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Simple, powerful human rights principles, upon which a great number of nations can agree, may resonate within a society and provide a catalyst for change.\textsuperscript{141}

Nahid Toubia's words may be apposite by way of conclusion:

Actions to stop FGM can be taken on many levels...The overriding consideration for all activities is that they be guided by the knowledge and wisdom of individuals from the communities involved, with special attention paid to the concerns of women. Unguided or patronizing interference from outsiders can create a backlash in favor of FGM, as has happened in the past.

Finally, it is important to emphasize that FGM is part of a persistent global situation where women remain powerless because they lack access to resources, jobs, and education, and where women's bodies are controlled by a male-dominated social ideology. A global action against FGM cannot undertake to abolish this one violation of women's rights without placing it firmly within the context of efforts to address the social and economic injustice women face the world over. If women are to be considered as equal and responsible members of society, no aspect of their physical, psychological, or sexual integrity can be compromised.\textsuperscript{142}

\textbf{DOMESTIC RELATIONSHIP LAW: AN ALTERNATIVE, INCLUSIVE MODEL OF FAMILY LAW}

\textbf{TRACEY SUMMERFIELD}

Tracey Summerfield graduated from Murdoch University in 1997, having completed an LLB and BA (Communication Studies). She has remained in various teaching positions in the School of Law, lecturing and tutoring in both the Law and Legal Studies programmes. With the assistance of an Australian Postgraduate Award, Tracey is currently studying towards her PhD in Law and Cultural Studies, also at Murdoch, and will continue occasional teaching.

\textbf{INTRODUCTION}

This article seeks to conceptualise a family law system, similar to that which already exists, but which applies to the full spectrum of domestic relationships in Australia.

It is the premise of the article that the narrow jurisdiction of the \textit{Family Law Act 1975} (Cth) (FLA) denies a comprehensive and specialised system of dispute resolution to alternative models of domestic relationship which, while dissimilar in form to the traditional family model, are similar in nature. Relationships which are not legitimised through legal marriage, such as heterosexual and homosexual de facto relationships, “marriages” sanctioned through alternative cultural or religious rituals, or long-term co-tenants (even if “familial” in nature, such as brother and sister), are restricted to the common law and/or civil law systems for dispute resolution. This is despite the fact that the arrangements made by families (in this wider sense) have more similarities to those of the traditional family model, than they do to commercial relationships.

Negotiations in domestic settings, whatever their form, are most often undertaken under the mantle of trust, mutuality and emotion, without a view to

\textsuperscript{141} Id.398
\textsuperscript{142} Above, note 4, 47
the potential legal ramifications. Further, such arrangements tend to be in relation to matters of an indeterminate nature, that is matters that are difficult to define as “transactions”, and relate to an unspecified period of time. Commercial negotiations, on the other hand, are generally of a determinate and finite nature, and are undertaken cautiously, with a view to the legal effect of agreements or actions. Finally, in the event of dispute, formal, legalistic and adversarial resolution mechanisms are less appropriate to the domestic setting where the parties may, by necessity, have an ongoing relationship. This is unlike the commercial setting where the parties may more easily elect to terminate all future dealings in the event of dispute. Hence, domestic relationships, whatever their form, should be supported by the family law regime which operates in recognition of the differing nature of relationships.1

With these key similarities between domestic relationship forms in mind, I will consider some of the existing proposals for extending legal rights to alternative family models. I conclude that none of these proposals provide a comprehensive legal system to all domestic models.

As an alternative, a conceptual shift in approach is suggested. The application of the family law system is currently determined by family form, thereby excluding domestic relationships which do not match recognised models. I argue that an inclusive system is possible by changing the focus of the FLA to a consideration of the characteristics of relationship. The test for the application of the family law system would then become whether the characteristics of relationship are such that they point to a sufficient degree of emotional, social or economic interdependency. Such an interdependency, it is argued, affects the nature of negotiations in such a way as to warrant access to an alternative law system which is cognisant of the specific nature of domestic or “family” negotiations.

In Australia, family law is encapsulated in the Family Law Act 1975 (Cth) (FLA) but applies, in general terms, only to parties of a marriage.2 Hence, the family law system only applies to a particular family model. What of family relationships which are not sanctioned through marriage - what is the legal framework for regulating these transactions and for resolving these disputes? Some of the states and territories have introduced de facto relationship law in relation to property disputes between unmarried couples,3 but this is a poor relative of the FLA in terms of the wider benefits derived from the latter, such as access to a specialised Family Court and to alternative dispute resolution mechanisms.4 Hence, alternative family models do not benefit from a comprehensive family law system.

In this paper I take issue with the limited application of family law in

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1 This assumes a distinction between the private and the public spheres, one which is argued to be of a fictional nature [see: Thornton, M. (ed) Public and Private: Feminist Legal Debates (Melbourne: Oxford University Press, 1995)]. By making the above claim I am not claiming that the distinction is a valid one, nor do I wish to perpetuate the myth of the division. However, in law there is a distinction between law that is family in nature (that is, private) and other civil (that is, public) law and it is with a view to the existing legal arrangements that I make my point.

2 The Family Law Act’s jurisdiction is “matrimonial causes” (Family Law Act 1975 (Cth), s39(1). This is defined as (certain) “proceedings between the parties to a marriage” (Family Law Act 1975 (Cth), s4 (1). For a discussion of the definition of “marriage” see notes 13 and 30, and related text. The jurisdiction is extended under Family Law Act 1975 (Cth), Part VII, and Family Law Act 1975 (Cth), s69H, to both nuptial and extra-nuptial children, and may be brought by any party with an interest in the child’s welfare: Family Law Act 1975 (Cth), s69C(2)(d). Despite this extended jurisdiction, there is argument that traditional family values permeate considerations involving children. See, for example, Family Law Act 1975 (Cth), s43(b) which provides for the “need to protect the institution of marriage”, and the pointed references to biological parenting throughout Family Law Act 1975 (Cth), Part VII, as if it is a preferred relationship to non-biological child/parent relationships. The difficulty of applying the family law system to family forms which are different to the traditional nuclear model was discussed in re CP (1997) FLC 92-741. Dewar argues that the case illustrates that in applying “the best interests of the child” test (Family Law Act 1975 (Cth), s68F) it is necessary to acknowledge “that there are different concepts of good, or that there are different ways of understanding what it means to bring up child well...”. Dewar J., “Indigenous Children and Family Law” (1997) 19 Adelaide Law Review 217-230. Preference for traditional, (Anglo Celtic) family values are indicated in the cases which have dealt with positions of “difference”: eg. Goudge v Goudge (1984) FLC 91-534 and in re CP (1997) FLC 92-741 in relation to indigenous cultures and Re L (1983) FLC 91-353 and Doyle and Doyle (1992) FLC 91-286 regarding homosexual parenting.

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multiculturalism at its widest conception - to accommodate all types of cultural practices, not only those pertaining to ethnicity.

My central thesis is that to be truly equitable in the delivery of a family law system, we need to move conceptually from this reliance on form to a characteristics based model; that is, a model which determines application on the basis of generic relationship characteristics, which point to the existence of a degree of interdependency.

I have organised my arguments into three parts. In the first part I make my own suggestions for an inclusive family law model, reconceptualising this as “domestic relationship law”. In Part II, I briefly consider the more common proposals for extending legal recognition, specifically, family law, to alternative family models. Finally, in Part III I critique my own model, with a view to my earlier analysis of the more commonly cited alternatives.

**PART I: AN INCLUSIVE FAMILY LAW MODEL**

Perhaps it is possible to conceptualise an alternative, inclusive and equitable model of “family” or “domestic relationship” law. I argue for a comprehensive, specialist model, similar in form and perhaps largely in substance, but not in application, to the current system and I provide an outline of a model which has the capacity for enabling alternative domestic formations to benefit from a family law system.

**THE BENEFITS OF THE CURRENT FAMILY LAW SYSTEM**

There have been many proposals for extending the family law regime to particular types of relationships. There are limitations to each of these, as I describe in Part II. However, what I find most problematic is the idea of amending law on a piecemeal basis to deal with “newly” recognised forms of family. This proposal permits family law, as it is currently conceived, to be flexible to accommodate the particular characteristics of different types of “family”. I advocate for the maintenance of the existing family law regime because of two key qualities, which are denied by some of the alternatives provided in Part III. Firstly, it provides for national uniformity of law.

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Australia, and seek to conceptualise a way of framing family law so that it has application to the multiplicity of domestic models. To have disparate legal systems for domestic relationships which, though different in model, are essentially similar in nature, is inequitable and discriminatory. It denies the benefits of a family law system to particular sectors of the community. In doing so, it relegates the disputes of alternative domestic relationships to the common law system which, in developing on the basis of issues of the commercial setting is, largely, not suited to the domestic setting. The effect is that the parties of traditionally constructed families have access to a specialised system which is responsive to their particularity, whilst other family models have limited access to legal redress to injustices that arise from within the domestic setting.

There have been proposals for greater legal recognition of alternative domestic relationships. However, these have largely focussed on the need to extend existing definitions to include specific domestic forms. For example, there are arguments that the property division aspects of the FLA should apply to heterosexual\(^5\) and homosexual\(^6\) de facto relationships. Whilst this may be a good thing, I challenge this general approach; that is, the attempts to extend family law on a family model basis. In short, I advocate the need to move away from family law models that are delimited through the setting of boundaries which are based on family type or form; for example, headed by a married couple, a heterosexual de facto couple, or a same sex heterosexual couple. This type of approach is consistent with the recommendation of the Australia Law Reform Commission’s report on *Multiculturalism and the Law* which concludes that “a general amendment of Australian law to make it less narrowly monocultural and more flexible to accommodate individual differences” (ALRC Report No 57 1992, para 1.24) is preferable to the development of laws focussed on special groups. This viewpoint can apply to multiculturalism at its widest conception - to accommodate all types of cultural practices, not only those pertaining to ethnicity.

My central thesis is that to be truly equitable in the delivery of a family law system, we need to move conceptually from this reliance on form to a characteristics based model; that is, a model which determines application on the basis of generic relationship characteristics, which point to the existence of a degree of interdependency.

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\(^5\) For example, as reported by the Australian Parliament. Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act The Family Law Act 1975 (Cth): Aspects of its Operation and Interpretation, (Canberra : AGPS, 1992) Chapter 10

Secondly, it is a comprehensive body of law specialised around the particular attributes of “family” relationships. The need for such a specialisation becomes patently obvious if one considers the limitations of a reliance upon common law principals and the supporting procedures for the resolution of domestic property disputes.

The alternative to a legislative system of family law, except where specifically provided under ancillary legislation, is a reliance upon common law principles. A problem with an uncoordinated approach to family law is that the laws touching on such relationships may not be based upon the specific needs of family relationships. For example, outside of a specialised family law regime, the various aspects of a domestic dispute, such as parenting, property division and divorce, would each have to be the subject of separate legal actions. In addition, because the common law is developed around problems of a generic nature and not specifically as they would arise in a familial context, its principals and solutions could fail to take into account the specificity of a domestic, as opposed to, say, a commercial relationship. It is, perhaps, for this reason that the states and the Commonwealth had legislated specifically on matters of a domestic nature even prior to the introduction of the FLA.

An illustration of the limitation of the common law is the issue of property division and the relevant equitable principals, that is, those of resulting and constructive trusts. There is not scope here to describe the relevant caselaw and principles. It is sufficient to say that equity is severely limited in its ability to recognise contributions to property that are indirect and non-financial, such as attending to the welfare of the household.

Further, the Queensland Law Reform Commission in its working paper on de facto relationships asserted that equitable principles are uncertain, they are not well defined, and they are unable to “keep pace with the increasingly diverse kinds of living arrangements which occur in society and the needs which arise out of such relationships”. This concern was reflected in submissions to that inquiry, which almost unanimously recommended the introduction of legislation replacing the common law in respect to de facto couples.

Further, the Commission argued that pursuit of common law remedies are expensive because the Court requires all the facts of the case, and must engage with “intricate and sophisticated principles of equity.” I would add that, given that the procedures of the common law are not tailored around the specific needs of “family” they form an inferior dispute resolution mechanism which is, additionally, more alienating to the community.

The existing family law regime, on the other hand, is responsive both substantively and procedurally to the issues of family. The Senate Standing Committee on Constitutional and Legal Affairs in its report on the clauses of the Family Law Bill set out the benefits of the proposed Family Court of Australia. The Committee asserted that a federal family law system, coupled with a specialised federal court structure, was capable of providing a more appropriate response to the diverse needs of families undergoing separation.

It suggested that this approach enabled, alongside traditional court supports, the provision of counselling for adults and children, supportive court services and specially selected and appointed judges better equipped to deal with the complexities of family conflicts. The system would also enable judges to develop an expertise in family litigation through their appointment specifically

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7 While the leading cases deal with heterosexual de facto couples, there is general consensus that they apply equally to alternative domestic models; “the rules, however they come to be formulated, ought to apply indifferently to all property relationships arising out of cohabitation in a home legally owned by one member of the household, whether that cohabitation be heterosexual, homosexual, dual or multiple in nature”: Allen v Snyder [1977] 2 NSWLR 685, 698 per Glass, JA.

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to the Family Law Court. In theory the Act would also provide a legal avenue which was more human, compassionate and effective in the resolution of family disputes than a general legal system. As the Law Reform Commission reported, the main reason for establishing the Family Court was that “the legal system was not equipped to deal with both the legal and personal problems arising from marriage breakdown and divorce.” It was suggested that the philosophy of the Family Court was that “sensitive personal issues arising from the breakdown of relationships should be dealt with in a non-punitive, supportive environment in which human needs, especially the welfare of children, would be given priority” and that this was reflected in the multi-disciplinary approach of the Family Court which brought together lawyers, social workers and psychologists. Hence, in addition to traditional litigation, the Family Court today offers, alternative dispute resolution mechanisms such as mediation and court counselling services.

The second advantage of the current system is that it is federal in nature. The issue of national uniformity is one that is bound up in the politics of a federation and so is subject to Commonwealth/state tensions. However, it has been recognised since federation that national uniformity in laws concerned with family is desirable. For example, on the issue of divorce, arguments were put by some of the framers of the Constitution and accepted reluctantly by others, that national disunity in laws would lead to a situation in which a person could, if dissatisfied with the laws of their state, alter their state of domicile in order to effect the legislative response of their choice. This, it was said, would lead to “a condition of things socially of a most deplorable character”.

A further argument for national uniformity is that put by Barwick in 1959 in his second reading speech of the Matrimonial Causes Bill 1959 (Cth). The introduction of the Bill, was, according to Barwick, inspired by an appreciation by federal politicians of “the effect which the great mobility afforded by modern transport and our expanding industrialisation have had on such problems as domicile, and the disparity of the grounds of divorce from state to state.” It was proposed that, in this regard, the system would “treat people uniformly as citizens of Australia, and not diversely as citizens of the various states or territories.”

These arguments are pertinent to laws affecting all domestic relationship models. The existence of disparate state-based legislation has the effect that parties in one state have rights that are denied to the parties of another, an argument which is rightly put in relation to all sorts of laws, and which is leading to states committing to uniform or at least comparable legislation in a wide range of legal matters, especially in respect to activities that are not necessarily confined to a state’s jurisdiction, such as corporations law and family law. The need for uniformity in family law derives, arguably, from the fact that “family” is a relatively persistent state, comprising many transactions over an extended period of time. On the other hand, most legal relationships are concerned with few transactions and exist over a finite period of time. Hence family law needs to be able to have relevance over the lifetime of the relationship. Related to this is that relationships may, throughout their existence, be maintained across state borders and that, increasingly, domestic units move between states. A lack of uniformity means that, as is currently the case regarding de facto relationships, the parties may have reasonably well set out rules and processes for resolving property disputes in one state, but not in another. Further, in effect, the individual’s inchoate proprietary rights vary according to their place of domicile. It is perhaps because of the absurdity that

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13 Family Law Act 1975 (Cth), Part IV, Division 3
15 Id, 217
16 Family Law Act 1975 (Cth), Part III Division 5 - Mediation and Arbitration
17 Family Law Act 1975 (Cth), Part III Division 4 - Counselling
18 O’Connor, RE, Australia, Commonwealth of Australia Convention Debate, Sydney (22nd September1897) 1080
19 Ibid

20 Australia House of Representatives Parliamentary Debates (Hansard) Vol 23 1959, 2223 (14 May 1959)
21 Id, 2224
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\[\text{Id, 2224}\]

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arises from disparate legislation that the states have referred matters relating to all children, irrespective of the normal constitutional divisions of power, to the Commonwealth.23

Unfortunately the benefits that are derived from a national, specialised system are denied to a large sector of the community who do not satisfy the jurisdictional requirements of the FLA. Because of these advantages I support a federal, specialist family law system. The issue becomes one of how to make such a system accessible and applicable to the diversity of domestic formations representative of Australian society. This is discussed below.

AN ALTERNATIVE APPROACH TO FAMILY LAW – THE DOMESTIC RELATIONSHIP LAW MODEL

I should clarify before progressing, that in this paper I am not concerned so much with the content of the law, but with the approach of the law. The goal is to visualise a way in which the full range of domestic arrangements can fall under the jurisdiction of a comprehensive family law system which is similar in form and scope to the current one. There is not, however, scope in this paper to comment on the content of the law, except in general terms. Clearly, changing the nuclear family centred approach of the family law system requires more than just extending its jurisdiction to non-traditional domestic formations. There is a further task of amending the content to reflect the diversity of domestic relationships which would be covered. For example, references to “family”, “the institution of marriage” and “the union of man and woman,”24 particularly as they operate as underlying principals of the FLA, would need to be amended in favour of a diversity of arrangements and values. There would also need to be programs aimed at reorienting legal staff and advocates on the new, wider directions of the Act. With this in mind, let us proceed to a discussion of how family law can be inclusive.

I call my proposed model a “domestic relationship law” model rather than a “family law” model because of the dominant conservative readings of the latter. In my own mind the terms “domestic relationship” and “family” are interchangeable. The notion of “family” is open to far wider readings than its traditional, narrow conception. However, it’s current usage is heavily value laden - it has operated in dominant discourse in an excluding manner, marking the norm from the other, the centre from the margins. Because of this, it is pragmatic to use terminology which is clearly inclusive, and which disables the strangle-hold of “family” on rights of legitimacy. Perhaps then, having been legislatively sanctioned and publicly legitimised, alternative domestic formations will be in a better position to claim the term “family”, thus releasing “family” from its traditional construct by extending the concept to other models of domestic relationship.

To Whom Should It Apply?

This model is conceptually different from the family law system as we know it, in that it’s application hinges on the “how” rather than the “whom”. Hence the question should be reframed as “how does the model apply?” The current system has application to particular family models. In contrast, the application of the proposed model is based upon characteristics of relationship, rather than form, as will be discussed further below. These characteristics provide indicators of whether there is a degree of social and economic interdependence. Because the proposal is not based upon relationship form it has potential application to any type of domestic relationship to which the characteristics apply. Hence, the model could apply irrespective of gender, cohabitation, nature and extent of intimacy, the existence or otherwise of dependent children, the formal legal sanctioning of the relationship or the nature or cultural origins of any rituals marking the relationship. It could apply to, for example, lovers, extended family members, people in shared housing arrangements or non-cohabiting co-parents. The pivotal question would be whether there is a degree of social and economic interdependence such that, in the event of a dispute, a resolution mechanism, which is tailored around the peculiarities of domestic relationships and their negotiations, should be available.

23 Although Western Australia has not referred its powers, in general terms, the jurisdiction of both nuptial and ex-nuptial children remains co-located.
24 As in, for example, Family Law Act 1975 (Cth), s43,
arises from disparate legislation that the states have referred matters relating to all children, irrespective of the normal constitutional divisions of power, to the Commonwealth.\textsuperscript{23}

Unfortunately the benefits that are derived from a national, specialised system are denied to a large sector of the community who do not satisfy the jurisdictional requirements of the FLA. Because of these advantages I support a federal, specialist family law system. The issue becomes one of how to make such a system accessible and applicable to the diversity of domestic formations representative of Australian society. This is discussed below.

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What Are The Features Of The Model?

In explaining the model I will make reference to North American legal commentators and judges who have reflected upon a similar approach to defining “family”\(^{25}\) for extending rights and obligations to gays and lesbians\(^{26}\) and for determining child custody.\(^{27}\) However, these applications of the concept have been limited to very specific matters. I have found no evidence that the idea has been argued in relation to a family law system generally, nor in a critique specifically of the Australian family law system. I will refer to these earlier authors in explaining my proposal. It is also useful to refer to those parts of the FLA which enable the Acts application to parties other than those of a marriage.

The Commonwealth has, generally, jurisdiction to legislate in respect to both nuptial and ex-nuptial children, by virtue of the State’s transferral of powers. The issue of jurisdiction satisfied, in dealing with disputes in respect to children the focus of the FLA shifts from a concern with the marital status of the parties before it, (that is, their family form) to a concern with the child’s interests. This therefore, indirectly, extends jurisdiction to parties other than those of the marriage or de facto relationship. The effect is that whereas, generally, only the party of a marriage can bring proceedings under the FLA,\(^{28}\) any person can bring proceedings in relation to children.\(^{29}\) Hence, in theory, the issue of family form is no longer critical to a determination under this Part.


\(^{26}\) See, for a brief reference, Sanders, D, “Constructing Lesbian and Gay Rights” (1994) 9:2 CILS/RCDS 99,134-135


\(^{28}\) Family Law Act 1975 (Cth), s4, definition of “matrimonial cause”

\(^{29}\) Id, s69C

The test for the Family Court becomes then, how to make decisions regarding children? The FLA provides that the paramount consideration for the Court is “the best interests of the child”\(^{30}\) and provides a set of criteria to assist in determining the child’s best interests.\(^{31}\) Hence, the judge’s assessment of best interests is moved from a consideration of the type of relationship to a focus on the nature of the relationship between the applicant and the child. My proposal is for a similar approach to all aspects of domestic relationship law. I argue for a general shift in approach from one of form to one of the nature of the relationship itself, that is, the characteristics of the relationship and the extent of economic, social and emotional interdependency. Whilst the effect of such a change is more directly relevant to questions of property, insofar as any party can make an application in respect to children, there is an indirect effect on such proceedings; it changes the framework for considering the attributes of the parties in determining the best interests of the child. The preference for the nuclear family and the values implicit in this (questions of gender roles, sexuality, marital status, and so on) which provide the framework of current law and which therefore may be influential in determinations surrounding children would be outside of the context of the legislation and hence no longer have relevance. I will discuss the proposal in relation to the more direct issue of how family law can be modified to enable its application to the full range of domestic arrangements, with the effect on determinations in relation to children being a consequence of the wider approach.

The case of Braschi v Stahl Associates\(^{32}\) was concerned with defining “family” for the purpose of determining whether New York residential tenancies protection due only to family members of a tenant, applied to the plaintiff, the tenant’s same-sex partner. The majority view was that the determination of family for purposes of ascertaining whether the right should be afforded “should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.”\(^{33}\) A valid

\(^{30}\) Id, s65E

\(^{31}\) Id, s68F

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construction of family, in the particular context, was said to be one which is "long term and characterised by an emotional and financial commitment and interdependence." 34 Family membership "should be based on an objective examination of the relationship of the parties....it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control." 35

Braschi's functionalist approach to defining family could easily be applied to determining the application of domestic relationship law in Australia. The issue becomes not whether the relationship before the court satisfies a criterion of form but whether it's nature, in terms of emotional, financial and, I would add, social commitment and interdependence, lends itself to assumptions of mutual obligation. It is on this basis that the alternative mode of legal redress would apply. This concept is not entirely new in Australian "family" law. The ACT Domestics Relationships Act 1994 has a similar, functionalist approach to determining its application. However, as with other state based legislations pertaining to de facto relationships, it is procedurally and substantively inferior to the Commonwealth family law regime.

If this is the basis of a new domestic relationships law model, there remains the problem of mapping out the relevant characteristics which permit a determination that the relationship is one to which the Act should apply. The FLA in its approach to children does provide a guide for such decisions. Insofar as the Court is bound to consider the "best interests of the child" in child related matters, it has adopted a functionalist approach similar to that advocated by Braschi. It does not, in theory, rely on form, that is, assumptions based upon, for example, gender, marital status or biological connection. I say in theory because, as legal commentators have often proposed, "judicial pronouncements are influenced by judges' perceptions of social and cultural values, and by their own values." 36 The task is to find a means by which judicial discretion can be supported and directed. A way of doing this is to ensure that the exercise of discretion is aimed at a goal which is determinate. Hence, the controversies surrounding the decisions of judges in relation to Family Law proceedings relating to children may arise because the matter for judges to determine is what is in the "best interests" of the child, 37 an indeterminate concept. It is, arguably, difficult to determine "best interests" except through a reflection and application of one's own experiences and values. The "domestic relationships law" model, on the other hand, has a more determinate goal; that is the finding that the relationship has a degree of "economic, social and emotional interdependency." This involves a less value-laden assessment, as long as there are guides to assist forming such a conclusion. I will return to the FLA's approach to children on this point.

The problem of indeterminacy aside, a focus on the best interests of the child requires that judges look at the nature of the relationship, with reference to a range of considerations 38 - it is, in essence, a neutral functional approach. 39 I would advocate the development of considerations, such as those provided under s68F of the FLA, to assist in the determination of whether a relationship is one to which a domestic relationships law should apply. The ACT Act, while having a similarly functionalist approach, has not gone so far as to provide guides for determining a "domestic relationship". It relies only in the broad defining statement of "personal or financial commitment and support", 40 leaving it to judicial discretion to determine what factors might lead to such a finding, without guides to the exercise of that discretion.

Which characteristics lend themselves to a finding of relationship which, using the Braschi criterion, is economically, emotionally and socially independent? Assuming that legal definitions of family are subjective and relative,

34 Id., 54
35 Id., 55
36 Scott, Jocelyn, Women and the Law (Sydney: Law Book Co Ltd., 1990) 284
37 Family Law Act 1975 (Cth), s6SE
38 as listed in Family Law Act 1975 (Cth), s68F
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based upon the beliefs and values of the individual and her/his community, how is that to be encapsulated into legal formulation? As Jaff so nicely puts it:41

[t]he problem ... becomes how to transform ... [a] psycho-social view of the family into legal rules for determining the legal rights and obligations that flow from certain relationships.42

She suggests a list of criteria which, though applicable to a different context, are a useful starting point for finding ways of determining domestic relationship for the purpose of this proposal. They would assist the court in determining whether the arrangements of the parties of a relationship give rise to a finding of economic, social or emotional interdependency, irrespective of whether it was one based on, for example, shared-housing, biological links, caring or intimacy. Hence, they would operate similarly to the considerations for determining the best interests of the child under the FLA, although they are more explicit and therefore more directive. They are:

- "whether finances were pooled, large purchases made together and monthly expenses paid together;
- whether children had been born out of the relationship, or whether foster or adoptive children had been raised by both or all parties to the relationship;
- whether food was bought, prepared and eaten together;
- whether the relationship was stable and enduring;
- whether the parties to the relationship cared for each other in times of sickness etc...;
- whether there was frequent, perhaps daily, contact between the parties to the relationship;
- whether financial assistance was exchanged on a fairly regular basis;

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42 Above, note 25, 238

- whether childcare responsibilities were shared or exchanged;
- whether there was a high degree of intimacy and/or confidentiality between the parties.”43

The Braschi judgment considers, further, that indicative but not conclusive of a finding of family is:

the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services.44

Other factors that might be relevant are:45

- whether there is a sexual relationship;
- "whether the people consider that the relationship is likely to continue indefinitely";
- "the basis on which the people make plans for, or engage in, joint social activities"; and, finally,
- if cohabiting, the basis on which responsibility for home duties is distributed.

It is my assertion that the application of domestic relationship law generally, notwithstanding exceptions such as issues of children, should be based upon the sort of criteria described above. Note that these are considerations only. A relationship need not satisfy all or even a majority of the considerations - they provide a guide to assist the judge in making an objective assessment upon the facts before her/him. On the other hand, evidence of certain characteristics, might give rise to a presumption of interdependency which would need to be

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negated by the other party; for example the pooling of finances, the (ostensibly) joint rearing of children and the sharing or exchange of childcare responsibilities. Having determined whether or not the nature of the relationship is one of interdependency and therefore subject to the family law regime, the criteria then assists a determination of the dispute; that is, for example, the division of property or whether some form of maintenance or support is payable. This broad ranging application clearly indicates the need for a reconsideration of the content of the law, using the current FLA as model, to ensure its appropriateness to a wider range of circumstances than is currently envisaged. It may not, however, be necessary to construct a different property division regime for different types of relationship. Rather, once the jurisdictional issue of economic, social and emotional interdependency has been satisfied, the question of direct and indirect, financial and non-financial contributions to property would determine the outcome.

It may be instructive to apply the test to some alternative domestic models. In the case of, let’s say, Sergio and Connie (he has two children, she has one, they live together, sharing economic resources but are not a de facto couple in the ordinary sense of the word) the Family Court would not currently have jurisdiction. If Sergio’s contributions to the household were diminished because he undertook primary responsibility for home duties, including the primary carer for all children, he would have difficulty obtaining recognition for these non-financial and indirect contributions to asset acquisition. However, under the proposed domestic relationships model, it may be open to the Court to find that they satisfy the test of economic, social and emotional interdependency. The normal rules of property division would apply. If, on the other hand, they did not share economic resources, looked after their own children as they would if they lived separately, maintained separate accounts and hence lived together purely on a share house basis, the test of interdependency would not be satisfied.

The same could be said for a married couple. If they maintained independent lifestyles, with separate, delineated contributions to accounts and household assets and no children were raised jointly the domestic relationships law may not apply. The point is that the application of the Family Law Act should not be determined by a preferred model of domestic relationship.

This model clearly supports a high level of judicial discretion in the determination of jurisdiction. This goes against the flow of current legislative trend. However, given the diversity of domestic models and arrangements subject to the domestic relationship law model, I support the argument presented by Dewar that a discretionary system “is capable of achieving better outcomes in individual cases through its sensitivity to the individual facts of each case”. While judges need to be informed and conscious of wider, social issues when making determinations, such as that of power relations between parties, it is important that, as much as is possible, the judgment be value-free to enable an open-minded consideration of the matters before it. However, I appreciate the concerns that a purely discretionary system can give rise to inconsistency and the imposition by judges of their individual values. It is even argued that, because a discretionary based system relies so heavily upon the investigation of the facts, it is prone to delays and, additionally, burdens the legal system. Finally, it is true that many settlements occur within the shadow of the law, and that there is therefore a need to maintain some indicators of outcome.

My response to these concerns is twofold. Firstly, the domestic relationships law is presented only as a conceptual model, one which certainly requires refinement and further comment in terms of the substantive provisions which would need to follow. The other is that such discretion, to the extent that it would exist under a refined model, need not be unfettered. As is the case in property settlements under the current regime, a discretionary based model need not be free from direction or scrutiny and accountability. The jurisdictional criteria set out above leads the exercise of judicial discretion and

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46 Dewar argues that there has been a shift in family law from an emphasis on discretion to an emphasis on rules: Dewar, J, (undated, c.1997) Reducing Discretion in Family Law, Working Paper No.1, Family Law Research Unit, Griffith University, Brisbane 2-3

47 Id, 12

48 Ibid

49 For those concerned that even fettered discretion is problematic, for reasons already discussed, Dewar makes some procedural suggestions, although concedes that for the rule-favouring advocates, these go only some of the way to addressing the problem, id 12-13. He finally recommends a system which incorporates different approaches for, on the one hand, the negotiations that occur in the shadow of law, and, on the other, judicial determinations, id 22.
negated by the other party; for example the pooling of finances, the (ostensibly) joint rearing of children and the sharing or exchange of childcare responsibilities. Having determined whether or not the nature of the relationship is one of interdependency and therefore subject to the family law regime, the criteria then assists a determination of the dispute; that is, for example, the division of property or whether some form of maintenance or support is payable. This broad ranging application clearly indicates the need for a reconsideration of the content of the law, using the current FLA as model, to ensure its appropriateness to a wider range of circumstances than is currently envisaged. It may not, however, be necessary to construct a different property division regime for different types of relationship. Rather, once the jurisdictional issue of economic, social and emotional interdependency has been satisfied, the question of direct and indirect, financial and non-financial contributions to property would determine the outcome.

It may be instructive to apply the test to some alternative domestic models. In the case of, let’s say, Sergio and Connie (he has two children, she has one, they live together, sharing economic resources but are not a de facto couple in the ordinary sense of the word) the Family Court would not currently have jurisdiction. If Sergio’s contributions to the household were diminished because he undertook primary responsibility for home duties, including the primary carer for all children, he would have difficulty obtaining recognition for these non-financial and indirect contributions to asset acquisition. However, under the proposed domestic relationships model, it may be open to the Court to find that they satisfy the test of economic, social and emotional interdependency. The normal rules of property division would apply. If, on the other hand, they did not share economic resources, looked after their own children as they would if they lived separately, maintained separate accounts and hence lived together purely on a share house basis, the test of interdependency would not be satisfied.

The same could be said for a married couple. If they maintained independent lifestyles, with separate, delineated contributions to accounts and household assets and no children were raised jointly the domestic relationships law may not apply. The point is that the application of the Family Law Act should not be determined by a preferred model of domestic relationship.

This model clearly supports a high level of judicial discretion in the determination of jurisdiction. This goes against the flow of current legislative trend. However, given the diversity of domestic models and arrangements subject to the domestic relationship law model, I support the argument presented by Dewar that a discretionary system "is capable of achieving better outcomes in individual cases through its sensitivity to the individual facts of each case". While judges need to be informed and conscious of wider, social issues when making determinations, such as that of power relations between parties, it is important that, as much as is possible, the judgment be value-free to enable an open-minded consideration of the matters before it. However, I appreciate the concerns that a purely discretionary system can give rise to inconsistency and the imposition by judges of their individual values. It is even argued that, because a discretionary based system relies so heavily upon the investigation of the facts, it is prone to delays and, additionally, burdens the legal system. Finally, it is true that many settlements occur within the shadow of the law, and that there is therefore a need to maintain some indicators of outcome.

My response to these concerns is twofold. Firstly, the domestic relationships law is presented only as a conceptual model, one which certainly requires refinement and further comment in terms of the substantive provisions which would need to follow. The other is that such discretion, to the extent that it would exist under a refined model, need not be unfettered. As is the case in property settlements under the current regime, a discretionary based model need not be free from direction or scrutiny and accountability. The jurisdictional criteria set out above leads the exercise of judicial discretion and

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46 Dewar argues that there has been a shift in family law from an emphasis on discretion to an emphasis on rules: Dewar, J, (undated, c1997) Reducing Discretion in Family Law, Working Paper No.1, Family Law Research Unit, Griffith University, Brisbane 2-3.

47 Id, 12

48 Id

49 For those concerned that even fettered discretion is problematic, for reasons already discussed, Dewar makes some procedural suggestions, although concedes that for the rule-favouring advocates, these go only some of the way to addressing the problem, id 12-13. He finally recommends a system which incorporates different approaches for, on the one hand, the negotiations that occur in the shadow of law, and, on the other, judicial determinations, id 22.
provides a means by which judges are made accountable for their decisions. Appeal courts are able to reassess the trial Judge’s exercise of discretion if s/he has not applied the relevant rules of law in coming to that discretionary decision. The setting out of criteria in the body of law informs the exercise of discretion, rendering the judge accountable. However, given the invisibility of naturalised assumptions of “family”, the concept having assumed a neutral status, there is the problem that these are not apparent in judgments and hence do not easily give rise to appeal. I recommend, therefore, a requirement that the reasons for decisions are spelled out in such a fashion as to enable an insight into how a judge’s personal values may have permeated the decision. The effect is twofold: it challenges judges to reflect on how their own values inform decision-making and assists appeals on such grounds.

PART II: A SUMMARY OF SOME OTHER PROPOSALS FOR REFORM OF FAMILY LAW

Theoretically, there are a number of ways in which domestic formations other than the traditional nuclear model could be incorporated into a family law system. I say theoretically because the Constitutional limits to the Commonwealth’s legislative power may mean that for some of the proposals, including my own, to be effective uniformly there would need to be either Constitutional amendment or state co-operation through a transferal of powers to the Commonwealth (as has occurred in relation to the jurisdiction of the Family Court regarding ex-nuptial children), or by the adoption of uniform state legislation. I suggest that the latter is more likely than the former. I will discuss the proposals as if they were constitutionally possible.

LEGISLATIVE MODELS INCLUSIVE OF ALTERNATIVE DOMESTIC RELATIONSHIPS

The possibilities include:

- extending the right of marriage under the Marriage Act beyond heterosexual, monogamous and life-long relationships. This would therefore extend family law jurisdiction to these other relationships;
- extending the jurisdiction of the FIA by defining “family” in such a manner as to include alternative domestic models;
- introducing uniform legislation, similar to the de facto legislation existing in some states and territories, extending regulation to same-sex couples and other relationships not legally sanctioned through the Marriage Act;
- supporting the development and recognition of domestic relationship contracts by the Family Law Act;
- introducing registration of relationship legislation; that is, a system whereby people may register their relationship as one to which certain rights, predetermined by the state, would apply.

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50 As in the case of Stay v Stay, (1997) FLC §92-751 where the trial judge wrongly assessed the husband’s contribution to property as “special” thereby impacting to his favour on the distribution of property upon separation. Note, the caution on appealing discretionary decisions in Gronow v Gronow (1979) FLC §90-716. Here the High Court unanimously agreed that “an appellate court should be slow to overturn a primary judge’s discretionary decision on grounds which only involve conflicting assessments of matters of weight” (headnote).

51 For example, R v B (1996) FLC 92-658. The minority judgement was that the reference by the trial judge to “instinctive insight” into the children’s needs suggested a gender-stereotypical view. The majority judgement, however, found that it was open to the trial judge, on the evidence, to find that the husband was inexperienced in raising children. A stereotypical view may well be disguised in the trial Judge’s reasoning.

52 As provided under Family Law Act 1975 (Cth), s69H

53 Another means of recognising the rights of parties of alternative domestic formations not discussed here is to amend individual pieces of legislation, such as those relating to social security and intestacy. However this paper is specifically concerned with the issue of “family” law, and not with general legal rights.

54 Enunciated in Marriage Act 1961 (Cth), s46, reflecting the Hyde formulation, which is argued to be authority for the scope of the “marriage power” of the Commonwealth Constitution: Mason and Brennan JJ, in Calverley v Green (1984)155CLR 242, 259-60 and Brennan J in The Queen v L (1991) 174 CLR 379, 392. Hyde v Hyde & Woodmansee defines marriage as “the voluntary union for life of one man and one woman, to the exclusion of all others”: (1866)LR1 P&D 130 per Sir James Wilde

55 Despite the wide legislative powers of the states (for example, to recognise same-sex couples, polygamous relationships and other alternative models of domestic relationships) they have been slow to legislate in respect to relationships which do not replicate the traditional nuclear model; for example the South Australian legislation
provides a means by which judges are made accountable for their decisions. Appeal courts are able to reassess the trial Judge’s exercise of discretion if s/he has not applied the relevant rules of law in coming to that discretionary decision.\(^5^0\) The setting out of criteria in the body of law informs the exercise of discretion, rendering the judge accountable. However, given the invisibility of naturalised assumptions of “family”, the concept having assumed a neutral status, there is the problem that these are not apparent in judgments and hence do not easily give rise to appeal.\(^5^1\) I recommend, therefore, a requirement that the reasons for decisions are spelled out in such a fashion as to enable an insight into how a judge’s personal values may have permeated the decision. The effect is twofold: it challenges judges to reflect on how their own values inform decision-making and assists appeals on such grounds.

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**LEGISLATIVE MODELS INCLUSIVE OF ALTERNATIVE DOMESTIC RELATIONSHIPS**

The possibilities include:\(^5^3\)

- extending the right of marriage under the *Marriage Act* beyond heterosexual, monogamous and life-long relationships.\(^5^4\) This would therefore extend family law jurisdiction to these other relationships;
- extending the jurisdiction of the FIA by defining “family” in such a manner as to include alternative domestic models;
- introducing uniform legislation, similar to the de facto legislation existing in some states and territories, extending regulation to same-sex couples and other relationships not legally sanctioned through the *Marriage Act*;\(^5^5\)
- supporting the development and recognition of domestic relationship contracts by the *Family Law Act*;
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\(^5^2\) As provided under *Family Law Act 1975* (Cth), s69H

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There is not the scope in this paper to comprehensively outline and analyse all of these proposals. However, it is possible to conclude that while each proposal is meritorious, each one is deficient in its ability to provide a comprehensive family law model for all domestic relationships, irrespective of form.

The first three proposals seek to extend equivalent or similar legal rights to applies to "the relationship between a man and a woman who, although not legally married to each other, live together on a genuine domestic basis as husband and wife": s3 De Facto Relationships Act 1996 (SA). See also: 4275 Property Law Act 1958 (Vic); s3(1) De Facto Relationships Act 1991 (NT). The ACT Domestic Relationships Act 1994, however, applies to the parties of a "domestic relationship" (as opposed to a de facto marriage) irrespective of the parties' genders or living arrangements, or the extent to which the relationship equates to marriage: s3. The NSW Property (Relationship) Act 1984 has recently extended jurisdiction to more broadly defined "domestic relationships", though one of the defining criteria is cohabitation between the parties.


those provided under the FLA to alternative family models. This, it is suggested, could occur by either widen the application of the FLA to specific alternative models (such as "de facto relationships" or "extended families"), by enabling certain alternative family models to become legally sanctioned through marriage or by introducing de facto relationship legislation.

A number of flaws are shared by such proposals. Firstly, the family law system would still only be available to those relationships legally recognised under the Marriage Act, the FLA or the individual state de facto legislation. Hence, these proposals extend privilege only to domestic relationships that are formally recognised by the state. A second, fundamental flaw with this option is that it is primarily based upon the redefining of boundaries – as to who may/may not marry, what constitutes family, or what constitutes a de facto relationship. This involves the state constantly trying to keep abreast of social change – incorporating new models of "family" into the family law system as it becomes "recognised" as being of such significance that it warrants attention. Such an approach is patently inefficient and determinations are, arguably, based upon moral considerations – of whether certain models should be recognised by the state. The effect is that the state elevates some models of relationship above others on the basis of, for example, culture or sexuality. In doing so, alternative models are marginalised and disenfranchised. Hence a key problem with these proposals is that, whilst providing recognition to more family models than is currently the case, they inevitably involve excluding some family formations; such as those relationships for which there is no name, only an arrangement. An additional effect is that raised by Colker. She argues that incorporating alternative relationships into the current legislative regime merely creates a pressure for those alternative models to conform to existing constructs which are based upon more traditional senses of relationship. For example, if the Marriage Act was simply amended to allow same-sex marriages, the traditional assumptions of marriage would

56 Above, note 56, 321-22. Note: Colker's arguments are based upon the question of whether same-sex relationships should be allowed to marry. Her analysis, however, applies more widely to measures to incorporate alternative domestic relationships into existing legislative regimes.
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remain the standard, that is, assumptions of monogamy, perpetuity and Christian values. Finally, there are arguments that the existing family models are oppressive, based upon patriarchal notions of gender relations.58

Other proposals seek to extend some family law rights to alternative domestic family models by enabling parties to register their relationships or to enter into domestic contracts.59 The central deficiency with these proposals is that they would provide significantly inferior legal rights and procedures to alternative models of family compared to those that are provided through the FLA to traditionally constructed families. For example, they do not provide a right of access to a sensitised judiciary or to mediation and counselling, as provided under the FLA. There are however, further, more conceptual and critical issues with the registration and contract proposals.

Both relationship registration and contracts rely upon individual action - the parties speculating upon the nature of their relationship and the possibilities for conflict. Hence, neither option operates as a default in the absence of positive steps of recognising a relationship, as does, for example, de facto relationship legislation in the absence of parties entering into marriage. They rely upon the parties having a sense of commercial caution, foresight and motivation as well as access to information and resources, a prerequisite which by its nature has cultural and class implications. As articulated by Stoddard

...couples...need knowledge, determination and - most importantly - money. No money, no lawyer. And no lawyer, no protection. Those who lack the sophistication or the wherewithal to retain a lawyer are simply stuck in most circumstances.60

Finally, the effectiveness of the registration model is largely reliant upon the introduction of supporting legislation providing particular rights to the parties of such relationships. Without such legislation it is likely that the “fact of registration will usually confer no benefit other than the public declaration and recognition of the partnership”.61 Hence, such a model would require, in this context, supporting legislation bestowing a family law regime.

Finally, there is the problem of applying the rules of the market place to the domestic space. According to Cox “relationships in households are based on blood, law, property and, presumably, on a sense of mutual obligations” 62 as well as “tradition, power, emotion and trust”.63 This domain, which has commonly been referred to as the “private” sphere by feminist theorists, does not easily accommodate questions of economy in the negotiation of relations, unlike the “public” sphere which “comprises those activities that take place in paid work, in political and community activities [and is] the sphere of ‘economically rational man’.”64 Domestic contracts and relationship registration rely upon the application of the techniques of the public, to the space of the private. The first issue, then, is how to apply matters of economics, money and self-interest to the sphere of trust, emotion and tradition. Secondly, how does one put a value upon matters, which, through being part of the private sphere, are considered valueless, perhaps even “priceless”. In addition, these proposals, particularly contract, essentially require the parties to encapsulate into legal form, events which are contingent upon future action. How can one form an agreement as to how, in the event of separation in, say, ten years time, property should be divided, unless one has prior knowledge of the events that will transpire (such as, child birth, employment opportunities, lotteries winnings) in the time between the formulation of agreement and the point of separation? Further, how is a party’s ability or inability to negotiate to be factored into contract, particularly

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In short, the proposed alternatives, individually or in combination, fail to provide a comprehensive family law regime for all domestic relationships irrespective of form. It is however, possible to conceptualise an alternative approach to resolving the disputes which arise from domestic relationships. This is by substituting considerations of form for considerations of character.

**PART III: CRITIQUE OF THE MODEL**

**ADVANTAGES OF THE DOMESTIC RELATIONSHIP LAW MODEL**

The suggested model addresses some of the problems with the proposals for reform outlined in Part II. The advantages touch on three central issues that arose from my earlier critique - equity and equality, the deconstruction of “family” and its effect on the rights of alternative domestic models and, finally, the general issue of accessibility.

The primary quality of my domestic relationship model of law is that it is equitable. It’s application is uniform, irrespective of gender, race, sexuality, marital status and so on. Its emphasis is on the characteristics of relationship. Hence, any domestic relationship could have access to a such a comprehensive and specialised legal system to resolve disputes, as long as the characteristics of relationship give rise to a finding of economic, social and emotional interdependency between the parties. For example, let’s say that two brothers live together in a jointly owned home and share resources but, at middle-age, decide to live separately. The characteristics of the relationship may mean that they would have access to the domestic relationships law system to resolve property disputes, rather than seek redress through the common law which would treat them as commercial strangers and ignore the complexity and non-commercial context of the negotiations. The model would, similarly, extend the benefits of such a system to: the situation where a woman cares for her mother in old age; shared-housing arrangements between single people: or to two friends, each with children, who decide to share house and resources, with one party being primarily responsible for “family” care and the other responsible for income support. On the other hand married persons would not be bound by the provisions of the FLA simply by virtue of their marital status. This acknowledges that people may, in the alternative, organise their affairs in a business like manner and should not, therefore, have the presumptions of the Family Court cast upon them. As this illustrates, the model has application far beyond the current family and de facto relationship law regimes.

A further, significant advantage is that a reliance on characteristics rather than form gives the model an organic existence, enabling the recognition of relationship types as they develop and therefore keeping up with social change and preventing the continuing need for legislative revision in the wake of social reform. Hence the model remains socially relevant. Further, it overcomes the problem of the need for the parliament to draw distinctions between those relationships which are to be sanctioned and those which are not, hence removing, as far as is possible, questions of morality from the issue of rights.

Related to this latter point, the proposed model liberates domestic relationship law from the value-laden constraints imposed by the family law model. Because it does not assume paramountcy of any particular relationship form it overcomes the existing tendency for relationships to be measured against a traditionally constructed family norm. Hence, there is no longer any reified model to which all others must aspire. This frees families which look like the traditional model from having to operate as such, destabilises “family” and its oppressive connotations and enables a reworking of the dominant family model in accordance with the values of the parties involved. It enables alternative models to be recognised, affirmed and judged in their own right, and not in relation to an assumed norm. In doing so, it does not depoliticise
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proactive alternative life-style choices but supports and validates them. Further, it eradicates the hierarchy of family models, at least in the area of domestic relationships law and, if we see law as normative, this has an effect on the dominant constructions of family.

These benefits have application not only to the recognition of rights but also to the way in which courts might come to a determination. If there is not an *a priori* "right" domestic form, or way to operate, the courts can but look to the relationship before them. There is, theoretically, no place for ethnocentrism - judgment can only be made in the social and cultural context of the relationship itself and, in forming a judgment, the court would not be justified in making comparisons with traditional, Anglo-Celtic family constructs. Hence, a gay couple does not have to operate like a heterosexual couple in their lifestyle arrangements to be considered worthy parents (presumably an impossible task given the assignment of gender roles in heterosexual relationships) because the heterosexual model is no longer the favoured one. Assumptions about the paramountcy of biological parenting no longer have a place in, for example, a determination of the right of an Aboriginal child to retain a relationship with its community. Similarly, the court can resolve property disputes between two long term co-tenants, in the face of assumptions that only traditional families significantly share economic resources.

An additional benefit of a characteristics based model is that it operates irrespective of whether the parties have taken formal steps, prior to the dispute, in recognition of their relationship. Contracts and relationship registration requires that the parties have a foresight of the progression of the relationship and the disputes that might arise and, subsequently, enter into legal negotiations to document proposed arrangements for dealing with disputes. The FWA requires that the parties marry, except in relation to children. The requirement to take formal steps in order to simplify processes for dealing with future disputes is a cultural, social and economic barrier for some groups in the community; for example, low-income people, people from non-Anglo-Celtic cultural backgrounds who may wish to have their traditional rituals legitimised and recognised in the same way as Christian rituals, people from non-English speaking backgrounds, and those who occupy a place of oppression and disempowerment in Australian society.

Jaff proposes that a further advantage of a characteristics based system is that it would encourage people to reflect upon the substance of their own relationships, rather than the mere formal existence. This would..."cause[e] them to reflect on those relationships and to value them when they are healthy and supportive relations or to leave them when they are characterised by oppression and pain". This reflection on the consequences of relationship is supported, in essence, by the ethos of the new Part VII of the FWA which encourages the parties of a relationship, firstly, to agree on "parenting" arrangements (to use the terminology of the Act) and, secondly, to recognise their ongoing obligations to children of the relationship.

Finally, there are, according to Jaff, procedural advantages. Although she does not elaborate on the point, Jaff suggests that a characteristics based approach (to defining "family") is administratively sound and realistic. It is also arguable that the proposal would provide an element of certainty of outcome. Just as trends in outcomes in family law enable practitioners to make reasonable predictions, extending a family law system to all relationships of a domestic nature would enable similar foresight of outcomes. It would also support negotiations in the shadow of law; that is, the private resolution of

65 Notwithstanding the remaining economic and practical benefits associated with marriage and nuclear family models.

66 I attribute this general observation to a more specific point made by Stoddard, who favours the right of marriage for same-sex couples over the registration of legal instruments "to assure that those at the bottom of the economic ladder have a chance to secure their relationship rights": in Rubenstein above, note 56, 399-400
67 Of defining "family" in law generally.
68 Above, note 25, 239
69 See Joint Select Committee, above, note 5, Chapter 5, Part 3 and Family Law Council Patterns of Parenting After Separation (Canberra: AGPS, 1992), paras 5.04-6.05.
70 Above, note 25, 241. The conclusion of administrative soundness is based upon reflections on the use of a similar approach (in form, rather than substance) in child custody cases in some parts of the US. She refers the reader to Garka v McCoy and Polikoff, above, note 56
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disputes without direct recourse to the law but through its use as a negotiating tool.

**Disadvantages Of The Domestic Relationship Law Model**

One of the concerns commonly raised in regard to extending laws broadly to relationships of a domestic nature is that of how to delimit the law. The Queensland Law Reform Commission, in advocating the need for a legislative regime to address the issue of property rights of “sharers” (that is, people in de facto relationships as well as others in sharing situations, such as co-tenants and extended family members), reflected on the need to limit the legislation “so that frivolous or unmeritorious claims did not clog the system or bring the law into disrepute.”

Further criticisms of the sharer model were contained in public submissions to the proposal. Of 21 responses, only three supported the sharer concept. The greatest criticism of the proposed model was that it was intrusive. It was suggested that the proposal was “paternalistic”, risking imposition of western concepts of property ownership and distribution on other cultures and that the law should only intervene where there are obvious power imbalances (which, it was suggested, is not an issue in non-de facto domestic arrangements). Further, it was argued that in relation to flatmates “such arrangements are intended to be temporary and the parties make financial arrangements which they consider equitable between themselves. If they are too stupid to do so, the law should not meddle.”

Related to the above criticism is the argument, used against de facto relationship proposals and applicable to the wider proposal, that such legislation does not enable people to “opt out” of legislative intervention. It is argued that this is often one of the considerations for people choosing to cohabit rather than marry. Similarly, it is alleged that, “[f]or alternative lifestyles to be real alternatives, the differences between the legal consequences of marriage and those of other lifestyles must be preserved.”

I accept that there are claims of excessive state intervention into areas of our lives which we, as individuals, believe we are capable of controlling. However, a central precept of our legal system is the relinquishment of individual rights and concerns, for the sake of larger social goals. This precept forms the basis of traffic law, of criminal law and even commercial and corporations law. While the area of family and the private sphere have historically been a place of greater immunity from state intervention there is growing recognition of the importance of the law in this area. Suggestions of maintaining the private sphere as a legal no-go area perpetuate the scope for abuses of a physical, social and economic nature. Reports on domestic violence and child abuse suggests that the place of domestic relations is as much, if not more, prone to abuse as the public sphere, a situation to which the law should respond. Hence domestic relationships should be no more “protected” from state involvement than public relationships. The assertion of Olsen and Jaff is pertinent:

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75 Jaff, above note 25, 240 quoting Fineman, id, 325

76 For example, the legal system has been slow to respond to offenses against women and children in the home until relatively recently. Even the concept of marital rape is a relatively new one.

77 Although the trend has been for legal intervention to be of a different nature in the home setting than in the public sphere, as apparent from, for example, the proposals for counselling services as a response to assault in the home, in place of, or in tandem with, the normal criminal responses (see Peace, E, (ed) (1987) In Our Best Interest: A Process for Personal and Social Change Minnesota Programme Development Inc.) and the interdisciplinary approach to dispute resolution under the Family Law Act 1975 (Cth) as discussed above.

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71 Above, note 9, 4
72 Id, 5-6
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"The problem with the law's treatment of unmarried people is not really a problem of state "intervention," but a "problem of the substance of that state behaviour". The question is not whether, how and how much the state should intervene, for the state's apparent non-intervention into alternative lifestyles is itself intervention in the form of the disadvantages that flow from the preference for marriage. The question is how to empower unmarried people...so as to lessen their burden without eliminating their choice."\(^\text{79}\)

For similar reasons, the issue of delimiting is of a secondary nature. Whilst it may be desirable to separate disputes of a commercial nature from those of a domestic nature, because, as I have already suggested, the relationships involve different imperatives, I do not see a necessity for distinctions within the domestic category in terms of the application or otherwise of the law as I propose. The distinctions arise in the interpretation of outcome - how the nature of the relationship should impact on the court's determination. Hence, the question becomes not one of to whom might domestic relationship law apply and how parties can remove themselves from the system, but rather does the nature of the relationship and what transpires between the parties lend itself to state intervention. Parties can "opt out", and the law will be limited, simply by parties organising their interaction in a manner which is equitable and non-exploitative, to the extent that this is legislatively determined. This is, in effect, not dissimilar from the situation that parties to, say, a commercial contract find themselves if that contract breaches protective legislation.\(^\text{80}\) The law intervenes only where one party feels that there is a breach of that contract, or where the contract or actions of a party is such as to attract the law's intervention to uphold what are considered to be reasonable community standards of behaviour. The intervention is limited to where it is invited by one or more of the parties.


An additional concern is the question of jurisdictional uncertainty. Currently there is certainty on the part of married couples and de facto couples in some States, that their relationship falls within the jurisdiction of the family law system, and certainty on the part of others in "family-like" relationships (such as homosexual couples and home sharers) that they do not. However the proposed model does not permit such clarity. Despite the wide flexibility permitted under the model, it is fair to say that most married and de facto relationships, especially if there are children of the relationship, would satisfy the criteria. Therefore, certainty remains for such groups. A new uncertainty arises for those people who are married and, in some states, those in de facto marriages, but whose affairs are arranged in non-conventional ways (for example by not living in an interdependent fashion) and for those relationships who would ordinary fall outside of recourse to a sympathetic body of law. However, the social and legal benefits of a system which is inclusive and non-discriminatory outweighs, I think, the disadvantages of a degree of uncertainty, particularly if that uncertainty would fall largely on the margins only.

CONCLUSION

I have argued in this paper that the family law regime, as provided under the FLA is, in many ways, a model system of law for the resolution of family disputes. However, it fails to meet the needs of Australian society, a society which is culturally diverse and so gives rise to a wide range of domestic relationships or "families" in the broad sense. This is despite the possibility that the ways in which alternative and traditional models of domestic relationship organised may be similar.

A means by which a family law system could be inclusive of alternative models would be to stop asking the question "to whom should it apply?" and instead consider "in what circumstances should it apply?" My proposed "domestic relationship law" determines its application on the basis of the whether the characteristics of the relationship are such as to enable a finding that there is a degree of social, emotional or economic interdependence and, consequently, that a system of domestic relationship law should apply.
The problem with the law’s treatment of unmarried people is not really a problem of state “intervention,” but a “problem of the substance of that state behaviour”. The question is not whether, how and how much the state should intervene, for the state’s apparent non-intervention into alternative lifestyles is itself intervention in the form of the disadvantages that flow from the preference for marriage. The question is how to empower unmarried people…so as to lessen their burden without eliminating their choice.\textsuperscript{79}

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By approaching family law in this manner is it conceivable that all relationships which are familial in nature, irrespective of their form, could have the benefit of a specialised family law system? Could we have a family law system in the widest sense which would address the issues that might arise between domestic parties, irrespective of their sexuality, the formality of the arrangements or whether the connections are biological, social or legal in nature. Surely we at least have to start with a vision of inclusion.

WHAT’S IN A NAME? INFORMAL JUSTICE FOR WOMEN VICTIMS OF DOMESTIC VIOLENCE AND THE CRIMINAL INJURIES COMPENSATION SCHEME OF WESTERN AUSTRALIA

LINDA JUREVIC*

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INTRODUCTION

I have been uncomfortable with the treatment of women victims of domestic violence since I began practising law in 1988. Initially, my discomfort was caused by my inability to obtain effective remedies for women victims, eg. protection orders which would actually protect. I then became increasingly frustrated by the judiciary’s inability, and at times refusal, to understand the circumstances of my clients. I believed that if the substantive law was changed, so would the treatment of victims. Judges would be required to apply the law regardless of any personal bias and victims would at least be able to find some solace in the fact that society no longer condoned their maltreatment. I discovered, however, that even when beneficial changes were made to the substantive law, the outcome for victims was not necessarily better.

In 1995, I investigated the treatment of women victims of domestic violence

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1 Throughout this article I will use the phrase ‘women victims of domestic violence’. By domestic violence I mean actual or threatened physical violence between married, de facto, or intimate partners in a heterosexual relationship. It is beyond the scope of this article to explore domestic violence which occurs in gay or lesbian relationships.