementation of the Commission's scheme however, would still leave England and Wales some way behind the well-developed Australian system.

### 6.3.2.2 Financial and property provisions on the breakdown of de facto relationships

#### *6.3.2.2a Recognising the deficiencies of property law*

It has already been mentioned that NSW was the first Australian jurisdiction to legislate for a divorce-like scheme applicable on the breakdown of de facto relationships. Several reasons were given by the NSW Law Reform Commission and the then NSW Government for legislating to provide property and financial provisions for de facto partners that were akin to those available for spouses.<sup>219</sup> They believed that ordinary principles of trust and property law were inadequate in dealing with disputes between de facto partners,<sup>220</sup> which are the same concerns as those expressed in England and Wales.<sup>221</sup> Property law could not fully take into account the nature of the relationship between the parties, because the focus of property law was only on the legal title to property. The only way of adjusting interests in property was if direct financial contributions to the purchase price had been made by the non-owning partner and so a resulting trust would arise, or if it was possible to establish the 'common intention' of the partners that both should have a share in the property.<sup>222</sup> The law did not fully take into account non-financial contributions, such as caregiving and homemaking, which could lead to injustices.<sup>223</sup> Similarly to the calls for reform by the English judiciary, the NSW Law Reform Commission noted that the

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<sup>218</sup> *ibid* [5.15], [5.17], [5.61].

<sup>219</sup> See also above, 6.1.1.

<sup>220</sup> NSW Legislative Assembly Deb 17 October 1984, 2001 (David Paul Landa, Attorney General). See also New South Wales Law Reform Commission (n11) [8.5]; M Evans 'De Facto Property Disputes: The Drama Continues' (1987) 1(3) *Australian Journal of Family Law* 234, 234-248.

<sup>221</sup> See above, 6.3.2.1a and 6.3.2.1b. See also R Chisholm 'De Facto Relationships in New South Wales' (1986) 1(1) *Australian Journal of Family Law* 87, 88.

<sup>222</sup> See New South Wales Law Reform Commission (n11) Part 7.

<sup>223</sup> *ibid* [5.9], [7.31].

deficiencies of the law in this area 'prompted sustained judicial criticism of a kind which [was] unusual in Australia.'<sup>224</sup> For example, Hope JA in *Muschinski v Dodds*<sup>225</sup> noted that there was 'a need for reform of the law... along the lines adopted in the family law legislation upon the breakdown of the marriage,' because the problem was 'a growing one' which 'the courts [would] not be able to solve by themselves'.<sup>226</sup>

Additionally, and unlike the Law Commission's limited proposals, extending some provision for maintenance akin to that available for married couples was also seen as necessary. Chisholm notes that this was controversial because, on the one hand, there were 'arguments to the effect that such a law perpetuates the dependent status of women', and, on the other there were arguments that maintenance could protect the (female) economically weaker partner and protect her from exploitation.<sup>227</sup> The NSW Law Reform Commission felt that limited maintenance payments should be available for de facto partners upon relationship breakdown, because failing to do so could cause 'serious injustice by failing to provide a means, even on a temporary basis, of alleviating financial hardship caused by the breakdown of a de facto relationship.' The NSW Commission focussed on the situation where financial needs arise that 'are attributable to the relationship' such as in a case 'where a woman cannot support herself adequately because of her responsibilities to care for children'.<sup>228</sup> The NSW Commission's proposals were implemented in NSW in 1984<sup>229</sup> and provided a basis for reforms in the other states and territories. These state laws then provided a template for the federal law provisions that have now superseded state law in all states and territories except Western Australia.

#### 6.3.2.2b *The preliminary requirements*

Before a court will consider granting property or financial orders, there are several hurdles to pass. Firstly, the applicant must prove that a de facto relationship existed between the parties, and that it has broken down,<sup>230</sup> and as shown above, this is not always an easy task. Next, there

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<sup>224</sup> *ibid* [5.10].

<sup>225</sup> *Muschinski v Dodds* (1982) 8 Fam LR 622.

<sup>226</sup> *ibid* 629. See also New South Wales Law Reform Commission (n11) [5.11].

<sup>227</sup> Chisholm (n221) 90.

<sup>228</sup> New South Wales Law Reform Commission (n11) [8.5].

<sup>229</sup> De Facto Relationships Act 1984 (NSW) (later renamed the Property (Relationships) Act 1984 (NSW) by the Property (Relationships) Legislation Amendment Act 1999 (NSW), sch 1[2]).

<sup>230</sup> The onus of proving the existence of a de facto relationship rests with the party who applies to the court for property and maintenance orders: *Locke v Norton* (n68) [13] (Rees J).

are certain geographical requirements to satisfy,<sup>231</sup> and additionally, one of four gateway requirements<sup>232</sup> must be met:<sup>233</sup>

- The ‘period, or the total of the periods, of the de facto relationship is at least 2 years’ (this does not have to be a continuous two year period),<sup>234</sup>
- There is a child of the de facto relationship;<sup>235</sup>
- The applicant has made ‘substantial contributions’, and a failure to make an order ‘would result in serious injustice’: this includes financial or non-financial contributions made directly or indirectly to the acquisition, conservation or improvement of property, or contributions made to the welfare of the family, including as a homemaker or parent;<sup>236</sup>
- The relationship is, or was, registered in one of the states or territories.<sup>237</sup>

It is argued here that the fact that ‘substantial contributions’ (that one partner has made a gain at the others’ expense) is sufficient reason for the court to consider granting property or financial orders suggests that the need to protect a partner and prevent exploitation is a central objective of the legislation.

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<sup>231</sup> Family Law Act 1975 (Cth), s90SD (financial provision) and s90SK (property provision): a couple must be ‘ordinarily resident’ in a ‘participating jurisdiction’, that is a territory or a referring state, at the time the application is made to the court. They must also have resided in a participating jurisdiction for at least one-third of the relationship, or alternatively that the party applying for an order has made substantial contributions to property, or substantial contributions as a homemaker or parent whilst residing in a participating jurisdiction.

<sup>232</sup> This is a term borrowed from the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 – Explanatory Memorandum, [121]. See also G Watts ‘De facto relationships legislation’ (2009) 23(2) Australian Journal of Family Law 122, 126-7.

<sup>233</sup> The situation is similar in Western Australia, although whether the relationship is registered is irrelevant in that jurisdictions: Family Courts Act 1997 (WA), s205Z.

<sup>234</sup> See Family Law Act 1975 (Cth), s90SB(1). It need not be a continuous two year period – see Kovacs (n28) 107; see also *Hamblin v Dahl* [2010] FMCAfam 514.

<sup>235</sup> A child of the de facto relationship is defined in s90RB of the Family Law Act 1975 (Cth): ‘a child is a *child of a de facto relationship* if the child is the child of both of the parties to the de facto relationship.’

<sup>236</sup> Family Law Act 1975 (Cth), s90SM(4). For an example see *Spencer v Speight* (n91) [172-4] (Benjamin J), where the applicant had made ‘substantial contributions’ in the form of financial arrangements to contribute money to the respondent’s mortgage account, despite the relationship being of 17 months duration.

<sup>237</sup> Family Law Act 1975 (Cth), s90SB(d). The definition of de facto relationships is not uniform in all areas of Australian law. Under the Family Law Act 1975 (Cth), registration of a relationship is to be taken into account when assessing whether a relationship is a de facto relationship; and then if a de facto relationship is found there are no other gateway requirements that need to be met. In other areas of federal law however registration of a de facto relationship is conclusive proof of the existence of the relationship: see Acts Interpretation Act 1901 (Cth), s2D-2E.

### 6.3.2.2c Property and maintenance orders

The court will only grant an order if it is 'just and equitable' to do so.<sup>238</sup> The court can adjust interest in *any* property owned by either de facto partner, including the possibility of superannuation (or pension) splitting:<sup>239</sup> this is in sharp contrast to the approach in England and Wales where a cohabitant must prove ownership of an asset, because all the courts are able to do is declare already existing interests in the property of unmarried couples.<sup>240</sup> Applications should be made within two years of the breakdown of the relationship,<sup>241</sup> but there is flexibility to grant leave to apply after this period if the court is satisfied that hardship would be caused to the party or to a child if no orders were made; or in maintenance issues, if the party would be unable to support themselves without the aid of 'an income tested pension, allowance or benefit.'<sup>242</sup> This again suggests that the need to protect an economically weaker partner is an objective of the provision.

The original provisions of some states and territories took a similar approach to that of the Law Commission in England and Wales by purposively differentiating between de facto and married couples. For example, in NSW and the Northern Territory, the courts could only consider the past contributions of the parties and could not consider their future needs when determining property interests. Maintenance payments were not available in Queensland or South Australia, and the maintenance provisions elsewhere were more limited than those for spouses. So, in NSW and the Australian Capital Territory, maintenance orders were only granted if there was a child under 12 that the applicant cared for, or, if the applicant was unable to support themselves because their 'earning capacity has been adversely affected by the circumstances of the relationship' and that maintenance would enable them to undertake

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<sup>238</sup> Family Law Act 1975 (Cth), s90SM(3). The same is true in Western Australia: Family Courts Act 1997 (WA), s205ZG(3).

<sup>239</sup> Family Law Act 1975 (Cth), Part VIII B. Property does not include superannuation in Western Australia.

<sup>240</sup> This is pointed out by George (n188) 58.

<sup>241</sup> Within the 'standard application period': Family Law Act 1975 (Cth), s44(5). If an application is not made within two years, or if there are no exceptional circumstances which will allow the court to consider the claim out of time, then state and territory property law provisions will be the only provision available: see Watts (n232) 135.

<sup>242</sup> Family Law Act 1975 (Cth), s44(6). The situation is the same in Western Australia: Family Courts Act 1997 (WA), s205ZB-205ZC.

training. Maintenance was intended to be a short-term measure, coming to an end either when the child reached 12 years of age,<sup>243</sup> or within 3-4 years of the order being made.<sup>244</sup>

Following the federal reforms, the provision for the breakdown of de facto relationships is identical to that for married couples. In determining whether to adjust interests in property, the courts may consider the future needs and financial capacity of the parties, as well as their past contributions to the relationship.<sup>245</sup> Maintenance orders are now available in the same way as for spouses where a partner is unable to support themselves adequately due to the care and control of a child under 18, if they are unable to work due to 'age or physical or mental incapacity', or for 'any other adequate reason.'<sup>246</sup> Theoretically, it is possible that a maintenance order could impose a life-long obligation to support a former de facto partner.<sup>247</sup> The changes made under the federal provisions ensure that the law can better protect an economically vulnerable partner on relationship breakdown because of the possibility of considering the future needs of the parties as well as the changes made to the maintenance provision, at least where the other partner is able to support them following relationship breakdown, and are consistent with the federal government's intention to treat de facto and married relationships equally.<sup>248</sup>

To respect individual autonomy and choice, the Australian system allows de facto couples to opt-out of the courts' jurisdiction on relationship breakdown.<sup>249</sup> For these financial agreements to be valid in Australia, both parties must obtain independent legal advice, so that they understand the effect, advantages and disadvantages of entering into such an agreement.<sup>250</sup> An opt-out provision has the benefit of allowing legally aware de facto couples to opt-out of the legislative system and make their own arrangements; but function-based

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<sup>243</sup> According to Barrie John Unsworth (Minister for Transport and the Vice-President of the Executive Council) the decision was made to cease maintenance payments after a child turned 12 because this was the age at which a child would attend secondary school, and the 'impact of child care responsibilities diminishes' and it becomes easier for the parent to enter the workforce: NSW Legislative Council Deb 31 October 1984, 2888.

<sup>244</sup> Property (Relationships) Act 1984 (NSW), s27, s30; Domestic Relationships Act 1994 (ACT), s22.

<sup>245</sup> Family Law Act 1975 (Cth), s79, s90SM: this section also allows the court to take into account any matters which are listed in s90SF relating to maintenance where they are relevant. This is the same in Western Australia: Family Courts Act 1997 (WA), s205ZG.

<sup>246</sup> Family Law Act 1975 (Cth), s90SF. The same is true in Western Australia: Family Courts Act 1997 (WA), s205ZD.

<sup>247</sup> Kovacs (n28) 111.

<sup>248</sup> See above, 6.1.1.

<sup>249</sup> The same is true in Western Australia: see Family Courts Act 1997 (WA), Part 5A, Division 3.

<sup>250</sup> Family Law Act 1975 (Cth), s90UJ: de facto partners and spouses are treated identically in this area. For the provision for spouses see s90G. State and territory provision also allowed for an opt-out provision. For a rationale for this, see for example, NSW Legislative Assembly Deb 17 October 1984, 2003 (David Paul Landa, Attorney General); New South Wales Law Reform Commission (n11) [5.57].

recognition remains as a safety net for those people who are not aware of the legal consequences of their relationship practices but may benefit from legal recognition on the breakdown of the relationship.

### 6.3.3 A social status for informal couple relationships?

Whilst function-based recognition generates a *legal* status,<sup>251</sup> because the law treats cohabiting and de facto relationships as a particular class and bestows legal consequences on the relationships, it is less clear whether a *social* status is created. Perhaps there is a recognised social status of cohabitant in England and Wales, even if it is based on the mistaken belief in a status of a common law marriage.<sup>252</sup> But, arguably, any social status of cohabitant is going to be viewed as inferior to the social status of marriage: chapter one noted that although cohabitation is becoming an acceptable and valued family form in England and Wales, with 66% of people seeing little difference between being married and cohabiting, 59% of people believed that marriage is the best kind of relationship.<sup>253</sup> The development of relationship recognition in Australia suggests that even though there is a distinct legal status of de facto relationship, and that, according to Graycar and Millbank, a de facto relationship is an accepted social concept,<sup>254</sup> there is something lacking about function-based recognition when compared with form-based recognition in a symbolic sense. Despite the substantive equality between de facto and married relationships (in that they are treated in virtually identical ways by the law), the form-based registration options were introduced partly on the basis of symbolic reasons,<sup>255</sup> and the fight for marriage equality continues.<sup>256</sup> Formal recognition of a relationship is significant because it allows couples to attach a label to the relationship that enables other people to understand that it is a significant family relationship.<sup>257</sup> While function-based frameworks of recognition can generate a social status, there is something symbolically significant about formalised relationships, especially marriage, relating to family display which, it seems, function-based recognition cannot replicate.

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<sup>251</sup> Legal status was defined in Chapter 2, 2.2.1.3 as a 'condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities. Such, for example, are the status of married persons'.

<sup>252</sup> cf Chapter 1, 1.2.1. For a discussion of the pervasiveness of the common law marriage myth see Barlow and others (n148) Chapter 3.

<sup>253</sup> Chapter 1, 1.2.1.

<sup>254</sup> Graycar and Millbank 'The Bride Wore Pink' (n9) 233; and Graycar and Millbank 'From Functional Family' (n32) 128.

<sup>255</sup> Chapter 4, 4.3.1.

<sup>256</sup> Chapter 3, 3.2.1.5.

<sup>257</sup> See Chapter 4, 4.3.1.



## **6.4 Conclusion**

This chapter has confirmed the suggestions in chapter two<sup>258</sup> that form- and function-based recognition are similar in some ways, namely that both approaches generate a legal status and respect choice and autonomy. But, the chapter has also showed that function-based recognition is not without its challenges. Function-based recognition is inherently uncertain because it must be demonstrated to a third party that a relationship is of a certain quality and performs particular functions before it will be legally recognised, which stands in sharp contrast to the administrative efficiency of form-based recognition. But, an analysis of case law interpretations of the Australian de facto relationships suggests that a flexible (uncertain) system reduces the chance of function-based recognition becoming overly exclusive, because there is flexibility for the courts to take into account a variety of living arrangements. It has also been suggested that a different, inferior, social status attaches to the informal relationships than that which attaches to marriage.

But, the administrative efficiency and symbolism of form-based relationships is not a reason to abandon further consideration of function-based recognition. It has also been made clear that function-based recognition offers the benefit of operating as a safety net because there is no need to opt-in for legal recognition of the relationship, which potentially means that function-based recognition is best placed to protect the economically weaker partner on relationship breakdown. The desire to bring functionally similar relationships under family law's protection has so far proved influential in developing marriage as well as the registered couple *and* caring relationships, and the moderate function-based system. As such, it is necessary to further explore the potential of function-based frameworks to be used in ways that respond to family diversity that could bring more family relationships under family law's protection. No such reforms have taken place in England and Wales, and so the Australian attempt at a radical function-based reform will be the subject of the next chapter.

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<sup>258</sup> For a summary, see Chapter 2, 2.4

## **Chapter 7 – Informal caring relationships: the “radical” function-based approach**

This chapter explores what is referred to in the thesis as radical function-based recognition.<sup>1</sup> England and Wales has not developed such a system,<sup>2</sup> and so the focus of this chapter will be on the provision for what will be collectively referred to as the ‘informal caring relationships’ in New South Wales (NSW), the Australian Capital Territory (ACT), Tasmania and South Australia (SA). The chapter will argue that the informal caring relationships are, paradoxically, best described as a conservative attempt at a radical reform. An analysis of the caring relationships and the rationales advanced to justify their introduction suggests that there is a reluctance to move beyond the marriage model and a reluctance to think about family in non-traditional ways.

The discussion will be divided into three sections. Firstly, a discussion of the legal structure of the caring relationships will show that function-based recognition is flexible because it can provide for family diversity, but that the structure of the caring relationships is not that different from the structure of marriage. It will also confirm the findings of the last chapter that function-based recognition is uncertain, and will suggest that this uncertainty is exacerbated when recognition moves beyond the most marriage-like of relationships. Secondly, the rationales behind the caring relationships will be analysed. This will show that, similarly to the findings of chapter five, mixed reasoning lay behind the reforms, but it is likely that the true rationale was to appease opponents of same-sex relationship recognition reforms. Thirdly, the discussion will show that while the caring relationships generate a legal status, there is no evidence that they generate a social status. The conclusion suggests that the lack of principled reasoning behind the reforms means that the reforms have not been particularly radical, and therefore only hint at the potential of function-based recognition to be used in radical ways to respond to family diversity.

### **7.1 What are the ‘caring relationships’?**

The last chapter showed that function-based recognition is inherently uncertain, and that defining marriage-like relationships is no easy task. In light of this, it is necessary to explore

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<sup>1</sup> See Chapter 2, 2.3.3.2.

<sup>2</sup> For a discussion of the position of those in ‘carer’ relationships under private law, see B Sloan *Informal Carers and Private Law* (Hart Publishing, 2013). Sloan, p3, uses the UK Government’s definition of ‘carer from the Department of Health ‘Carers at the heart of 21<sup>st</sup> Century Families and Communities: ‘A Caring System on your Side. A Life of your Own’ (Department of Health, 2008), 19: ‘A carer spends a significant proportion of their life providing unpaid support to family or potentially friends. This could be caring for a relative, partner or friend who is ill, frail, disabled or has mental health or substance misuse problems’. As will be made clear, the ‘caring relationships’ under discussion in this chapter are not necessarily confined to ‘carer’ relationships as used by Sloan.

how the Australian jurisdictions have defined the caring relationships through legislation, and how judges have interpreted these definitions. This will show that the uncertainty of function-based frameworks is exacerbated when the 'type' of relationship under question is different from the marriage-like couple, because the caring relationships are a new legal creation. This is important for the thesis because one of the main differences between form-based and function-based approaches is the way legal recognition is triggered: as long as the legal structure (and particular formalities) is complied with, a formalised relationship will be valid, whereas the structure *and* quality of a relationship must be proved for legal recognition under a function-based system.

### **7.1.1 The difficulties of definition**

One reason why only four Australian jurisdictions have created radical function-based frameworks of relationship recognition is the difficulties associated with defining informal relationships. For example, at one point, the Queensland Law Reform Commission felt that reforms were necessary in the area of property division upon relationship breakdown to cater for relationships between unmarried 'home sharers' because of the inadequacies and complexities of property law.<sup>3</sup> They gave some examples to illustrate when such difficulties may arise, such as the case of the 'spinster daughter' who has lived with and cared for her elderly mother for 20 years, and gave up her job to commit to her caring responsibilities, but will later face hardship when the mother 'orders her to leave the house'. Another example was of a grandmother who contributed towards the purchase price of a property with her son and daughter-in-law and who cared for the grandchildren, but the relationship later breaks down and she is not reimbursed for her contributions.<sup>4</sup> The significance of this point will become clearer throughout the chapter, but for now it should be noted that the Commission's focus was on traditional family relationships between blood relatives and relations created through marriage, and not on any broader concept of family. The Commission, however, encountered difficulties defining 'sharer' in a way that would allow deserving claims while preventing 'frivolous or unmeritorious' ones.<sup>5</sup> The subsequent consultation provided no appropriate

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<sup>3</sup> Queensland Law Reform Commission *Shared Property: Resolving Property Disputes between People Who Live Together and Share Property* (WP No 36, 1991), 1-3. cf Law Commission *Sharing Homes: A Discussion Paper* (2002), [1.2].

<sup>4</sup> Queensland Law Reform Commission *Shared Property* (n3) 14.

<sup>5</sup> *ibid* 15.

solution to this difficulty, and consequently the proposals for reform were limited to consideration of informal de facto relationships.<sup>6</sup>

The task of defining caring relationships may be even more difficult than defining cohabiting and de facto relationships, because whilst legislators and judges had popular ideas of what constitutes a marriage-like relationship to draw from to define a de facto relationship, a caring relationship has no such template to follow. As predicted in chapter two, careful deliberation of how to draw the boundaries is important: function can be too exclusive if the parameters are so tightly drawn that not many relationships would qualify, and can also be too inclusive if the parameters are so wide as to grant legal recognition in inappropriate situations. Willmott, Mathews and Shoebridge offer the hypothetical scenario of a woman who aids her elderly neighbour by cleaning his house and doing his weekly shopping without payment. Prior to this, the neighbour assisted the woman by mowing her lawn free of charge. The authors suggest that this relationship may be considered a caring relationship in some jurisdictions, but, that there are no ‘compelling social justice arguments’ to suggest that this neighbour relationship should be legally recognised.<sup>7</sup> This suggests that it is not the mere performance of a function that is important, but rather the motivation behind it. As the then ACT Attorney General put it,

*...the essential element we are looking for to make a relationship a real domestic relationship... is either deep personal affection or love. But it is, of course, extraordinarily difficult to put those sorts of terms into legislation.*<sup>8</sup>

To think of it in another way, it is the ‘family’ in ‘family practices’ that gives those practices significance, or, as Smart says, it is the motivation behind our actions that makes them meaningful.<sup>9</sup> This suggests that policymakers face a difficult task of ensuring that only those

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<sup>6</sup> Queensland Law Reform Commission *De Facto Relationships* (WP No 40, 1992), 4, 14. The final report (Queensland Law Reform Commission *De Facto Relationships* (No 44, 1993)) only discussed proposals for reform for both opposite- and same-sex de facto couples, and did not include any other form of domestic relationship.

<sup>7</sup> L Willmott, B Mathews and G Shoebridge ‘Defacto Relationships Property Adjustment Law – A National Direction’ (2003) 17(1) Australian Journal of Family Law 1, 21.

<sup>8</sup> ACT Legislative Assembly Deb 19 May 1994, 1803 (Mr Humphries). See also the comments of Stone J in *McKenzie v Storer* [2007] ACTSC 88, [66]: ‘Having regard to the Attorney-General’s comment to the Assembly that you “look for the motivation” when determining whether a relationship qualifies as a domestic relationship, I am satisfied that the defendant was motivated by feelings of friendship, sympathy and charity. I am also satisfied that, initially at least, the plaintiff was grateful to the defendant, and... felt that the defendant’s act was that “of a true friend”. It is notable that, the defendant’s closing submissions assert that the parties entered into their arrangements “as friends, or almost as family”.

<sup>9</sup> See Chapter 1, 1.3.2.2a.

relationships that are intended to be captured by the provision are legally recognised to ensure that legal recognition does not become overly intrusive.

### 7.1.2 The legal structure of the caring relationships

Prima facie, the caring relationships are indicative of a radical change in Australian frameworks of relationship recognition. Summerfield claims in the ACT context that creating 'domestic relationships', the ACT term for a caring relationship, was a radical move because it 'mark[ed] a departure from' a focus on relationship type 'in favour of a consideration of character.'<sup>10</sup> Similarly, Millbank and Sant in the NSW context suggest that one way to view the reforms was that they have radically transformed family law because,

*...the concept of a domestic relationship is in some senses a radical departure from traditional laws about the family, because it redefines family obligations around love, interdependence and choice, rather than blood and marriage or 'marriage-like' relationships. In doing this it arguably destabilises heterosexuality and the hetero-nuclear family.<sup>11</sup>*

The reforms should not, however, be viewed as particularly radical because, as will become apparent, an attempt to legislate for something different has led to the creation of a revised marriage model of relationship.

There are many similarities between the definitions adopted in the different jurisdictions. They all focus on the same relationship type, or relationship structure, that of the relationship between two adults, regardless of whether they are related, subject to evidence that the relationship exhibits particular characteristics. The focus remains on dyadic relationships, which follows the legal structure of marriage. The rationale behind this focus on dyadic relationships rather than networks of care is unclear. Nicholson J in the SA case of *Taddeo v Taddeo*<sup>12</sup> questioned this requirement, and asked why an unemployed son who remains living with his mother or father could be found to have formed a caring relationship with that parent; but, if the adult son had remained living with both parents then there would be no caring relationship between all three of them.<sup>13</sup> Perhaps the reason for this limitation is practical, to reduce the number of relationships that may be considered as caring relationships. Alternatively, it may be

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<sup>10</sup> T Summerfield 'Understanding the Law of the Family: A Question of Practice not Interpretation' (2002) 11(1) Griffiths Law Review 44, 47.

<sup>11</sup> J Millbank and K Sant 'A Bride in her Every-Day Clothes: Same Sex Relationship Recognition in NSW' (2000) 22(2) Sydney Law Review 181, 203.

<sup>12</sup> [2010] SADC 61.

<sup>13</sup> *ibid* [69].

a result of the complex rationales behind the reforms, which will be discussed below,<sup>14</sup> and signify a reluctance to move away from the marriage model and to think about family in non-traditional ways.

Another similarity in the legal structure of the caring relationships is that relationships in which care and support are provided for a fee, as a part of an employment relationship or on behalf of a government organization, will not be recognised as a caring relationship.<sup>15</sup> This operates as a way of limiting the number of relationships that may be recognised, and means that the motivation behind the giving of care and support is central: performing functions because you are paid to do so is qualitatively different from the performance of a function motivated by love, commitment or a sense of obligation.

The caring relationships must fit a particular structure – a relationship between two adults, regardless of whether they are related, and that care is not provided for a fee. But, with function-based recognition this is only part of what the parties must establish before the relationship will be legally recognised, because they must also go on to prove that the relationship performs particular functions. The following table shows that the jurisdictions have defined their caring relationship category in slightly different ways:

Table 3 –

Jurisdiction	Nomenclature	Definition
ACT	Domestic relationship	'a personal relationship between two adult persons in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other' <sup>16</sup>
NSW	Close personal relationships	'...between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care' <sup>17</sup>

<sup>14</sup> For discussion, see below 7.2.

<sup>15</sup> Domestic Relationships Act 1994 (ACT), s3(2); Property (Relationships) Act 1984 (NSW), s5(2); Relationships Act 2003 (Tas), s5(2); Family Relationships Act 1975 (SA), s11.

<sup>16</sup> Domestic Relationships Act 1994 (ACT), s3(1).

<sup>17</sup> Property (Relationships) Act 1984 (NSW), s5(1)(b), as amended by the Property (Relationships) Legislation Amendment Act 1999 (NSW), sch 1 [9].

Tasmania	Caring relationships	'...a relationship... between two adult persons whether or not related by family, one or each of whom provides the other with domestic support and personal care' <sup>18</sup>
SA	Domestic partners <sup>19</sup>	'...a person is... a domestic partner if he or she is... living with that person in a close personal relationship' <sup>20</sup> '...a close personal relationship means the relationship between two adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis...' <sup>21</sup>

Chapter six showed that function-based recognition is inherently uncertain. But, it is submitted that a uniform approach towards defining the informal caring relationships may help reduce the inherent uncertainty of function-based recognition, and would be valuable because the courts could benefit from case law interpretations of caring relationships from other jurisdictions.<sup>22</sup>

To get an understanding of the types of activities that are sufficient to fulfil these definitions and prove that a caring relationship exists, it is necessary to further explore the different definitions.

### 7.1.3 An overview of the caring relationships

The ACT was the first jurisdiction in Australia to legally recognise caring relationships by creating the legal status of 'domestic relationship', which includes both opposite- and same-sex de facto relationships, *and* caring relationships within the same provision.<sup>23</sup> The ACT provision does not require parties to live together, but does require the presence of two other elements: 'personal or financial commitment' must be provided as well as 'support of a domestic nature for the material benefit of the other'. Financial commitment is straightforward and refers to

<sup>18</sup> Relationships Act 2003 (Tas), s5(1).

<sup>19</sup> It is worth noting that the South Australia 'Law Handbook' refers to domestic partners as 'companion relationships', further adding to the complexity of the current position: <<http://www.lawhandbook.sa.gov.au/ch21s05s07.php>> accessed 4/10/16.

<sup>20</sup> Family Relationships Act 1975 (SA), s11A, as amended by Statutes Amendment (Domestic Partners) Act 2006 (SA), s5.

<sup>21</sup> *ibid.*

<sup>22</sup> See, *Taddeo v Taddeo* (n12) [72] (Nicholson J): 'However, each of the interstate Acts is in terms quite different from those of the South Australian legislation and therefore the interstate authorities can only be of limited assistance.'

<sup>23</sup> For discussion of the ACT's 'domestic relationships' see J Millbank 'Domestic Rifts: Who is using the Domestic Relationships Act 1994 (ACT)?' (2000) 14(3) Australian Journal of Family Law 163.

financial matters such as a joint mortgage.<sup>24</sup> Personal commitment refers to non-financial contributions such as caring for an ill partner, completing household tasks<sup>25</sup> or where one party helps the other to renovate property or aiding with business matters.<sup>26</sup> Domestic support includes matters such as homemaking and having a relationship with a partner's children<sup>27</sup> whereas for the 'material benefit' of another simply means that the contributions are 'significant or important' to the recipient.<sup>28</sup> Neither the personal or financial commitment nor the domestic support need be reciprocal; it is sufficient that only one party provides them for the benefit of the other.<sup>29</sup>

The NSW provision is narrower than that of the ACT, because NSW requires the parties to live together and one or the other must provide both 'domestic support' and 'personal care'. During the parliamentary debates the then Attorney General suggested that domestic support consists of 'household shopping, cleaning, laundry and like activities' while personal care consists of 'assistance with mobility, personal hygiene and generally ensuring the physical and emotional comfort of one or both parties for the other.'<sup>30</sup> This suggests that financial contributions sufficient to prove 'financial commitment' in the ACT would not be considered as relevant circumstances in NSW. The Tasmanian approach is similar to that of NSW, in that one or both of the parties need to prove that 'domestic support and personal care' were provided, although partners to caring relationships in Tasmania, in the same way as partners to domestic relationships in the ACT, do not have to live together to be legally recognised. Some of the differences between the three jurisdictions, such as whether financial contributions are sufficient evidence of a caring relationship, may be attributable to the fact that the jurisdictions focus on different relationship types: the NSW and Tasmanian provisions focus on the provision of care between non-sexual partners, whereas the ACT focusses on interdependency within any unmarried relationship, including both caring and de facto relationships in the one provision.

The SA provision is noticeably different and narrower than the others because the parties must 'live together as a couple on a genuine domestic basis'.<sup>31</sup> This is similar to the provision for

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<sup>24</sup> *McKenzie v Storer* (n8) [55] (Stone J).

<sup>25</sup> *Brady v Harris* [2012] FamCA 420, [100] (Faulks DCJ).

<sup>26</sup> *Bullivant v Holt* [2012] FamCA 134, [21-37] (Faulks DCJ).

<sup>27</sup> *ibid* [38-53] (Faulks DCJ).

<sup>28</sup> *ibid* [70, 73] (Faulks DCJ).

<sup>29</sup> *ibid* [16] (Faulks DCJ).

<sup>30</sup> NSW Legislative Council Deb 13 May 1999, 229 (JW Shaw, Attorney General and Minister for Industrial Relations).

<sup>31</sup> In *Taddeo v Taddeo* (n12) [72] Judge Nicholson pointed out that the authorities from the other jurisdictions which concerned the informal caring relationships were 'in terms quite different from those



de facto relationships,<sup>32</sup> but the requirement of living ‘as a couple’ for SA’s ‘domestic partners’ does not require a sexual relationship.<sup>33</sup> Living ‘as a couple’ has been interpreted by Judge Nicholson in *Taddeo* to mean that two people ‘voluntarily join together... to form a new relationship of mutual support and dependence’,<sup>34</sup> and that this requirement may operate to prevent unmeritorious claims.<sup>35</sup> The finding of a domestic partnership is to be determined on a ‘case by case basis’,<sup>36</sup> which does little to provide certainty in this function-based system. A ‘domestic partnership’ is ‘intended to be closer in concept to that of a *de facto* relationship (albeit, absent the need for any “romantic” element)’ than the similar provisions in the other jurisdictions.<sup>37</sup>

In addition to the definitions, and similarly to the approach under the de facto legislation,<sup>38</sup> the Tasmanian and SA provision provide a list of circumstances for the court to consider in determining the existence of a caring relationship.<sup>39</sup> Both jurisdictions provide similar lists, which include the following non-exhaustive indicia:

- The duration of the relationship;
- The nature and extent of common residence;
- The degree of financial dependence or interdependence, and any arrangements for financial support;
- The ownership, use and acquisition of property;
- The degree of mutual commitment to a shared life;
- The performance of household duties;

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of the South Australian legislation and therefore the interstate authorities can only be of limited assistance.’

<sup>32</sup> Chapter 6, 6.1.2.

<sup>33</sup> See *Taddeo v Taddeo* (n12) [64].

<sup>34</sup> *ibid* [67].

<sup>35</sup> *ibid* [69-71].

<sup>36</sup> *ibid* [73].

<sup>37</sup> *ibid* [79].

<sup>38</sup> See Chapter 6, 6.1.2.

<sup>39</sup> The NSW Law Reform Commission recommended in 2006 that the NSW legislation be amended to contain a similar list of indicia to that used in Tasmania, and later in SA. The Commission felt this step would act ‘as a safeguard against trivial claims being brought’, presumably because the lists provides signposts as to the relevant characteristics a relationship needs to possess to be classified as a caring relationship. These recommendations were not acted upon by the NSW government who chose to create a ‘relationships register’ for de facto relationships and did not take forward any of the other recommendations made by the Commission. See New South Wales Law Reform Commission *Relationships* (Report No 113, 2006), [3.23], Recommendation 12. A Head ‘The Legal Recognition of Close Personal Relationships in New South Wales’ (2011) 13 *Flinders Law Journal* 53, 60 notes incorrectly that the Commission recommended not amending the definition of a ‘close personal relationship’.

- The reputation and public aspects of the relationship.<sup>40</sup>

The SA list additionally includes the indicia of the ‘care and support of children’, which suggests that the reforms were lacking in principle as this seems to be a factor relevant for de facto relationships.

Further analysis of the caring relationships is necessary to show how a radical function-based approach works in practice and how the different elements of the definitions have been interpreted by judges. This is difficult in the ACT, Tasmania and SA however as there are so few cases involving caring relationships, and this makes it difficult to ascertain which functions and characteristics of a relationship will be sufficient to satisfy the definitions. NSW is the jurisdiction that has the most case law interpreting the meaning of ‘close personal relationships’, and so these cases will be explored to see how this category is used and how the definitions are interpreted in practice. This will show that the courts have gradually expanded on the definition of a ‘close personal relationship’, which, in turn, has expanded on the type of relationship that can be included under the provisions.

#### 7.1.3.1 NSW’s ‘close personal relationships’

Close personal relationships (CPR) require parties to prove that their relationship meets three indicia: 1) that they were living together; and that one or both parties provided the other with both 2) domestic support; and 3) personal care. This definition has been subject to criticism from academics. For example, Millbank and Sant were critical of the requirement that parties to a CPR must live together because this means that the legislation would not be able to ‘achieve its objectives, for example, passing an intestate’s estate to those whom the intestate would most likely wished it passed to, or a deceased workers’ entitlements on to their dependants - because the law is constrained by categories that are not flexible or purposive in their operation.’<sup>41</sup> These concerns have not played out in practice, because the NSW judiciary have taken a flexible approach towards interpreting the legislative provision: the issue in NSW is that the category of CPR has been expanded in such a way as to exacerbate the uncertainty that is already inherent in function-based frameworks of relationship recognition.

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<sup>40</sup> See Relationships Act 2003 (Tas), s5(5); Family Relationships Act 1975 (SA), s11B.

<sup>41</sup> Millbank and Sant (n11) 212.

### 7.1.3.1a *The first case: Dridi v Fillmore*

In *Dridi v Fillmore* in 2001<sup>42</sup> the parties had met through an escort agency and commenced a sexual relationship, and later lived together in the defendant's home.<sup>43</sup> Master Maccready, as he then was, noted that there were no difficulties establishing that the parties 'lived together' in this case because all that was necessary was for them to have 'shared accommodation together'. Living together for a CPR does not require 'a sharing of food or eating arrangements' as would be the case for de facto partners who would need to 'live together as a couple'.<sup>44</sup> 'Domestic support' was also easily established with factors such as providing 'free accommodation and meals' being sufficient. Master Maccready also gave other examples of what may constitute domestic support that were not present in *Dridi*, which were 'shopping for both parties' and 'washing clothes'.<sup>45</sup> There was no evidence in this case that either party had provided 'personal support':

*...I would not have thought that matters such as "emotional support" would by themselves have fallen within the composite expression. The expression seems to be directed to a different level of reality such as assistance with mobility, personal hygiene, and physical comfort. Such activities obviously however will include an element of emotional support.*<sup>46</sup>

Head notes that this approach is consistent with 'the broad intentions of Parliament' to limit 'the scope of the legislation to relationships characterised as a live-in unpaid carer'.<sup>47</sup> However, later cases have expanded on this initial interpretation of the necessary characteristics of a CPR in such a way that the 'type' of relationship included within the ambit of the provision is now much wider than that advanced by Master Maccready in 2001.

### 7.1.3.1b *Living together in the same household*

Initially, cases adopted a similar approach to the requirement of 'living together' as that taken in *Dridi*. For example, in *Richardson v Kidd*,<sup>48</sup> it was noted that deciding whether the parties were living together in a CPR was easier than determining whether they are living together as a couple in a de facto relationship,<sup>49</sup> because living together merely amounts to 'the physical fact'

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<sup>42</sup> [2001] NSWSC 319.

<sup>43</sup> *ibid* [5].

<sup>44</sup> *ibid* [103]. For the de facto provision, see Chapter 6, 6.1.2.

<sup>45</sup> *ibid* [104].

<sup>46</sup> *ibid* [108].

<sup>47</sup> Head (n39) 64.

<sup>48</sup> [2002] NSWSC 306.

<sup>49</sup> In *Sharpless v McKibbin* [2007] NSWSC 1498, [46] (Brereton J) it was suggested that a de facto relationship became a close personal relationship when the parties continued sharing accommodation but ceased sharing a bedroom.

of sharing accommodation. Consequently, in *Richardson*, no CPR was found because the parties did not live together on a full-time basis.<sup>50</sup>

Later cases have taken an approach that is, arguably, inconsistent with *Dridi* and *Richardson*. In *Przewosnik v Scott*<sup>51</sup> a CPR was found even though the parties had only cohabited intermittently. The fact that they kept personal possessions, such as cars and clothing, at each other's houses appears to have been indicative of them 'living together',<sup>52</sup> even though this was not on a full-time basis. Similarly, in *Hayes v Marquis*<sup>53</sup> McColl JA commented that there was no need for parties to a CPR to live together on a 'fulltime' basis to satisfy the living together requirement,<sup>54</sup> and so the fact that the appellant only stayed with the respondent for several nights a week was sufficient. Einstein J in the same case stated that living together means 'to cohabit/to dwell together' and the test is to consider objectively the 'nature and extent' of the common residence:

*To live together requires that the two adult persons be seen as regarding the place or places in which they live as 'their home'. Both of them may not always be found in that home because from time to time family or business requirements or similar may require one or both to spend some time elsewhere... But the dominant parameter will be whether or not the individuals concerned may be discerned to regard the premises in question as their home and in so doing to be acting reasonably.*<sup>55</sup>

This broad approach has been followed in later cases. In *Skarika v Toska*<sup>56</sup> Lindsay J found that the 'living together' requirement for a CPR 'is no less adaptable to the reality of domestic life' than that for de facto couples.<sup>57</sup> Consequently, there is no need for a single residence because 'people can live together in a place which can be said to be their home, and, at the same time, jointly or severally have more than one home which, from time to time they separately occupy.'<sup>58</sup> Lindsay J stressed that living together is about 'the quality and nature of the relationship rather than mere physical proximity',<sup>59</sup> which is markedly different from the comments made in *Richardson*.

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<sup>50</sup> *Richardson v Kidd* (n48) [55] (Master Macready).

<sup>51</sup> [2005] NSWSC 74.

<sup>52</sup> *ibid* [22].

<sup>53</sup> [2008] NSWCA 10.

<sup>54</sup> *ibid* [78].

<sup>55</sup> *ibid* [166].

<sup>56</sup> [2014] NSWSC 34.

<sup>57</sup> For discussion of the meaning of 'living together' for de facto couples, see Chapter 6, 6.1.2.1.

<sup>58</sup> *Skarika v Toska* (n56) [39-40].

<sup>59</sup> *ibid* [43].

### 7.1.3.1c Domestic support and personal care

The requirement for 'domestic support' has been relatively straightforward, although there are indications that this element is also being expanded upon. In *Jurd v Public Trustee*,<sup>60</sup> the fact that the plaintiff cooked for the deceased was evidence of domestic support.<sup>61</sup> In *Bogan v Macorig*,<sup>62</sup> the plaintiff did all the housework, including 'washing, ironing and cleaning', which was sufficient,<sup>63</sup> as was the 'modest domestic support' of 'taking the dogs for a walk', buying groceries and performing 'errands' in *Geoghegan v Szelid*.<sup>64</sup> Inconsistently with the comments made in *Dridi*, providing free accommodation was found to be insufficient for domestic support in *Popescu v Borun*.<sup>65</sup> The decision in *Ak-Tankiz v Ak*<sup>66</sup> appears to extend the concept of domestic support beyond that envisaged in the first case to include the making of various financial payments.<sup>67</sup>

The requirement for 'personal care' has also been expanded upon. Some of the earlier cases followed the approach in *Dridi* and limited 'personal care' to physical acts.<sup>68</sup> For example, in *Jurd*, assisting with bathing was proof of personal care<sup>69</sup> and in *Richardson*, personal care was provided in the form of assistance with showering and aiding the deceased to use the toilet.<sup>70</sup> In *Bogan v Macorig* there was no CPR because the plaintiff had not 'attended to the deceased's personal needs': there was no evidence of her having assisted with matters such as 'feeding, clothing or showering', assisting with 'personal mobility' or assisting with medication.<sup>71</sup> Similarly in *Blyth v Spencer*<sup>72</sup> it was found that personal care is limited to meeting someone's 'personal needs' by performing tasks such as 'bathing, dressing, cooking meals and all the matters of personal hygiene'.<sup>73</sup> *Saravinosvka v Saravinovski*<sup>74</sup> suggests that the personal care performed need not be for the entire duration of the relationship, and as long as there are 'some acts of personal care which are more than de minimis, the definition will be satisfied'.<sup>75</sup>

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<sup>60</sup> [2001] NSWSC 632.

<sup>61</sup> *ibid* [30] (Master Macready).

<sup>62</sup> [2004] NSWSC 93.

<sup>63</sup> *ibid* [52] (Master Macready).

<sup>64</sup> *Geoghegan v Szelid* [2011] NSWSC 1440, [161].

<sup>65</sup> [2011] NSWSC 1532, [78].

<sup>66</sup> [2014] NSWSC 1044.

<sup>67</sup> *ibid* [168].

<sup>68</sup> See also *Nedijokovic v Orozovic* [2005] NSWSC 755, [26] (Macready AsJ).

<sup>69</sup> *Jurd v Public Trustee* (n60) [30] (Master Macready).

<sup>70</sup> *Richardson v Kidd* (n48) [54] (Master Macready).

<sup>71</sup> *Bogan v Macorig* (n62) [55] (Master Macready).

<sup>72</sup> [2005] NSWSC 653.

<sup>73</sup> *ibid* [20] (Macready AsJ). See also *Ye v Fung* [2006] NSWSC 243, [24], [26].

<sup>74</sup> [2016] NSWSC 964.

<sup>75</sup> *ibid* [349] (Kunc J).

The NSW Court of Appeal decision in *Hayes v Marquis* has expanded on the interpretation of personal care in a way that is inconsistent with earlier cases, and, as Head notes, 'has, to a significant extent, widened the scope of the types of relationships that can now be classified' as a CPR.<sup>76</sup> Einstein J agreed with the comments of Master Macready in *Dridi* that personal care involves 'matters such as assistance with mobility, personal hygiene' and 'physical comfort'. Significantly, Einstein J also stated that this list should not be considered exhaustive, and that emotional support may be sufficient in some cases.<sup>77</sup> McColl JA went further and stated that emotional support is relevant because 'society recognises the importance emotional support can play in an individual's well being', and that 'personal care' 'should not be confined to matters relating to physicality'. McColl JA also acknowledged that the NSW government 'contemplated that personal care services may encompass ensuring the physical and emotional support of one or both parties for the other.'<sup>78</sup> This suggest that the expansion of 'personal care' to include 'emotional support' is consistent with the aims of the government, but was inconsistent with the comments from the early case law. This broader approach to personal care has been followed in later cases such as *Drury v Smith*<sup>79</sup> and *Saravinosvka v Saravinovski*,<sup>80</sup> and even Macready AsJ himself has supported this wide meaning of 'personal care' in *Hughes v Charlton*.<sup>81</sup>

#### 7.1.3.1d The uncertainty of the boundaries of a CPR

To further add to these expansions on the requirements of a CPR, an examination of the case law shows that not all the judgments explain clearly what is meant by 'domestic support' or 'personal care'. In both *Przewoznik v Scott* and *Sharpless v McKibbin*,<sup>82</sup> the judgments merely state that a CPR existed without any elaboration as to which functions have been performed that satisfy the statutory criteria.<sup>83</sup> Some cases, such as *McCarthy v Tye*<sup>84</sup> and *Przewoznik* found a CPR without reference to any authorities.<sup>85</sup> A few cases bypass the actual statutory requirement of proving 'domestic support and 'personal care' and refer to other indicia altogether. In *Hughes v Charlton*, Macready AsJ refers to the 'domestic assistance'<sup>86</sup> that the plaintiff provided the deceased as being an important factor in determining the existence of a

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<sup>76</sup> Head (n39)73. See also Sloan (n2) 171 who makes the same point.

<sup>77</sup> *Hayes v Marquis* (n63) [168].

<sup>78</sup> *ibid* [86-7]. For the second reading speech, see NSW Legislative Council Deb 13 May 1999, 229 (JW Shaw, Attorney General and Minister for Industrial Relations).

<sup>79</sup> [2012] NSWSC 1067, [133] (Hallen AsJ).

<sup>80</sup> *Saravinosvka v Saravinovski* (n74) [337] (Kunc J).

<sup>81</sup> [2008] NSWSC 467, [20].

<sup>82</sup> [2007] NSWSC 1498.

<sup>83</sup> For criticism see Head (n39) 67-9.

<sup>84</sup> [2015] NSWSC 1947.

<sup>85</sup> *ibid* [38-43]; *Przewoznik v Scott* (n48) [18-25].

<sup>86</sup> *Hughes v Charlton* (n81) [55].

CPR. ‘Domestic assistance’ appears to include matters such as cooking<sup>87</sup> and caring for the deceased’s personal hygiene and clothing,<sup>88</sup> although this is not made clear in the judgment. This is consistent with the authorities on what constitutes domestic support and personal care, but the different terminology, referring to ‘domestic assistance’, adds uncertainty. Other cases invent new indicia. For example, in *Smith v Daniels*, Slattery J found that ‘the necessary companionship<sup>89</sup> and living together and mutual support for a’ CPR were present. As Head notes, this is ‘quite surprising’ because the legislative requirements of ‘domestic support and personal care’ are not the same as ‘companionship’ and ‘mutual support’. These latter indicia suggest an element of reciprocity that is not necessary under the statutory provision, as well as having ‘somewhat different and far broader connotations than the existing indicia.’<sup>90</sup> Head gives the example of companionship implying a need for friendship, which is unnecessary under the current definition.<sup>91</sup> Judgements such as that in *Smith v Daniels* are unhelpful because they aggravate the uncertainty that is inherently a part of a function-based system.

#### **7.1.4 Caring relationships – increasing litigation?**

An analysis of the case law shows that the informal caring relationships are often used as one possible claim of many, such as being an alternative claim should the primary claim to being in a de facto relationship fail.<sup>92</sup> One reason for this may be the inherent uncertainty of function-based recognition: it is difficult to ascertain with certainty whether an informal relationship will meet the threshold to be a legally recognised relationship, and perhaps it is prudent to cover all bases to ensure that the relationship is legally recognised.

So, for example, in *Taddeo v Taddeo*,<sup>93</sup> a SA case involving a mother making a claim on her daughter’s home, the mother claimed that either the daughter held the property on trust for her, or alternatively that they were ‘domestic partners’ and so the mother was entitled to a property adjustment order in her favour. This suggests that introducing the caring relationship category has not reduced the need for people to rely on property law principles when their relationship is found not to be a caring relationship. In cases involving claims against the deceased’s estate, a claim to be in a caring relationship will be one of multiple claims. For

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<sup>87</sup> *ibid* [49].

<sup>88</sup> *ibid* [50].

<sup>89</sup> See similar comments by Hallen AsJ in *Thompson v The Public Trustee of New South Wales* [2010] NSWSC 1137, [100] referring to the ‘necessary companionship’ found in a close personal relationship.

<sup>90</sup> Head (n39) 79.

<sup>91</sup> *ibid*.

<sup>92</sup> This was also noted by the NSW Law Reform Commission. See New South Wales Law Reform Commission (n39) [3.7].

<sup>93</sup> [2010] SADC 61.

example, in the NSW cases of *McCarthy v Tye*<sup>94</sup> and *Marsh-Johnson v Hillcoat*<sup>95</sup> the applicants claimed to be in a de facto relationship with the deceased; or in a close personal relationship with the deceased; or otherwise entitled to make a claim because they had been 'wholly or partly dependant on the deceased.'<sup>96</sup>

This all suggests that introducing the caring relationship categories has given additional opportunity for individuals to make claims, and has not reduced the need for litigation or reduced costs. But this does not mean that the radical function-based approach is unnecessary. As Sloan argues, the fact that a caring relationship may only be pleaded as an alternative should not be taken as a reason to reject the introduction of caring relationships in England and Wales. This is because the caring relationship categories have 'proved vital in cases where an applicant has been unable to bring himself within one of the other categories'.<sup>97</sup> Providing various routes to relief is beneficial because it means that where relationship generated need has arisen, there is an increased chance that an applicant will be protected by family law, when the courts feel that such relief is appropriate. For example, as will be made clear below,<sup>98</sup> in the SA case of *Taddeo*, the fact that the applicant *could* make a claim on the basis of being in a caring relationship did not mean that she was successful, because the court assessed all of the circumstances and concluded that only a limited financial reward was 'just an equitable' in this instance. The caring relationships provide a possibility of relief, but this will only be granted where the court decides it is appropriate.

## **7.2 The rationale behind the reforms**

To understand what factors have influenced the development of function-based recognition in Australia, it is necessary to explore the reasons behind the reforms. Prima facie, functional arguments, that relationships that perform similar functions should be treated similarly by law, have been influential in the development of function-based recognition of informal caring relationships. But, it will be argued that, as was the case with the registered couple relationships,<sup>99</sup> the real rationale was to placate opponents of same-sex relationship recognition by making the reforms appear as if they were about care and interdependency

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<sup>94</sup> *McCarthy v Tye* (n84) [1].

<sup>95</sup> [2008] NSWSC 1337, [14]

<sup>96</sup> Succession Act 2006 (NSW), s57 (previously Family Provision Act 1982 (NSW), s6).

<sup>97</sup> Sloan (n2) 173.

<sup>98</sup> See below, 7.3.1.

<sup>99</sup> See Chapter 5, 5.2.1.2.



rather than sexual relationships.<sup>100</sup> It will be suggested that this lack of genuine concern for the position of those in caring relationships is a reason why the reforms are so similar to marriage in terms of the legal structure of the relationship.

### **7.2.1 The functional arguments: treating like (family) relationships alike**

The ACT became the first jurisdiction in Australia to legislate for non-couple relationships. The perceived need to recognise a diversity of relationships, and for fairness, or the need to grant substantive equality, between functionally similar relationships dominated the debates on the Domestic Relationships Bill 1994 in the ACT Assembly. The creation of the 'domestic relationships' category was intended to acknowledge a diversity of families, with the then Attorney General stating that the reforms recognized 'that families may take other forms than the traditional nuclear family of a married couple and their children'.<sup>101</sup> The opposition stressed that the bill was about the duty of the ACT Assembly to 'promote and support the institution of the family'.<sup>102</sup> It was believed that from a 'social justice perspective, it is most equitable to define personal domestic relationships on the basis of financial arrangements rather than sexual relationships'<sup>103</sup> because financial contributions and interdependencies can occur in any relationship, regardless of its type.<sup>104</sup>

The arguments advanced in the ACT were similar to those advanced in NSW when they first legislated for the financial consequences of the breakdown of de facto relationships, which were discussed in chapter six.<sup>105</sup> The ACT government emphasised that the law governing property division on relationship breakdown for unmarried relationships was unsatisfactory because it was 'obscure, costly and rather uncertain',<sup>106</sup> which contrasted with the relatively certain and 'fairly comprehensive' position of married couples under federal legislation.<sup>107</sup>

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<sup>100</sup> See the same arguments also advanced during the parliamentary debates on the Civil Partnership Bill, see Chapter 5, 5.1.1.1, and in the debates leading up to the registered caring relationships, see Chapter 5, 5.2.1.

<sup>101</sup> ACT Legislative Assembly Deb 21 April 1994, 1119 (Mr Connolly, Attorney General and Minister for Health). See also, Mr de Domenico (ACT Legislative Assembly Deb 19 May 1994, 1808) who described the reforms as recognising 'that some people do wish to live in situations that do not reflect the traditional family model.'

<sup>102</sup> ACT Legislative Assembly Deb 19 May 1994, 1805 (Mr Humphries).

<sup>103</sup> ACT Legislative Assembly Deb 12 October 1993, 3343 (Ms Follett, Chief Minister and Treasurer). See also ACT Legislative Assembly Deb 12 October 1993, 3347 (Mr Connolly, Attorney General, Minister for Housing and Community Services and Minister for Urban Services).

<sup>104</sup> ACT Legislative Assembly Deb 12 October 1993, 3346 (Ms Follett, Chief Minister and Treasurer).

<sup>105</sup> See Chapter 6, 6.1 and 6.3.2.2a.

<sup>106</sup> ACT Legislative Assembly Deb 12 October 1993, 3346 (Ms Ellis). See also M Wallace 'Domestic Relationships Legislation' (1994) 1(1) Canberra Law Review 124, 124 who describes the common law as 'inadequate', 'complex and costly, and yields unpredictable results.'

<sup>107</sup> ACT Legislative Assembly Deb 12 October 1993, 3339 (Mr Humphries). cf Chapter 3, 3.3.1 which discusses the financial remedies provision for spouses under federal law.

Property law could not take into account non-financial contributions, such as ‘unpaid labour in the home’, to adjust property interests on the breakdown of an unmarried relationship. This could lead to situations ‘where it would be unconscionable’ for one partner to gain a benefit and deny the other ‘a share in those benefits.’<sup>108</sup> The rationale for the reforms was summed up in this way:

*It is not just de factos in the conventional sense who miss out in this situation. There are many other personal relationships which evoke the personal interdependence of a marriage and which also, arguably, should be protected by the law; for example, an adult child who resides in a house or a flat with their parent, a companion to an aged person, a parent living in a granny flat.<sup>109</sup> The question, I think, is a worthy one. Should, for example, a child who has made financial commitments on behalf of a parent have fewer rights than a wife who has made such commitments for her husband? Should a strict commercially framed law of contracts define the entitlements of people who are adopting an increasingly diverse range of lifestyles in our community?<sup>110</sup>*

The ACT reforms were thought necessary because relationships that perform similar functions face the same relationship generated need, especially on relationship breakdown, and so these relationships should be recognised and protected by the law in the same way.

NSW legislated in 1999 to recognise ‘close personal relationships’. As Willmott, Mathews and Shoebridge note, ‘there was little explanation about why the scope of the legislation needed to be broadened’ to caring relationships.<sup>111</sup> According to the then NSW Attorney General, the ‘close personal relationship’ category was intended to provide for relationships such as those that ‘might exist between a daughter and [an] elderly parent residing together for the purpose of obtaining and giving domestic support and personal care’, but not relationships where people were ‘sharing accommodation as a matter of convenience, in the way that flatmates might.’<sup>112</sup> The intention was for the ‘close personal relationship’ category to protect those in ‘carer’

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<sup>108</sup> Wallace (n106) 124.

<sup>109</sup> Similar examples were also given by others, see: ACT Legislative Assembly Deb 12 October 1993, 3343, 3345 (Ms Follett, Chief Minister and Treasurer); ACT Legislative Assembly Deb 12 October 1993, 3346-7 (Ms Ellis).

<sup>110</sup> ACT Legislative Assembly Deb 12 October 1993, 3340 (Mr Humphries). See also similar comments: ACT Legislative Assembly Deb 12 October 1993, 3346 (Ms Ellis); ACT Legislative Assembly Deb 12 October 1993, 3348 (Mr Connolly, Attorney General, Minister for Housing and Community Services and Minister for Urban Services); ACT Legislative Assembly Deb 19 May 1994, 1800-1 (Mr Humphries); ACT Legislative Assembly Deb 19 May 1994, 1805 (Ms Szuty).

<sup>111</sup> Willmott, Mathews and Shoebridge (n7) 21.

<sup>112</sup> NSW Legislative Council Deb 13 May 1999, 229 (JW Shaw, Attorney General and Minister for Industrial Relations).

relationships, specifically it seems traditional family relationships such as adult children, primarily daughters, caring for elderly parents.<sup>113</sup>

Tasmania legislated in 2003 to create a legally recognised category of ‘caring relationship’. The Tasmanian government, in a similar way to the ACT, emphasised the importance of recognising the changing nature of family relationships in contemporary society and that the legal protection given to heterosexual couples should be extended to non-couple relationships. It was said that the government had a responsibility to recognise and support the relationship choices that people make.<sup>114</sup> Reminiscent of the Burden sisters’ case and the debates about the Civil Partnership Bill,<sup>115</sup> one form of relationship intended to benefit was that of ‘two elderly companions who may have lived together for many years and who have supported each other in practical and emotional ways’.<sup>116</sup> The government did not give specific reasons as to why partners to ‘caring relationships’ such as these two elderly companions would benefit from legal recognition in any particular areas of law, but a report by the Tasmanian Joint Standing Committee in 2001, which acted as a basis for the reforms, suggests that functional arguments were important. The Committee noted that partners to caring relationships shared ‘similar values’ and faced ‘the same difficulties as traditional families’, and that non-couple relationships were especially ‘disadvantaged in areas of property rights, intestacy and other entitlements’ and so would benefit from legal recognition.<sup>117</sup>

The SA reforms were intended to recognise relationships between ‘two adults who live together in an enduring personal relationship of mutual affection and support, whether or not the relationship is sexual.’<sup>118</sup> The then SA Attorney General gave a similar example as that given in Tasmania, of ‘two elderly ladies’ who cohabit ‘in a supportive personal relationship’ as being those who may benefit from legal recognition because their relationship may share many of the characteristics of a ‘couple’ relationship:

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<sup>113</sup> For example, see NSW Legislative Council Deb 25 May 1999, 294, 295 (JM Samios); NSW Legislative Council Deb 25 May 1999, 296 (I Cohen); NSW Legislative Assembly Deb 1 June 1999, 736 (Ms Nori, Minister for Small Business, and Minister for Tourism); NSW Legislative Assembly Deb 1 June 1999, 739 (RH Smith); NSW Legislative Assembly Deb 1 June 1999, 740 (RW Turner).

<sup>114</sup> Tasmanian House of Assembly Deb 25 June 2003, 29-32 (Mrs Jackson, Attorney General and Minister for Justice and Industrial Relations).

<sup>115</sup> Discussed in Chapter 5, 5.1.

<sup>116</sup> Tasmanian House of Assembly Deb 25 June 2003, 32 (Mrs Jackson, Attorney General and Minister for Justice and Industrial Relations).

<sup>117</sup> Joint Standing Committee on Community Development *Report on the Legal Recognition of Significant Personal Relationships* (Parliament of Tasmania, 2001), 22-24, 25.

<sup>118</sup> South Australia House of Assembly Deb 14 November 2006, 1207 (MJ Atkinson, Attorney General).

*Perhaps they pool their income to pay for the needs of both. Perhaps they divide household tasks between them according to skills or preferences, so that one does the shopping for both and the other the gardening. Perhaps they provide practical help to each other. For example, one might be able to drive and the other not, so the driver takes the other to medical appointments. Perhaps they share a social life so that they entertain mutual friends at their home and go out together to visit friends or take part in family occasions. In many respects, they lead the same sort of shared life that couples lead but they may not have any sexual relationship.<sup>119</sup>*

So again, the argument that relationships that function in similar ways should be treated similarly was advanced as a rationale for recognising a broader variety of relationships.

The introduction of the caring relationships could be viewed as attempts to shift the focus of law from sex to caring, by suggesting that it is the care provided within family relationships that deserves legal recognition and protection. In a similar way in which Morgan advocates a move to thinking about defining family by its practices and not its ‘form’, and Smart advocates a ‘personal life’ approach that recognises the diversity and fluidity of the family we live with,<sup>120</sup> the Australian reforms broadened the category of relationships that the law views as ‘family’ on a functional basis. As Goodie and Summerfield note in the ACT context, the ‘legislation replaces consideration of “family” form with characteristics of the relationship’ and therefore, ‘family is defined by reference to its practices, rather than on the basis of whether it is headed by a couple, or whether they cohabit, or the question of sexuality.’<sup>121</sup> Of course, the caring relationships are still a focus on a particular type of relationship, because they must first be dyadic relationships between adults before the characteristics of the relationship bear any relevance. But the shift away from a focus on the sexual couple is significant in illustrating the potential of function-based recognition to respond to family diversity.

### **7.2.2 Disingenuous reasoning?**

Arguably, the functional arguments and this focus on care is merely a smokescreen to distract from the real purpose of the reforms. When the reforms are set in context, an alternative, perhaps cynical, interpretation becomes apparent. The real rationale may have been to avoid opposition to the changing definition of de facto relationships to include same-sex

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<sup>119</sup> South Australia House of Assembly Deb 14 November 2006, 1207 (MJ Atkinson, Attorney General).

<sup>120</sup> cf Chapter 1, 1.3.2.2a.

<sup>121</sup> J Goodie and T Summerfield ‘What’s in a name? Family, identity and social obligation’ (2002) 6 University of Western Sydney Law Review 209, available from <<http://www.austlii.edu.au/au/journals/UWSLawRw/2002/9.html>> accessed July 23, 2015.

couples by moving the focus away from the similarities between same- and opposite-sex couples, and focussing instead on broader notions of family based on care. In the same way as happened in the debates for the registered caring relationships,<sup>122</sup> the Australian policymakers presented the caring relationship reforms as being about expanding the types of relationship protected by family law, but the real reason for this focus on care is to lessen the symbolic significance of legally recognising same-sex couples as family relationships.

In the ACT, framing the legislation in terms of functions as opposed to sexual relationships ensured that same-sex couples were included within an 'unsexed' category.<sup>123</sup> This allowed legislators to recognise same-sex relationships in law, as a type of family relationship, without acknowledging them as sexual relationships akin to *de facto* and marriage relationships. For example, the then Attorney General noted that similar proposals had failed in other Australian jurisdictions because they were 'obsessed with homosexual relationship[s]', and implied that the ACT's focus on care and financial commitment was the appropriate way forward,<sup>124</sup> presumably because this would enable the bill to reach the statute book. The Attorney General was careful to ensure that the bill was presented as one remedying injustices caused by ordinary principles of property law for a broad variety of family relationships rather than anything that was intended to specifically benefit same-sex couples, or to recognise same-sex couples as family.

Similarly,<sup>125</sup> the NSW reforms were packaged as ones that merely remedied deficiencies in property law by extending the protection already given to opposite-sex *de facto* partners<sup>126</sup> to other unmarried relationships, rather than reforms benefitting same-sex couples.<sup>127</sup> In SA, it was clear that the government's priority was to remove discrimination against same-sex

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<sup>122</sup> See Chapter 5, 5.2.1.

<sup>123</sup> This term is used by Millbank and Sant (n11) 185.

<sup>124</sup> ACT Legislative Assembly Deb 12 October 1993, 3348 (Mr Connolly, Attorney General, Minister for Housing and Community Services and Minister for Urban Services).

<sup>125</sup> It is unclear why the Tasmanian government chose to legislate for caring relationships, as most of the discussion in the Tasmanian Parliament focussed on the reforms relating to same-sex relationship recognition. See, for example, the long speech of Mr Hiddings (Leader of the Opposition) which focusses on, as he sees it, the three main deficiencies of the reforms – 1) allowing same-sex couples to adopt; 2) the registration provision for significant relationships devaluing marriage; and 3) issues regarding presumption of parenthood for same-sex couples (Tasmanian House of Assembly Deb 25 June 2003, 33-44).

<sup>126</sup> See for example, NSW Legislative Council Deb 13 May 1999, 230 (JW Shaw, Attorney General and Minister for Industrial Relations): 'I remind honourable members that the primary purpose of the De Facto Relationships Act is to provide for the redistribution of property of a relationship on its breakdown.' See also - NSW Legislative Council Deb 25 May 1999, 295 (JM Samios); NSW Legislative Assembly Deb 1 June 1999, 709 (Mr Hartcher); NSW Legislative Assembly Deb 1 June 1999, 712-3 (Ms Moore); NSW Legislative Assembly Deb 1 June 1999, 738 (Mr O'Doherty).

<sup>127</sup> For discussion see, for example, Millbank and Sant (n11) 201-3.

couples, but some parliamentarians were eager for a broader variety of relationships to be recognised,<sup>128</sup> which led the government to legislate for a broad, non-sexual, definition of 'domestic partners'. Some members of the SA parliament applauded the measures for their recognition of non-sexual relationships,<sup>129</sup> while others believed that they were only included in the reforms to placate those that opposed the legal recognition of same-sex relationships.<sup>130</sup> This all suggests that there was a careful attempt to package the reforms in such a way as to reduce opposition. Additionally, the focus in the debates in all four jurisdictions on family relationships such as daughters caring for elderly parents could be seen as a very traditional approach to thinking of family relationships and the functions they perform. As Millbank and Sant put it, 'the debates express fundamentally conservative propositions about what families ought to be. In such a context a radical re-envisioning of the family appears unlikely.'<sup>131</sup> The caring relationships are not intended to provide for family diversity per se, rather they are intended as a means to promote ideas about traditional families to distract from the legal recognition of same-sex couples.

The complex reasoning behind the informal caring relationship reforms are important because they show that there was a lack of principled reasoning behind the reforms. A genuine concern over the difficulties encountered by those in caring relationships because of a lack of legal status may have led to a more radical reform, and the arguably disingenuous reasoning may go some way towards explaining why the caring relationships are modelled on marriage and are limited to dyadic relationships. This suggests that there needs to be a real call for reform, such as was the case with financial provision for separating de facto couples or for the legal recognition of same-sex relationships, before any truly radical change can take place.

### **7.3 The effect of legal recognition of caring relationships**

Exploring the consequences of the legal recognition of caring relationships adds further support to the argument that there was a lack of principled reasoning, and a lack of genuine concern for the position of people in non-couple relationships, behind the reforms. The package of legal consequences bestowed on the caring relationships lacks clear principle, and although it seems that the caring relationships generate a *legal* status, because the law treats them as a

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<sup>128</sup> South Australia House of Assembly Deb 14 November 2006, 1206-7 (MJ Atkinson, Attorney General).

<sup>129</sup> See, for example, South Australian Legislative Council Deb 6 December 2006, 1282-3 (AL Evans) – 'Sex is a poor public test for the validity of domestic partnerships because sexual relationships are generally a private matter.'

<sup>130</sup> South Australian House of Assembly Deb 22 November 2006, 1384 (Mr Pisoni).

<sup>131</sup> Millbank and Sant (n11) 205.

‘particular class in society to which the law ascribes peculiar rights and duties’,<sup>132</sup> it appears that they do not generate a *social* status.

### 7.3.1 The legal consequences

The legal consequences of an informal caring relationship are far more limited than those bestowed on marriage, the registered ‘couple’ relationships and informal de facto relationships, and are more limited than those bestowed on the registered caring relationships. Arguably, this more limited recognition is peculiar in light of the functional arguments advanced as a rationale for the introduction of caring relationships: if partners to caring relationships face the same difficulties as partners to de facto relationships, or more specifically, same-sex couples, then why are the legal consequences bestowed on the relationships so significantly different? This again suggests that the introduction of the caring relationships was not motivated solely by concerns that relationships that function similarly should be treated similarly by law and that more complex reasons were at play.

The package of legal consequences bestowed on the caring relationship varies between jurisdictions. For example, partners to ‘domestic relationships’ in the ACT ‘enjoy protection mainly in the context of criminal law, health-related legislation as well as business and consumer legislation’,<sup>133</sup> and are also eligible to make a claim for provision out of the estate of the deceased domestic partner.<sup>134</sup> They are excluded from the Administration and Probate Act 1929 however which deals with intestacy because this provision is limited to those in de facto relationships.<sup>135</sup> In NSW, apart from the financial remedies available on relationship breakdown, very few legal consequences are bestowed upon close personal relationships and they are only recognised in around five pieces of legislation,<sup>136</sup> which includes rights to make claims under the family provision legislation where a claimant can prove that there are ‘factors which warrant the making of the application.’<sup>137</sup> Similarly in South Australia, ‘domestic partnerships’ attract few legal consequences and have limited rights such as the right to claim provision on the death of

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<sup>132</sup> See Chapter 2, 2.2.1.3.

<sup>133</sup> N Witzleb ‘Marriage as the ‘Last Frontier’? Same-Sex Relationship Recognition in Australia’ (2011) 25(2) *International Journal of Law Policy & the Family* 135, 142.

<sup>134</sup> Family Provision Act 1969 (ACT), s7(b).

<sup>135</sup> Administration and Probate Act 1929 (ACT), s44.

<sup>136</sup> See J Millbank ‘Recognition of Gay and Lesbian Families in Australian Law – Part 1’ (2006) 34(1) *Federal Law Review* 1, 12, n52. See also Social Development Committee *Statutes Amendment (Relationships) Bill 2005* (Parliament of South Australia, Report 21, 2005), Appendix 5.2; New South Wales Law Reform Commission (n39) [3.35].

<sup>137</sup> Succession Act 2006 (NSW), s57(1)(f); s59(1)(b).

a partner<sup>138</sup> and an exemption from stamp duty.<sup>139</sup> The situation is different in Tasmania where partners in informal caring relationships are recognised in around 34 pieces of legislation. This includes being considered a 'relative' under the Alcohol and Drug Dependency Act 1968, as a 'partner' under both the Cooperatives Act 1999 and the Fatal Accidents Act 1934 and as a 'member of the family' under the Witness Protection Act 2000.<sup>140</sup> Significantly however, informal caring relationships are not included within Tasmania's intestacy or family provision rules.<sup>141</sup>

Perhaps the most significant legal consequence bestowed on the caring relationships is that the courts have the jurisdiction to make property and maintenance orders upon the breakdown of a caring relationship in the same way as they could for a de facto relationship under state and territory law. Firstly, an applicant would need to prove the existence of the caring relationship; and secondly, would only be granted an order if they met certain jurisdictional requirements,<sup>142</sup> that the relationship is of a particular duration; or that the applicant has made 'substantial contributions' to the relationship;<sup>143</sup> and thirdly, that it is considered just and equitable to grant an order.<sup>144</sup> Additionally, respect for autonomy and choice has been built into the property and maintenance provisions for caring relationships by allowing parties to make binding financial agreements that set out their property and financial arrangements upon relationship breakdown. Both parties must have received independent legal advice about the effects, advantages and disadvantages of such an agreement for it to be valid.<sup>145</sup> This shows that function-based recognition can respect autonomy and choice in the

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<sup>138</sup> Inheritance (Family Provision) Act 1972 (SA); Administration and Probate Act 1919 (SA); Victims of Crime Act 2001 (SA); Workers Rehabilitation and Compensation Act 1986 (SA).

<sup>139</sup> Stamp Duties Act 1923 (SA).

<sup>140</sup> In addition, see Social Development Committee (n136) Appendix 5.2 for a complete list of the legal consequences of the Tasmanian informal caring relationships.

<sup>141</sup> See the Intestacy Act 2010 (Tas), s6(b).

<sup>142</sup> Domestic Relationships Act 1994 (ACT), s11; Property (Relationships) Act 1984 (NSW), s15; Domestic Partners Property Act 1996 (SA), s9(2). These do not appear in the Tasmanian legislation.

<sup>143</sup> ACT – 2 years: Domestic Relationships Act 1994 (ACT), s12; NSW – 2 years: Property (Relationships) Act 1984, s17; Tasmania – 2 years: Relationships Act 2003 (Tas), s37; SA – 3 years: Domestic Partners Property Act 1996 (SA), s9(2).

<sup>144</sup> Domestic Relationships Act 1994 (ACT), s15; Property (Relationships) Act 1984 (NSW), s20; Relationships Act 2003 (Tas), s40; Domestic Partners Property Act 1996 (SA), s10. In addition, any claim should be made within two years of the breakdown of the relationship unless there are exceptional circumstances: see Domestic Relationships Act 1994 (ACT), s13; Property (Relationships) Act 1984 (NSW), s18; Relationships Act 2003 (Tas), s38; or within one year in SA – Domestic Partners Property Act 1996 (SA), s9(3).

<sup>145</sup> Domestic Relationships Act 1994 (ACT), s33; Property (Relationships) Act 1984 (NSW), Part 4; Relationships Act 2003 (Tas), Part 6; Domestic Partners Property Act 1996 (SA), Part 2.



same way as form-based recognition by allowing partners to opt-out of some legal consequences.

Millbank believes that there was no need to include caring partners in the financial remedies provision and was highly critical of the decision to include ‘non-couples’ and ‘non-cohabitees’ because ‘such groups are simply less likely [than couples] to jointly own or contribute to property’. Millbank believed that the focus in the parliamentary debates on adult children caring for their elderly parents was ‘misguided’<sup>146</sup> because the likelihood of such a claim being made while the elderly parent was still alive was unlikely, ‘and the court ordering the sale of a property from under an incapacitated and/or elderly person in order to pay a share to the carer seems... to be yet more unlikely.’<sup>147</sup>

Cases between parents and their adult children claiming property adjustment orders are rare,<sup>148</sup> but such facts did occur in the SA case of *Taddeo v Taddeo*. In *Taddeo*, however, it was the elderly mother who was claiming a share in her daughter’s home, and not the daughter claiming against the mother as foreseen by Millbank. Here, the parties had lived together in a domestic relationship for over 24 years, and despite the mother’s non-financial contributions in the form of ‘gardening and housekeeping’<sup>149</sup> and financial contributions towards utility bills and purchasing shopping, furniture and household appliances,<sup>150</sup> she did not obtain a share in the daughter’s home. The ‘just and equitable’ result in this instance was that the mother received a lump sum payment of \$4,000.<sup>151</sup> Nicholson J reasoned that the daughter was aged 55 and receiving an ‘invalid pension’, and although she owned her own home she would need to support herself for many years to come, whereas the mother had moved in with another daughter and continued to enjoy the same lifestyle.<sup>152</sup> The requirement that a court may only make such an order as is ‘just and equitable’ in the circumstances of the case should prevent unmeritorious claims from succeeding, but this does not establish whether partners to caring relationships need access to financial remedies in the first place. Millbank argues that partners to caring relationships will benefit from legal recognition in some areas, but not in the area of financial remedies on relationship breakdown because,

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<sup>146</sup> Millbank ‘Domestic Rifts’ (n23) 181.

<sup>147</sup> *ibid*.

<sup>148</sup> *Taddeo v Taddeo* (n12) [72] (Nicholson J).

<sup>149</sup> *ibid* [131].

<sup>150</sup> *ibid* [132].

<sup>151</sup> *ibid* [143].

<sup>152</sup> *ibid* [141-2].

*'Carers', particularly those related by blood, appear to me to be a class of constituents unlikely to require property division regimes during life and who already have them available after death – their existence in the debate therefore says much about the desire of politicians to reinforce traditional notions of family and de-sex or de-radicalise this law reform in the public eye.*<sup>153</sup>

This reiterates the point that the motivations behind the caring relationships category may not stem in their entirety from a genuine concern for the injustices faced by people in caring relationships, but rather that there was a need to lessen the significance of recognising same-sex couples as de facto partners.

### **7.3.2 A lack of a social status**

Whilst the last chapter argued that de facto relationships generate a social status, albeit an inferior one to marriage,<sup>154</sup> there is no evidence to suggest that the caring relationships generate a social status. The failure to generate a social status should not be taken as an indication that there is no purpose to recognising such relationships, because this failure to generate a social status is partly due to a lack of knowledge about the existence of these relationships as well as the role of social and cultural norms in this area. It was noted above that there is a dearth of case law on the caring relationships, which may suggest there is a lack of knowledge about their existence. Millbank found that the lack of use of the Domestic Relationships Act 1994 in the ACT was partly because of a lack of knowledge amongst the public about the provision, and suggested that 'the legal profession itself was not well versed on the coverage and operation of the [provision]'.<sup>155</sup> If no one is aware of the existence of the caring relationships, then there is no opportunity for a social status to be generated. Additionally, caring relationships do not have a long history of recognition as is the case with marriage, or to a lesser extent de facto relationships. Caring relationships are a new creation, and as such it is likely that many people would be surprised to find themselves in a legally recognised caring relationship. This is especially the case when the caring partners are already related, such as in the case of an elderly parent and an adult child: they are likely to see their relationship in those terms, as parent and child, and not in some other, caring, category. As Nicholson J noted in *Taddeo*,

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<sup>153</sup> Millbank 'Domestic Rifts' (n23) 181-2. See also Millbank and Sant (n11) 204.

<sup>154</sup> See Chapter 6, 6.3.3.

<sup>155</sup> Millbank 'Domestic Rifts' (n23) 171. See also O Rundle 'An Examination of Relationship Registration Schemes in Australia' (2011) 25(2) Australian Journal of Family Law 121, 146-7 who discusses the correlation between low take-up rates of registered caring relationships and lack of knowledge about their existence.

*It would come as a surprise to the participants in many domestic living arrangements involving family members if they were to be characterised as being parties to a “close personal relationship” thus giving rise to an entitlement to a property division order under the [legislation].*<sup>156</sup>

Summerfield has suggested, in the context of recognition of same-sex relationships, that there are cultural reasons behind a reluctance to utilise property provisions in the ACT.<sup>157</sup> Same-sex couples had a history of being excluded ‘from “easy” law regimes for resolving economic problems’ because these provisions were reserved for heterosexuals; this means that same-sex couples were historically used to finding alternative means of resolving their disputes.<sup>158</sup> The same arguments could be extended to partners in caring relationships who may not consider their relationship a ‘caring relationship’ at all, and would therefore not expect a legal status to attach to the relationship, and may be used to finding alternative means of resolving any disputes or difficulties that may arise. Perhaps it takes time to generate a social status, and that the further relationship recognition moves away from marriage, the less likely it is that a social status will attach to a relationship.

#### **7.4 Conclusion**

This chapter shows that the Australian reforms are, paradoxically, conservative attempts at radical reform because the move towards recognising caring relationships is not indicative of a new way of thinking about family. The fact that the parliamentary debates introducing the caring relationships focussed on relationships such as those between (unmarried) adult children and their elderly (widowed) parents<sup>159</sup> suggests that the reforms were not intended as a radical re-thinking of ‘family’. Perhaps one reason for the conservative nature of the reforms is that even though policymakers have been prepared to think of new forms of relationship recognition (for whatever reason), there have been no corresponding calls for change from wider society. The fact that legislators have legislated in a vacuum, in the sense that they have attempted to create a new type of relationship in law without reference to any demands or proposals from wider society, may have limited the potential for any truly radical change to take place. Perhaps this all infers that, for the purposes of this thesis, there are some

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<sup>156</sup> *Taddeo v Taddeo* (n12) [69].

<sup>157</sup> Summerfield (n10) 54.

<sup>158</sup> *ibid* 59-60.

<sup>159</sup> See for example Queensland Law Reform Commission *Shared Property* (n3) 14, discussed above at 7.1.1; and see 7.2.1 for examples of the type of family relationship envisaged by the supporters of the reforms in all the jurisdictions.

difficulties with Fineman's proposals for radical function-based reforms<sup>160</sup> that would abolish marriage and focus instead on the caretaker-dependant dyad. Fineman's proposals suggest reimagining the way we recognise relationships as a top-down endeavour. But the Australian experience suggests that change needs to be driven by wider society before anything radical takes place, or in other words that organic bottom-up change is necessary; perhaps there needs to be both a social *and* a political call for a new way of thinking about relationships before anything truly radical can happen.

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<sup>160</sup> See Chapter 2, 2.3.3.2.

## **Conclusion**

This thesis has explored the desirability and viability of a function-based, as opposed to a form-based, approach to the legal recognition of adult relationships by comparing the English and Welsh system with that of Australia. In part one, two rationales were advanced to explain why it is necessary to consider reforming the current (primarily)<sup>1</sup> form-based approach to relationship recognition in England and Wales. Firstly, chapter one explained that reform is necessary because the current approach is too exclusive and ignores many of the relationships that are formed between adults. Secondly, chapter two explained that there is a consensus that family law performs two functions that are relevant to the thesis. The first is the protective function, and the second is the symbolic function. It was suggested that the current form-based system does not protect those people who do not formalise their relationships, and so a function-based system that applies without a requirement to opt-in *may* provide a better alternative in this respect. Further, it was suggested that the symbolic function of family law has already been an influential factor in developing form-based recognition in England and Wales.

This conclusion will discuss the main findings of the thesis by reference to the research questions set out in the introduction, namely:

1. How do the theoretical similarities and differences between form-based and function-based approaches to relationship recognition play out in practice?
2. What factors have supported and constrained the development of form-based and function-based approaches to relationship recognition?

The discussion will show that, while the theoretical findings highlighted in chapter two,<sup>2</sup> which we will return to now, are valid, they only begin to reveal the complex relationship between form-based and function-based recognition.

### **Research question 1: the similarities and differences between form-based and function-based recognition**

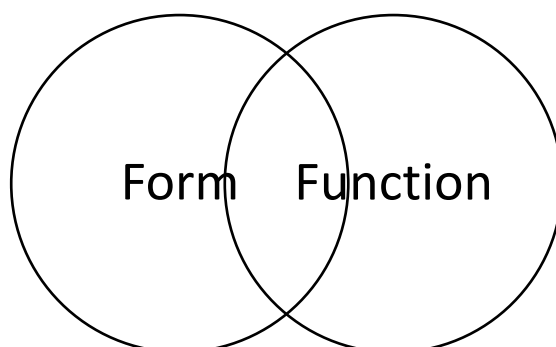
Chapter two explained that in theoretical terms, form-based and function-based approaches are similar in many ways, but that they are distinct in others. The following figure was presented to depict the relationship between form-based and function-based recognition in terms of the similarities and differences between them:

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<sup>1</sup> Although the English and Welsh approach is often referred to as 'form-based', Chapter 6, 6.3 explained that cohabiting relationships acquire a substantial package of legal consequences which shows that England and Wales does recognise cohabiting relationships on a functional basis.

<sup>2</sup> For a summary of the findings, see Chapter 2, 2.4.

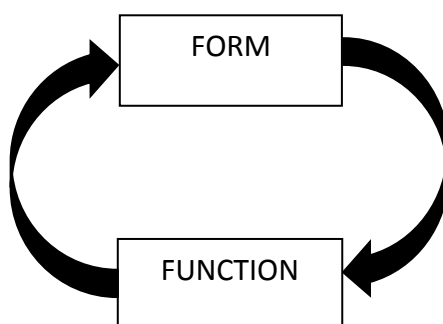
Figure 1



The literature examined suggested that both approaches can generate a 'status', although it was unclear whether a function-based approach could generate both a legal *and* a social status. It was also apparent that, whilst form-based systems respect individual choice and autonomy by only recognising those relationships that have been registered through the deliberate actions of the parties, function-based systems can similarly respect choice and autonomy by making provision for couples to opt-out of some legal consequences. Moreover, it was suggested that both form-based and function-based approaches can be used flexibly, in ways that inclusively provide for relationship types other than the most marriage-like of couples. The literature also suggested that there are some differences between the approaches that mainly relate to the way in which legal recognition is triggered. Form-based recognition was found to be administratively efficient because there was a formal record of the existence of the relationship, whereas function-based recognition appeared to be uncertain because of the difficulties of proving the existence of informal relationships.

A second figure was also presented as a visual representation of the circularity relating to arguments about the respective advantages and disadvantages of form-based and function-based approaches:

Figure 2



The administrative efficiency of form-based approaches is advantageous, but in order to benefit from legal recognition steps must be taken to opt-in. This apparent disadvantage of form-based systems in failing to protect those who have not opted-in may lead us to think that function-based systems are preferable. But, the uncertainty of function-based systems makes the administrative efficiency of form-based systems seem attractive, and so we find that both approaches have disadvantages.

#### Similarities between form-based and function-based recognition

The comparative research confirmed that, at least in theory, both form-based and function-based systems can generate a legal status, because a formal relationship and an eligible informal relationship are treated as a special category by law and a package of legal consequences is bestowed upon them.<sup>3</sup> Additionally, it has been found that the desire to respect individual autonomy and choice has been a significant theme when developing relationship recognition systems. For example, pre-nuptial agreements are now enforceable in England and Wales because of a perceived need to protect individual autonomy,<sup>4</sup> which shows how marriage - a form-based system of recognition - has been developed to better protect autonomy. Also, the desire to respect autonomy and choice has been influential in developing function-based recognition. The Law Commission's proposals for reforming the financial consequences of relationship breakdown for cohabitants in England and Wales emphasised a need to protect autonomy via provision for an enforceable opt-out agreement, and the Australian function-based recognition of de facto and caring relationships allows partners to opt-out via financial agreement.<sup>5</sup> The thesis has also argued that 'choice' and 'autonomy' are complex concepts, and that the arguments of those opposed to function-based recognition because it does not respect autonomy and choice are too simplistic.<sup>6</sup> The research has also confirmed that both form-based and function-based frameworks of relationship recognition can be used to respond to the diversity of family relationships that are formed, as evidenced by the existence of the registered and informal caring relationships in Australia.

#### Differences between form- and function-based recognition

An exploration of the way in which form-based and function-based recognition have been used in England and Wales and Australia has confirmed an important difference between the two approaches: form-based relationships are administratively efficient and, as confirmed by

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<sup>3</sup> For a discussion of 'status', see Chapter 2, 2.2.1.3.

<sup>4</sup> See Chapter 3, 3.3.2.

<sup>5</sup> See Chapter 6.3.2.2c, Chapter 7, 7.3.1.

<sup>6</sup> See Chapter 2, 2.3.2.3; in relation to consent to marriage, see Chapter 3, 3.2.1.2a.

chapter six, function-based systems are characterised by uncertainty. The administrative efficiency of form-based systems, and the relative ease of proving the existence of form-based relationships as opposed to the difficulty of proving the existence of a relationship under function-based recognition, was put forward as a rationale in favour of creating new form-based options to register a relationship in both England and Wales and Australia. For example, the Victorian government asserted that an option to formalise a relationship is preferable to function-based recognition, because this allows partners to avoid having to suffer the ‘indignity’ of proving the existence of their relationship on a functional basis in court.<sup>7</sup>

Additionally, it has become clear that function-based recognition has a particular advantage over form-based systems, which has been an important factor in creating and developing function-based recognition in both jurisdictions. Function-based systems operate as a safety-net because there is legal recognition of a relationship without the need to take any steps to register the relationship. For example, the Tasmanian government highlighted this safety-net benefit as a reason for introducing function-based systems rather than only having form-based relationships, as did the Law Commission of England and Wales in their proposals for reforming the law on the financial consequences of the breakdown of cohabiting relationships.<sup>8</sup> This is another example of the circularity of discussing the benefits and difficulties of form-based and function-based approaches as depicted in Figure 2. The uncertainty of functional systems make form-based systems appear more appealing. But, the need to opt-in to form-based systems means that the safety-net of a functional approach is appealing for those who wish to protect the vulnerable partner. This suggests that function-based recognition may be more effective at fulfilling family law’s protective function than form-based recognition.

Two other differences between form-based and function-based recognition, which were not readily apparent from the literature discussed in chapter two have been highlighted while exploring the development and creation of form-based and function-based systems in both jurisdictions. Firstly, the way in which a social status is not automatically generated following the creation of a legal status, and secondly, the different meanings of ‘form’ and the consequent complex interaction between ‘form’ and function-based recognition.

#### *Social status and symbolism*

The findings of the thesis, based on an examination of sources such as Hansard, policy documents, case law and secondary sources, suggests that one difference between marriage

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<sup>7</sup> See Chapter 4, 4.2.1.

<sup>8</sup> See Chapter 6, 6.2.2.



and the other formalised relationships considered in the thesis appears to be social rather than legal. An exploration of different formalised relationships showed that they all generate a legal status, but there is evidence to suggest that the social status of marriage is unique. Despite the fact that the registered couple relationships in Australia attract an almost identical package of legal consequences as marriage, there is a continuing push for same-sex marriage in that jurisdiction, which suggests that the registration options are lacking symbolically. In England and Wales, there is evidence to show that some people, such as Wilkinson and Kitzinger, believe that civil partnership is a lesser status than marriage, while others, such as Steinfeld and Keidan, see it as a different status that is valuable and preferable to the social status of marriage.<sup>9</sup> Chapter four explained that the different social status of these registered relationships may be attributable to the fact that they mimic marriage because they provide for the same, or similar,<sup>10</sup> type of relationship and provide almost identical legal consequences. The end result is that the registered couple relationships are measured, and sometimes found wanting, against marriage in a symbolic sense, and so generate a different social status. Arguably, the registered caring relationships in Tasmania and Victoria fail to generate any social status, and this is partly due to a lack of knowledge about their existence. Social and cultural norms are important in generating a social status: a relationship between a parent and a child, for example, is viewed socially and by the partners themselves in those terms and not as a 'caring' relationship.<sup>11</sup> Marriage has had centuries to generate a social significance, and the registered couple relationships may generate a social status because they mimic the legal structure of marriage. But, the caring relationships are a new creation that few people appear to know about, and so at this point it seems they fail to generate a social status.

An examination of the sources used in the thesis suggests that function-based systems do not generate a social status akin to that of marriage and it appears that there is something symbolically significant about formalised relationships that function-based systems cannot replicate. Despite the substantive equality of treatment between married and de facto couples in Australia, the creation of the registration options and the continuing fight for same-sex marriage suggest that functional recognition is lacking in symbolic terms. One reason why function-based recognition fails to generate the same social significance as marriage is because people value being able to attach a label to their relationship and the opportunity to 'display'

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<sup>9</sup> See Chapter 4, 4.3.2.

<sup>10</sup> Same-sex marriage is not recognised in Australia, and that civil partnership is only available for opposite-sex couple in England and Wales.

<sup>11</sup> For discussion, see Chapter 5, 5.2.3.2b.

their family practices.<sup>12</sup> Being recognised as ‘family’ by the law in a formal sense, particularly following a ceremony that is required by the state,<sup>13</sup> appears to carry greater symbolic significance than being considered ‘family’ on a functional basis. This confirms the suggestion in chapter two that form-based recognition may be best placed to serve family law’s symbolic function because formal recognition of a relationship by the state helps partners demonstrate to other people that their relationship is a significant family relationship.

#### *The relationship between ‘form’ and function*

Chapter two highlighted that the term ‘form’, or ‘form-based’, is often used ambiguously in the existing literature, and can refer to two distinct concepts of ‘formalised relationship’ and ‘relationship type’.<sup>14</sup> The thesis has also confirmed that function-based systems can be categorised into ‘moderate’ and ‘radical’ approaches because the parameters of function-based recognition are drawn with reference to relationship type: the law continues to favour some types of relationship over others. For example, the Australian de facto relationships are limited to relationships between two unrelated adults, and the caring relationships, whether formal or informal, are limited to relationships between two adults whether related or not. In this way, formalised relationships and function-based systems are similar because they are both limited by reference to relationship type.

But, the thesis shows that the way in which both formalised relationships and function-based approaches are limited by ‘type’ is different. In the same way that ‘form’ has two distinct meanings, it is submitted that relationship ‘type’ can also be divided into two different elements, of ‘structure’ and ‘quality’:

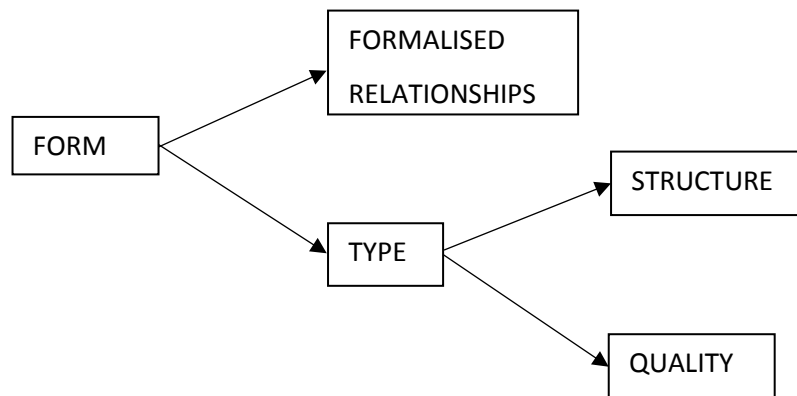
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<sup>12</sup> For discussion of Finch’s concept of ‘family display’, see Chapter 1, 1.3.2.2c.

<sup>13</sup> For discussion of the importance of ceremonies, see Chapter 4, 4.3.1.1.

<sup>14</sup> See Chapter 2, 2.2.

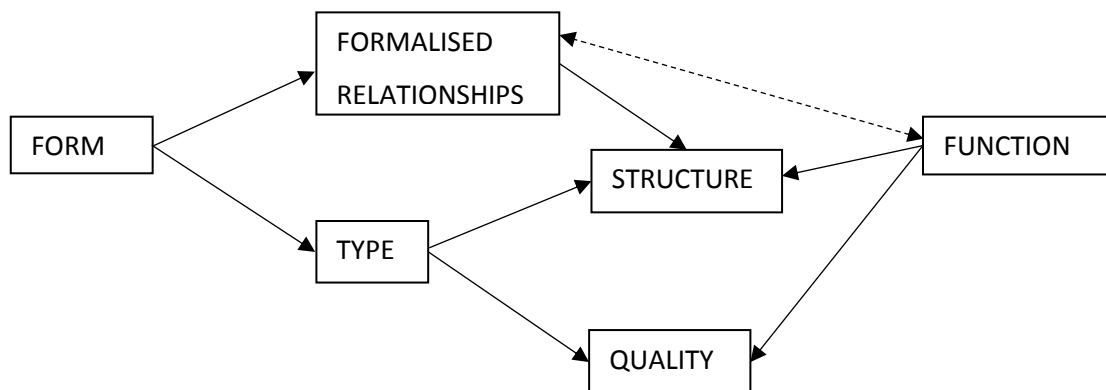
Figure 3



‘Structure’ refers to the model or the framework of the relationship, for example, that there is a relationship between two unrelated adults. Type as ‘quality’ is distinct because it refers to the nature of the relationship, or to the qualitative characteristics of a relationship, such as whether the parties share a common residence, whether there is financial interdependency or third party perceptions of the relationship.

The true interaction between ‘form’ (in all three senses) and function, is represented by the following figure:

Figure 4



The broken line between ‘formalised relationships’ and ‘function’ signifies that both approaches share many of the same benefits and effects. The fact that the arrows point towards both ‘formalised relationships’ and ‘function’ signifies the circularity of discussion relating to the advantages and disadvantages of both approaches. More specifically in relation to ‘type’, the figure shows that although both form-based and function-based systems of recognition are limited to particular types of relationship, the ‘type’ with which they are concerned is different. Formalised relationships assume that relationships that ‘fit’ a particular structure are also of a

particular quality, and no inquiry is undertaken to determine the quality of the relationship for the purposes of legal validity. For example, chapter three showed that policymakers value marriage because they assume it is a supportive, loving and committed relationship,<sup>15</sup> even though all that is necessary to form a valid marriage is that the relationship fits a particular structure (and that the required formalities are complied with). Function-based recognition is different because for a valid relationship under a functional system the parties must prove that the relationship *both* fits a particular structure *and* prove the quality of the relationship. So to prove the existence of an informal caring relationship in NSW, for example, chapter seven showed that the relationship must fit a particular structure (two adults, whether or not they are related) *and* provide sufficient evidence that the partners lived together, and one or both provided domestic support and personal care.<sup>16</sup> As such, function-based systems impose more stringent standards on parties than form-based systems because of the need to fit a structure *and* prove the quality of the relationship. In light of the fact that the sociological literature discussed in chapter one suggested that the defining feature that characterises a relationship as ‘family’ for many is the functions that the relationship performs,<sup>17</sup> perhaps function-based recognition provides a more principled way forward than form-based recognition, because function-based frameworks focus on the quality of a relationship, and this better corresponds with the way people think about family.

### **Research question 2: factors which affect the development of relationship recognition systems**

There are many factors that have informed the development of form-based and function-based frameworks of relationship recognition, some of which were already identified or hinted at in the literature discussed in chapter two,<sup>18</sup> and others that were discovered by exploring the development of frameworks of recognition in both jurisdictions.

#### Competing effects: administrative efficiency vs safety-net provision

Confirming the findings of chapter two, practical concerns were often cited in parliamentary debates, especially in Australia, as reasons to prefer form-based over function-based systems, and so in this way practical concerns have supported the development of form-based systems. One reason why the registered couple relationships were thought necessary in Australia was to provide easier access to legal remedies for de facto couples because form-based systems are administratively efficient. This is a benefit that all form-based frameworks share,

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<sup>15</sup> See Chapter 3, 3.4.1.

<sup>16</sup> See Chapter 7, 7.1.3.1.

<sup>17</sup> See Chapter 1, 1.3.2.2a and 1.3.2.2b.

<sup>18</sup> For a summary of those findings, see Chapter 2, 2.4.

regardless of the relationship type that they legally recognise, because all formalised relationships have a formal record of when the relationship began (and ended). But, function-based recognition acts as a safety-net that protects people without them needing to register the relationship. In Tasmania, this benefit was a reason to preserve function-based recognition of de facto couples, and to extend it to caring relationships, at the same time as creating the registration options for both couple and caring relationships. The differences between form-based and function-based recognition have been acknowledged by policymakers, and the response in many jurisdictions, such as Tasmania, has been to utilise both form-based and function-based recognition alongside each other so as to take advantage of the benefits of both approaches.

#### The significance of functional arguments and family law's protective function

As predicted in chapter two in relation to the literature advocating the introduction of a moderate function-based system in England and Wales,<sup>19</sup> functional arguments that relationships that function similarly should be treated similarly by law have been influential in developing function-based recognition. For example, chapter six showed that the Australian de facto relationships were assumed to perform the same functions as marriage, and therefore should be treated similarly by law.<sup>20</sup> Likewise, one reason to support the recognition of informal caring partners in Australia was that caring relationships were assumed to perform similar functions to same-sex relationships, which in turn were assumed to be functionally similar to spouses, and therefore the different types of relationship should be treated in a similar way by law.<sup>21</sup>

Significantly, the research also found that functional arguments have been employed to develop formalised relationships, even though the quality of a relationship is irrelevant under form-based recognition. There is no universal agreement as to the expected functions of marriage, but nevertheless the marriage ideologies ensure that marriage is put on a pedestal both socially and legally because of the functions it is assumed or expected to perform. The evolving ideologies of marriage, with a shift in focus on the functions marriage is expected to perform has led to developments in the legal structure such as allowing same-sex couples to marry.<sup>22</sup> Similarly, civil partnerships in England and Wales and the Australian registered couple relationships were introduced because same-sex couples, and opposite-sex de facto couples in

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<sup>19</sup> See Chapter 2, 2.3.3.1.

<sup>20</sup> See Chapter 6, 6.2.1.

<sup>21</sup> See Chapter 7, 7.2.1.

<sup>22</sup> See Chapter 3, 3.4.1.

Australia, were assumed to be functionally similar to married couples. Due to this functional similarity, it was thought that unmarried couples should have the same option to formalise their relationship and gain access to the same legal consequences as spouses.<sup>23</sup> Functional arguments were also advanced successfully to introduce the registered caring relationships in Tasmania and Victoria. It was assumed that a relationship between caring partners would function similarly to a de facto relationship, who in turn are assumed to be functionally similar to spouses, and so they too, it was said, should be treated similarly by law.

The functional arguments used to develop and create both form-based and function-based recognition are in essence concerns about the types of family relationship that are subject to family law's protective function. The need to protect an economically vulnerable unmarried partner, in both couple and caring relationships, has been viewed as equivalent to the perceived need to protect an economically vulnerable spouse. So, in this way, the desire to bring more people under family law's protection has been an influential supporting factor in developing both form-based and function-based frameworks of relationship recognition.

#### The influence of the marriage model

The last 30 years or so has seen considerable development in relationship recognition frameworks in both jurisdictions. In England and Wales, a new form-based relationship has been created for same-sex couples with civil partnership; marriage has been opened up to same-sex couples; and there is increasing legal recognition of unmarried cohabiting relationships, which includes same- and opposite-sex couples, under a developing function-based approach. The change in Australia is even more striking. While marriage remains unavailable for same-sex couples, the position of de facto couples, both same- and opposite-sex, has been transformed into a position of almost identical legal treatment with spouses; many states and territories have introduced options to register a couple relationship; two states allow registration of caring relationships; and four states legally recognise informal caring relationships on a functional basis.

Upon closer examination, however, it is apparent that there is one factor that has constrained the development of these frameworks of relationship recognition: the influence of the marriage model. For example, the registered couple relationships in both England and Wales and Australia are closely modelled on marriage and Australia's registered caring relationships are not far removed from marriage because they too focus on dyadic relationships. Form-based recognition could be used in more innovative ways to better provide for diverse family

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<sup>23</sup> See Chapter 4, 4.1.1.

relationships that may not be dyadic in structure, as per Brake's suggestion to 'minimize marriage'.<sup>24</sup> Even the moderate function-based approach focusses on the same relationship structure as marriage and assumes that both informal and married relationships function in the same way. Despite the fact that they provide for a different relationship structure, the informal caring relationships are also modelled on marriage because the focus continues to be on dyadic adult relationships that perform similar caring and supportive functions to those expected of marriage. The recognition of the informal caring relationships is a far more conservative reform than that called for by either Fineman or Polikoff.<sup>25</sup> Neither the form-based nor the function-based approaches in Australia are radically different from marriage. There have been considerable developments in the area of the legal recognition of adult relationships, especially in the recognition of same-sex couples as being family relationships, but, there appears to be an unwillingness by policymakers to move beyond the confines of the marriage model and to explore radical new ways of utilising form-based and function-based frameworks.

### **The implications of the research for policymaking**

The marriage-centric, primarily form-based system, in England and Wales is in need of reform. The diversity of relationship practices today, in terms of both a diversity of types of relationship considered as family by those involved, and the fact that people may experience multiple relationships types in a lifetime, shows that the current framework does not correspond with contemporary family practices. The thesis has shown that, theoretically at least, form-based and function-based frameworks of relationship recognition are similar in many ways, and neither approach is clearly better than the other at responding to family diversity. Function-based recognition is flexible enough to provide for different types of family relationship, but it is not a failsafe system for responding to diversity because of the difficulties with defining relationships and the inherent uncertainty of function-based systems. Form-based recognition is also flexible in terms of the types of relationships that could be formalised, but to benefit from legal recognition people must take steps to register their relationship, and not everyone does so. Both form-based and function-based systems have the potential to be used in radical ways as envisaged by the commentators discussed in chapter two, but this potential has been limited

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<sup>24</sup> Brake suggested that marriage could be 'minimized' i.e. that the capacity requirements of marriage be modified to allow any caring relationship, whether it be a sexual relationship or otherwise, or a relationship between two or more people, to 'marry'. See Chapter 2, 2.2.2.1.

<sup>25</sup> Fineman proposes abolishing marriage and focussing instead on the caretaker-dependant dyad, whereas Polikoff suggests the 'valuing all families approach' which consists of re-naming marriage as civil partnership; a registration system of designated family relationships; and a function-based system that legally recognises relationships when they would benefit from legal protection. See Chapter 2, 2.3.3.2.

by a lack of political will and a lack of imagination, on the part of both policy makers and society in general, to think beyond marriage and marriage-like relationships.

In light of the similarities between both frameworks, there needs to be a principled discussion about the purpose of relationship recognition, akin to that advocated by Glennon and Polikoff, discussed in chapter two.<sup>26</sup> Policymakers need to consider why some relationships are recognised while others are ignored and consider what legal consequences should follow legal recognition of a relationship, so that the framework of relationship recognition utilised responds to the needs of the 'family we live with'.<sup>27</sup> A good starting point is consideration of the functions of family law. The thesis has accepted that, while there is debate as to the functions of family law, there is consensus that it has both a protective and a symbolic function.<sup>28</sup> Arguably, policymakers need to decide which of these functions is most important when considering any reforms to the current framework of relationship recognition in England and Wales, and, deciding which function should guide reforms could lead to the creation of a framework of legal recognition of relationships that responds to family diversity and the needs of real families.

The Australian caring relationships provide an example of what can happen when there is no principled discussion prior to legally recognising a new type of relationship. The Australian policymakers failed to distinguish between the symbolic and protective functions when explaining why the legal recognition of 'caring relationships,' under both a form-based and a function-based approach, was necessary. Australian policymakers have attempted to attach a label to some family relationships and called them 'caring relationships', hence fulfilling the symbolic function, at the same time as claiming that people in these relationships require family law's protection.<sup>29</sup> The difficulty with attempting to attach a label to 'caring relationships' is that people do not feel a need to have their relationship recognised as a 'caring relationship' because this is not a familiar concept. They might not see the provision of care and support as generating a familial tie, and may instead conceive of themselves as family because of the structure of the relationship, such as it being a relationship between a parent and child or between siblings or friends. While for same-sex couples it was apparent that by being ignored by the law they were missing out on a family identity and the legal protection offered to opposite-sex couples by marriage or being recognised as couples under a function-based system, this was not the case for 'caring relationships'.

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<sup>26</sup> See Chapter 2, 2.3.3.1 2.3.3.2.

<sup>27</sup> See Chapter 1, 1.3.2.2.

<sup>28</sup> For a discussion of the functions of family law, see Chapter 2, 2.1.

<sup>29</sup> See Chapter 5, 5.2.1 and Chapter 7, 7.2.



Perhaps part of the problem in Australia is the fact that there is no empirical evidence suggesting that people need or want legal recognition of caring relationships,<sup>30</sup> and so there was no call for reform to tell policymakers what people in caring relationships actually need. Such a call for reform would bring with it clarity and could generate a legal response that is tailored to the need and desire of people in caring relationships. The fact that caring relationships were introduced to distract from the legal recognition of same-sex couples coupled with an absence of a genuine call for reform has led to a situation where policymakers have fallen back on familiar models of relationship recognition rather than think of new ways of utilising form-based and function-based frameworks. But, people in family relationships that are characterised by caregiving require a legal response that departs from traditional models of relationship recognition, and as such, there is no template to follow as there was for same-sex couples. This all suggests that a bottom-up approach, that is an approach based in a call for reform from society, is necessary before any radical reforms will take place.

But, the fact that people do not see themselves as requiring an identity of a caring relationship, does not mean that different types of relationship would not benefit from family law's protection: there may still be relationship generated need that it is appropriate for the law to remedy. While this thesis has taken issue with the way Australian policymakers used the protective rationale to distract from the symbolism of legally recognising same-sex couples as family, it is accepted that the protective function of family law is a convincing rationale for changing the framework of relationship recognition to be more inclusive of family diversity. If the fact that married couples and unmarried couples' relationships are assumed to function in the same way leads to them being protected in the same way by law, then there is no cogent reason to suppose that other types of relationship, performing the same or similar functions, would not also benefit from similar legal protection. The legal recognition of caring relationships on the basis that they require family law's protection, may begin a process of making them intelligible as relationship types and as such could precipitate calls for a more radical and far-reaching reform in the future.

#### Concluding comments

In conclusion, this thesis has explored whether function-based recognition provides a desirable and viable alternative to form-based recognition. The findings of the thesis suggest that while on balance, function-based recognition provides a more principled way forward,

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<sup>30</sup> See R Graycar and J Millbank 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition' (2007) 24 Washington University's Journal of Law and Policy 121, 153.

formalised relationships have their own benefits, and as such it seems that we need to utilise *both* frameworks of relationship recognition to provide for family diversity. On the one hand, function-based recognition is best placed to fulfil family law's protective function, and this framework is more reflective of what we value about our personal relationships because function-based recognition focusses on the quality of relationships, and so provides a more principled way forward. On the other hand, formalised relationships appear best placed to fulfil family law's symbolic function. Formalised relationships allow people to attach a family label to their relationship and have the relationship recognised as an important family relationship by other people, and this has proven to be significant for same-sex couples in particular. But, not all relationships require both the protective and symbolic functions of family law. As such, the circularity of discussing the benefits and disadvantages of form-based and function-based recognition, as depicted in figure 2, might not indicate that either approach is redundant or inadequate, and rather, signifies that both approaches are needed because they serve similar, but not identical, purposes.

This all suggests that theorists and policymakers need to focus on how best to utilise both approaches to relationship recognition, with an emphasis on carefully selecting the approach that is most appropriate in the circumstances. Combining both approaches to exploit their particular advantages is logical, considering that recognising a diversity of types of family relationship involves recognising that they may all have different needs, and as such it would be possible to pick the approach that is most suitable in the circumstances. Taken together, this suggests that commentators such as Fineman who advocate a radical overhaul of relationship recognition are acting prematurely. It appears that a bottom-up approach, in which calls for new frameworks of recognition emerge from those involved in different types of relationship, will be required if any truly radical reform, successfully tailored to the needs and desires of the family we live with, is to take place.

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