

# RETHINKING RELATIONSHIPS

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*The Property (Relationships) Act 1976 is generally regarded as progressive and inclusive. The Act applies an equal property sharing regime to married spouses, civil union partners and de facto partners. It does not, however, recognise other sorts of close domestic relationships such as those between a parent and adult child or between siblings. This is in contrast to Australia where a number of jurisdictions have conferred relationship status on domestic relationships. This article considers whether there is a similar case to be made in New Zealand for extending property rights to people in domestic relationships.*

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## **I INTRODUCTION**

Professor Bill Atkin can lay rightful claim to the title as New Zealand's pre-eminent family law analyst. His work is received with the highest regard both in New Zealand and overseas, and his encyclopaedic knowledge of the discipline brooks no comparison. More so than any other academic in his field, Professor Atkin has played a key role in many of the advancements made to family law in New Zealand in recent times.

As a law student in the 1980s I well recall reading articles by Professor Atkin on the then very topical Matrimonial Property Act 1976.<sup>1</sup> Years later, confronted with the sweeping amendments made in 2001 by the Property (Relationships) Act 1976, again I found myself consulting the works of Professor Atkin as the first point of reference for clarification on the new law. With New Zealand's relationship property laws both past and present already so expertly analysed by Professor Atkin, I fear that any attempt at re-examination here would be an exercise in futility. Accordingly,

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1 See generally Bill Atkin "The New Regime of Family Property" [1977] NZLJ 81; Bill Atkin "Ordering the Sale of the Matrimonial Home" [1977] NZLJ 187; Bill Atkin "Ancillary Powers Under the Matrimonial Property Act 1976" [1977] NZLJ 316; Anthony Angelo and Bill Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237; Bill Atkin "Property Division on a Short Second Marriage" [1978] NZLJ 86; Bill Atkin "Matrimonial Property Going Overseas" (1984) 11 NZULR 183; Bill Atkin "Matrimonial Property: Time to Take Stock" [1985] NZLJ 25; Bill Atkin "Matrimonial Property – A Quartet of Court of Appeal Decisions" (1987) 1 FLB 98; Bill Atkin "De Factos Engaging Our Attention" [1988] 1 NZLJ 12; and Bill Atkin "De Facto Relationships and the Law" (1989) 2 FLB 30.

rather than reflect on current relationship property law, this brief discussion aims to consider an issue previously unexamined in New Zealand, which could pose challenges in future decades.

New Zealand's relationship property laws are generally regarded as progressive and inclusive.<sup>2</sup> In one respect, however, it is arguable that New Zealand is lagging behind some jurisdictions in its failure to recognise relationship property rights for all potentially eligible "couples". Notwithstanding the expansion of the Property (Relationships) Act in 2001 to de facto partners, and again in 2004 to civil union partners,<sup>3</sup> the legislative emphasis remains on "coupledom" in the sense of marriage or marriage equivalence, the unarticulated assumption being that these are the only sorts of relationships that give rise to legitimate property-sharing expectations.

The monocular focus of the current model excludes people living together in other sorts of non-intimate, but close personal or "domestic" arrangements (hereafter collectively referred to as "domestic relationships"). Examples of domestic relationships could include family relationships, such as a parent and an adult child, siblings, or perhaps even unrelated but interdependent housemates. Although not recognised in the Property (Relationships) Act 1976, domestic relationships can bear many of the functional hallmarks of marriages, civil unions and de facto relationships, such as mutual commitment, caring and support.

The issue has gained noticeably more traction in other countries. For example, most jurisdictions in Australia have already conferred relationship status on domestic relationships, "representing a movement towards a more fluid concept of relationships governed by redistributive law".<sup>4</sup> This article will consider whether a similar case could be made in New Zealand for extending property rights to people in other types of domestic relationships.

The discussion will begin by briefly examining whether there is, or at least might be, an unmet need for the legal recognition of domestic relationships. It will then look at how far New Zealand has moved beyond traditional formalism, and is already applying a functional approach to relationships outside marriage. It will consider whether that approach could be further extended to non-intimate domestic relationships as a valid form of coupledom. Finally, using the Australian legislation as a template, the article will identify some concerns that would need to be addressed were New Zealand to consider legal recognition of domestic relationships.

It would be remiss to begin, however, without sounding a note of caution. Since the issue of domestic relationships has received very little attention in New Zealand, the following discussion is

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2 See Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 52, who have noted: "New Zealand stands out on the international stage for its statutory equating of different types of relationship."

3 Civil Union Act 2004.

4 *McKenzie v Storer* [2007] ACTSC 88 at [57].

designed as no more than a scoping exercise identifying the questions that would need to be asked. If nothing else, it is hoped that the discussion might serve as a catalyst for generating further debate on the issue in New Zealand.

## **II IDENTIFYING A NEED FOR DOMESTIC RELATIONSHIP RECOGNITION**

Domestic relationships remain largely invisible in New Zealand and are ignored by the state. Indeed, in 2000, at the 10th World Conference of the International Society of Family Law, Professor Atkin outlined the then-proposed changes to New Zealand's relationship property laws and observed:<sup>5</sup>

Same-sex relationships were also included but not other domestic relationships such as family ones which are covered by legislation in other jurisdictions. This is a little anomalous, given that the focus is now firmly on the law of property, rather than the nature of the relationship, and is illustrated by the change of name from the *Matrimonial Property Act* to the [*Property (Relationships) Act*]. Logically, other domestic relationships, such as those between family members, could have been brought within the scope of the legislation.

It will be recalled that the 2001 amendments had a difficult gestation. The Property (Relationships) Amendment Act 2001 (subsequently renamed the Property (Relationships) Act 1976) was originally conceived as two separate legislative proposals: the Matrimonial Property Amendment Bill 1998<sup>6</sup> and the De Facto Relationships Bill 1998.<sup>7</sup> In September 1999 the Government Administration Committee reported back to the House on the De Facto Relationships (Property) Bill 1998. The Committee reported that of the 163 submissions it received, four submissions suggested that the Bill should be widened to include all domestic relationships.<sup>8</sup> Three of the four submissions referred to legislation in the Australian Capital Territory, the Domestic Relationships Act 1994 (ACT), which covers a broad range of domestic relationships and gives the court wide discretionary powers to adjust the property interests of those in a domestic relationship.<sup>9</sup> The Committee distinguished the Australian legislation, however, noting that a major difference

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5 Bill Atkin and Wendy Parker "De Facto Property Developments in New Zealand: Pressures Impeded Progress" in John Dewar and Stephen Parker (eds) *Family Law Process, Practices and Pressures: Proceedings of the Tenth World Conference of the International Society of Family Law* (Hart Publishing, Oxford, 2003) 555 at 562.

6 Matrimonial Property Amendment Bill 1998 (109).

7 De Facto Relationships (Property) Bill 1998 (108).

8 De Facto Relationships (Property) Bill 1998 (108-2) (select committee report).

9 The Domestic Relationships Act 1994 (ACT) covers de facto and same-sex relationships, and a wider range of relationships such as where an adult provides support to a parent or vice versa, and may include relationships where the parties do not share the same household.

between the Australian Capital Territory scheme and the proposal in the Bill was that the former was purely discretionary, which enabled the court to tailor any property award to meet the facts of a particular situation, whereas the Bill contained a presumption of equal sharing.<sup>10</sup>

The issue of domestic relationships also received some attention in the context of the debates leading up to the enactment of the Civil Union Act 2004. A Supplementary Order Paper promoted by National Party Justice Spokesperson, Richard Worth MP, raised the question of legal rights for people in non-conjugal relationships.<sup>11</sup> Mr Worth argued that the Civil Union Bill was not inclusive and discriminated against non-sexual relationships such as those between siblings or friends.<sup>12</sup> The Supplementary Order Paper proposed replacing the term "civil union" with the term "civil relationship", thereby widening the number of couples who would be able to register their relationship and enjoy the protections and benefits that the companion Bill, the Relationships (Statutory References) Bill would provide.<sup>13</sup> The proposal received some cross-party support in the House. United Future MP Judy Turner, for instance, argued that registering a relationship did not have to be "a bedroom issue", and that a lot of relationships would benefit from establishing clear next-of-kin status, provision of protection of jointly owned property, and would reflect "the investment over a period of years that [had] been given to the relationship by providing some legal framework and some legal protection around that".<sup>14</sup> Supporters of the Civil Union Bill saw the Supplementary Order Paper as a delaying tactic rather than a serious proposal, however.<sup>15</sup> When put to the vote, the proposed amendments were defeated by a margin of 46 votes in favour to 74 votes against.

The lack of legislative enthusiasm for domestic relationships in New Zealand does not necessarily mean that the status quo should be preserved indefinitely. Family law, after all, is no

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10 De Facto Relationships (Property) Bill 1998 (108-2) (select committee report). The Committee's efforts to distinguish the Domestic Relationships Act 1994 (ACT) from the Bill are not entirely convincing because the Australian Capital Territory legislation also covers de facto relationships.

11 Supplementary Order Paper 2004 (314) Civil Union Bill 2004 (102). See also the discussion in Nan Seuffert "Sexual Citizenship and the Civil Union Act 2004" (2006) 37 VUWLR 281 at 299–301.

12 (9 December 2004) NZPD 17658.

13 (7 December 2004) NZPD 17437.

14 (7 December 2004) NZPD 17475.

15 When questioned about Mr Worth's proposals at a post-Cabinet press conference, Prime Minister Helen Clark observed that the issues raised by Mr Worth could be considered in another forum, but not in the context of the current Bill. She suggested that the proposed amendment was a copy-cat measure of a similar amendment which was unsuccessfully tried by a junior Conservative MP in the House of Commons during the debates on the Civil Partnership Act 2004 (UK). The House of Commons rejected that proposal by 381 votes to 74 and went on to pass the Civil Partnerships Bill by 389 votes to 47: Kevin List "PM's Presser: Civil Unions and Mr Zaoui's Bail" (press release, 7 December 2004).

more than a state construction, subject to change and reinvention.<sup>16</sup> The state determines who may constitute "families" or be in the types of relationships the state is prepared to recognise, and the state then delineates the responsibilities and privileges of those family members.<sup>17</sup> Over time, those definitions may need to be changed. An obvious example in recent New Zealand history is the inclusion of de facto partners in the Property (Relationships) Act in 2001.

Data from the New Zealand Census in 2013 shows that a large minority of New Zealanders live together in a wide variety of ways that do not conform to the archetypal notion of the nuclear family comprising a couple with dependent children. At least some of these alternative living arrangements could potentially qualify as domestic relationships. Although it is not possible to assess with any accuracy how many people in New Zealand are in domestic relationships, the Census gathers data on extended families and household composition, which helps to build a broad picture of the different ways that New Zealanders live together.<sup>18</sup>

There were 1,549,890 households in New Zealand in 2013.<sup>19</sup> The Census definition of a household is either one person who usually lives alone, or two or more people who usually live together and share facilities (such as for eating or cooking) in a private dwelling. A household may contain one or more families, other people in addition to a family, or no families at all, such as unrelated people living together.<sup>20</sup>

Included within the total number of households in 2013, were 1,136,397 families. A family is defined as two or more people living in the same household who are either a couple with or without children, or one parent and their children.<sup>21</sup> A significant number of New Zealanders live outside the dynamic of the typical "family nucleus". In 2013 there were 100,605 "extended families", ranging between one generation and three or more generations living in the same dwelling. An "extended family" is defined as a group of related people who usually reside together as a family nucleus with one or more other related people, or two or more related family nuclei, with or without

16 Laura A Rosenbury "Friends With Benefits?" (2007) 106 Mich L Rev 189 at 193.

17 At 193.

18 Other statistics on marriages, civil unions and divorces indicate that there were: (i) 19,237 resident marriages in 2013, dropping below 20,000 for the first time since 2001; (ii) 187 resident civil unions registered, of which 65 per cent were same-sex unions; (iii) 46 civil unions registered to overseas residents, of which 83 per cent were same-sex unions; (iv) 2,642 resident civil unions registered in New Zealand up until the end of 2013, with 164 civil unions dissolved; (v) 8,279 orders for dissolution of marriage granted in New Zealand in 2013; and (vi) 9.4 divorces for every 1,000 estimated existing marriages in New Zealand. See Statistics New Zealand "Marriages, Civil Unions, and Divorces: Year ended December 2013" (press release, 5 May 2014).

19 This represented an increase of 6.6 per cent from the 2006 figure of 1,454,175.

20 Statistics New Zealand *2013 Census QuickStats about families and households* (November 2014) at 21.

21 At 21.

other related people.<sup>22</sup> By composition, in 2013, 58.2 per cent of extended families consisted of three or more generations, 36.4 per cent consisted of two generations and the remaining 5.4 per cent were one-generation families (such as couples living with siblings or cousins).<sup>23</sup>

Many families include adult children living at home. The 2013 data showed that 110,559 families included adult children aged 20 years or older, 42,894 of which included a child aged 30 years or over.<sup>24</sup> In 11.9 per cent of one-parent families, the youngest child was aged 30 years or over, compared with four per cent for couples with children.<sup>25</sup>

In addition, the 2013 figures revealed that there were 72,384 "other" multi-person households, defined as households not forming a "family", comprising either related people (for example, siblings), related and unrelated people, or unrelated people (for example, flatmates).<sup>26</sup>

Beyond the Census data, there is further evidence of the existence of domestic relationships based on care and support in the specific context of caring for the health or personal needs of another person. A recent report commissioned by Infometrics has estimated that there are around 420,000 unpaid caregivers currently looking after family members.<sup>27</sup> The report further estimated that the value of unpaid family care was \$10.8 billion or 5 per cent of GDP in 2013. Aside from the obvious questions around the duty of the state to recognise such unpaid contributions to society,<sup>28</sup> some of these relationships may also arguably give rise to private relationship property rights and expectations between the parties.

In conclusion, if even only a fraction of the atypical family living arrangements identified above could be said to engender a domestic relationship, it would nonetheless result in a significant portion of the community being unable to partake in the extensive range of consequences that attach to marriage or marriage-like relationships. It might be surmised, then, that there is a potential unmet need to consider the relationship property rights of people who live together in "domestic relationships". Ideally, however, empirical analysis specifically targeted at investigating the existence and incidence of domestic relationships in New Zealand would be required to confirm these assumptions.

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22 At 24. The 2013 figures represented a steady increase, up from 82,692 in 2006 and 64,929 in 2001.

23 At 24.

24 At table 7.

25 At 13–14.

26 At table 24.

27 Catherine Harris "Unpaid caring hits household incomes" (28 January 2015) [Stuff.co.nz](http://www.stuff.co.nz) <[www.stuff.co.nz](http://www.stuff.co.nz)>.

28 See *Attorney-General on Behalf of the Ministry of Health v Spencer* [2015] NZCA 143.

### III IN JUSTIFICATION OF DOMESTIC RELATIONSHIPS

#### A Form Versus Function

In 1866 Lord Penzance defined marriage "as understood in Christendom [as] the voluntary union for life of one man and one woman".<sup>29</sup> Very little, if any, of that definition withstands close inspection today.<sup>30</sup> Religion is no longer the only basis for marriage in modern secular society;<sup>31</sup> social and cultural meanings are just as important to many people. Equally, marriage is not regarded as a lifelong institution terminated only by the death of one of the spouses. In many countries, moreover, marriage is no longer the exclusive preserve of heterosexual couples.<sup>32</sup> It is even arguable that the voluntariness element has disappeared following the inclusion in 2001 of de facto partners in the Property (Relationships) Act 1976. Given that the court can rule on the existence of a de facto relationship and retrospectively impose de facto status on a couple, the status will not be "voluntary" for some people.<sup>33</sup>

For all that, the historical influence of the institution of marriage continues to cast a long shadow over the state's understanding of what it means to be a "couple". Contrary to first impressions, it might be argued that a relatively conventional approach is still applied to the concept of "coupledom" in New Zealand. Although the marriage analogy has been stretched to its outer limits by treating civil unions, de facto relationships<sup>34</sup> and same-sex marriages on a similar legal footing for property sharing purposes, all of these relationships share in common the premise that a "couple" is an intimate pairing between two people with no ties of kinship. The Interpretation Act 1999 resolves any residual doubt as to the breadth of a de facto relationship by providing that where the expression de facto relationship is used in an enactment, it refers to a relationship between two people who live together as a couple in a relationship in the nature of marriage or civil union.<sup>35</sup>

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29 *Hyde v Hyde* [1866] LR 1 P&D 130 (HL).

30 See Ruth Deech "Civil Partnership" [2010] Fam Law 468.

31 Secular marriage became available with the passing of the Marriage Act 1753 (UK), otherwise known as Lord Hardwicke's Act 1753. Prior to that time, the legal requirements for a valid marriage in England and Wales were governed by the canon law of the Church of England.

32 The Marriage (Definition of Marriage) Amendment Act 2013, s 5, extended marriage to same-sex spouses. "Marriage" is now defined as "the union of 2 people, regardless of their sex, sexual orientation, or gender identity". See also *Obergefell v Hodges* 576 US 11 (2015) where, by a majority of 5–4, the United States Supreme Court held that the fundamental right to marry is guaranteed to same-sex couples.

33 See the discussion in Deech, above n 30.

34 The Property (Relationships) Act 1976 defines a de facto relationship in s 2D as a relationship between two persons who "live together as a couple". The definition of "de facto relationship" in s 2D is discussed at 660–661, below.

35 Interpretation Act 1999, s 29A(1).

On the other hand, by recognising informal, unregistered de facto relationships, it is also arguable that New Zealand has adopted a functional methodology in order to justify "marriage equivalence". The functional approach reasons that relationship status turns on the performance of relationship functions, not the attainment of formalised legal status.<sup>36</sup>

Professor Atkin has thus observed:<sup>37</sup>

There are ... good reasons why the law should treat unmarried partners much the same as married couples: their relationships are usually functionally very similar to marriages with similar needs and problems requiring resolution; there are advantages in drawing upon the same body of jurisprudence instead of re-inventing the wheel each time an issue arises; recognising unmarried relationships in financial statutes is unlikely to undermine marriage because the legal issues that arise in each case are usually when the marriage or relationship is in strife or when one of the parties has died; many countries have laws that militate against discrimination on the basis of marital or other status; and definitions of relevant relationships and a duration requirement as a condition of jurisdiction (in New Zealand three years) can weed out the fringe associations that should be outside a marriage-based regime.

The question for this article is whether domestic relationships also share the same (or many of the same) functions as de facto relationships and if so, whether there are any reasons in either principle or policy to exclude them from relationship property sharing. This issue will be explored more fully later in the article. Before that, however, the following case study highlights some of the inherent weaknesses in the traditional distinction based on form over function.

Much like New Zealand, the United Kingdom does not recognise domestic relationships. Unlike New Zealand, the issue has received more attention there owing to the publicity surrounding the case of *Burden v The United Kingdom*.<sup>38</sup> The two complainants were elderly unmarried sisters, both aged in their eighties. They had lived together all their lives; for the last 31 years in a house built on land they inherited from their parents.<sup>39</sup> The sisters had looked after their parents and two aunts until their deaths. Each sister made a will leaving her estate to the other sister. They were concerned, however, that when one of them died, the survivor would be forced to sell the house to pay the 40 per cent inheritance tax required under the Inheritance Tax Act 1984 (UK).<sup>40</sup>

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36 The functional approach is discussed in more detail in the next part of the article.

37 Bill Atkin "The Legal World of Unmarried Couples: Reflections on 'De Facto Relationships' in Recent New Zealand Legislation" (2008) 39 VUWLR 793 at 794.

38 *Burden v United Kingdom* (2008) 47 EHRR 38 (Grand Chamber, ECHR).

39 See at [9]–[12] for the full facts.

40 At the time, ss 3, 3A and 4 of the Inheritance Tax Act 1984 (UK) applied an inheritance tax of 40 per cent on estates in excess of £285,000. This issue would, of course, no longer be of concern in New Zealand since the enactment of the Estate Duty Repeal Act 1999.

The sisters took their case to the European Court of Human Rights. They complained under art 14 (prohibition of discrimination) of the European Convention on Human Rights<sup>41</sup> taken in conjunction with art 1 of Protocol No 1 (protection of property)<sup>42</sup> that, when the first of them died, the survivor would be required to pay inheritance tax on the dead sister's share of the family home, whereas the survivor of a married couple or a homosexual relationship registered under the Civil Partnership Act 2004 would be exempt from paying inheritance tax in these circumstances.<sup>43</sup> In its Chamber judgment, the Court rejected the applicants' case by a majority of four to three.<sup>44</sup>

The case was referred to the Grand Chamber, and was again rejected, this time by 15 votes to two. The majority noted that the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners. The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members. The fact that the applicants had chosen to live together all their adult lives did not alter this essential difference between the two types of relationship.<sup>45</sup>

The Court further noted that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by art 12 of the Convention and gives rise to social, personal and legal consequences.<sup>46</sup> Since the enactment of the Civil Partnership Act 2004, a same-sex couple also has the choice to enter into a legal relationship designed by Parliament to correspond as far as possible to marriage.<sup>47</sup> As with marriage, the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of cohabitation. Thus:<sup>48</sup>

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. Just as there can be no analogy between married and Civil Partnership Act couples, on the one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or

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41 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953).

42 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 262 (opened for signature 20 March 1952, entered into force 18 May 1954).

43 Inheritance Tax Act 1984 (UK), s 18(1).

44 *Burden v United Kingdom* (2007) 44 EHRR 51 (Section IV, ECHR).

45 *Burden v United Kingdom*, above n 38, at [62].

46 At [63].

47 At [64].

48 At [65].

civil partners, on the other hand ... the absence of such a legally binding agreement between the applicants renders their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple.

The very guarded approach adopted by the majority favoured form over function in distinguishing between marriage and civil unions, as opposed to other more informal relationships. From a New Zealand standpoint, the majority's argument that the distinction lies in the "public undertaking" required for marriages and civil unions, is unconvincing. Since 2001 the Property (Relationships) Act 1976 has treated informal de facto relationships, which have no registration or "opt-in" requirements, in the same way as marriages and civil unions.<sup>49</sup>

The two dissenting Judges in *Burden* challenged the majority's view, identifying what they regarded as logical inconsistencies in its position. In the opinion of one Judge, the recent extension of privileges historically limited to married couples to same-sex civil union partners, opened the door for reconsideration of the question whether the denial of the tax advantage to other modes of association is rationally related to a legitimate government interest.<sup>50</sup>

I ask myself, at this point, 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?

... If the State nevertheless does decide to extend the tax exemption to one extramarital group, it should employ at least a minimum of reasonableness while deciding not to apply the benefit to other groups of people in relationship of similar or closer proximity. I believe making consanguinity an impediment is simply arbitrary.

Significantly, when the Civil Partnership Bill (UK) was passing through Parliament,<sup>51</sup> an amendment to it was adopted in the House of Lords (by a narrow margin of 148 to 130 votes) which would have had the effect of extending the availability of civil partnership, and the associated inheritance-tax concession, to family members within the "prohibited degrees of relationship".<sup>52</sup> The amendment was reversed when the Bill returned to the House of Commons. In the course of

49 However, the point made earlier in the discussion, that all three relationships share a common denominator of an intimate relationship between two unrelated people, still applies.

50 *Burden v United Kingdom*, above n 38, at 29–30 per Judge Zupančič (Slovenia). See also the dissenting opinion of Judge Borrego Borrego (Spain) at 31–32.

51 Civil Partnership Bill 2002 (UK).

52 Rigorous requirements accompanied the recommendation: the parties had to be over 30 years of age, have cohabited for at least 12 years, and not already be married or in a civil partnership with another person.

debate in the House of Lords, however, a number of those who dissented did so, not because the concerns of those individuals in domestic relationships were not valid, but because the Bill was not regarded as the appropriate legislative base on which to deal with them.<sup>53</sup>

A more recent development in the United Kingdom has been the enactment of the Marriage (Same Sex Couples) Act 2013 in England and Wales and the Marriage and Civil Partnership (Scotland) Act 2014, thereby further breaking down the traditional views of marriage.<sup>54</sup> A few months earlier, the Marriage (Definition of Marriage) Amendment Act 2013 came into force in New Zealand.<sup>55</sup> In a speech to the Peers, Baroness Ruth Deech, an advocate for the recognition of rights for domestic partners,<sup>56</sup> argued that the change to the marriage laws could finally open the way for carers and relatives who live together, such as the Burden sisters, to be given the same legal status as married couples. She suggested that the unfairness against family members was increased even further with the legal recognition of same-sex marriage, and that the European Court of Human Rights would now be likely to support a challenge to the current civil partnership restrictions unless they were opened up to those not in a sexual relationship.<sup>57</sup>

### ***B In Favour of a Functional Approach***

Although domestic relationships have received very little attention in New Zealand, there are cogent reasons why we should at least engage in debate as to whether they ought to be recognised. By including de facto relationships in the Property (Relationships) Act, it is arguable that New Zealand has already gone some way to accepting domestic relationships. The Property (Relationships) Act 1976 defines a de facto relationship in s 2D as a relationship between two persons who "live together as a couple".<sup>58</sup> This was a change from the definition originally proposed in the De Facto Relationships Bill 1998 which defined a de facto relationship as a

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53 See the discussion in *Burden v United Kingdom*, above n 38, at [19]–[20]. See also Anne Bottomley and Simone Wong "Shared Households: A New Paradigm for Thinking about the Reform of Domestic Property Relationships" in Alison Diduck and Katherine O'Donovan (eds) *Feminist Perspectives On Family Law* (Routledge Cavendish, Abingdon, 2006) 39 at 47.

54 Same-sex marriage became legal in England and Wales on 13 March 2014, and in Scotland on 16 December 2014. Northern Ireland has not introduced legislation allowing same-sex marriage.

55 Same-sex marriage became legal in New Zealand on 19 August 2013.

56 See for example Ruth Deech "What's A Woman Worth" [2009] Fam Law 1140; Ruth Deech "Cohabitation" [2010] Fam Law 39 at 40; and Ruth Deech "Sisters Sisters – And Other Family Members" [2010] Fam Law 375.

57 John Bingham "Spinster sisters could win legal right to be treated as married couples, Peers told" *The Telegraph* (online ed, 24 June 2013).

58 Property (Relationships) Act 1976, s 2D(1)(b). See *Brookers Family Law: Family Property* (online looseleaf ed, Brookers) at [PR2D.02].

"relationship in the nature of marriage".<sup>59</sup> That wording followed other older statutes including the Social Security Act 1964.<sup>60</sup> The Justice and Electoral Reform Committee accepted the criticism that the reference to marriage was inappropriate to describe a relationship which was not marriage, and amended the wording to "living together as a couple".<sup>61</sup> In response to submissions that the meaning required clarification, the Justice and Electoral Reform Committee inserted the list of nine factors now contained in s 2D(2). Section 2D(2) provides:

In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

- (a) the duration of the relationship:
- (b) the nature and extent of common residence:
- (c) whether or not a sexual relationship exists:
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
- (e) the ownership, use, and acquisition of property:
- (f) the degree of mutual commitment to a shared life:
- (g) the care and support of children:
- (h) the performance of household duties:
- (i) the reputation and public aspects of the relationship.

It will be observed that one factor to be taken into account is whether or not a sexual relationship exists. Section 2D(3) further provides that in determining whether two persons live together as a couple, no finding in respect of any of the matters stated in subs (2) is to be regarded as necessary, and a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case. As noted in the previous section of the article, the Interpretation Act 1999 provides that where the expression "de facto relationship" is used in an enactment, it refers to a relationship between two people who live together as a couple in a relationship in the nature of marriage or civil union.<sup>62</sup> However, s 2D makes it clear that a sexual relationship, while a relevant consideration – an important one, even<sup>63</sup> –

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59 De Facto Relationships Bill 1998 (108-1), s 17.

60 For discussion of the expression "relationship in the nature of marriage", see *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA); and *Thompson v Department of Social Welfare* [1994] 2 NZLR 369 (HC).

61 Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-3) (explanatory note) at 7–8.

62 Interpretation Act 1999, s 29A (1).

63 Atkin and Parker, above n 2, at 42 state: "The existence of a sexual relationship, while only one indicative factor, is nevertheless an important one. As has been said, '[t]he sexual element of the relationship and the intimacy it entails is unique to marital or de facto relationships.' It is a singular and easily identifiable

is not an absolute precondition for a de facto relationship.<sup>64</sup> This surely strengthens the argument for recognising domestic relationships, since all the other criteria listed in s 2D(2) support a functional approach and can be carried out by domestic partners just as they can by de facto partners.<sup>65</sup>

The phrase "living together as a couple", and the wording in s 2D(2) and (3), were borrowed from the De Facto Relationships Act 1984 (NSW).<sup>66</sup> What makes this somewhat unremarkable legislative transplant more interesting is that in 1999 New South Wales amended its legislation to include "domestic relationships", defined as a de facto relationship or a:<sup>67</sup>

... close personal relationship (other than a marriage or de facto relationship) 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.

While more will be said about the Australian laws on domestic relationships later in the article, the developments in that jurisdiction are a signal that New Zealand could consider adopting a similar policy.

The question whether to collapse the established distinctions between different relationship types is a topic of ongoing debate amongst family law theorists. Although there is still a vocal "pro-marriage" lobby,<sup>68</sup> there is also a growing concern that distinctions between marriage and de facto relationships, or intimate couple de facto relationships and other domestic relationships, no longer provide a rational basis for legal policy. Rather, states should be looking to develop a more inclusive method of determining when and how adult personal relationships are recognised in the law.<sup>69</sup> It is

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distinguishing feature" (citing *Bar-Mordecai v Rotman* NSWSC 120009/94, 18 June 1998 at [507], where Einstein J held that a de facto relationship did not exist).

64 A de facto relationship was found to exist in *Horsfield v Giltrap* (2001) 26 FRNZ 404 (CA), although that case was decided on constructive trust principles prior to the enactment of the Property (Relationships) Act 1976. The partners lived in separate residences and did not engage in a sexual relationship because of their religious beliefs, although they spent most of their non-working waking hours at the house of the male partner, and they were emotionally dependent on one another. They ran a joint investment portfolio and their relationship lasted 22 years. In *Scragg v Scott* [2006] NZFLR 1076 (HC) at [37], Gendall and France JJ were of the opinion that the relationship in *Horsfield v Giltrap* would have qualified as a de facto relationship under the Property (Relationships) Act 1976 had the legislation been in force.

65 Bottomley and Wong, above n 53, at 45, suggest: "[The] decentring of sexual practices opens up a space for recognising 'relationships' which might not actually include a sexual element at all and allowing for other patterns of domestic interdependency which are not 'couple' based."

66 Property (Relationships) Act 1984 (NSW), s 4(1)–(3).

67 Property (Relationships) Legislation Amendment Act 1999 (NSW), s 5.

68 See for example Lynn D Wardle "Deconstructing Family: A critique of the American Law Institute's 'Domestic Partners' Proposal" [2001] BYU L Rev 1189.

69 See Brenda Cossman and Bruce Ryder "What is Marriage-Like Like? The Relevance of Conjuality" (2001) 18 Can J Fam L 269.

here that functional methodology provides the platform for arguing that domestic relationships are the normative equivalent to marriage and marriage-like relationships.

A functional approach to marital and family theory seeks first to identify the essential characteristics of, or functions performed by, the conventionally accepted relationship – that is, the nuclear marital family.<sup>70</sup> Secondly, it considers whether an alternative relationship shares those characteristics. If so, then the alternative relationship ought also to receive the benefits accorded the conventionally recognised relationship. The primary goal of this approach has been to gain inclusion of non-conventional family forms in the definition of "family" so that they may receive benefits enjoyed by modern marital families.<sup>71</sup>

While a functional approach would broaden the law's reach, it has been argued that "it is unlikely to disrupt the privileging of marriage and domesticity".<sup>72</sup> Other relationships would be recognised by the law:<sup>73</sup>

... only to the extent that they mirror, at least in respects deemed important by the state, the traditional nuclear family. Sex is expendable, but other aspects of domesticity are required. Therefore, the way of life known as marriage is largely affirmed, not challenged.

To digress momentarily, some theorists have questioned the functional theory, arguing that the most significant drawback to using it to gain legal recognition of non-traditional families is that doing so implicitly concedes the marital nuclear family as the paradigmatic form.<sup>74</sup> Of course, a

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70 Vivian Hamilton "Mistaking Marriage for Social Policy" (2004) 11 Va J Soc Pol'y & L 307 at 319.

71 At 320.

72 Rosenbury, above n 16, at 222.

73 Rosenbury, above n 16, at 222. Hamilton, above n 70, at 313–314, also argues that two of marriage's key functions – dependent caregiving, and economic support and redistribution (best represented by s 2D(2)(d) and (f) of the Property Relationships Act 1976) – provide immeasurable social benefit, and the state's interest in, and responsibility for, ensuring the public welfare not only merit state support of these functions, they require it. However, caregiving and economic support benefit society whether performed within or outside marriage. See also Ann Shalleck "Foundational Myths and the Reality of Dependency: The Role of Marriage" (1999) 8 Am U J Gender Soc Pol'y & L 197 at 201–202, who argues "efforts to analogize other relationships to marriage, in order to achieve for those units the privileges of marriage, serve primarily to reinforce, rather than challenge, the primacy of the marriage relationship".

74 See Hamilton, above n 70, at 321. See also Cossman and Ryder, above n 69, who argue that rather than trying to identify marriage equivalence, it is preferable to reformulate relational definitions to focus more precisely on the kinds of emotional and economic interdependence relevant to the objectives of particular laws.

related question is what is it about marriage that automatically attracts proprietary and other legal consequences?<sup>75</sup>

Returning to the issue of relationship equivalence, the case of *Re Cotton (dec'd)*<sup>76</sup> is a practical demonstration of the theory outlined above, that functionality does *not* depend on being married, in a civil union or even a de facto relationship. The case concerned a successful application by the plaintiff for provision from the estate of her late brother under the Law Reform (Testamentary Promises) Act 1949. The facts revealed a level of interdependence and a division of domestic functions between the brother and sister reminiscent of what might be found in many traditional marriages of days gone by. No doubt, the degree of care and support between the parties would in reality exceed that which exists in a large number of marriage or marriage-like relationships. Much like *Burden v The United Kingdom*, the only two indicia missing from the list in s 2D(2) were: (c) a sexual relationship; and (g) the care and support of children. Yet, because the parties were related by blood, the Property (Relationships) Act 1976 was unavailable to the plaintiff.

The brother was born with a physical disability and, despite having a successful career, lived at home all his life. The plaintiff trained as a teacher and initially worked and lived in various locations around New Zealand. In her early 30s, she returned home to live with her parents and brother. Some years later she formed a romantic relationship, but was pressured by her then elderly parents not to marry for fear that the brother would be left on his own.<sup>77</sup> A promise was made to the plaintiff by her mother, and acknowledged by the brother, that if she remained at home and looked after her brother, he would provide for her.

The plaintiff thereafter relinquished the opportunity of an independent life, and stayed at home to look after her brother (and, initially, her parents) on the understanding that she would be financially reimbursed by her retirement being taken care of by her brother. The plaintiff assumed the running of the home in order that her brother might concentrate on his career. In her evidence

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75 While these matters are beyond the compass of this article, the answer may lie in part in the historical notions of sharing and caring that can be detected in the doctrines of unity of marriage, coverture and dower. Upon marriage, a woman's legal status was that of *feme covert*, the spouses becoming one legal entity under the authority of the husband. The strictures of coverture on the wife were partially offset, however, by the doctrine of dower where the husband promised to "endow" his wife in her widowhood with a life interest in one third of any real property owned by the husband during the marriage. See the discussion in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) at 2–6.

76 *Re Cotton (dec'd)* HC Dunedin CP18/00, 5 April 2001.

77 There was a second sister, but she had left home years earlier to get married.

she described herself as "a housekeeper, personal assistant and hostess".<sup>78</sup> The plaintiff characterised her life with her brother as an excellent one:<sup>79</sup>

[S]ome people thought they were a married couple ... [T]hey were committed companions for life; they lived together, travelled together, and had a good life. ... [S]he cooked a three course meal every night ... got his breakfast ready, and had lunch waiting for him when he came home in the afternoon. She washed and ironed his clothes.

In 1991, when her brother's health deteriorated, the plaintiff reduced her teaching hours at his request to free up more time to look after him, which adversely affected her pension, but she was assured by him that he would look after her. She later took time off work to nurse him following a mild stroke and a major operation. The plaintiff retired from teaching in 1999.

A further testamentary promise was alleged in 1998 that, should the brother die, he would reward the plaintiff for her devoted service to him by providing for her in his will to enable her to live comfortably and independently in retirement, and live in the house they shared (and which was owned by them as tenants in common in equal shares). In accordance with that agreement, the plaintiff, in her brother's presence, instructed the family solicitor to draft her will to leave a life interest in the house to her brother, and to leave the rest of her estate to him, but should he predecease her, the residue would go to a cousin and two nephews. In the plaintiff's presence, the brother asked the solicitor to draft an equivalent will. It transpired, however, that the plaintiff's sisterly devotion was not truly reciprocated, because the brother subsequently instructed the solicitor to change his will to leave the residue of his estate to the two nephews.

The High Court accepted the plaintiff's version of what happened in the family. It held that the initial promise had been reinforced by the way the siblings lived together for more than 30 years, and by the later testamentary promise made prior to the meeting with the lawyer to make their wills. To the outside world they appeared as a couple, the plaintiff's services going much further than the natural incidents and consequences of family life, thereby enabling the brother to accumulate his estate.

*Re Cotton (dec'd)* reveals the practical reality that people in domestic relationships may struggle to find a viable cause of action when they have a claim they want to bring before a court. It was fortunate that the existence of the promises could be established in that case. In other cases claimants may be less lucky if they are unable to prove an express or implied promise by the deceased to reward the claimant for the services or work by making some testamentary provision for the claimant, for the purposes of the Law Reform (Testamentary Promises) Act 1949.<sup>80</sup>

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78 At [35].

79 At [41].

80 Law Reform (Testamentary Promises) Act 1949, s 3(1).

In some circumstances, people in domestic relationships may also have recourse to remedies under the Family Protection Act 1955,<sup>81</sup> or the ordinary principles of contract, property and trust law. Remedies under these laws, however, often have strict qualifying criteria and the outcomes are less certain than under the Property (Relationships) Act.<sup>82</sup> If these other avenues of redress are unavailable, a claimant could be left entirely without provision. This may be especially problematic if the claimant had assumed a domestic caring role in the relationship, and is left without current work skills, or is at an age where re-entry into the workforce would be difficult. Spouses, civil partners and de facto partners left in such circumstances would not encounter the same obstacles, but would instead have recourse to the Property (Relationships) Act.

In conclusion, when finding in favour of the plaintiff in *Re Cotton (dec'd)*, Hansen J acknowledged:<sup>83</sup>

It is hard to conceive of a case where the support was as great as this particular one. That, of course, makes the fact that this matter ends up before this Court even sadder than is normal.

That the family discord was such that the matter ended up in court was indeed sad. Just as unfortunate, perhaps, was that the only cause of action available to the plaintiff was a Testamentary Promises Act claim. To exclude close relationships such as the one between the Cotton siblings from the avenues of redress enjoyed by the variety of forms of coupledness that are already legally recognised nowadays in New Zealand, surely gives pause for thought.

#### **IV QUESTIONS OF IMPLEMENTATION**

If New Zealand were to consider enacting property sharing rights for domestic relationships, some important decisions would need to be made regarding how the law should appear in finished form. Among the main issues that would need to be addressed would be to identify to whom a domestic relationship regime would apply, to what property it would apply and how the scheme would be applied. Drawing on the Australian legislation, the following discussion briefly sketches out some possible options and identifies some problems that would require resolution.<sup>84</sup>

81 As well as the spouse, civil union partner or de facto partner of the deceased, the children, grandchildren, stepchildren and parents of the deceased may also make a claim against the estate of the deceased person: Family Protection Act 1955, s 3. Therefore, the plaintiff in *Re Cotton (dec'd)*, as the sister of the deceased, would not have been able to make a claim.

82 For example, the Property (Relationships) Act 1976 applies a system of equal sharing of the relationship property, whereas other legislation requires the applicant to make out their claim, and the awards are discretionary.

83 At [103].

84 Note also, in Alberta, Canada, the Adult Interdependent Relationships Act SA 2002 c A-4.5 extends to non-conjugal partners living together in a relationship of interdependence. See also the Law Commission of Canada *Beyond Conjugal: Recognizing and Supporting Close Personal Adult Relationships* (December 2001).

A majority of jurisdictions in Australia (Australian Capital Territory, New South Wales, Tasmania, South Australia and Victoria) provide legal rights for people in domestic relationships.<sup>85</sup> The Australian Capital Territory was the first jurisdiction to give legal status to domestic relationships. The Domestic Relationships Act 1994 (ACT) adopts a very broad definition of "domestic relationship", defined as a personal relationship between two adults in which "one provides personal or financial commitment and support of a domestic nature for the material benefit of the other". A domestic relationship includes a domestic partnership<sup>86</sup> (in New Zealand terminology, a de facto relationship), but not a legal marriage.<sup>87</sup> A personal relationship may exist between people although they are not members of the same household.<sup>88</sup> The court may not make an order for relief unless satisfied that the domestic relationship existed for not less than two years.<sup>89</sup>

In the years between 1999 and 2008, New South Wales,<sup>90</sup> Tasmania,<sup>91</sup> South Australia<sup>92</sup> and, most recently, Victoria<sup>93</sup> followed the lead taken by the Australian Capital Territory. Some key

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85 The Relationships Act 2011 (Qld), Family Court Act 1997 (WA) and De Facto Relationships Act 1991 (NT) recognise de facto relationships, but not wider domestic relationships.

86 Section 169 of the Legislation Act 2001 (ACT) defines a "domestic partnership" as a relationship between two people, whether of a different or the same sex, living together as a couple on a genuine domestic basis.

87 Domestic Relationships Act 1994 (ACT), s 3(1).

88 Section 3(2)(a). See *McKenzie v Storer* (2007) ACTSC 88, for a discussion of the background to the Act. See also Bottomley and Wong, above n 53, at 47; Jo Goodie and Tracey Summerfield "What's In a Name? Family, Identity and Social Obligation" (2002) 6 UWSLR 209; and Tracey Summerfield "Understanding the Law of Family: A Question of Practice, Not Interpretation" (2002) 11 GLR 44.

89 Domestic Relationships Act 1994 (ACT), s 12(1).

90 The Property (Relationships) Act 1984 (NSW), as amended in 1999, defines "domestic relationship" as a de facto relationship or a close personal relationship (other than a marriage or a de facto relationship) between two adults, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care (s 5).

91 The Relationships Act 2003 (Tas) replaced the De Facto Relationships Act 1999 (Tas). It covers de facto relationships (referred to in s 4 as "significant relationships") and caring relationships between two adult persons whether or not related by family, one or each of whom provides the other with domestic support and personal care (s 5). There is no living together requirement.

92 The Domestic Partners Property Act 1996 (SA), as amended by the Statutes Amendment (Domestic Partners) Act 2006 (SA), includes domestic partners as those in a "close personal relationship", defined as a relationship between two adults (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis (s 3). The definition expressly states "[t]wo persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them".

93 The Relationships Act 2008 (Vic) recognises caring relationships between two adults 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

features are observable among the jurisdictions. First, although the requirements are worded differently, the jurisdictions share in common the requirement that the relationship is one where the parties provide care and support to each other. In line with the Australian Capital Territory, New South Wales,<sup>94</sup> Tasmania<sup>95</sup> and Victoria<sup>96</sup> require that the parties be in a domestic relationship for a minimum period of two years. South Australia is the exception, with a higher threshold of three years.<sup>97</sup> Secondly, all of the jurisdictions recognise that domestic relationships can exist between family members or between unrelated parties. Thirdly, there is no requirement in the Australian Capital Territory, Tasmania and Victoria that the parties must live together under the same roof.<sup>98</sup> Fourthly, all of the jurisdictions exclude relationships where the care and support is provided for a fee or payment, such as under an employment relationship between the persons or on behalf of an organisation such as a government agency.<sup>99</sup> Finally, Tasmania and Victoria provide relationship registration schemes.<sup>100</sup>

In view of the fact that New Zealand has already borrowed heavily from the New South Wales legislation for the purposes of defining *de facto* relationships, it is not inconceivable that we could again look to our western neighbours for guidance on domestic relationships. Issues of individual wording aside, each of the five Australian jurisdictions are in general agreement regarding points one, two and four referred to in the preceding paragraph. Thus, a domestic relationship is one where the parties, whether related by blood or not, provide care and support to each other. Interdependency on a genuine domestic basis is required, meaning that where the care and support is provided for a

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persons in the 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.

94 Property (Relationships) Act 1984 (NSW), s 17(1).

95 Relationships Act 2003 (Tas), s 37(1). If a relationship is registered, s 37 does not apply (s 37(3)).

96 Relationships Act 2008 (Vic), s 42(2)(c), sets eligibility for orders for unregistered domestic partnerships at two years.

97 Domestic Partners Property Act 1996 (SA), s 9(c).

98 The Relationships Act 2008 (Vic) goes so far as to expressly state that a relationship may exist whether or not the parties are living under the same roof. Both New South Wales (Property (Relationships) Act 1984 (NSW), s 5(1)(b)) and South Australia (Domestic Partners Property Act 1996 (SA), s 3) require that the couple "live together". See *Hayes v Marquis* [2008] NSWCA 10 for a discussion of the meaning of to "live together".

99 Domestic Relationships Act 1994 (ACT), s 3(2)(b); Relationships Act 2003 (Tas), s 5(2); Domestic Partners Property Act 1996 (SA), s 3; and Relationships Act 2008 (Vic) s 5.

100 Under the Relationships Act 2003 (Tas), if a relationship is registered, proof of registration is proof of the relationship (s 5(4)). If the relationship is not registered, an analysis along the lines of that required under s 2D(2) of the Property (Relationships) Act 1976 (NZ) is required to determine if there is a caring relationship (s 5(5)). The Relationships Act 2008 (Vic) also provides the option of registration of caring relationships (s 10(3)(ab)).

fee or payment, the relationship does not qualify as a domestic relationship. The current qualification requirement for de facto relationships under Property (Relationships) Act 1976 is that the partners live together for a period of three years or longer.<sup>101</sup> The same qualification period could be imposed on domestic relationships, although in practice and as demonstrated in *Re Cotton (dec'd)*, many domestic relationships may endure for many decades.

The two issues on which the states are divided are whether the parties must live together and whether domestic relationships should be recognised on a presumptive or registration basis. In New Zealand, s 2D of the Property (Relationships) Act 1976 does not currently require that de facto partners must live together under the same roof.<sup>102</sup> Moreover, formal legal status is sufficient for a marriage or a civil union irrespective of a couple's practical living arrangements. It would seem inconsistent therefore to apply a different standard to domestic relationships. Concerns that disingenuous claimants might assert the existence of a domestic relationship in questionable circumstances could be largely avoided by providing a list of indicia (as in s 2D) to assist in objectively determining the existence of the relationship. The Australian experience shows that despite the widening of the law to include domestic relationships, there has not been a flood of cases from domestic partners.<sup>103</sup>

The issue of registration is, perhaps, more troublesome. Related to the concern of possible "overuse" noted in the preceding paragraph, it is arguable that it may be better to provide an opt-in registration system for domestic relationships. One of the drawbacks with the "opt-out" system used in the Property (Relationships) Act 1976 is that individuals may be under the misapprehension that they are not in a de facto relationship until the dispute goes to court, and the court decides

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101 Property (Relationships) Act 1976, s 2E(b).

102 One of the matters the court takes into account in determining whether the parties live together as a couple is the nature and extent of common residence: s 2D(2)(b). See *B v F (De facto relationship)* [2010] NZFLR 67 (HC) at [61], where Heath J considered that it is possible that "a person may share a family residence while electing not to sleep at that property exclusively, during the period of the relationship". See also *Scragg v Scott*, above n 64, where the parties lived apart for a much longer period of time than they were together.

103 In *McKenzie v Storer* (2007) ACTSC 88 at [58], Stone J noted that despite the inclusion of non-sexual relationships in the Domestic Relationships Act 1994 (ACT), "the decided cases [reveal] that the majority concern sexual relationships". For a discussion of the types of claimants using the Domestic Relationships Act, see Jenni Millbank "Domestic Rifts: Who is using the Domestic Relationships Act 1994 (ACT)?" (2000) 14 AJFL 163; and Summerfield, above n 88. It is beyond the scope of this article to embark on a study of the Australian case law, but reasons why there are not large numbers of domestic partnership claims could be that relationships between blood relatives are generally quite stable, and that property issues are often settled in other ways (such as through a will) that avoid the need to go to court.

retrospectively that a qualifying relationship did exist.<sup>104</sup> Consideration would need to be given to the wisdom of transferring a similar problem into any new laws for domestic partners. The pool of people in domestic relationships has the potential to be very diverse, so the difficulties could be magnified in the context of domestic relationships.

Imposing a registration system on domestic partners may raise objections in both practice and principle, however. First, introducing a different qualification scheme for a particular category of relationships could create confusion on a practical level for those concerned. Secondly, if the rationale for recognising domestic relationships is their functional equivalence with other relationships, imposing a registration system implies that they are still somehow different and possibly "less" significant than traditional marriage or marriage-like relationships. Thirdly, domestic partners may feel hesitant to register a partnership, or they may not see the need to register a partnership, particularly in close family situations. For example, the plaintiff in *Re Cotton (dec'd)* would not have supposed that she would ever need legal protection. Those problems may outweigh the "opt-out" concerns under the Property (Relationships) Act 1976.

There is a further matter that would need to be resolved before domestic relationships could be given legal status in New Zealand. Under the Property (Relationships) Act 1976 a couple's relationship property is divided equally, subject to only a few exceptions. Equal sharing is premised on the belief that partners contribute equally, albeit in different ways, to the partnership and are therefore entitled to share in the fruits of the partnership when it ends. The Australian schemes that recognise domestic partnerships are fundamentally different in that they are based on a discretionary model. The court may make an order adjusting the interests of the parties in the property as seems just and equitable, having regard to a number of matters such as the parties' financial and non-financial contributions to the property, including contributions to the welfare of the other party to the relationship or to the welfare of the family.<sup>105</sup> Unlike their New Zealand counterparts, the Australian courts are not prescriptively held to equal sharing.

The essential differences in the way that New Zealand and Australia approach the issue of property division could be a barrier to including domestic relationships in the Property (Relationships) Act 1976. It may be that a different scheme would be more appropriate, perhaps a discretion-based system as in Australia. Again, however, the philosophical objection to this approach in the New Zealand context would be that singling-out domestic partnerships for different treatment undermines the functional equivalence argument.

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104 For example, in *Coll v West* FC Morrinsville FAM-2009-039-160, 26 April 2010, the Court rejected the respondent's claim that the applicant was no more than a boarder whom she took in out of a need for money. See also the discussion in Margaret Briggs "The Formalization of Property Sharing Rights for de facto Couples" in Bea Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Vienna, 2009) 329 at 338–340.

105 See for example Property (Relationships) Act 1984 (NSW), s 20.

Lastly, it must be noted that the legal recognition of domestic relationships would have impact beyond the immediate sphere of relationship property sharing between the partners. Careful consideration would need to be paid to the implications of domestic relationships on succession, insurance and superannuation entitlements, tax breaks, state funded health and welfare benefits, student loans, dependent children, and even medical consent in emergency situations, to name but a few examples. These would be matters of considerable importance for the policy makers.

## V CONCLUSION

The question of relationship property rights (or, indeed, legal recognition in general terms) for individuals in domestic relationships has received little attention in New Zealand. This article has argued that there may well be an unmet need to extend the laws that operate in respect of spouses, civil union partners and de facto partners to people in domestic relationships. Of course, whether the current gap in the law should be regarded as a matter of concern depends, at least in part, on one's view of the extent to which the state should assume an interventionist role in dealings between private individuals. Parliament has, however, already shown its willingness to regulate the property affairs of people in de facto relationships, so is there any good reason not to extend that recognition to domestic relationships? *Burden v The United Kingdom* and *Re Cotton (dec'd)* reveal that domestic relationships can operate in a functionally equivalent way to marriage or marriage-like relationships. The only missing element is the sexual component, which has not deterred a majority of the Australian jurisdictions from extending the law to cover domestic relationships.

Theory is all well and good, but there is no resiling from the fact that the practical task of implementing laws for domestic partners would be fraught with difficulty. As Part IV of the article explained, important decisions would need to be made regarding the definition of a domestic relationship, what property would be subject to sharing, and how a scheme would be applied. In addition to those hurdles, introducing property sharing rights for domestic partners would have an inevitable domino effect on many other areas of the law. As such, relationship property rights could not be considered in isolation. Rather than tinkering at the edges of relationship property law by adding another category of relationship to the Property (Relationships) Act 1976, a more inclusive review of the current property sharing regime may be in order.