From 'form' to function and back again: a new conceptual basis for developing frameworks for the legal recognition of adult relationships

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In England and Wales marriage and civil partnership are privileged by law and society. But there is continuing concern in family law scholarship for couples that have not formalised their relationship, and are therefore in a legally precarious situation, particularly on relationship breakdown. This article introduces a new conceptual basis for the legal recognition of adult relationships by exploring 'form'-based recognition and function-based recognition. A new approach is necessary because 'form' is a term that has two distinct meanings: 'form' in the first sense is a reference to a formalised relationship whereas 'form' in the second sense is a reference to relationship type. The Australian experience of legislating for unmarried couple relationships shows that embracing function-based recognition has the unexpected consequence of leading back to 'form' in both senses of the term. This suggests that reform efforts in England and Wales should focus on developing formalised relationships and function-based recognition alongside each other because reform efforts focusing on only on one framework will inevitably be found wanting.

Introduction

It is well known that the fastest growing family type in the UK is the unmarried cohabiting couple. The number of cohabiting couples has more than doubled from 1.5 million in 1996 to 3.3 million in 2017.[1] But the framework for recognising relationships in England and Wales has not changed in line with the changing demographic picture. The creation of civil partnership for same-sex couples in 2004 and allowing same-sex marriage from 2014 have been significant in valuing and legally recognising same-sex relationships. Similarly, recent legislation that would allow opposite-sex couples to enter civil partnerships is important in its own right.[2] However, there is continuing and growing concern over the position of couples who are cohabiting in informal relationships,[3] especially in light of the changes to civil partnership. Academics have written extensively about the difficulties facing individuals, often women, on the breakdown of informal relationships where there is no recourse to the system of property redistribution upon relationship breakdown used by spouses and civil partners.[4] It has been over 10 years since the Law Commission's report calling for the introduction of a statutory scheme

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[1] Office for National Statistics (ONS), 'Families and households in the UK: 2017' (Statistical Bulletin, 2017), 4.

[2] Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, s 2.

[3] The position for cohabitants in Scotland is different under the Family Law (Scotland) Act 2006. For discussion see F Wasoff, J Miles and E Mordaunt, 'Cohabitation: lessons from research north of the border' [2011] 23 CFLQ 302.

[4] See eg, G Douglas, J Pearce and H Woodward, 'Cohabitants, property and the law: a study of injustice' (2009) 27 MLR 24; A Barlow and J Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' [2010] 22 CFLQ 328.

dealing with the financial consequences of the breakdown of cohabiting relationships[5] and several private members' bills with similar aims have been introduced,[6] but no legislative reform has been forthcoming.

In light of the expectation that civil partnerships will be amended to include opposite-sex couples by the end of 2019,[7] and the continuing concern in family law scholarship about the legal position of cohabiting couples upon relationship breakdown, it is timely to take a step back to explore different frameworks of relationship recognition from a theoretical perspective. This article presents a new conceptual basis for the legal recognition of adult relationships that derives from a theoretical comparative study of two different frameworks of relationship recognition – 'form-based' and 'function-based' recognition.[8] 'Form-based' recognition can be a reference to formalised relationships, such as marriage and civil partnership, where parties take steps to register their relationship to give it a formal status. 'Function-based' recognition is where relationships are legally recognised based on their functions or characteristics. As Jenni Millbank has explained, function-based frameworks 'rest on a performative aspect… 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.'[9] In practical terms, this usually means that the court or the decision maker will,

> …conduct an objective overview of [a] relationship, usually retrospectively, with a focus on 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.[10]

This article challenges the current dominance of formalised relationships in England and Wales by arguing that it is necessary to develop a nuanced approach to reform where both formalised

[5] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Law Com No 307 (2007).

[6] For example, Cohabitation Rights Bill 2016-17 and the Cohabitation Rights Bill 2015-16 sponsored by Lord Marks; Inheritance (Cohabitants) Bill 2012-13 and Cohabitation Bill 2008-09 sponsored by Lord Lester.

[7] The Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, s 2(2) permits the secretary of state to reform civil partnership via regulations that should come into effect before 31 December 2019. The government have previously indicated that reform will take place: O Bowcott and S Carrell, 'Civil Partnerships to be opened to heterosexual couples' *The Guardian* (2 October 2018). Available from www.theguardian.com/uk-news/2018/oct/02/civil-partnerships-to-be-opened-to-heterosexual-couples (last accessed 24 June 2019).

[8] K Griffiths, 'From "form" to function and back again: a comparative analysis of form-based and function-based recognition of adult relationships in law' (PhD Thesis, Cardiff University 2017).

[9] J Millbank, 'The limits of functional family: lesbian mother litigation in the era of the eternal biological family' (2008) 22 IJLPF 149, 150 (emphasis in original text).

[10] A Head, 'The legal recognition of close personal relationships in New South Wales – a case for reform' (2011) 13 *Flinders Law Journal* 53, 55 (emphasis in original text).

relationships and function-based recognition are used alongside each other in order to create a system that meets the needs of different relationships. Reforming civil partnership alone will do nothing to address concerns about the precarious legal position of cohabiting couples on relationship breakdown.

Part A adds much needed clarity to the academic debate by arguing that 'form-based' recognition is a term that is sometimes used ambiguously in the literature because this can be a reference either to formalised relationships or relationship type. While the dominance of formalised relationships, and hence the development of marriage and civil partnership, can be explained by the advantages of this framework of relationship recognition and the perceived challenges with function-based recognition, there are cogent reasons to pursue function-based reforms. Part B moves on to explore the development of frameworks of relationship recognition in Australia. This provides an interesting comparison because Australia, like England and Wales, has also seen an increase in the number of couples cohabiting without formalising their relationships,[11] but the Australian response has been different to that in England and Wales. Australia has a well-developed function-based framework for legally recognising unmarried couple relationships, usually referred to as de facto relationships, and several registration options for these relationships have also been introduced. This discussion will add to the current literature by showing that legislating for function-based frameworks leads back to 'form' in *both* senses of the term. It will be suggested that reform efforts focusing on developing formalised relationships only, such as the recent changes to civil partnership, or focusing solely on function-based frameworks will be found wanting: the benefits of one framework can be used to remedy the disadvantages of the other. The development of Australia's framework of relationship recognition shows that a more nuanced approach to reform is necessary than what has taken place to date in England and Wales.

A. Exploring 'form-based' and function-based frameworks of recognition

There is a considerable body of work by academics advocating the need to reform the legal framework for recognising adult relationships in England and Wales. Much of this literature questions *why* the formalised relationships of marriage and civil partnership are treated differently from informal cohabiting relationships by law, with this different treatment especially apparent upon relationship breakdown.[12] The question asked by these commentators is whether relationships should be recognised because of their 'form' or because of the functions the relationship performs. Although

[11] Australian Bureau of Statistics, 'Year Book Australia: 2012' (2012), available from www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Marriages,%20de%20facto%20relationships%20and%20divorces~55 (last accessed 27 June 2019).

[12] See L Glennon, 'Obligations between adult partners: moving from form to function?' (2008) 22 IJLPF 22, 26.

not everyone agrees,[13] the consensus seems to be that the current framework needs reforming so that cohabiting relationships are given greater legal recognition particularly on relationship breakdown. These are calls to develop new frameworks that recognise relationships on the basis of the functions they perform.[14] This paper will first explore the literature on relationship recognition to determine what 'form'-based and function-based frameworks have to offer from a theoretical perspective, before moving on in Part B to see how these findings play out in practice in Australia. This discussion in this part will add clarity to the academic debate and determine the benefits and challenges associated with form-based and function-based frameworks of recognition. While there are clear reasons why formalised relationships are appealing to policy makers, there are also clear reasons to pursue function-based reforms.

Exploring 'form-based'-recognition: the dominance of formalised relationships

There is not much literature looking specifically at 'form'-based recognition. Perhaps this area is under-theorised because the meaning of the term is assumed to be clear. But, exploring the commentary that advocates reforming the current framework of relationship recognition shows that 'form' is a term that has a double meaning, which is important because it challenges the traditional understandings of the meaning of 'form'. 'Form' is sometimes used as a reference to 'formalised relationships' and at other times it is used to refer to relationship 'type'. Examples of this can be seen in Anne Barlow and Grace James' paper calling for the introduction of function-based reforms for regulating the financial consequences of the breakdown of cohabiting relationships. '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',[15] and 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'.[16] 'Form' in the first sense of 'formalised' relationship is a reference to relationships such as marriage and civil partnership where eligible people take steps to register their relationship in a manner prescribed by the state, leading to legal recognition of that relationship.[17] The act of forming a marriage or registering a civil partnership triggers legal recognition of that relationship. In contrast, 'form' in the second sense of 'type' is a reference to the kind of

[13] Such as R Deech, 'The case against legal recognition of cohabitation' (1980) ICLQ 480.

[14] See eg, Glennon, above n 12; Barlow and Smithson n 4 above; S Wong, 'Shared commitment, interdependency and property relations: a socio-legal project for cohabitation' [2012] 24 CFLQ 60.

[15] A Barlow and G James, 'Regulating marriage and cohabitation in 21st century Britain' (2004) 67 MLR 143, 153 (emphasis in original).

[16] Ibid, 147. This is also true of other authors. For example: Glennon, above n 12, who also uses 'form' ambiguously, eg at 43: '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.'

[17] R Probert, 'When are we married? Void, non-existent and presumed marriages' (2002) 22 *Legal Studies* 398.

relationship that is legally recognised. Many types of relationship are formed by adults during their lifetime, such as unmarried cohabiting relationships, which are the focus of this paper, as well as sexual relationships with partners living elsewhere (or living-apart-together relationships), cohabiting relationships between siblings and friendships.

It is important be clear as to what exactly is meant by 'form' because formalised relationships and relationship type are distinct concepts. Sometimes, a reference to 'form-based' can mean 'form' in both senses of the term. For example, it could be said that England and Wales currently have a form-based approach in the second sense as well as the first. Marriage and civil partnership, while being formalised relationships, are only available for a particular type of relationship, that of two adults who are not related by family and are not already in a formalised relationship. But, the different meanings of 'form' are not interchangeable, and sometimes 'form' can only be used as a reference to relationship type. For example, 'form' can only be a reference to relationship type when referring to an area of law such as inheritance provision where cohabitants are eligible to apply for financial provision where they can evidence that they have lived with the deceased as their 'husband or wife' or 'civil partner'.[18] Similarly, proposals for function-based reforms explored later in this section are confined to recognising a particular type of relationship, the cohabiting couple. As such, clarity as to what exactly is meant by 'form' is important. While form in the first sense is a reference to formalised relationships, a distinct framework from a function-based framework of recognition, 'form' in the second sense of relationship type is a much wider concept that can include situations where particular types of relationship are recognised because they are formalised *or* because they are eligible for legal recognition under a function-based approach. It should also be remembered that relationship type is not limited to the married/cohabiting couple. In summary, formalised relationships and function-based frameworks are mechanisms of relationship recognition, while 'form' in the second sense of relationship type is a broader concept. As such, perhaps 'form' is a term that is best avoided.

Despite the focus in the academic literature on developing function-based recognition, the formalised relationships of marriage and civil partnership have been the focus of recent reforms. As such, it is important to consider what formalised relationships have to offer as a prelude to exploring the desirability of a different approach, namely function-based frameworks. There appear to be three main reasons why reform efforts have centred on formalised relationships, which also shed some light on why function-based reforms have not been forthcoming.

[18] Inheritance (Provision for Family and Dependants) Act 1975, s 1(1A) and s 1 (1B).

Practical benefits

Formalised relationships are relationships where parties have taken steps to register their relationship and make it formal. In this way, formalised relationships are generally an administratively efficient way of recognising relationships because there is a formal record of who is in a formalised relationship with whom at any given time.[19] The government acknowledged this as a practical benefit of formalised relationships during the consultation on the introduction of civil partnership. It was noted that civil partnership would provide 'legal certainty about… when the relationship began and ended' that 'would enable an accurate assessment of when liabilities began and ended.'[20]

The administrative efficiency that characterises formalised relationships contrasts with the difficulties of proving when a relationship is eligible for legal recognition under a function-based framework. Although the focus of this paper is on adult relationships, concerns about the operation of function-based frameworks have also been noted in the context of other family relationships, such as parent and child. Jenni 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 and it can be especially difficult to ascertain the nature of a relationship retrospectively.[21] 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.'[22] 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,[23] which suggests that function-based systems are characterised by uncertainty. Thus, there are practical reasons of proof which may explain the appeal of formalised relationships to policy makers.

The symbolic appeal of formalised relationships

Another benefit of formalised relationships is the symbolic significance that is attached by many to the process of formalising a relationship. Nicola Barker explains that same-sex marriage was considered necessary in part because formal recognition of a relationship by the state is 'both an end in itself and a means to an end in that those who seek same-sex marriage not only seek recognition

[19] A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart, 2005), 107.
[20] Women and Equality Unit, 'Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples' (2003), [2.3].
[21] Millbank, above n 9, 151. See also J Millbank, 'If Australian law opened its eyes to lesbian and gay families, what would it see?' (1998) 12 *Australian Journal of Family Law* 1, 33-34.
[22] Millbank, n 9 above, 150-51.
[23] Ibid, 152.

from the state, but also from members of birth families, religious institutions and employers.'[24] Symbolic arguments have also played a role in introducing civil partnership and were advanced as a reason in favour of introducing civil partnership by the then government:

> It would provide for the legal recognition of same-sex partners and give legitimacy to those in…, interdependent, same-sex couple relationships that are intended to be permanent. Registration would provide a framework whereby same-sex couples could acknowledge their mutual responsibilities, manage their financial arrangements and achieve recognition as each other's partner.[25]

Of course, different people will attach different levels of symbolic significance to different formalised relationships, with some viewing marriage as superior and civil partnership as inferior, and others viewing civil partnership as preferable. Celia Kitzinger and Sue Wilkinson felt that civil partnership was a '"consolation prize"… to lesbians and gay men' which they considered to be 'offensive and demeaning',[26] while Rebecca Steinfeld and Charles Keidan felt so strongly that civil partnership was the preferable option that they took their case to the Supreme Court.[27] Differing views about the value of different formalised relationships does not diminish the fact that their value extends beyond their administrative efficiency: there is also the intangible benefit of the symbolic significance that attaches to the change of legal status that accompanies formalising a relationship. This symbolic significance is unlikely to be associated with function-based frameworks in the same way because function-based frameworks do not require parties to proactively take steps to opt-in to a formal status and have their relationship legally recognised.

Respecting choice?

A third reason behind the introduction of civil partnership was that formalised relationships supposedly respect individual choice to be subject to legal rights and responsibilities because of the requirement to opt-in for the relationship to be legally recognised. As the consultation paper for civil partnership states:

[24] N Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan, 2013), 3.
[25] Women and Equality Unit, above n 20, [1.2].
[26] *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [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 *Feminism and Psychology* 127.
[27] See *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32.

> The government recognises that some people deliberately choose not to make formal commitments to each other… An opt-in system would support individual choices, and would not impose responsibilities on those who do not want them.[28]

This suggests that a model of recognition that is not 'opt-in', presumably a function-based framework of recognition, would 'impose' legal consequences on people who have not chosen them. Some authors such as Elizabeth Scott argue that an 'autonomy-based framework' where parties choose to be subject to legal recognition 'is superior' to an approach where 'unchosen' recognition is imposed on a relationship.[29] Similarly, Ruth Deech has argued that some cohabitants do not marry because they 'reject the legal incidents of marriage', and consequently, function-based reforms regulating the breakdown of cohabiting relationships should be avoided so that there is 'a corner of freedom for such couples to which they can escape and avoid family law.'[30]

Although these arguments about choice may seem convincing, upon closer examination it becomes clear that the notion that formalised relationships respect choice, while function-based frameworks do not, is too simplistic because it does not fully take into account the complex reality of the idea of 'choice' and the factors that lay behind relationship practices. Additionally, as will be discussed below, to the limited extent that this concern is legitimate, this 'corner of freedom' that Deech desires can be retained within a function-based framework by providing an option to opt-out of legal recognition by agreement to allow legally aware cohabitants to make their own arrangements for relationship breakdown.

Rebecca Bailey-Harris explains that arguments that formalised relationships respect choice are problematic because they 'assume *freedom* of choice and *informed* choice, an assumption which is by no means universally justified in the formation of family relationships.'[31] As Martha Fineman explains, there are several factors at play behind relationship choices:

> 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… we may

[28] Women and Equality Unit, above n 20, [2.3].
[29] E Scott, 'Marriage, cohabitation and collective responsibility for dependency' [2004] *The University of Chicago Legal Forum* 225, 230. For similar comments, see D Kovacs, 'A federal law of de facto property rights: the dream and the reality' (2009) 23 *Australian Journal of Family Law* 104, 106 and 109.
[30] Deech, above n 13, 483. See too her comments on the second reading of the Cohabitation Rights Bill 2017-2019: 'If people will not marry and not enter into a partnership, clearly they wish to be left alone by the law and not boxed into a corner.' *Hansard,* HL Deb, vol 796, col 1263 (15 March 2019).
[31] Rebecca Bailey-Harris, 'Law and the unmarried couple: oppression or liberation' [1996] 8 CFLQ 137, 138 (emphasis added).

> 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.[32]

Studies have found that there are varied reasons why people marry that cast doubt on how *free* a choice to marry may be. For example, John Eekelaar and Mavis Maclean found that some marry due to a desire to comply with convention, such as following religious teachings or parental wishes. When external pressures, or to use Fineman's terminology, 'long-standing cultural and social arrangements and dominant ideologies', mean marriage is the only acceptable option, the extent to which marrying is a 'free' choice must be questioned. Eekelaar and Maclean found that only in a minority of cases did people marry for pragmatic reasons, such as to take advantage of immigration rules.[33] Of course, there are some who decide whether to formalise their relationship based, or partly based, on the legal consequences that attach to different relationships. But, the extent to which these are *informed* choices should be questioned. Recent research found that 46 per cent of people continue to believe in the common law marriage myth, that cohabitants are treated in law as if they were married.[34] The study showed that this misconception was just as prevalent amongst cohabitants as amongst the married.[35] Pascoe Pleasance and Nigel Balmer similarly found that there 'were substantial and ongoing public misconceptions about both cohabitation and marriage law'.[36] For example, their study showed that 35 per cent of respondents did not think that 'a financially dependent spouse would have a good legal claim for financial support after 10 years of marriage, and 29 per cent mistakenly stated that such a spouse would *not* have a claim.'[37] Additionally, even where individuals are aware of the legal consequences of different relationships, this does not mean that they will take steps to formalise to protect themselves. As Anne Barlow and Simon Duncan explain, assuming people will make rational decisions about relationships on the basis of their knowledge of the law risks making a 'rationality mistake': even where cohabitants are aware that they are not protected by law in the same way as spouses, they will not necessarily take steps to marry or form a civil partnership. Barlow and Duncan argue that relationship decisions are made 'with reference to moral and socially negotiated views

[32] M Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press, 2004), 40-41.
[33] J Eekelaar and M Maclean, 'Marriage and the moral bases of personal relationships' (2004) 31 *Journal of Law and Society* 510, 517-23. For similar findings, see also M Hibbs, C Barton and J Beswick, 'Why marry? The perceptions of the affianced' [2001] Fam Law 197; Barlow and James, above n 15; Barlow et al, above n 19.
[34] NatCen 'Almost half of us mistakenly believe that common law marriage exists' (22 January 2019) available from http://www.natcen.ac.uk/news-media/press-releases/2019/january/almost-half-of-us-mistakenly-believe-that-common-law-marriage-exists/ - last viewed 28 February 2019.
[35] 48% of cohabitants and 49% of married individuals believe in the common law marriage myth.
[36] P Pleasance and N J Balmer, 'Ignorance in bliss: modeling knowledge of rights in marriage and cohabitation' (2012) 46 *Law and Society Review* 297, 330.
[37] Ibid, 322 (emphasis in original).

about what behaviour is accepted or expected as right and proper' and the outcome of this negotiation will vary 'in particular social contexts.'[38] As such, even where cohabitants are aware of their legally precarious situation,[39] it cannot be assumed that they will formalise because relationship decisions are not made solely on the basis of the legal consequences that attach to different types of relationship.

In light of these findings, it is difficult to argue that cohabitants are making an informed choice *not* to attach legal consequences to their relationships and that spouses *are* making informed choices to be subject to particular legal consequences when there is misunderstanding about the law that applies for different relationships. As such, the notion of 'choosing' to be subject to legal consequences by formalising a relationship, or to avoid legal consequences by cohabiting informally, oversimplifies the issues: the legal consequences of a particular type of relationship is often not the most important factor in deciding whether or not to marry, because relationship decisions are more complicated than that, and where this is a factor, it cannot be assumed that people are always making decisions based on correct knowledge of the applicable law.

Exploring function-based recognition: the case for reform

While it is apparent that the benefits of formalised relationships and the supposed challenges of function-based recognition make formalised relationships an appealing option for policy makers, there are cogent reasons to pursue function-based reforms. Exploring two proposals for function-based reforms regulating the property and financial consequences of the breakdown of cohabiting relationships, one from academics and another from the Law Commission, suggests that there are two main reasons to support such a reform. First, a focus on the similar functions performed by married and unmarried couples' relationships arguably means that both types of relationship require the same or similar protection by the law. Second, the authors support function-based reforms rather than introducing further options to formalise relationships because function-based frameworks offer a distinct benefit that is not shared with formalised relationships.

Anne Barlow, Simon Duncan, Grace James and Alison Park support the introduction of function-based reforms that would allow for the legal recognition of unmarried cohabiting couples alongside recognition of formalised relationships. They make the persuasive argument that such reforms are necessary to protect the economically disadvantaged partner on relationship breakdown: relationship-generated disadvantage can occur in both married and unmarried relationships because

[38] A Barlow and S Duncan, 'New Labour's communitarianism, supporting families and the rationality mistake: Part II' (2000) 22 JSWFL 129, 141.

[39] Not everyone agrees that cohabitants' legal position is undesirable. See for example R Auchmuty, 'The Limits of Marriage Protection: in Defence of Property Law' (2016) 6 *Oñati Socio-Legal Series* 1196.

they perform similar functions, and so they require the same legal response.[40] They explain that the time has come for policy makers to question the legal regulation of marriage and ask whether marriage is privileged today because it is a formalised relationship, a 'state endorsed contractual-arrangement embodying a public commitment', or because of the 'functions and effects of marriage',

> …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…[41]

If marriage is recognised because of the functions it performs, then it is difficult to argue that cohabiting relationships that perform similar functions should not be treated in the same way by law.

Similarly, the Law Commission has recommended that a new statutory scheme is necessary to create a framework regulating the financial consequences of the breakdown of cohabiting relationships, which would operate alongside the current recognition of formalised relationships. The idea of protecting the economically disadvantaged partner was a prominent reason in favour of reform in the Commission's work. The Commission referred to empirical research[42] 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.'[43] As such, a desire to protect the economically disadvantaged partner, who is in the same situation as an economically disadvantaged spouse or civil partner, is seen as an important reason in favour of reform. The argument by both sets of authors is that cohabitants should be subject to the same or similar legal treatment as spouses due to the fact that relationship generated disadvantage occurs in both types of relationships because they perform similar functions, so the law should step in to protect the economically weaker partner on relationship breakdown.

Taking this argument about the need to protect cohabitants further, Barlow et al and the Law Commission agree that further reform of formalised relationships, presumably such as the recent efforts to allow opposite-sex couples to enter civil partnerships, is insufficient to protect separating cohabitants on relationship breakdown and as such reject the option of another registration scheme.[44]

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[40] Barlow et al, above n 19, 86.
[41] Ibid, 86. See also Barlow and James, above n 15, 153.
[42] 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, <www.lawcom.gov.uk/wp-content/uploads/2015/06/Cohabitation_Cardiff_Research.pdf> last accessed 28 January 2019.
[43] Law Commission, above n 5, [2.13].
[44] See too Rebecca Probert's contribution to the Law Commission's consultation on cohabitation reform where she rejects introducing an opt-in model: Law Commission n 5 above, [2.83-2.85].

As Barlow et al explain, focusing on formalised relationships has the 'fundamental problem of leaving large numbers of cohabitants unprotected by family law' because couples must opt-in, or register, to benefit. They argue that formalised relationships 'do nothing to prevent exploitation in the situation where one partner refuses to marry or register'.[45] This 'paternalistic' approach can be justified because 'the likely financial detriment – which we know is unequally borne in family relationships – cannot be accurately predicted in advance' and so legal remedies protecting the disadvantaged partner when things go wrong are necessary.[46] The Law Commission also rejected the creation of a registration scheme for cohabitants 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'.[47] This shows that function-based frameworks provide a safety net to protect economically disadvantaged partners when parties, for whatever reason, have not taken steps to formalise their relationship. As such, reform efforts focusing on formalised relationships only will do nothing to protect economically disadvantaged partners on relationship breakdown where couples, for whatever reason, do not formalise their relationship.

Legislating for function

Although there are good reasons for pursuing function-based reforms, this framework does pose some challenges. It has already been mentioned that the difficulties of proving the existence of a relationship under a function-based framework stands in sharp contrast with the administrative efficiency of formalised relationships. Additionally, it was noted that there is a misguided perception that formalised relationships respect choice to be subject to legal recognition while function-based frameworks do not. Another difficulty with function-based frameworks is about the type of family relationship that may inform the development of a function-based system.[48] This is an issue of principle: there is a risk that a function-based framework that is informed by an ideal vision of family relationships could affect the number of relationships that could be legally recognised under any reform. For example, Millbank, writing on same-sex relationship recognition, has argued that function-based frameworks 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.'[49] A function-based framework of recognition that draws on heterosexist assumptions

[45] Barlow et al, above n 19, 114.
[46] Ibid, 114-15.
[47] Law Commission, above n 5, [1.28]; see also [2.82-2.95].
[48] This concern has also been highlighted elsewhere: for example, Notes, 'Looking for a family resemblance: the limits of the functional approach to the legal definition of family' (1991) 104 *Harvard Law Review* 1640, 1654.
[49] Millbank (1998), above n 21, 33.

about the nature of relationships will fail to legally recognise relationships that do not conform to these expectations and it is submitted that this is potentially problematic for any relationship that does not conform with traditional ideas about families, not just same-sex couples. Millbank's findings suggest there is a danger that function-based recognition could be used to privilege only a particular ideal of family relationships, which could limit the number of relationships recognised under any function-based framework. As such, determining which family relationships ought to be included, and excluded, from function-based recognition is an issue that requires careful consideration when drawing up proposals for reform.

While drawing up proposals for function-based reforms is beyond the scope of this paper, exploring the proposals made by Barlow et al and the Law Commission is useful as a way to theoretically explore the extent to which the challenges with function-based frameworks can be overcome. It seems that the practical difficulties of proving the existence of a relationship and the principled challenges about traditional ideas about family excluding relationships that do not conform to an ideal image require careful consideration. Significantly, the reform proposals of both authors have been shaped by the argument often cited as a reason to oppose function-based recognition, that such a framework does not respect individual choice not to have a relationship legally recognised. The authors' solution to this perceived problem is to introduce the possibility for parties to opt-out of legal recognition by agreement.

It should be remembered that arguably the aim of Barlow et al' work was to explain *why* function-based recognition should be introduced, whereas the Law Commission's aim was to justify reform *and* offer a detailed blueprint for reform. As such, the level of practical detail in Barlow et al' work is less than that provided by the Law Commission. Barlow et al 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.[50] It is unclear whether any additional criteria would need to be proven. Bearing in mind Millbank's warning about the difficulty of proving the existence of a relationship retrospectively, it is unclear from these proposals how onerous the criteria for proving the existence of the relationship would be, and whether relationships would be expected to demonstrate that they conform with particular, perhaps traditional or gendered, ideas about family relationships in order to be eligible.

In their proposals, the Law Commission claimed that creating a straightforward system was of utmost importance:

[50] Barlow et al, above n 19, 116.

> Eligibility rules for the new scheme must be clear, principled and easy to apply. The more uncertain and complex they are, the more time and costs will be spent in resolving disputes, and the greater the potential for nuisance claims and for unnecessary intrusion into the minutiae of the parties' lives together.[51]

Despite these claims, the system the Commission has drawn up is cumbersome and supports Millbank's warning about the practical and principled challenges with function-based frameworks. There would be three hurdles for parties to pass before being eligible to apply for financial relief under the Law Commission's scheme. First, cohabitants would need to prove that they were indeed cohabitants. Although the Commission refrained from offering a definition of 'cohabitant',[52] they did explain that eligible couples would be those who could prove that they had been 'living as a couple in a joint household'.[53] A statutory list of criteria to assist the court in determining whether two people lived as a couple in a joint household was deemed unnecessary, because this is a concept believed to 'readily be understood as a matter of plain English.'[54] The Commission did suggest that courts should consider some 'central factors' however, such as the stability of the relationship, financial arrangements and the parties' responsibilities for children.[55] Additionally, it was noted that establishing whether the parties had a sexual relationship was important to distinguish cohabiting couples from platonic home-sharers and the Commission felt that intrusive inquiries into the sexual aspects of a relationship would be unavoidable in some cases.[56] Secondly, the parties also had to show that they had a child together or that they had lived together for a period between 2-5 years, to be determined by statute.[57] After successfully passing these hurdles, the success of any financial claim would still not be guaranteed because eligible cohabitants would next need to establish that either 'the respondent has a retained benefit' or 'the applicant has an economic disadvantage' that came about as a result of the applicant's contributions to the relationship.[58] It is arguable whether the Commission's proposals achieve the objective of creating a system that is 'easy to apply.'

In response to concerns that function-based recognition does not respect individual choice, both sets of authors suggest that any reforming legislation should include provision for parties to be able to opt-out of the scheme by agreement. Barlow et al explain that this 'would minimise oppression of those who wish to remain legally uncommitted' because they could avoid legal consequences that they do

[51] Law Commission, above n 5, [3.2].
[52] Ibid, [3.10].
[53] Ibid, [3.13].
[54] Ibid, [3.17].
[55] Ibid, [3.18-3.19].
[56] Ibid, [3.21].
[57] Ibid, [3.63].
[58] Ibid, [4.33]. For details of what would count as a 'qualifying contribution' see [4.34].

not wish to attach to their relationships.[59] This of course would only be beneficial for those cohabitants who are aware of their legal position and want to take steps to avoid being subject to any statutory scheme. The desire to respect choice however is one that is balanced with the need to protect the economically disadvantaged partner on relationship breakdown, and as such both sets of authors agree that any opt-out provision should be subject to safeguards. Barlow et al propose that there should be provision for 'some form of safety-net provision whereby children's interests are safeguarded and both partners can obtain independent legal advice'.[60] The Law Commission felt that provision for an opt-out agreement was necessary subject to some safeguarding rules to 'protect parties who had been treated unfairly at the time the agreement was made' and to provide for those cases where unforeseen circumstances had arisen.[61] Here we see that although both sets of authors believed provision for opt-out agreements are necessary to respect a choice not to be subject to any new scheme, which protects the 'corner of freedom' that Deech was concerned about, the notion of protecting cohabitants is significant enough to justify introducing a function-based framework of recognition that does not require parties to register the relationship.

B. Lessons from Australia

To determine the extent to which the benefits and challenges of both formalised relationships and function-based frameworks play out in practice, this section will look at the Australian experience of legislating to legally recognise unmarried couple relationships, often referred to as 'de facto' relationships. This shows that embracing function-based recognition has had the unexpected consequence of leading back to 'form' in *both* senses of the term. First, it will be shown that formalised relationships did not become unnecessary or irrelevant following extensive function-based recognition of de facto relationships. Second, it will be argued that an exploration of how function-based frameworks operate in practice demonstrates that function-based frameworks rely on 'form' in the second sense, a reference to the type of relationship recognised, albeit in a different way from formalised relationships.

The appeal of formalised relationships

The development of Australia's framework of relationship recognition shows that embracing function-based frameworks can lead back to 'form' in the first sense of formalised relationships. Historically, it was only marriage, between opposite-sex couples,[62] that was legally recognised, and marriage has

[59] Barlow et al, above n 19, 117.
[60] Ibid.
[61] Law Commission, above n 5, [5.15].
[62] Same-sex marriage is now allowed in Australia: Marriage Amendment (Definition and Religious Freedom) Act 2017 (Cth), s 2 amended the Marriage Act 1961 (Cth), s 2A. The legislation came into force on 9 December 2017.

always been subject to federal law. But, legal recognition of de facto relationships developed ad hoc under both state and federal law during the twentieth century, and this has developed into comprehensive recognition of these informal relationships. Today, de facto relationships, which includes couples of the same- and opposite-sex, are treated in an almost identical way to spouses under Australian law.[63] This includes access to a statutory scheme dealing with the financial and property consequences of the breakdown of de facto relationships, which is akin to that for spouses. Initially, individual states and territories had their own frameworks for dealing with the consequences of the breakdown of de facto relationships but following reforms in 2008[64] the framework is now governed by federal law and as such is consistent across Australia.[65]

The benefits of function-based frameworks

The rationale underpinning successful reform in Australia aligns with that of commentators such as Barlow et al and the Law Commission of England and Wales. First, arguments were advanced about the need to protect the economically disadvantaged partner on relationship breakdown. For example, in New South Wales (NSW), the first Australian jurisdiction to legislate for a divorce-like statutory scheme applicable on the breakdown of de facto relationships, the then Attorney General explained that the functional similarities between married and unmarried couples meant reform was necessary:

> 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, analogous legal principles ought to be applied to the resolution of financial affairs of de facto partners.[66]

The NSW Law Reform Commission argued that ordinary principles of trusts and property law were unable to meet the needs of separating de facto partners because of the complexities of establishing an interest in the family home. The increasing number of de facto relationships[67] meant that these difficulties were becoming problems for a wider section of society and so some legal remedy was necessary.[68] Similarly, the 2008 federal reforms were thought necessary partly because of equality

[63] O Rundle, 'An examination of relationship recognition schemes in Australia' (2011) 25 *Australian Journal of Family Law* 121, 123; N Witzleb, 'Marriage as the 'last frontier'? Same-sex relationship recognition in Australia' (2011) 25 IJLPF 135, 135.

[64] See the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth) that amended the Family Law Act 1975 (Cth).

[65] Western Australia has chosen not to be part of the federal reforms, but the state has its own legislation governing the breakdown of de facto relationships: see Family Courts Act 1997 (WA).

[66] *Hansard, NSW Legislative Assembly Debates,* 2002 (17 October 1984) (David Paul Landa, Attorney General).

[67] NSW Law Reform Commission, *Report on De Facto Relationships* (LRC 36, 1983), [3.8-3.9], see also [5.4-5.6].

[68] The NSW reforms did not result in identical legal treatment for de facto and married couples: see New South Wales Law Reform Commission, above n 67, [4.9], [5.8].

arguments.[69] 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.[70] These equality arguments were essentially functional arguments because their focus was on ensuring that relationships that function in similar ways are offered similar protection by law.

Second, the safety-net benefit of function-based frameworks and the potential to better protect disadvantaged partners on relationship breakdown was also an important factor behind the reforms. For example, when the Tasmanian government was legislating to introduce a registration system for couples, it was stressed that function-based frameworks were necessary to 'provide the safety net required to deliver equitable treatment under the law' to particular eligible relationships.[71] A report that formed the basis of the 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.'[72]

Significantly, in the same way as Barlow et al and the Law Commission, the desire to respect individual choice has also influenced the development of function-based recognition in Australia. The Australian system allows de facto couples to opt-out of the courts' jurisdiction to deal with financial provision on relationship breakdown by agreement.[73] For these financial agreements to be valid, both parties must obtain independent legal advice, so that they understand the effect, advantages and disadvantages of entering into such an agreement.[74] 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 recognition remains as a safety net for those people who may not be aware of the legal consequences of their relationship but would benefit from legal recognition on the breakdown of the relationship.

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[69] 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].

[70] See *Hansard, Australian Senate Debates,* 41 (14 October 2008) (Senator Louise Pratt).

[71] *Hansard, Tasmanian House of Assembly Debates,* 30 (25 June 2003) (Mrs Jackson, Attorney General and Minister for Justice and Industrial Relations).

[72] Joint Standing Committee on Community Development *Report on the Legal Recognition of Significant Personal Relationships* (Parliament of Tasmania, 2001), 50.

[73] The same is true in Western Australia: see Family Courts Act 1997 (WA), Part 5A, Division 3.

[74] Family Law Act 1975 (Cth), s 90UJ: de facto partners and spouses are treated identically in this area. For the provision for spouses see s 90G. The state and territory provision also allowed for an opt-out provision. Note that a financial agreement may be found voidable if there are vitiating factors such as duress, even where parties have received legal advice: *Thorne v Kennedy* [2017] HCA 49. For discussion see S Thompson, '*Thorne v Kennedy:* why Australia's decision on prenups is important for English law' [2018] Fam Law 415.

The benefits of registration

As already mentioned, de facto couples in Australia are today in a position where they are treated in an almost identical way to spouses under the law, including the same treatment on relationship breakdown. But, despite this substantive equality the fight continued to introduce same-sex marriage. Marriage is a matter reserved for the federal parliament under the Australian Constitution,[75] and although same-sex marriage is now permitted in Australia, successive federal governments have opposed same-sex marriage. Although the states and territories could not legislate for same-sex marriage because they cannot enact legislation that is incompatible with federal law[76] they could create their own registration options for de facto relationships, and this is exactly what six jurisdictions chose to do.[77] Tasmania has 'registered significant relationships'; Victoria has 'registered domestic relationships'; Queensland has 'civil partnership'; New South Wales (NSW) has 'registered relationships'; the Australian Capital Territory (ACT) has 'civil partnerships' and South Australia has 'registered relationships'.[78] All of these options are available for both same- and opposite-sex couples provided that they are not related by family, are both over 18, are not married or in another registered relationship and that both consent to registration. Registered relationships end when either partner dies or marries, or when the parties either jointly or individually apply to have the registration revoked.

Even though de facto relationships have long attracted a wide range of legal consequences, three main reasons were advanced as to why registration options were needed, and all three mirror the supposed benefits of formalised relationships discussed above. First, the administrative efficiency of formalised relationships was contrasted with the challenges of proving the existence of a relationship under function-based frameworks.[79] The NSW government felt that registration allows easier access to existing 'legal entitlements'[80] and in Victoria, the government explained that registration provides the practical benefit of ensuring that partners would not 'be put to the indignity' of having to prove the existence of their relationship in court.[81] The challenges of determining whether an informal relationship is legally recognised will be discussed below. Second, the supposed benefit of formalised relationships respecting individual choice was also mentioned. In Victoria for example, the government made it clear that registration was a means to 'recognise and dignify the free choice of

[75] Commonwealth of Australia Constitution Act 1900 (Cth), s 51(xxi) and (xxii).
[76] The Australian Capital Territory did legislate for same-sex marriage, but this was swiftly struck down by the Australian High Court: see *Commonwealth v ACT* [2013] HCA 55.
[77] For discussion of registered relationships see S Martin 'Registered Partnerships in Australia' in JM Scherpe and A Hayward (eds), *The Future of Registered Partnerships* (Intersentia, 2017).
[78] Relationships Act 2003 (Tas); Relationships Act 2008 (Vic); Civil Partnership Act 2011 (Qld); Relationships Register Act 2010 (NSW); Domestic Relationships Act 1994 (ACT); Relationships Register Act 2016 (SA).
[79] This is also pointed out by Martin, above n 77, 418.
[80] *Hansard, NSW Legislative Assembly Debates,* 22240 (23 April 2010) (Mr Barry Collier, Parliamentary Secretary).
[81] Relationships Bill 2007 Explanatory Memorandum (Vic), 1.

human beings to order their own lives and relationships in freedom, and respects that choice in terms of equality'.[82] 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'.[83] But, as argued above, these arguments about formalised relationships respecting choice make the mistake of assuming that relationship decisions are always made based on informed knowledge of the applicable law.

The third reason advanced to support the introduction of registered relationships is symbolic: the act of formalising a relationship attaches a label to that relationship, which allows third parties and the state to understand that it is a significant family relationship.[84] 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.[85] In Victoria, it was argued that registration would allow for the 'dignity of formal recognition' of a 'loving' 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.'[86] This suggests that there is something distinctive about formalised relationships in a symbolic sense that function-based frameworks cannot replicate.

The perceived value of the registered relationships compared with the perceived value of marriage differs between different people. Some felt that registration was a second-best alternative to marriage and continued to fight for marriage equality. A 2010 study found that almost 55 per cent of same-sex couples who had registered their relationships in a state or territory would prefer to be married.[87] Normann Witzleb explains that 'the institution of marriage retains a special cultural and social significance' for many and that the 'partnership registration schemes… lack comparable symbolic value'.[88] This in turn led to a continuing demand for same-sex marriage. But others feel that the registration options are equally valuable. For example, 27.6 per cent of respondents to the 2010 study preferred access to an alternative registration option.[89] Olivia Rundle argues that the 'symbolic social

[82] *Hansard, Victorian Legislative Assembly Debates,* 4393 (6 December 2007) (Mr Hulls, Attorney General).
[83] *Hansard, Tasmanian House of Assembly Debates,* 32 (25 June 2003) (Mrs Jackson, Attorney General, Minister for Justice and Industrial Relations).
[84] See Martin, above n 77, 420.
[85] *Hansard, Tasmanian House of Assembly Debates,* 32 (25 June 2003) (Mrs Jackson, Attorney General, Minister for Justice and Industrial Relations).
[86] *Hansard, Victorian Legislative Assembly Debates,* 4393 (6 December 2007) (Mr Hulls, Attorney General).
[87] SK Dane, B Masser, G MacDonald, JM Duck, 'Not so Private Lives: National Findings on the Relationships and Well-Being of Same-Sex Attracted Australians' (Version 1.1, 2010), 42: available from https://espace.library.uq.edu.au/view/UQ:205948 (last accessed 20 March 2019).
[88] Witzleb, above n 63, 136; see also 153.
[89] Dane et al, above n 87.

recognition' offered by the registered couple relationships is a means by which the 'state sends a message to couples that "your relationship matters"'.[90] Rundle noted that by 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.[91] 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.'[92]

Putting aside the differing symbolic perceptions of marriage and the registered relationships, it is apparent from the Australian experience that embracing function-based recognition, even to the point where unmarried/unregistered couples are treated in virtually the same way by law as married/registered couples, does not mean that formalised relationships suddenly become redundant. They are still valuable because of the practical benefit of being administratively efficient and, arguably more significantly, due to the symbolic significance of having a process to formalise a relationship and have that relationship recognised by the state. This reinforces the arguments above that the legal consequences of different relationships are not the primary motivator behind relationship choices and that the symbolism associated with marriage and civil partnership may be more prominent reasons for formalising. The Australian experience shows that embracing function-based frameworks led back to 'form' in the first sense of formalised relationships because formalised relationships have some benefits that are not shared with function-based frameworks.

Focussing on relationship type

Recognising that formalised relationships offer benefits does not mean that attempts at introducing function-based reforms should be abandoned in favour of offering further options to formalise relationships. The Australian experience shows that both formalised relationships and function-based recognition have different benefits and are best utilised alongside each other, which is what Barlow et al and the Law Commission were proposing should happen in England and Wales. Formalised relationships are appealing because they offer an administratively efficient means of recognising relationships and are symbolically significant to many. But, function-based systems were preserved in all the Australian states and territories that introduced registration options because they were seen

[90] Rundle, above n 63, 151.
[91] Ibid, 145.
[92] Ibid, 146.

as better placed to protect the economically disadvantaged partner, subject to an opt-out option for those couples who want to make their own arrangements on relationship breakdown.

But, the ease, or difficulty, of proving the existence of a relationship under a function-based framework determines the effectiveness of the framework to fulfil this protective role: the more difficult it is to prove that a relationship is a de facto or cohabiting relationship, the fewer relationships will be subject to the law's protection. Millbank's work discussed above warns that there are challenges with function-based recognition, namely the difficulties of proving the existence of an informal relationship retrospectively and the dangers of requiring parties to conform to a particular vision of family before the relationship will be legally recognised. An examination of how both formalised relationships and function-based recognition work in practice shows that both frameworks of recognition rely on 'form' in the second sense of relationship type, albeit in different ways. 'Type', like 'form', is a term that has two different meanings and can be used as a reference to relationship structure or relationship quality. 'Structure' refers to the model or the framework of the relationship, for example, that there is a relationship between two unrelated adults. 'Quality' is a reference to the nature of the relationship, or to the qualitative characteristics of a relationship, such as whether the parties share a common residence or whether there is financial interdependency. The different way in which formalised relationships and function-based frameworks interact with both meanings of 'type' is significant because this interaction has a direct connection with the benefits and difficulties of both frameworks.

Formalised relationships and relationship type

Part of the administrative efficiency of formalised relationships stems from the way this framework interacts with 'form' in the second sense of relationship type, or more specifically the requirement that formalised relationships conform to a particular structure. The legislation governing the Victorian 'registered domestic relationships' provide a particularly clear example of this. This legislation describes 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.[93]

[93] Relationships Act 2008 (Vic), s 5.

As Olivia Rundle observes, this definition is 'somewhat superfluous' because any two adults who fulfil the eligibility criteria may register.[94] To register a relationship in Victoria it is only necessary to comply with a particular structure: the parties must be over 18; they must not be married, in a registered relationship or another relationship that could be registered; and both parties must consent to the registration.[95] There is no need to prove some of the elements in the statutory description of a registered relationship. For example, there is no requirement to prove that either partner provides 'personal or financial commitment to the other or that either provides 'support of a domestic nature.' This suggests that while policy-makers were eager to set some expectations in the legislation as to the expected functions, or qualities, of the relationships that could be registered, the need to ensure the administrative efficiency of formalised relationships means that the expected qualities of the relationship are not part of the requirements for a valid registration.

This requirement to fulfil a particular structure only, without requiring parties to evidence any qualities of the relationship, is also a feature of the formalised relationship of marriage. Nicola Barker's 'marriage model' framework is helpful as a means to illustrate this point. The marriage model has three connected elements: the legal structure, the legal consequences, and the ideology of marriage. The legal consequences of marriage are not relevant here because these tell us little about what type of couple can form a valid marriage. Legal structure refers to the 'entry and exit requirements' of marriage, or, 'in other words, who may marry and dissolve a marriage, under what circumstances and according to what formalities.'[96] Barker acknowledges that there is some '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,'[97] but explains that she uses the term in a particular way, 'to refer to the beliefs and discourses that underpin… understandings of marriage as natural and universal.' Ideology is used to refer to 'the manifestation of an 'ideal' marriage.'[98]

In terms of forming a valid marriage, as well as the requirements to follow particular formalities,[99] the legal structure of marriage in both England and Wales and Australia requires both parties to be of marriageable age, to not already be married (or in a civil partnership in England and Wales),[100] and

[94] Rundle, above n 63, 135.
[95] Relationships Act 2008 (Vic), s 7.
[96] Barker, above n 24, 22.
[97] Ibid, 23. 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'.
[98] Barker, above n 24, 23.
[99] As provided for by the Marriage Act 1949.
[100] Being in a registered relationship in one of the states or territories will not prevent an individual from marrying. Rather, marrying will automatically bring the registered relationship to an end. See for example Relationships Act 2008 (Vic), s 11(b); Relationships Register Act 2010 (NSW), s 10(b).

that the parties are not related by family.[101] The parties must also consent to marrying.[102] Nevertheless, the ideology of marriage extends beyond the elements of the legal structure. For example, supporters of introducing same-sex marriage in England and Wales focussed on what they perceive to be the important characteristics of marriage in the parliamentary debates. Baroness Stowell argued 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'.[103] Opponents of same-sex marriage argued that marriage was about sex and procreation. For example, 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'[104] and many others stressed that marriage is a monogamous sexual relationship between heterosexuals.[105]

The differing versions of the ideology are significant for two reasons. First, it suggests that the ideology of marriage is not fixed, and so there is some uncertainty as to what the expected functions of marriage may be at any given point because marriage means different things to different people. This is important in any reform efforts that would define cohabitants as those couples who live together as if they were married because there is no consensus as to which qualities are expected to characterise marriage relationships. Second, many of the elements referred to, such as commitment, love, support and procreation, are not part of the legal structure of marriage since they are not requirements for forming valid marriages. In the same way that the Victorian definition of a registrable relationship was largely superfluous as the qualities listed extended beyond the required structure of registration, the ideology of marriage tells us what marriages should be in qualitative terms, but many of these expectations are not part of the legal structure. This shows that formalised relationships are administratively efficient in part because of the way validity of a relationship only requires parties to conform to a particular structure of relationship, while assuming the relationship actually fulfils particular functions.

Function-based frameworks and relationship type

Function-based frameworks of recognition are by their nature less administratively efficient than formalised relationships and this is because of the way function-based frameworks interact with relationship type. Looking at some of the case law to see how the courts determine whether a de facto relationship existed provides a good illustration of how function-based frameworks require parties to

[101] Matrimonial Causes Act 1973, s 11; Marriage Act 1961 (Cth), s 23B.
[102] Matrimonial Causes Act 1973, s 12; Marriage Act 1961 (Cth), s 23B.
[103] *Hansard,* HL Deb*,* vol 745, col 938 (3 June 2013).
[104] *Hansard,* HC Deb, vol 558, col 145 (5 February 2013) (Robert Flello).
[105] See eg: *Hansard,* HC Deb, vol 558, col 158 (5 February 2013) (Tim Loughton).

conform to both a particular structure *and* provide evidence that the relationship is of a particular quality. This highlights that Millbank's concerns about the practical and principled challenges of function-based recognition are issues to be considered carefully in any reform efforts.

Australian federal legislation defines a de facto relationship as a relationship between two people, where:

> …the persons 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.[106]

The first part of the definition refers to the preconditions[107] that parties must first meet to determine whether it is *possible* that the relationship is a de facto relationship. These preconditions require parties to prove that they conform to the required *structure* of the relationship, that it is a relationship between two people, who are not married to each other[108] and are not related.[109] This is similar to the legal structure of the registered relationships discussed above. After fulfilling the preconditions and determining that a relationship *may be* a de facto relationship, the parties must then go on to fulfil the second part of the definition and show that they *are* a couple who 'live together on a genuine domestic basis', and so *are/were* in a de facto relationship. This contrasts with the formalised relationships where relationships are expected to be of a particular quality, but it is not necessary to prove these qualities when determining if the registration or marriage is valid. The second part of the definition is a reference to the *quality* of the relationship, and this is the part of the definition that poses the greatest challenges when trying to establish the existence of a relationship.

The Australian legislation allows the courts discretion to consider 'all of the circumstances of the relationship' to determine whether the couple are living together on a genuine domestic basis.' But the legislation also provides that the court may take into account 'any or all' of the circumstances provided for by statute: [110]

a) The duration of the relationship;
b) The nature and extent of common residence;
c) Whether a sexual relationship exists;

[106] Family Law Act 1975 (Cth), s 4AA(1).
[107] Sometimes referred to as 'statutory preconditions' by judges, eg *Jonah v White* [2011] FamCA 221, [33].
[108] 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: Family Law Act 1975 (Cth), s 4AA(5).
[109] Related by family is defined by s 4AA(6), Family Law Act 1975 (Cth).
[110] Family Law Act 1975 (Cth), s 4AA(2).

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.

In many reported cases, while judges consider each factor in turn, the approach taken is to examine all of the circumstances of a relationship before taking a 'step back', to 'consider the matter as a whole.'[111] As Murphy J noted in *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…. 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".[112]

In *Baker v Landon*,[113] Riethmuller FM found that a de facto relationship existed, even though the respondent had claimed to be single to the department of social security. All other factors suggested that there had been a de facto relationship: it was a long cohabiting relationship, they had an ongoing sexual relationship, there was some financial interdependence and they had a commitment to a shared life together.[114] In *Dakin v Sansbury,*[115] Bender FM found that despite an 'unconventional' period[116] where the couple lived apart, the parties had been in a de facto relationship. An assessment of the circumstances showed that they had an ongoing sexual relationship, there was some financial dependency, they sometimes shared residence and property and the respondent was involved with the applicant's child.[117] In *Ricci v Jones*[118] however Riley FM found that despite the couple having a child together, there was no de facto relationship because this was a short (5 month) relationship, with no shared residence or finances and no mutual commitment to a shared life.[119] This flexible

[111] *Baker v Landon* [2010] FMCAfam 280, [126].
[112] *Jonah v White* [2011] FamCA 221, [66].
[113] [2010] FMCAfam 280.
[114] Ibid, [110-24].
[115] [2010] FMCAfam 628.
[116] Ibid, [171].
[117] Ibid, [100], [118], [119], [136].
[118] [2010] FMCAfam 1425.
[119] Ibid, [46-56].

approach allows the courts to make decisions on a case-by-case basis and is commendable because a flexible approach to assessing all of the circumstances of the relationship has the potential to protect more relationships upon relationship breakdown.

But this flexibility also means that it can be difficult for lawyers to advise clients as to whether their relationship will be legally recognised because it is difficult to predict when a court will find that a de facto relationship exists. Proving the qualities of a relationship can be cumbersome. In *Gissing v Sheffield*,[120] excluding the evidence that the parties themselves gave in court, the parties relied on 11 affidavits from witnesses and 24 exhibits to evidence the nature of their relationship.[121] The inquiries can also be intrusive, which may be a particular concern for same-sex couples who have not yet 'come out'. For example, in *S v B*, there was some dispute between the parties as to when a sexual relationship ended. Dutney J commented that,

> …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 ultimately sexual activity ceased. The appellant blamed his failure to obtain and sustain an erection on the respondent being fat.[122]

Dutney J then went on to explain that when the sexual relationship ended was not 'particularly relevant to whether the relationship continued in this case'.[123] If the issue of when, or why, the sexual relationship ended was not relevant to a determination of when the de facto relationship ended, it is questionable why the judge needed to refer to these sensitive details at all. Behrens comments that the 'intrusive' nature of the inquiries 'takes [Australia] 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.'[124] These intrusive inquiries have been referred to as 'undignified' in the parliamentary debates on the introduction of registered

[120] [2012] FMCAfam 1111.
[121] Ibid, [9-11].
[122] *S v B (No2)* [2004] QCA 449, [38].
[123] Ibid, [46].
[124] J Behrens, '"De facto relationship?" Some early case law under the Family Law Act' (2010) 24 *Australian Journal of Family Law* 350, 360.

couple relationships in Australia[125] and this was proffered as a reason to prefer formalised relationships over function-based recognition. The intrusive inquiries and the inherent uncertainty of function-based frameworks of relationship recognition appear to be largely unavoidable. It is significant however that despite these challenges, function-based frameworks have been retained in Australia, presumably because they offer the distinct benefit of protecting partners on relationship breakdown where steps have not been taken to formalise the relationship. This suggests that if a framework of recognition is to achieve the goal of protecting as many economically disadvantaged partners as possible by providing a flexible system that allows judges to make decisions on a case-by-case basis, then the inherent uncertainty and intrusive inquiries of a function-based framework is the price that must be paid.

Conclusion

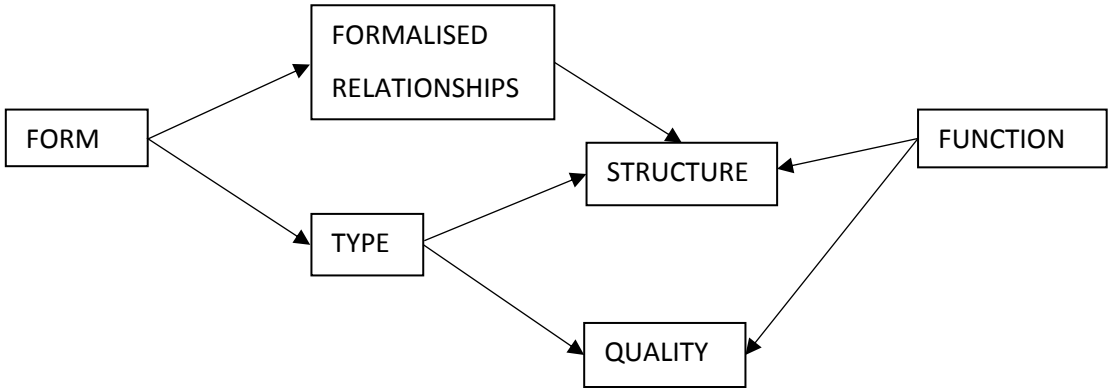
Recent reform efforts in the area of adult relationship recognition in England and Wales have focused on developing the formalised relationships of marriage and civil partnership. Many commentators have argued that function-based reform to regulate the financial consequences of the breakdown of cohabiting relationships is necessary alongside the formalised relationships or marriage and civil partnership. This paper agrees with these authors that a blended approach to reform is necessary, one that focuses on developing both formalised relationships and function-based recognition alongside each other. But it has also been argued that a more nuanced understanding of the meaning of 'form-based' recognition is necessary to provide clarity in the academic debate. It is apparent that 'form' has a double meaning and can be used as a reference to formalised relationships or as a reference to relationship type. With a clearer meaning of 'form' in mind, the Australian experience of legislating to legally recognise de facto relationships demonstrates the important lesson that introducing function-based recognition of couple relationships leads back to 'form' in both senses of the term, which shows that developing one framework while disregarding the other will provide inadequate reform.

The Australian experience shows that embracing function-based frameworks, even to the point where de facto couples are treated almost identically to spouses, does not diminish the appeal of formalised relationships. Despite the extensive legal recognition given to informal de facto relationships, the fight continued to secure marriage equality and six jurisdictions created registration options for opposite- and same-sex de facto couples. This shows that the existence of function-based frameworks does not mean that formalised relationships lose their appeal. Formalised relationships are still viewed as

[125] See for example, *Hansard, NSW Legislative Council Debates,* 22513 (12 May 2010) (John Hatzistergos, Attorney General): 'This bill will stop people from having to go through the indignity of proving their relationship to every bureaucrat who will make a decision about their entitlements.'

desirable and valuable because of their administrative efficiency and, arguably most significantly, due to their symbolic value in attaching a label to a relationship. These are benefits that are not shared with function-based frameworks. This is the first way in which legislating for function has led back to 'form' in the first sense of formalised relationship: legislating for function does not mean that formalised relationships are irrelevant or redundant. It is noteworthy however that despite the challenges relating to proving the existence of relationships, function-based frameworks have been retained in all Australian jurisdictions after the introduction of different options to formalise because function-based recognition offers the distinct and important benefit of acting as a safety net to protect the economically disadvantaged partner. The second way that legislating for function leads back to 'form', this time in the second sense of relationship 'type', is that function-based frameworks continue to rely on 'type', albeit in a different way than formalised relationships. Relationship type can be a reference to either the structure of a relationship or the qualities of the relationship. The interaction between formalised relationships, function-based recognition and relationship type is represented in the following figure:

Figure 1:



Formalised relationships are administratively efficient in part because they only require couples to comply with a particular structure, as this framework allows us to assume the qualities of the relationship. But it is more difficult to prove the existence of a relationship under a function-based framework because parties are required to comply with a particular structure *and* evidence the qualities of the relationships. Despite this inherent practical difficulty in relation to proving the existence of a relationship under a function-based framework, they have been retained in Australia presumably because they offer a distinct benefit. While formalised relationships only protect those who have taken steps to formalise their relationships, function-based frameworks do not require registration and thus act as a safety-net to protect people on relationship breakdown.

The Australian experience shows that both frameworks of recognition need to be used alongside each other because they offer different benefits. Same-sex marriage and opposite-sex civil partnerships are developments in relationship recognition that can be celebrated because of the benefits offered by formalised relationships. But the concern is that these developments should not be the last word on the development of relationship recognition in England and Wales. Focusing on developing formalised relationships only does nothing for the increasing number of people in cohabiting relationships, many of which incorrectly believe that they are treated in law as if they are married. Varying reasons lay behind people's relationship practices and different relationships will require different responses from the law. Offering different options to formalise relationships alongside the safety-net of function-based recognition for those who do not formalise, with an opt-out provision for legally aware couples who wish to avoid recognition, provides a framework that has something for everyone. This is a different approach than that which has been taken towards reforming the way adult relationships are recognised to date in England and Wales, where reform usually focuses on one issue at a time, such as introducing same-sex marriage and opening up civil partnership to opposite-sex couples. Theorists and policymakers need to focus on how best to utilise both approaches to relationship recognition and develop a blended approach to reform that meets the needs of different relationships.