

# PRACTITIONER ATTITUDES TO CARING RELATIONSHIPS UNDER THE VICTORIAN RELATIONSHIPS ACT: AN EMPIRICAL STUDY

SUSAN BARKEHALL THOMAS\*

*In Victoria, the Relationships Act 2008 (Vic) provides a registration process for people in caring relationships to register their relationship. If the relationship is registered and then breaks down, the Act provides a mechanism for a property claim to be made. Registration of the relationship also creates eligibility for a family provision claim on death of one of the parties. Of the five Australian jurisdictions which give statutory recognition to caring relationships, Victoria is the only jurisdiction with a mandatory registration requirement.*

*Despite its beneficial purpose, the registration process is not being adopted. Prior to registration, parties must seek independent legal advice. A requirement for advice can create a barrier to registration. This article reports on the results of a study in which Victorian legal practitioners were surveyed to determine if advice about registration is being sought, and whether practitioners are advising parties to register. As the Act also covers registration of domestic relationships, questions were asked about advice sought for domestic relationships, for comparison purposes.*

## I INTRODUCTION

This article stems from a study in which Victorian legal practitioners were asked about their knowledge of, and experience with, the *Relationships Act 2008* (Vic) ('*Act*'). In particular, the study sought to examine the attitude of Victorian practitioners to registrable caring relationships under the *Act*. A copy of the survey questions is attached as an appendix.

Victoria is one of five Australian jurisdictions to recognise that caring relationships (as opposed to domestic or de facto relationships)<sup>1</sup> may provide grounds to make a

\* PhD, LLM, BA(LLB)(Hons) (Monash); Senior Lecturer, Monash University Faculty of Law. I am very grateful to my research assistant Ian Liu. I also wish to thank the anonymous referees for their helpful comments.

1 Domestic or de facto relationships are defined as a 'domestic relationship' under the *Relationships Act 2008* (Vic) ('*Act*'). To be domestic partners in a domestic relationship the parties must be a couple: at s 5 (definition of 'registrable domestic relationship').

claim over property on breakdown of the relationship.<sup>2</sup> Caring relationships exist where people who are not a couple are in relationships of care and support. Caring partners have been described as ‘companions’<sup>3</sup> or ‘close companions’,<sup>4</sup> and can be related by family. For example, it was anticipated that parent/child<sup>5</sup> or sibling<sup>6</sup> caring relationships would be covered.

Caring partners are also one of the categories of eligible family provision claimants under the revised family provision regime in Victoria since 2014.<sup>7</sup> However, the Victorian legislation requires that the relationship be registered in order for the carer to be able to make a claim.<sup>8</sup> None of the other jurisdictions which acknowledge that caring relationships may generate rights over property (or eligibility for family provision) require registration in order to make a claim. While Tasmania permits relationship registration, the registration requirement is optional.<sup>9</sup>

While registration was seen to be necessary to create certainty,<sup>10</sup> if there was any intention for the provisions to have real effect, they have not operated as intended. As of May 2019, there were no registered caring relationships in Victoria.<sup>11</sup> However, national statistics show that ‘[i]n 2015, almost 2.7 million Australians were carers’ of an older person or person with a disability.<sup>12</sup> Most assistance provided to older Australians is informal, and is provided by family. Friends or

2 Ibid s 5 (definition of ‘registrable caring relationship’). The other jurisdictions are the ACT, New South Wales, South Australia and Tasmania. See *Domestic Relationships Act 1994* (ACT) s 3(1) (‘Domestic Relationships Act’); *Property (Relationships) Act 1984* (NSW) s 5(1)(b) (‘Property (Relationships) Act’); *Domestic Partners Property Act 1996* (SA) s 3(1) (definition of ‘close personal relationship’); *Relationships Act 2003* (Tas) s 5 (‘Tasmanian Relationships Act’).

3 Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November 2008, 4572 (Rob Hulls, Attorney-General) (‘Relationships Act Second Reading Speech’); Tasmania, *Parliamentary Debates*, House of Assembly, 25 June 2003, 29 (Judy Jackson).

4 South Australia, *Parliamentary Debates*, House of Assembly, 14 November 2006, 1207 (Michael Atkinson, Attorney-General).

5 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 May 1994, 1802 (Gary Humphries); New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1999, 535 (Paul Whelan).

6 *Relationships Act* Second Reading Speech (n 3) 4572 (Rob Hulls, Attorney-General).

7 *Administration and Probate Act 1958* (Vic) s 90 (definition of ‘eligible person’ para (h)) (‘Administration and Probate Act’).

8 Ibid.

9 *Tasmanian Relationships Act* (n 2) s 5. Seven caring relationships were registered in Tasmania as of December 2019: email from Registrar of Births, Deaths and Marriages to Susan Barkehall Thomas, 10 December 2019.

10 *Relationships Act* Second Reading Speech (n 3) 4573 (Rob Hulls, Attorney-General). Registration was also seen as necessary as it ‘ensures that only people who intend to have their caring relationship legally recognised as their primary relationship are captured by the registration scheme’.

11 Email from a Media Adviser, Department of Justice and Community Safety to Susan Barkehall Thomas, 28 May 2019 (‘Media Adviser Email’).

12 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2015* (Catalogue No 4430.0, 18 October 2016).

neighbours might also assist.<sup>13</sup>

Given the dearth of registrations in Victoria, research was conducted to determine the attitudes of Victorian legal practitioners to the *Act* and their experience in giving advice in relation to it. Legal practitioners are essential to the registration process, as parties seeking registration must obtain a certificate from a solicitor that they have been advised regarding the consequences of registration.<sup>14</sup>

The aim of the study was to obtain more information regarding the possible barriers to registration of caring relationships in Victoria. Practitioners were also asked about their knowledge of the aspects of the *Act* dealing with registration of domestic relationships, by way of comparison.

Part II of the paper sets out why the study was necessary, by outlining the relevance of registered caring relationships and comparing the position with some of the other Australian jurisdictions.<sup>15</sup> Part III of the paper discusses the study and the results which were obtained. Part IV analyses the results and what they suggest for Victoria.

## II BACKGROUND TO THE STUDY

Pursuant to the *Act*, parties who are in a 'registrable caring relationship' can apply to have the relationship registered.<sup>16</sup> The relationship is registrable if it is

a relationship (other than a registered relationship) between two adult persons who are not a couple or married to each other and who may or may not otherwise be related by family where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material

13 Seventy-three per cent of assistance is provided informally: Australian Institute of Health and Welfare, *Australia's Welfare 2017* (Report No 13, 19 October 2017) 176. The most common provider of assistance is a partner, followed by children (with daughters providing more assistance than sons): at 177. The Productivity Commission defined 'informal carers' as 'individuals providing aged care on a regular basis (often on an unpaid basis and without contract), for example, spouses/partners, family members, as well as neighbours or friends': Productivity Commission, *Caring for Older Australians: Overview* (Report No 53, 28 June 2011) XIII. 'Formal care' by contrast '[i]ncludes all care services that are provided in the context of formal employment regulations, such as through contracted services, by contracted paid care workers'.

14 *Act* (n 1) s 7(ba).

15 There is a small body of existing literature on relationship registration, although much of it concentrates on domestic relationships. See, eg, Amanda Head, 'The Legal Recognition of Close Personal Relationships in New South Wales: A Case for Reform' (2011) 13(1) *Flinders Law Journal* 53; Olivia Rundle, 'An Examination of Relationship Registration Schemes in Australia' (2011) 25(2) *Australian Journal of Family Law* 121; Donna Cooper, 'The Proprietary Consequences of Loving and Living Together' (2004) 23(1) *University of Tasmania Law Review* 45; Jenni Millbank and Kathy Sant, 'A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW' (2000) 22(2) *Sydney Law Review* 181; Jenni Millbank, 'Domestic Rifts: Who Is Using the Domestic Relationships Act 1994 (ACT)?' (2000) 14(3) *Australian Family Law Journal* 163.

16 *Act* (n 1) s 6.

benefit of the other, whether or not they are living under the same roof ...<sup>17</sup>

If the relationship is registered, but the relationship later terminates, it may be possible to make a claim for adjustment of property. Section 45 sets out the relevant considerations:

(1A) On an application by a caring partner under section 41 for an order to adjust interests with respect to the property of one or both of the caring partners, a court may make an order adjusting the interests of the caring partners in the property of one or both of them that seems just and equitable having regard to —

- (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the caring partners to the acquisition, conservation or improvement of any of the property or to the financial resources of one or both of the partners; and
- (b) the contributions made by either of the caring partners to the welfare of the other caring partner; and
- (c) the nature and duration of the registered caring relationship; and
- (d) any relevant matter referred to in section 51.

A person who is in a registered caring relationship is also an eligible applicant for family provision.<sup>18</sup> While Victoria previously had a broad family provision jurisdiction, the 2014 amendments to the *Administration and Probate Act 1958* (Vic) (*Administration and Probate Act*) moved the Victorian jurisdiction away from broad criteria to eligibility based on limited, listed categories. The importance of registered caring relationships under the new family provision regime may not yet be fully realised.

An application for registration of a caring relationship must include:

- A statutory declaration by each party that they consent to the registration, are not married, in a registered relationship, or a relationship that could be registered;
- A solicitor's certificate for each party that they were provided with legal advice independently of the other applicant. That advice must explain the consequences of registration and the advantages and disadvantages of registering; and

17 Ibid s 5 (definition of 'registrable caring relationship'). The *Act* also covers 'domestic relationships': at s 4. For the relationship to be a domestic relationship as opposed to a caring one the parties must be 'a couple': at s 5 (definition of 'registrable domestic relationship').

18 *Administration and Probate Act* (n 7) ss 90 (definition of 'eligible person' para (h)), 91.

- The registration fee and any further information the registrar may require.<sup>19</sup>

Obtaining legal advice is a necessary precondition to registration, but legal advice is not the only limiting factor as to whether the relationship can be registered. In Victoria, the definition for a registrable relationship is narrow, and the caring relationship can only be registered if neither of the parties is in another relationship which is registered, or registrable.<sup>20</sup> This is a very significant limitation on registrability. While an adult child may care for an elderly parent, if the adult child is married or in a registrable domestic relationship, the caring relationship cannot be registered. Equally, if the adult child is caring for both elderly parents who are married or in a domestic relationship, the caring relationship cannot be registered.

This stands in contrast to New South Wales, where there is no registration process. If parties fall within the definition of a ‘close personal relationship’<sup>21</sup> and the relationship breaks down, a claim may be able to be made on the basis of care provided. In New South Wales, the constraining factor for recognition of a close personal relationship instead of registration is that the parties must be ‘living together’.<sup>22</sup> There is no requirement that the care relationship be exclusive of other relationships.

*Saravinovska v Saravinovski* [No 6]<sup>23</sup> demonstrates how the New South Wales legislation differs from that in Victoria. In this case, the plaintiff cared for her parents in law (and then later solely for her father-in-law) in an intergenerational household for 24 years by cooking, house cleaning, and providing personal care, particularly as her father-in-law grew older. The plaintiff was also raising her own family in the shared household. When the relationship finally broke down, the plaintiff made a claim on the property. Her claim was successful and she was awarded a 30% interest on the basis of the care provided over the long period of time.

In New South Wales a person who was in a close personal relationship at the time of the death of the other party to the relationship is also eligible to make a

19 *Act* (n 1) s 7.

20 *Ibid* s 6(b). It must be their ‘primary relationship’: *Relationships Act* Second Reading Speech (n 3) 4572 (Rob Hulls, Attorney-General).

21 This is a relationship ‘(other than a marriage or a 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’: *Property (Relationships) Act* (n 2) s 5(1)(b).

22 *Ibid*. In this type of relationship, the notion of ‘living together’ may be ‘more attenuated’ than for a de facto relationship: *Hayes v Marquis* [2008] NSWCA 10, [79] (McColl JA).

23 [2016] NSWSC 964, *affd Saravinovski v Saravinovska* [2017] NSWCA 85.

claim for family provision.<sup>24</sup> As former de facto/domestic partners cannot claim for provision, claims are often made by applicants who had previously been the de facto partner of the deceased but at the time of death no longer met the requirements for that relationship.<sup>25</sup>

Other claims are made solely on the basis of care and domestic support. One case is *Ye v Fung* [No 3], where additional provision of \$425,000 was granted to a claimant who had been in a relationship with the deceased that was similar to the relationship of aunt and nephew.<sup>26</sup> The applicant and deceased had shared the home (belonging to the deceased) and the applicant had provided domestic support and personal care for the deceased over a period of 10 years. Successful claims have also been brought by a daughter-in-law who was the primary carer of the deceased,<sup>27</sup> a sister,<sup>28</sup> a “friend and carer”<sup>29</sup> and others.<sup>30</sup> Unsuccessful claims due to lack of evidence which satisfied the care requirements have been brought by a mistress,<sup>31</sup> and a nephew.<sup>32</sup> Other claims by non-family members have failed as the parties were not living together.<sup>33</sup>

In Victoria, the basis on which a former domestic partner can make a claim for provision is narrow,<sup>34</sup> and it is possible that former domestic partners could claim that they had become caring partners by the date of death, particularly given the absence of a requirement for the parties to be living together.<sup>35</sup> However, no claim

24 *Succession Act 2006* (NSW) s 57(1)(f). Tasmania however only allows for family provision for spouses or former spouses if the former spouse is ‘receiving or entitled to receive maintenance’: *Testator’s Family Maintenance Act 1912* (Tas) s 3A(e). ‘Spouse’ includes a person ‘in a significant relationship’: at s 2 (definition of ‘spouse’). Parties must be in a relationship as ‘a couple’ to be in a significant relationship: *Tasmanian Relationships Act* (n 2) s 4(1)(a). Parties in care relationships are not eligible for provision.

25 Critically this means that at the date of death the parties must have been living together ‘as a couple’: *Property (Relationships) Act* (n 2) s 4(1)(a). See, eg, *Barlevy v Nadolski* [2011] NSWSC 129; *Thompson v Public Trustee of New South Wales* [2010] NSWSC 1137. Unusually *Geoghegan v Szelid* [2011] NSWSC 1440 was a successful claim by an ex-husband on the basis that he and the deceased were in a close personal relationship.

26 [2006] NSWSC 635, affd *Fung v Ye* [2007] NSWCA 115.

27 *Josivovich v Stoikofski* [2008] NSWSC 474.

28 *Davis v Fordham* [2008] NSWSC 182.

29 *Skarica v Toska* [2014] NSWSC 34, [33] (Lindsay J).

30 *Jurd v Public Trustee* [2001] NSWSC 632.

31 *Popescu v Borun* [2011] NSWSC 1532. The plaintiff succeeded on the alternative basis of being a dependant member of the deceased’s household: at [100] (Macready AsJ).

32 *Bayssari v Bazouni* [2014] NSWSC 910.

33 See, eg, *Sedgwick v Varzonek* [2015] NSWSC 1275; *Amprimo v Wynn* (2015) 15 ASTLR 41. In the decision of *Smoje v Forrester* [2017] NSWCA 308 the Court of Appeal overturned a grant of \$550,000 additional provision to the applicant friend and carer of the deceased who visited the deceased every day in her motel room, as the parties did not satisfy the ‘living together’ requirement: at [42] (Basten, Macfarlan and Meagher JJA).

34 Under the *Administration and Probate Act* (n 7) a former spouse or domestic partner is only an eligible person if, at the time of the deceased’s death, he or she ‘(i) would have been able to take proceedings under the *Family Law Act 1975* of the Commonwealth; and (ii) has either — (A) not taken those proceedings; or (B) commenced but not finalised those proceedings; and (iii) is now prevented from taking or finalising those proceedings because of the death of the deceased’: s 90 (definition of ‘eligible person’ para (e)).

35 See, eg, *Carter v O’Brien* [2007] VSC 21. The successful plaintiff was the testator’s former domestic partner who had been his carer before his death.

can be made if there has been no registration.

A further contrast is presented with the position in the Australian Capital Territory, where a person who has been in a domestic relationship<sup>36</sup> for at least two years is eligible to make both a property claim<sup>37</sup> and a claim for family provision.<sup>38</sup> In relation to family provision, the relationship must have been continuous for at least two years, but can have been at any time.<sup>39</sup> This is even wider than New South Wales in acknowledging that past care relationships may give rise to an application for provision.

Accepting that the New South Wales and ACT criteria for making a provision claim are different to those in Victoria (and this is not the place to debate those differences), the point is that caring relationships are varied in their nature and are not confined to close family members (such as children) who can claim eligibility via another category.

Family provision eligibility in Victoria has undergone several major changes. Prior to 1997, family provision in Victoria had been available only to the widow, widower or children of the deceased.<sup>40</sup> The law was changed in 1997 to remove those categories.<sup>41</sup> Under the family provision regime that applied in Victoria from 1997 until 2014 the family provision eligibility was ‘criteria’ based rather than ‘relationship’ based. The questions for the court were whether ‘the deceased had responsibility to make provision for a person’ and whether ‘adequate provision’ had been made ‘for the proper maintenance and support of the person’.<sup>42</sup>

The court had to consider an extensive list of factors, including matters such as the relationship between the applicant and deceased, size of the estate, financial resources and needs of the applicant and of beneficiaries, age of applicant and if there were any disabilities.<sup>43</sup> Other factors included whether the applicant had contributed to ‘the welfare of the deceased’ or made contributions to ‘building

36 A ‘domestic relationship’ is ‘a personal relationship between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other and includes a domestic partnership but does not include a legal marriage’: *Domestic Relationships Act* (n 2) s 3(1).

37 The definition of ‘domestic relationship’ is wider than ‘domestic partnership’. See, eg, *Armstrong v Oates* [2016] FamCA 611.

38 *Family Provision Act 1969* (ACT) s 7(1)(b).

39 *Ibid.*

40 Victorian Law Reform Commission, *Succession Laws* (Report, August 2013) 107 [6.50] (‘*Succession Laws*’), citing the *Administration and Probate Act* (n 7) s 91 (as at 30 September 1958).

41 *Administration and Probate Act* (n 7) s 91, as amended by the *Wills Act 1997* (Vic) s 55 (as at 2 December 1997).

42 *Administration and Probate Act* (n 7) s 91, as amended by the *Wills Act 1997* (Vic) s 55 (as at 2 December 1997).

43 These factors were previously contained in s 91(4) of the *Administration and Probate Act* (n 7), as amended by *Wills Act 1997* (Vic) s 55 (as at 2 December 1997). The questions for the court and the factors to consider are now set out in s 91A of the *Act*.

up the estate'.<sup>44</sup> In this period, eligibility was not confined to persons in listed categories, so any person could make a claim.

In 2014 the Victorian Law Reform Commission reviewed the law on family provision. There was a belief that the categories were too broad and enabled 'opportunistic' claims.<sup>45</sup> Although there were not many litigated cases on the basis of care, it is difficult to know how many applications were actually made, as most family provision disputes are settled rather than litigated.<sup>46</sup>

Following the Commission's final report, the provisions were substantially changed.<sup>47</sup> Both the jurisdictional questions<sup>48</sup> and the provisions governing eligibility were changed. Eligibility is now based on the relationship between the deceased and the applicant for provision.<sup>49</sup> Further, some categories of claimant must also demonstrate dependency<sup>50</sup> or the extent to which they cannot by reasonable means adequately provide for their own proper maintenance and support.<sup>51</sup> The factors which may be considered by the court when determining the amount of provision to be granted have a substantial overlap with the factors that formerly applied in s 91.<sup>52</sup>

Categories of 'eligible person' include:

Without proving dependency:

- a 'spouse or domestic partner' at time of death;<sup>53</sup>
- a former spouse or domestic partner who could have brought a claim under the *Family Law Act 1975* (Cth);<sup>54</sup>
- children, stepchildren and persons who for a substantial part of the life of

44 *Administration and Probate Act* (n 7) s 91(4)(k), as amended by *Wills Act 1997* (Vic) s 55 (as at 2 December 1997).

45 *Succession Laws* (n 40) xvii [24].

46 *Ibid*.

47 *Administration and Probate Act* (n 7) ss 90–91A, as inserted by the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* (Vic) pt 2.

48 The court must not make an order unless, 'at the time of death, the deceased had a moral duty to provide for the eligible person's proper maintenance and support' and the distribution of the estate 'fails to make adequate provision for the proper maintenance and support of the eligible person': *Administration and Probate Act* (n 7) s 91(2)(c)–(d).

49 *Ibid* s 90 (definition of 'eligible person').

50 *Ibid* s 91(4)(d). The eligible persons referred to in paragraphs (h) to (k) are a registered domestic partner, a grandchild, spouse of the deceased's child or a member of the deceased's household: at s 90 (definition of 'eligible person' paras (h)–(k)).

51 *Ibid* s 91(4)(c). The eligible persons referred to in paragraphs (f) and (g) are adult children, adult stepchildren and applicants who believed the deceased was their natural parent who were treated as natural children of the deceased: at *ibid* s 90 (definition of 'eligible person' paras (f)–(g)).

52 These are now in *ibid* s 91A.

53 *Ibid* s 90 (definition of 'eligible person' para (a)).

54 *Ibid* s 90 (definition of 'eligible person' para (e)).



the deceased believed the deceased was their natural parent and were treated by the deceased as such. Children, stepchildren and persons who believed they were natural children who are under 18, are full-time students between 18 and 25 or have a disability are automatically eligible. Adults who are not students and do not have a disability have an additional requirement to satisfy.<sup>55</sup>

Those who are eligible but the court must not make an order unless satisfied of dependency:<sup>56</sup>

- ‘a registered caring partner of the deceased’;<sup>57</sup>
- ‘a grandchild of the deceased’;<sup>58</sup>
- a spouse of a child (including stepchild or person who believed they were a child) of the deceased who died within a year of the deceased’s death;<sup>59</sup>
- a person who was, at the date of death, a member of the household of which the deceased was a member or who previously was a member of the household and would likely have become that again.<sup>60</sup>

While the Victorian Law Reform Commission proposed that persons in both a ‘registered caring relationship’ and those in a ‘registrable caring relationship’ be eligible,<sup>61</sup> the final amendments only include persons in a registered caring relationship.<sup>62</sup> In relation to domestic partnerships, the new provisions recognise a domestic partner or former domestic partner (in limited circumstances) as an eligible person under the *Act*.<sup>63</sup> A former domestic partner is eligible even if the relationship was not registered.<sup>64</sup>

Consequently in Victoria, eligibility for a claim based solely on care either during the lifetime of a caring partner, or after the death of one of the parties in the

55 Ibid s 90 (definition of ‘eligible person’ paras (b)–(d), (f)–(g)). Where the claimant is an adult child, stepchild or person who believed they were a natural child and the claimant is not a full-time student under 25 and has no disability, the Court must also consider the ‘the degree to which the eligible person is not capable, by reasonable means, of providing adequately for the eligible person’s proper maintenance and support’ when considering the amount of provision to be awarded: at s 91(4)(c).

56 Ibid s 91(2)(b).

57 Ibid s 90 (definition of ‘eligible person’ para (h)).

58 Ibid s 90 (definition of ‘eligible person’ para (i)).

59 Ibid s 90 (definition of ‘eligible person’ para (j)).

60 Ibid s 90 (definition of ‘eligible person’ para (k)).

61 *Succession Laws* (n 40) xxviii [38(f)] (emphasis added).

62 *Administration and Probate Act* (n 7) ss 3(1) (definition of ‘registered caring partner’), 90 (definition of ‘eligible person’ para (h)).

63 Ibid s 90 (definition of ‘eligible person’ paras (a), (e)).

64 Ibid s 3(1) (definition of ‘domestic partner’).

caring relationship, is confined to people who have registered the relationship.<sup>65</sup> On the other hand, in New South Wales or the Australian Capital Territory, carers can apply for adjustments to property both during the life of the other person or after their death, without registration.

The Victorian case of *Unger v Sanchez*<sup>66</sup> illustrates the change in the family provision rules. In this case, additional provision was granted to the plaintiff who was very close to an elderly couple who were her neighbours and who ultimately regarded her as their adopted daughter. The plaintiff provided significant support and personal care to the couple initially, and later to the wife, over a period of seven years. For most of this period primary care was provided by nursing home staff. The plaintiff's actions were described by the trial judge as 'marked by an extraordinary degree of devotion and sacrifice'.<sup>67</sup>

Under the family provision regime as it now stands in Victoria, the plaintiff would be unable to make a provision claim. Even despite the fact that the relationship was not registered, her relationship was not one that could be registered in Victoria, as the plaintiff was married throughout the period during which care was provided.

Given that caring relationships in Victoria must be registered for them to generate any claim under statute, it is striking that not one single relationship of this type had been registered in Victoria as of 28 May 2019.<sup>68</sup>

### III THE STUDY

There are a number of reasons that can be hypothesised for the lack of registered caring relationships. There may be no registrations because members of the community are unaware that a caring relationship is registrable and, accordingly, they do not come to a solicitor for advice regarding a caring relationship before the relationship commences, during the relationship or at its termination.

65 It is possible that a carer could be eligible on another basis, for example as an adult child. In *Davison v Kempson (As Administrator of the Estate of Genevieve Davison, Deceased)* [2018] VSCA 51 an adult son successfully claimed provision. The son had lived with his mother for most of his life and for the last 12 years had been his mother's primary carer: at [86], [113] (Tate, Santamaria and Beach JJA). He paid his carer's payments into his mother's bank account and was held to be dependent upon his mother until her death: at [7], [93] (Tate, Santamaria and Beach JJA). Under the current provisions, he could still demonstrate that he would be an eligible person, as an adult child or dependant person who was in the deceased's household.

66 [2009] VSC 541 ('*Unger*'). It is accepted that this was overturned on appeal on technical grounds but there is no appeal decision on any databases: see *Re Will of Vourdoulidis* [2013] VSC 34, [16] n 13 (Zammit AsJ); *Erlich v Fleiszig* [2013] VSC 63, [129] (Lansdowne AsJ).

67 *Unger* (n 66) [81] (Kaye J). See also *Petrucchi v Fields* [2004] VSC 425 where a widowed daughter-in-law was given additional provision from her father-in-law's estate. Her care to her in-laws over many years was regarded as a 'significant contribution' to their welfare: at [49] (Mandie J). The plaintiff in this case was also married while making that contribution: at [20] (Mandie J). On the facts of that case the plaintiff would not be eligible under s 90 of the *Administration and Probate Act* (n 7) (definition of 'eligible person' para (j)) as a 'spouse ... of a child of the deceased' as the child of the deceased must have died 'within one year of the deceased's death'. The level of care provided can be compared with the care provided in the unsuccessful claim in *Mastroianni v State Trustees Ltd* [2014] VCC 1281.

68 Media Adviser Email (n 10).

Alternatively, parties may be seeking legal advice, at which point:

- they may come for advice and be provided with the advice to register;
- they may come for advice and be provided with the information about registration but not advised to register;
- they may come for advice and have other specific advice given.

Even if parties are provided with information on the registration process, it may not seem necessary to them to do anything about it.

The study questions were designed to obtain more information on the barriers to registration. If community awareness exists, it is more likely that practitioners are being asked to give advice about caring relationships. It was also sought to determine at what stage of a caring relationship the advice was sought. For practitioners who had been involved in giving advice about the *Act*, they were asked some general questions about the advice given.

Given the longer operating time frame of the *Act* compared to the new provisions in the *Administration and Probate Act*, questions were directed to advice about the *Act* only. Questions were also asked about the domestic relationships aspect of the *Act* to identify if there is a different pattern of community, and practitioner, behaviour.

After ethics approval was granted,<sup>69</sup> information about the study was sent to community legal centres, legal aid centres, and to Victorian suburban and regional legal practitioners who may have provided advice to parties in ‘domestic’ or ‘caring’ relationships in the last five years. Direct approaches were made to practitioners using the Law Institute of Victoria’s public register of practitioners specialising in elder law and in family law and the Law Institute of Victoria’s public register of legal practices by location. The study was also advertised in the *Legal Aid Brief*, the *Law Institute Journal*’s classified ads, the newsletter of the Federation of Community Legal Centres and via the professional networks of the researcher and the research assistant.

Twenty-seven responses were received to the survey questions via the online survey tool Qualtrics. Practitioners were asked a number of questions regarding their familiarity with the *Act*, the frequency with which they had given advice, the type of advice given, and whether that advice was followed.

69 Ethics approval granted by Monash University Human Ethics Low Risk Review Committee, Project 12331, 7 March 2018.

## **A Familiarity with the Act and Nature of Practice**

Initial questions dealt with the participants' knowledge of the *Act* and the nature of their legal practice.

Seven respondents were in sole practice, 15 were in 'other private practice' and two responded 'other' without further details.

Ten respondents identified themselves as 'very knowledgeable' or 'knowledgeable' about the *Act*. Fifteen indicated they were 'somewhat knowledgeable' or 'a little knowledgeable' and two 'not knowledgeable'.

Participants were asked if they were familiar with the particular provisions of the *Act* which allow parties in a caring relationship to be registered. In relation to this question, 22 said they were familiar with these, but five had no familiarity with this aspect of the *Act*.

## **B Questions regarding Caring Relationships**

Within the last five years, 17 of the participants had provided advice regarding the *Act*.

The 17 who had given advice in the last five years were then asked further questions about the nature and frequency of such advice. One respondent indicated giving such advice frequently, 10 occasionally and six rarely. The majority of these respondents (13) had given advice in relation to domestic relationships only; whereas a small percentage had given advice in relation to both caring and domestic relationships (four). None of the participants had given advice only in relation to caring relationships.

The next questions were designed to elicit whether clients are approaching solicitors for advice before entering into a caring relationship. Participants were asked if within the last five years they had given advice to clients that a caring relationship could be registered *before* the client entered into a caring relationship. Of the four participants who had given advice to parties about caring relationships, three of these had given advice to clients before the commencement of a caring relationship. These three participants were then given further questions regarding the nature of that advice. They were asked whether they:

- advised the client to register;
- advised the client not to register;

- informed the client that the provisions existed without providing advice; or
- other.

One had advised registration; one had provided information without giving advice and one had replied 'other'. The 'other' response was further expanded to indicate that the information was given regarding the existence of the provisions and the practitioner provided the information on how to register, but left the decision to the client. Thus, although three participants had provided information regarding registration, only one of these positively recommended the registration process. The other two practitioners informed the clients but were neutral.

None of these practitioners responded that they provided advice for any other alternative options.

The respondent who *had not* given advice about registration then answered further questions as to why advice about registration was not provided, and whether alternative advice was offered. The options were whether the respondent did not advise registration because they were not aware of the provisions, or did not advise about registration because registration was not appropriate. This respondent answered that registration was not appropriate to the clients' circumstances and had recommended a family agreement.<sup>70</sup>

The next set of questions asked about whether in the last five years advice on registration of a caring relationship had been provided to parties who were *already in* a caring relationship. Again, four respondents indicated that they had provided such advice. In this context, half of the practitioners had advised the parties to register, and half had provided information regarding registration without providing further advice.

A third set of questions was offered, which were designed to determine if clients seek advice regarding caring relationships *after* the termination of those relationships.

Twenty-five participants responded to this question. Twenty-one had never been asked to advise at the end of a caring relationship. Four had been asked for this advice.

In relation to the advice given in those four cases, the clients were advised that they may have a claim to assets or property. Further questions were available, to identify if the claim had any success. One respondent indicated that the client received a sum of money to settle the claim. Three advised that no money sum was given.

<sup>70</sup> Other answer options were contract, caveat or other.

Finally, participants were asked if they had been asked to provide the solicitor's certificate which is the necessary precondition to registration. Of the 26 responses to this question, 25 were negative and only one had been asked to give a certificate. This respondent also indicated that the certificate had been provided.

### **C Questions regarding Domestic Relationships**

The second set of questions in the survey was focused on advice given in relation to domestic relationships. The practitioners were asked if they had given advice regarding registration of domestic relationships either before or during these relationships.

Registration of domestic relationships is not necessary for family provision and not necessary for an application for distribution of property. Property distribution on breakdown of domestic relationships is now governed by the *Family Law Act 1975* (Cth) ('FLA'). If the parties are in a relationship that has been registered, that is one path to giving jurisdiction under the FLA<sup>71</sup> but registration is not necessary for the federal jurisdiction to apply. The *Act* now only has residual application if the breakdown was prior to 2009.

A significantly higher proportion of the respondents had given advice about registration of a domestic relationship *before* the commencement of such a relationship. Sixteen respondents provided an answer to this question. Thirteen respondents had given advice regarding registration and three indicated they had not.

Of the 13 who had given advice regarding registration, three had recommended registration, eight had provided information without a recommendation and two had provided 'other' advice. One respondent who answered 'other' indicated that all the options had been advised to clients. Effectively this means that registration had been recommended four times, information had been provided nine times and 'other' advice had been given once.

The three practitioners who answered 'no' to whether they had given advice regarding registration of a domestic relationship then answered a further question to elicit why they had given a negative response. All three indicated that they were aware of the provisions but had felt registration was not appropriate. One of these advised the client to lodge a caveat and the remaining two recommended 'other'. In a question designed to elicit further information about the 'other' response, one indicated that advice was being given to separated couples.<sup>72</sup> No responses were received in relation to the provision of alternatives or the nature

71 *Family Law Act 1975* (Cth) s 90SB(d) ('FLA').

72 This response is not in the correct category as these were questions regarding registration 'prior' to entering the relationship and has to be discounted.

of such alternatives. Given that domestic partnerships are now governed by the *FLA* which does not require registration, it is not surprising that registration was not recommended.

Sixteen respondents also answered the questions regarding giving advice to parties during a domestic relationship. Of these, 12 had provided advice regarding registration. Ten of these either recommended registration (four) or provided information regarding registration but did not positively endorse registration (six). Two answered 'other'. One 'other' response indicated that all of the advice options had been granted. This effectively means 13 provided advice to register, seven provided information and one provided 'other' advice.

Four did not provide advice regarding registration, indicating that such advice was not appropriate in the circumstances. One advised a family agreement. One was giving advice to separated couples and one was collating evidence of a relationship. Again, due to the operation of the *FLA*, one would not expect a significant focus on registration.

#### **D Opinions regarding Registration of Caring Relationships as a Requirement for Property Claims**

Participants were also asked their opinion regarding registration of caring relationships as a mandatory pre-condition to making a property claim, and whether this was too restrictive. Twenty-three responses were provided to this question. The responses were almost evenly split, with 11 answering yes, and 12 answering no.

An additional question was whether participants thought that caring partners should be able to access a property distribution scheme without registration. Ten respondents answered yes, and 13 answered no.

#### **E General Comments about the Act**

Participants were also asked if they had any other comments.

There was a strong theme in the comments that the *Act* is now irrelevant or outdated<sup>73</sup> and should be repealed due to marriage equality.<sup>74</sup> These comments are accurate in relation to domestic relationships, as the *Act* has only a residual application and no ongoing role to play. It was also noted that the '*Act* is almost an afterthought'.

<sup>73</sup> Three comments made this point.

<sup>74</sup> One comment made this point.

One comment stated more broadly: ‘Not well known or appreciated laws. Experience was that advice was noted but no decision was taken.’ While it was not indicated which aspect of the *Act* was being commented upon, this particular comment speaks to the general apparent lack of knowledge about the caring relationships aspect of the *Act*.

## IV ANALYSIS

Due to the reasonably small number of participants, definitive conclusions cannot be drawn from the survey data. However, the results do provide sufficient data for some tentative conclusions about the role of practitioners in giving advice regarding registration of caring relationships.

The responses indicated that more survey participants gave advice in relation to parties considering entering into a domestic relationship. It may be the case that participants who had provided advice on domestic relationships (as opposed to caring relationships) self-selected and this created a bias towards answers that reflected a greater proportion of respondents who had provided advice on this type of relationship. However, the information was widely circulated and invitations sent to elder law specialists, community legal centres and legal aid offices as well as solicitors in general practice. Thus, while the results are not definitive, they are consistent with a conclusion that there are many fewer situations where clients approach a solicitor for advice regarding caring relationship as opposed to domestic relationships. This suggests that one of the barriers to registration of caring relationships is simply that members of the community do not know that registration is possible, and consequently do not seek legal advice.

The small number of responses may also indicate a lack of awareness in the profession regarding the possibility of registration of these relationships. It is impossible to determine whether this was a factor in the low response rate.

A statutory property division regime on the breakdown of de facto relationships has existed in Victoria since 1998.<sup>75</sup> It should be quite unsurprising that there is more community awareness of the consequences of entering into a domestic relationship as opposed to a caring relationship.

It may also be significant that several respondents regarded themselves as ‘not knowledgeable’ or ‘a little knowledgeable’ regarding the *Act* and most only had familiarity in relation to the domestic partnership aspect of the legislation.

If practitioners are not familiar with the caring relationships provisions, they may have missed opportunities to advise clients of the effect of the *Act* and the

<sup>75</sup> *Property Law Act 1958* (Vic) pt IX, as amended by *Property Law (Amendment) Act 1998* (Vic) ss 5–7. This part was repealed in 2008: *Act* (n 1) s 72.



consequences of registration. Alternatively, their lack of awareness comes from the same general lack of community knowledge of the operation of the *Act* in relation to carers. If they are not asked for advice on how a relationship should be structured, or what the consequences may be, they have no opportunity to consider the *Act*.

However, where the practitioners have given advice in relation to the *Act*, the results also suggest that the practitioners are not themselves the barrier to registration. Overall, the results show that parties who have sought advice regarding registration of a caring relationship were provided with the information regarding registration in most cases, and in some cases, registration was positively recommended.

This is useful information, as it tends to confirm the other tentative conclusions. Few clients are seeking advice on whether to register.

Comments by participants reflect that most attention is given to the domestic relationships aspect of the *Act*.<sup>76</sup> In relation to caring relationships, the ongoing importance of registration is generally overlooked. No participant noted the registration aspect of caring relationships and the relevance for family provision.

Ultimately however, the results suggest that the most likely situation is that people in caring relationships do not know that their relationship can be registered and they most likely do not understand the consequences of registration or non-registration as the case may be. An education campaign may provide greater awareness but may not result in any relationships being registered. Even parties who understand the possibility of registration may find the cost and inconvenience of seeking legal advice a sufficient disincentive.

### ***A Opinions regarding Registration as a Mandatory Precondition to Property Claims***

While practitioners noted the lack of use of the *Act*, and some had recommended registration, it was interesting that a substantial proportion did not consider mandatory registration in order to access the *Act* to be too strict. The responses were quite evenly split with 52% of respondents considering mandatory registration to be acceptable.

This potentially reflects an attitude on the part of practitioners that caring should not give rise to a property claim unless the parties have formally considered this

<sup>76</sup> As an aside, it is interesting to note that comments reflected a view that there is little ongoing role for these provisions in the wake of marriage equality. This assumes that parties only accessed the domestic relationship registration scheme because marriage was not available. This can be disputed: see, eg, Rundle (n 15) for reasons why registration may be a preferred choice.

is how their relationship should function.

However, only a small number of respondents had provided advice regarding caring relationships and more responses were received on the question of registration. Some of the responses to this question must have come from practitioners who had not given advice on the caring relationships aspect of the *Act*. In the absence of personal experience some of these did not consider registration to be a problem.

Given that the focus of this research was registration and its relevance to property claims, it is unknown whether practitioners have much knowledge of the amendments made to the family provision eligibility rules. Further empirical work on family provision and claims by carers could be significant here in determining whether claims by carers were common under the older family provision eligibility structure and whether practitioners regularly give advice in relation to the eligibility of carers.

## **B Family Agreements as Alternatives?**

Family agreements for caring relationships were advised in one instance, and they have been proposed as a solution for informal care arrangements.<sup>77</sup> In this context, family agreements usually refer to an ‘assets for care’ arrangement, where the older person transfers an asset (often their home) in exchange for a promise of care.<sup>78</sup> However, family agreements could be used more broadly to document care expectations and create a formal contract regarding assets.

The process of formalising a family agreement can serve the useful function of requiring the parties to carefully consider their expectations of the relationship,<sup>79</sup> and documenting what the rights are to be. The Australian Law Reform Commission (‘ALRC’) report *Elder Abuse: A National Legal Response* noted: ‘The making of family agreements is, in many cases, highly beneficial for the older person and not inherently a form of elder abuse.’<sup>80</sup> If the arrangement is an ‘assets for care’ agreement, where an asset is to be transferred, proper legal advice should ensure that the older person has had the legal options properly explained to them, and it significantly reduces the likelihood of the agreement being entered

77 See, eg, Brian Herd, ‘The Family Agreement: A Collision between Love and the Law?’ [2002] 81 (Spring) *Reform* 23.

78 This is the sense in which the term is used by the Australian Law Reform Commission (‘ALRC’) in *Elder Abuse: A National Legal Response* (Report No 131, May 2017) (‘*Elder Abuse*’).

79 See Herd (n 77) 26. The ALRC noted submissions which identified that the problem with informal agreements is ‘the failure of the parties to think through in detail their expectations under the agreement and what would happen if things go wrong’: *Elder Abuse* (n 78) 206 [6.15].

80 *Elder Abuse* (n 78) 206 [6.12].

into as a consequence of undue influence or unconscionable conduct.<sup>81</sup>

However, the ALRC noted the likelihood that family agreements are informal.<sup>82</sup> Reliance on informal arrangements carries risks<sup>83</sup> and it has been argued that there is a greater chance of elder abuse.<sup>84</sup>

The low number of responses recommending family agreements supports the general understanding that formal family agreements are not widely used.<sup>85</sup> Further, as none of the respondents indicated that the advice was acted on, it appears that even if advice was given to make an agreement, any agreement made after seeking advice is informal.

If parties have a formal agreement drafted, after independent advice is given, the formal agreement may also mitigate the risk of elder abuse occurring in the management and division of assets.<sup>86</sup> However, even if an education campaign were conducted to create greater awareness around family agreements, parties may not pursue formal arrangements due to the costs and inconvenience of obtaining formal legal advice.<sup>87</sup> The existence of trust between family members is also a disincentive to formalising such agreements.<sup>88</sup>

81 Although it is possible for legal advice to be unable to counteract such behaviour in particular circumstances: see *Thorne v Kennedy* (2017) 263 CLR 85. The New South Wales Legislative Council General Purpose Standing Committee No 2 heard evidence that solicitors may not be adequately trained to assess the competence of the older person and their ability to understand the transaction or may only undertake a cursory inquiry: Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (Report No 44, June 2016) 103–8 [7.1]–[7.13] (*'Elder Abuse in New South Wales'*).

82 '[T]ypically not put in writing' and generally without the benefit of legal advice even if they are written: *Elder Abuse* (n 78) 203 [6.2].

83 For example, if the agreement has not been documented it is harder to enforce: Mike Clare, Barbara Black Blundell and Joseph Clare, 'Examination of the Extent of Elder Abuse in Western Australia: A Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data' (Research Report, Crime Research Centre, University of Western Australia, April 2011) 50 (citation omitted); John Boersig and Dominic Illidge, 'Addressing Elder Abuse: Perspectives from the Community Legal Sector in the ACT' (2018) 18 *Macquarie Law Journal* 93, 103.

84 Boersig and Illidge (n 83) 102.

85 Seniors Rights Victoria ('SRV') documented the number of callers who had contacted their hotline in relation to drafting family agreements: Melanie Joosten, Briony Dow and Jenny Blakey, *Profile of Elder Abuse in Victoria: Analysis of Data about People Seeking Help from Seniors Rights Victoria* (Summary Report, June 2015). In the two-year period covered by the Report, the SRV conducted 755 advice calls: at 26 tbl 21. Advice about family agreements was given to four clients and agreements were drafted for three clients: at 26 tbl 21 n 5.

86 Boersig and Illidge (n 83) 102–4. Legislated models have been suggested: *Elder Abuse in New South Wales* (n 81) 99 [6.92], citing Seniors Rights Service, Submission No 25 to Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Inquiry into Elder Abuse in New South Wales* (13 November 2015) 26–7 ('SRS Submission').

87 *Elder Abuse* (n 78) 207 [6.18], citing Hervey Bay Seniors Legal and Support Service, Submission No 75 to Australian Law Reform Commission, *Inquiry on Protecting the Rights of Older Australians from Abuse* (18 August 2016).

88 See, eg, Dale Bagshaw et al, 'Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and Their Family Members' (2013) 66(1) *Australian Social Work* 86. The authors note that trust in family members is one of the reasons why approximately half of their sample responded they were not concerned about financial abuse: at 99.

## V CONCLUSION

Given the small number of respondents to the survey questions on registration of caring relationships, it is hard to draw conclusions about practitioner attitudes in general. The results of the study indicate that the respondents were not negative in their attitudes to registration. In the few instances where advice was given about a caring relationship, parties were provided with information about registration or generally advised to register. It is not possible to say if this is reflective of general attitudes in the profession.

Problematically however, there may be a lack of awareness in the profession regarding registration of caring relationships which has the result that clients are not being informed of registration as a possibility.

It is possible that other factors are the reason for the absence of any registered relationships. First, the limitations on who can be in a caring relationship render the legislative jurisdiction impractically narrow. Exclusivity of relationship is unlikely given that most informal care is provided by family members.<sup>89</sup> Secondly, the few instances in which advice was sought suggests there is a lack of community awareness regarding caring relationships, particularly in comparison to domestic relationships.

Thirdly, the process of registration is potentially a disincentive in itself, as it involves legal fees and the completion of formal paperwork.

Further empirical research could improve our knowledge about community awareness of the *Act* and obtain more concrete information about the barriers to registration. A survey of carers and the persons they care for could address:

- Their understanding of the options available to them;
- Whether they have an informal family agreement;
- What are the barriers to implementing a formal family agreement?
- What are the barriers to registration?
- Are they in a registrable relationship?
- Would they register if their relationship was registrable?

This would provide a clearer picture to explain the lack of registrations of caring relationships, whether parties would register if their relationship was registrable, and whether informal family agreements are widely used. This would then enable further conclusions to be drawn on the suitability of the registration requirements.

<sup>89</sup> See above n 13 and accompanying text.

Given the increasing awareness of the prevalence of financial abuse against older Australians committed by their children, the requirements for independent advice and registration built into the *Act* may well serve a protective purpose. Both parties to the relationship are informed as to their rights and the consequences of registration (or lack of it). However, several contrary points are worth noting. First, no property rights are transferred at the stage of registration. Registration is about jurisdiction. Careful legal advice at this stage may not prevent or mitigate the risk of elder abuse in the actual relationship.<sup>90</sup>

Further, even if registration is not possible, this does not mean that no property claim is available; it only removes the statutory basis. A carer may be able to bring a claim in equity or on the basis of an undocumented informal family agreement. This may potentially be more complex and expensive for both parties. From the carer's perspective this may make a claim impossible to pursue. If the claim is pursued it may be more drawn out and financially burdensome for both parties than using the statutory process.<sup>91</sup> If registration has a valid purpose, the system should be redesigned and a community awareness program should be undertaken.

Further work also needs to be done in relation to family provision and caring relationships. As it is still too soon for the courts to have made many decisions, and many cases settle out of court, empirical survey work is likely to provide a better picture regarding the number of unregistered carers, their relationship to the party cared for, and the impact of the legislative change.

90 As to the failings of legal advice, the New South Wales Legislative Council General Purpose Standing Committee No 2 noted 'a failure on the part of legal practitioners to take the necessary care in fulfilling their responsibilities provides a ripe opportunity for abuse by others': *Elder Abuse in New South Wales* (n 81) 117 [7.47]. Recommendations for further training for solicitors and for improvements of the guidelines were made: at 117–18 [7.49]–[7.50].

91 *Elder Abuse* (n 78) 207 [6.20]; *Elder Abuse in New South Wales* (n 81) 99 [6.92], citing SRS Submission (n 86) 17. A report by Wainer, Darzins and Owada suggests that legal action may not be taken to redress losses from financial abuse due to the older person's inability to pay for legal action: Jo Wainer, Peteris Darzins and Kei Owada, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study* (Report, 10 May 2010) 10. See also *Elder Abuse* (n 78) 208 [6.22]. They may also be reluctant to use the legal system against a person on whom they are dependent for care: Wainer, Darzins and Owada (n 91) 12.

## VI APPENDIX: COPY OF THE SURVEY<sup>92</sup>

**1. How would you describe your knowledge of the *Relationships Act 2008*?**

Not knowledgeable

A little knowledgeable

Somewhat knowledgeable

Knowledgeable

Very knowledgeable

**2. Are you familiar with the provisions in the *Act* which allow for registration of a caring relationship, defined as a relationship, ‘between two adult persons who are not a couple or married to each other and who may or may not otherwise be related by family where one or each of the persons in the 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’?**

Yes

No

**3. In the last five years have you advised clients about any aspect of the *Relationships Act*?**

Yes

No

**3a. If yes, how often have you given advice about the *Relationships Act*?**

Frequently (eg at least once a month)

Occasionally

Rarely

**3b. In the last five years have you given advice in relation to:**

Caring relationships only? (Skip questions 5 and 6)

<sup>92</sup> Minor revisions have been made to the grammar and presentation of the survey. The survey questions have also been numbered for ease of reference, and the questions amended to include references to other questions within the survey where appropriate.

Domestic relationships only? (Skip questions 3 and 4)

Both caring and domestic relationships?

- 4. The next few questions are about clients who were considering entering into a caring relationship but were not in caring relationship. Have you ever advised a client who was considering entering into a caring relationship that the relationship could be registered under the *Relationships Act 2008*?**

Yes

No

- 4a. If no, is this because:**

You were not aware of the registration provisions?

You were aware of the registration provisions but felt that registration was not appropriate in the client's circumstances?

- 4b. If registration was not appropriate — what alternatives have you recommended? — eg contract, family agreement, caveat, other.**

- 4c. If yes to 4, have you ever:**

Advised a client to pursue registration of the relationship?

Advised a client not to pursue registration of the relationship?

Informed a client that the registration process exists but provided no recommendation?

Other

If other please provide details

- 4d. If you have advised a client not to pursue registration of the relationship, did you provide alternative recommendations?**

Yes

No

- 4e. If yes to 4d, if possible, please comment on the broad nature of those alternatives (eg contract, family agreement, estoppel, constructive trusts, lodgement of caveat).**

- 4f. If yes to 4d, did the client(s) implement any of those alternatives?**

Always

Usually

Sometimes

Rarely

Never

Don't know

- 5. The next few questions are about clients who were already in a caring relationship but not registered under the *Relationships Act 2008*. Within the last five years have you ever advised a client who was *already in a caring relationship* that the relationship could be registered under the *Relationships Act 2008*?**

Yes

No

- 5a. If no, is this because:**

You were not aware of the registration provisions?

You were aware of the registration provisions but felt that registration was not appropriate in the client's circumstances?

- 5b. If registration was not appropriate — what alternative did you recommend? — eg contract, family agreement, caveat, other.**

- 5c. If yes to 5, have you ever:**

Advised a client to pursue registration of the relationship?

Advised a client not to pursue registration of the relationship?

Informed a client that that the registration process exists but provided no recommendation?

Other

If other please provide details

- 6. The next few questions are about clients who were considering entering into a domestic relationship but not registered under the *Relationships Act 2008*. Have you ever advised a client who was *considering entering into a domestic relationship* that the relationship could be registered under the *Relationships Act 2008*?**

Yes

No



**6a. If no, is this because:**

You were not aware of the registration provisions?

You were aware of the registration provisions but felt that registration was not appropriate in the client's circumstances?

**6b. If registration was not appropriate — what alternative did you recommend? — eg contract, family agreement, caveat, other.**

**6c. If yes to 6, have you ever:**

Advised a client to pursue registration of the relationship?

Advised a client not to pursue registration of the relationship?

Informed a client that the registration process exists but provided no recommendation?

Other

If other please provide details

**6d. If you have advised a client not to pursue registration of the relationship, did you provide alternative recommendations?**

Yes

No

**6e. If yes to 6d, if possible, please comment on the broad nature of those alternatives (eg contract, family agreement, estoppel, constructive trusts, lodgement of caveat).**

**6f. If yes to 6d, did the client implement any of those alternatives?**

Always

Usually

Sometimes

Rarely

Never

Don't know

**7. Within the last five years have you ever advised a client *who was already in a domestic relationship* that the relationship could be registered under the *Relationships Act 2008*?**

Yes

No

**7a. If no, is this because:**

You were not aware of the registration provisions?

You were aware of the registration provisions but felt that registration was not appropriate in the client's circumstances?

**7b. If registration was not appropriate — what alternative did you recommend? — eg contract, family agreement, caveat, other.**

**7c. If yes to 7, have you ever:**

Advised a client to pursue registration of the relationship?

Advised a client not to pursue registration of the relationship?

Informed a client that that the registration process exists for the relationship but provide no recommendation?

Other

If other please provide details

**8. The next few questions are about clients who had *previously been in a caring* relationship. Have you been ever asked to advise a client who had *previously been in a caring* relationship regarding rights that may have been acquired by the caring party as a consequence of care provided?**

Yes

No

**8a. If yes, have you ever advised that the carer may have acquired rights to assets owned by the party being cared for?**

Yes

No

**8b. Did the carer ever receive any assets or a sum of money to resolve the situation?**

Yes

No

**9. Have you ever been asked to provide the solicitor's certificate that is required for registration of a *caring relationship* under the *Relationships Act*?**

Yes

No

**9a. If yes, did you provide that certificate?**

Yes

No

**9b. If no, can you comment on the reasons?**

**10. Do you think that mandatory registration of caring relationships in order to make a property claim under the *Act* on termination of the relationship is too restrictive?**

Yes

No

**11. Do you think that parties who have been in caring relationships should be able to access a statutory property division regime without any registration requirements?**

Yes

No

**12. Do you have any other comments about the operation of the *Relationships Act*?**

**13. Please advise the nature of your practice:**

Sole practitioner

Other private practice

Community legal centre

Legal Aid practitioner

Other – please specify

**You have now finished the survey. Thank you for your participation.**