

# THE RELATIONSHIPS ACT 2008

Tuesday 22<sup>nd</sup> April 2008

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## The RELATIONSHIPS ACT 2008

(Act No 12 of 2008)

*A Paper delivered by Kathryn Rees, barrister, to the Eastern Suburban Law Association  
on 22 April 2008*

*Caveat:* This paper had to be prepared in reliance on the clauses of the Relationships Bill. The Parliamentary Minutes of proceedings disclose that the Bill was not amended in either House. However, practitioners should check the Act for themselves, now available on the internet, to ensure that the provisions remain unchanged. So far as I can see, the provisions remain unchanged.

1. In 2001, amendments were made to about 60 Victorian Statutes, introducing the concept of domestic partner and domestic relationship irrespective of gender. Those changes were effected by the *Statute Law Amendment (Relationships) Act 2001*. We all used to refer to that Act as “the *Relationships Act*” – a simple and suitable name for it, and we were peeved that the Government hadn’t seen fit to use such an easy title. Now history has caught up with us. The genuine *Relationships Act* has come to town and we now know why the Government did not use such an easy title in 2001. Fortunately, we rarely have to refer to the *Statute Law Amendment (Relationships) Act* any more because the amendments effected by it are so well enshrined in our statutes that it’s as if they have always been there.

### The Relationships Bill 2007

2. On 4 December 2007, the *Relationships Bill* was introduced to the Legislative Assembly by the Honourable Rob Hulls, Attorney-General. The Bill was aimed at completing the package of reform commenced in 2001, and it honours a broader promise, now found in the *Charter of Human Rights and Responsibilities*, to promote the values of equality, respect and dignity inherent in human rights.

### Statement of Compatibility

3. As everyone is probably aware, before a Bill can be considered by Parliament, the member of Parliament introducing the Bill must comply with section 28 of the *Charter of Human Rights and Responsibilities* by making and tabling a “Statement of Compatibility” – that is, the member must outline in what respect the Bill engages the human rights protected by the Charter. The Attorney-General tabled the Statement of Compatibility in respect of the *Relationships Bill* on 6 December 2007 in the Assembly.

4. The Attorney said—

“The principles underpinning the Charter of respect, equality, freedom and dignity tie closely to the objectives of the Bill. These principles include that human rights: are essential in a democratic and inclusive society that respects the rule of law, human dignity and equality and freedom; belong to all people without discrimination, and the diversity of the people of Victoria enhances our community. The Bill enhances the right to equality before the law for all Victorians by recognising domestic relationships, regardless of the genders of the couple. Equality before the law is a fundamental right enshrined in the Charter, which is essential in a democratic and inclusive society.”

5. The Statement of Compatibility identified various human rights protected by the Charter which are relevant to the Bill – recognition and equality before the law (s 8 of the Charter), privacy and reputation (s 13), freedom of expression (s 15), property rights (s 20), and the right to a fair hearing (s 24).

### Status of the Bill

6. The Bill was passed by the Legislative Assembly on 12 March, and by the Legislative Council on 10 April 2008. It received Assent on Tuesday, 15

April 2008, just one week ago.<sup>1</sup> From this point on, I will refer to it as “the Act”. *And please note the “Caveat” at the top of page 1 of this paper.* So far as I am aware, its commencement has not yet been proclaimed. I do not expect it to be proclaimed until most of the necessary regulations are in place. By s 2 of the Act, the Act commences operation on a day or days to be proclaimed, and in default of proclamation, most of the Act will commence on 1 December 2008, the rest on 1 July 2009.

#### OVERVIEW OF THE ACT

7. The Act establishes a relationships register for the registration of domestic relationships in Victoria. The relationships register is for all couples, irrespective of gender, who do not wish to marry or who cannot marry, and who are in a *registrable relationship*. The relationships register will allow Victorian couples in registrable domestic relationships to register their relationship with the Registrar of Births, Deaths and Marriages.
  
8. The aim is to provide a measure of certainty, and, with it, dignity, to domestic partners. We have all come across situations where A is hospitalised and B, his or her domestic partner, is sidelined by relatives, such that medical staff are reluctant to discuss A’s health issues with B without proof, or at least acceptance, of the relationship. And we have all seen what happens when a partner makes a Part IV claim on the estate of the deceased partner, and relatives say that they weren’t partners, but only friends. These sorts of

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<sup>1</sup> The Act will be available in the usual printed form in about 2-3 weeks.

situations are very hurtful, very difficult and often very costly (if litigation ensues) and they usually arise at times of great distress or grief.

9. The Act also provides a single location for statutory provisions governing property matters in the event of a breakdown of a domestic relationship. It provides for the enforcement of relationship agreements made between domestic partners,<sup>2</sup> allows for the adjustment of property interests between domestic partners and establishes a limited scheme for maintenance.
10. The Act repeals Part IX of the *Property Law Act*, which currently deals with the property of domestic partners, and incorporates the provisions from Part IX, making some amendments to accord with additional provisions relating to maintenance and relationship agreements. Further, there are necessary consequential amendments to other Victorian Acts.
11. The Attorney-General pointed out in his Second Reading Speech that a domestic relationship, registered or otherwise, is not of course marriage, over which the State has no constitutional power and which is defined by the *Commonwealth Marriage Act 1961* to exclude same-sex couples.
12. The Act preserves, for those who do not register their relationship, the existing scheme of recognition established in 2001, and has compatible definitions of domestic partner. No adverse inference is to be drawn for couples who do not register their relationship. However, as has been already mentioned, there are

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<sup>2</sup>

But not always.

always difficulties of proof in determining such an unregistered (domestic) relationship. You are all familiar with the matters to be taken into account in such a determination, located in section 275(2) of the *Property Law Act* since 2001, now to be found in the *Relationships Act*.

## SCHEME OF THE ACT

13. The Act is divided into Chapters, and each Chapter is divided into Parts.<sup>3</sup>

Chapter 1, Introduction;

Chapter 2—Registration of domestic relationships, including Part 2.2—*Registration of a Registrable Relationship*, Part 2.3—*The Relationships Register*, Part 2.4—*General Power of Review*;

Chapter 3—Relationship Agreements, Property and Maintenance, including Part 3.2—*Relationship Agreements*, Part 3.3—*Property and Maintenance*;

Chapter 4—General and Transitional Provisions and Consequential Amendments.

### Chapter 1

14. The purpose of the Act is set out in section 1 –

- (a) to establish a relationships register in Victoria for the registration of domestic relationship;
- (b) to provide for relationship agreements;

<sup>3</sup>

By section 36(1) of the *Interpretation of Legislation Act*, the headings to the Chapters and Parts formed part of the Act. Headings to sections, clauses, etc of this Act also form part of the Act: section 36(2A). Even a note at the foot of a provision of *this* Act forms part of the Act: section 36(3A).

- (c) to provide for adjustment of property interests between domestic partners and the rights of domestic partners to maintenance;
- (d) to repeal Part IX of the *Property Law Act* 1958 and make consequential amendments to other Acts.

15. Section 3 has definitions which apply across the whole Act. These definitions don't give much away. "Adult person" means a person who is 18 years of age or more; "legal practitioner" means an Australian legal practitioner within the meaning of the *Legal Profession Act* 2004; "registered relationship" means a relationship between two persons that is registered under Part 2.2; "relationship agreement" has the meaning given in section 35(1).

## Chapter 2

16. The purpose of this Chapter is to establish a Relationships Register in Victoria for the registration of domestic relationships. The register is to be maintained by the Registrar of Births, Deaths and Marriages: s 17. The register must contain particulars required to be included by the Act of each registered relationship and may contain further information if the Registrar considers this appropriate. All such information –mandatory and discretionary– constitutes "registrable information": s 5. In Chapter 2, "registrable relationship" means

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 a relationship (other than a registered relationship) between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a relationship in which a person provides domestic support

and personal care to the other person – (a) for fee or reward; or (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

17. Other definitions for the purposes of Chapter 2 are: Registrable information, Relationships Register, Revocation Application (s 5).

18. The Second Reading Speech makes it clear that a registrable relationship is confined to a couple in, effectively, a marriage-type relationship, whether same or opposite sex. I am not saying that a sexual relationship is an essential element of the relationship. But the Second Reading Speech expressly states that the registration model used in our Act, though similar to the Tasmanian Scheme established in 2004, does not include the registration of what the Tasmanian Scheme describes as a “caring relationship”. In Tasmania, a “caring relationship” involves a concept of relationship that is broader than that of a couple and can be between two family members. There may be an amendment in the future to include such, but a caring relationship is not at present part of the Relationships Act.

#### Registration under Part 2.2

19. If two persons are in a registrable relationship, they may apply to the Registrar in an approved form to have that relationship registered. They must be domiciled or ordinarily resident in Victoria, i.e. live in Victoria. They cannot be married to each other or anybody else, nor can they already be in a registered relationship,<sup>4</sup> and they must not be in another relationship that could

<sup>4</sup> The Explanatory Memorandum confines ‘being in a registered relationship’ to a relationship that is already registered in Victoria. However that is not how I read section 6(b). Registration

be registered under Part 2.2. For registration, a statutory declaration by each partner is needed, and proof of identity and age, of course payment of a prescribed fee, and anything else the Registrar requires.

20. An application for registration can be withdrawn if either of or both get cold feet, but the withdrawal form must be given to the Registrar within 28 days after the date of lodging of the application (s 9). So, a relationship can't be registered until after 28 days have passed or until the Registrar has been provided with all the information she requires, whichever is the later.

21. The Registrar has the right to refuse to register a relationship: s 10(3)(b). Is it possible to have a review of such a refusal? Is review possible of any other decisions under the Act?

Review by VCAT of a decision of the Registrar under the *Relationships Act*

22. Section 28 provides a general power of review to a person whose interests are affected by a decision of the Registrar under the Act. Application may be made to VCAT for review of the decision. Any application for review must be made within 28 days after the later of –

(i) the day on which the decision is made and

(ii) (provided the person has made a request under s 45 of the VCAT Act for a statement of reasons) the day on which a statement of reasons is given to the person or the person is informed that a statement of reasons will not be given.

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is possible in Tasmania, and I think being in a registered relationship in Tasmania would preclude a person from being in a registrable relationship in Victoria.

23. In accordance with s 51 of the VCAT Act, the Tribunal will have all the powers of the Registrar when exercising its review jurisdiction in respect of a decision, and may affirm or vary the decision, make its own decision or return the matter to the Registrar for re-consideration. Note especially that s 51(5) provides that, if an applicant does not appear (personally or by a representative) at the hearing of the proceeding for review of a decision, the Tribunal *must* confirm the decision.

Revocation of registration – how can this occur ?

24. Registration can be revoked —

- by the death of either partner (s 11(1)(a));
- by the marriage of either partner (s 11(1)(b));
- by the Registrar on the application under s 12 by either or both partners, but if the application is made by only one the application must be served on the other and proof of service provided (s 13);
- by the Court on the application of an interested person or on its own motion (under s 16);
- by VCAT (pursuant to s 28).

25. A revocation application made to the Registrar can be withdrawn within 90 days of lodging (a nice cooling-off period) under s 14. So the Registrar must not revoke the registration on application to her for revocation until at least 90 days have passed.

26. The Registrar has to provide a report to the minister of the number of registrable relationships registered during a financial year and the number of registrations revoked in that year (s 32). Anecdotal evidence from Tasmania is that very few domestic relationships are being registered.

### Part 2.3

27. Part 2.3 deals with the Relationships Register, the Registrar's power of enquiry, correction and amendment of the register and most importantly, access to and certification of entries in the register.

28. The register must contain particulars required by the Act and may contain further information if its inclusion is considered appropriate by the Registrar (s 17). The Registrar has a power of enquiry to verify information provided and so on. The Registrar may give notice to a person to provide information and may require a person to answer specified questions. There is a penalty of 10 penalty units for a person who fails to comply with her notice without reasonable excuse (s 18). The register may be corrected if the Registrar finds out that some details are incorrect. Further, the Registrar must, if required by a Court or Tribunal, correct or amend the relationships register (s 19).

### Access to the Register & Certification of Entries

29. Division 4 of Part 2.3 deals with access to and certification of register entries.

Everyone is probably aware there has been some difficulty in getting death certificates when a solicitor wishes to make an application for grant of probate or a grant of letters of administration. For some reason, BDM seem willing to

supply a death certificate to people named by the informant as next of kin. As we all know, often the next of kin have not been identified accurately, sometimes deliberately so. Children of a first marriage are sometimes omitted, and so on. Further, as we all know, it might be the case that there is a domestic partner who might rank above children in seeking a grant of an intestate estate. Anecdotal evidence is that it is often very difficult to obtain a copy of the death certificate in those circumstances.

30. In Division 4, there are a number of sections which deal with access to the register. Of course, the Division starts with a protection of privacy statement. The Registrar is obliged to protect those persons to whom the entries in the register relate and any other persons named in those entries, from *unreasonable intrusion* on their privacy. What is unreasonable is often in the eye of the beholder. One would have thought that requesting a copy of a death certificate for compliance with a statutory requirement to file same at the Office of the Registrar of Probates would not constitute unreasonable intrusion into anyone's privacy.
31. Section 21 provides for a search of the register. Application must be made. The applicant must state the reason for the applicant's interest in the subject matter of the search and of course pay the proscribed fee. The Registrar may reject the application if the applicant does not show an adequate reason. But sub-section (4) of section 21 says that in deciding whether an applicant has an adequate reason for wanting information, the Registrar must have regard to

- (a) the relationship if any between the applicant and the person to whom the information relates,
- (b) the age of the entry,
- (c) the contents of the entry and
- (d) any other relevant factors.

32. The Registrar may issue a certificate certifying particulars contained in an entry or certifying that no entry was located in the relationships register about the relevant relationship. Such a certificate is admissible in legal proceedings as evidence of the entry to which the certificate relates and the facts recorded in the entry (s.22).<sup>5</sup>
33. The Registrar must maintain a written statement of the policies on which access to information contained in the relationships register is to be given or denied under this Division and she must give a copy of the statement on request to any person (s.23).
34. The Registrar may, on conditions the Registrar considers appropriate, allow a person or organisation that has an adequate reason for wanting access to the relationships register to have such access to the register, and she may provide information extracted from the register to the person or organisation. Again,

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<sup>5</sup> The Registrar may issue a certificate or other document under the Registrar's signature and seal, or a facsimile of the Registrar's signature and seal produced by stamp or machine imprint or by a prescribed method: s 10(1) of the *Births, Deaths and Marriages Registration Act*. All courts must take judicial notice of the Registrar's signature and seal or facsimile of the Registrar's signature and seal produced in accordance with subsection (1) affixed to a certificate or other document and, until the contrary is proved, must presume that it was duly affixed: s 10(2).

there are mandatory matters which the Registrar must take into account in deciding whether to give the access – she must have regard to the nature of the applicant's interests, the sensitivity of the information, the use to be made of the information and other relevant factors (s. 24(2)).

35. One would hope that the requirements that the Registrar must maintain a written statement of access policies and must take into account the matters variously in s 21(4) and s 24(2) will make it easier for solicitors to search and obtain information from the register. For example, there may be a situation where a person dies intestate and you need to check whether there is a registered relationship, and other matters. The persons who were believed to have registered their domestic relationship may have separated long since, and no revocation application may have been made.

36. BUT such hope of facilitated access is dashed when one notes that those same requirements are already in the Births Deaths and Marriages Registration Act, ss 45,47 and 48.

37. Part 2.5 contains enforcement provisions in relation to false representations and falsification of certificates, matters which the Registrar must do, and also machinery provisions empowering the Registrar to do certain things.

### Chapter 3 – Relationship Agreements, Property and Maintenance

38. Chapter 3 is a most important chapter. It deals with relationship agreements, property and maintenance. The purpose of the chapter is to provide for the

effect of relationship agreements made between domestic partners, the adjustment of interests in property between domestic partners and the rights of domestic partners to maintenance. The adjustment of interests in property between domestic partners was covered by Part IX of the *Property Law Act*, however this new Act goes much further in giving maintenance rights to domestic partners and is also make it very clear what the effect of agreements is. It also specifically empowers the Court to vary or set aside agreements in certain circumstances.

39. Definitions for Part 3.2 (relationship agreements) are — domestic partner, domestic relationship, financial matters, financial resources, property, and relationship agreements: s 35.

40. For Part 3.2, 'Domestic partner' of a person means (a) a person with whom the person is or has been in a domestic relationship, or (b) a person with whom the person is contemplating entering into a domestic relationship. The definition of domestic relationship has three branches – (a) a registered relationship (b) the usual definition of domestic relationship that we have become accustomed to, and (c) still requires there to be a couple but refers to one or both of the persons providing personal or financial commitment and support of a domestic nature for the material benefit of the others irrespective of their genders and whether or not they are living under the same roof.

41. In determining whether a domestic relationship (other than a registered relationship) exists or has existed, all the circumstances of the relationship are

to be taken into account, including any one or more of the matters listed in s.35(2). When you look at the Act, you will recognise those matters as being the ones now/formerly in s.275(2) of the *Property Law Act*. Also, s 35(3) repeats the caution that for the purposes of this Part, a person is not a domestic partner of another person only because they are co-tenants.

### Relationship agreement

42. The definition of relationship agreement discloses that the agreement can be made before the relationship in contemplation of it, during the relationship, in contemplation of the termination of the relationship or even after the termination of the domestic relationship. The agreement must include provision for financial matters whether or not it provides for other matters.
43. Section 36 provides that a relationship agreement is to be dealt with according to the law of contract. A relationship agreement cannot be dismissed as simply some sort of family arrangement, provided there is offer, acceptance and consideration, the terms are sufficiently clear to be enforceable. The parties must have been 'ad idem' when entering into the contract..
44. There is no requirement under general contract law that a contract be in writing, or, if it is in writing, that it be signed by the parties. You will notice that "relationship agreement" is not defined as being a written agreement. So, a relationship agreement can be binding even if not in writing, but of course, the usual problems regarding proof of the agreement then arise.

45. The usual principles apply as with any contract – if fraud (a false statement of fact may knowingly or recklessly) induced the agreement, then it will be set aside. Duress, undue influence or unconscionable conduct may also result in the contract being avoided.
46. Must the parties have separate, independent legal advice before the relationship agreement can be binding? There is no positive requirement of this. BUT if no such advice is obtained, and not just obtained, but certified, with the certificate attached to the agreement, the Court can more readily make orders inconsistent with the terms of the relationship agreement. Refer to section 59.
47. Section 37 provides that a Court may vary or set aside the relationship agreement where circumstances have changed and it would lead to serious injustice if the agreement were to be enforced. In my opinion, **serious injustice means much more than merely “unfair”**, despite the annotation in the Explanatory Memorandum to the Relationships Bill, which suggests that unfairness is sufficient.

What if a partner dies? What does this mean for the relationship agreement ?

48. Section 38 sets out the effect on the relationship agreement if a partner dies. In the first place, if the agreement requires payment of periodic maintenance, that provision can only be enforced against the estate of the paying domestic partner if the agreement specifically provides for this to occur. No right to pay periodic maintenance can survive the death of both partners. However,

recovery of arrears of payment can be pursued against an estate. On the other hand, provisions in a relationship agreement relating to property and lump sum payments will usually be enforceable on behalf of, or against, the estate of the deceased domestic partner.

### Part 3.3

49. Part 3.3 deals with property and maintenance. Definitions for Division 1 of Part 3.3 are: Division 1 Definitions, Applicant, Child, Domestic Partner, Domestic Relationship, Financial Matters, Financial Resources, Legal Practitioner's Certificate, Property: s 39.
50. For Part 3.3 Div 1, Domestic relationship means (a) a registered relationship or (b) a relationship between two persons who are not married to each other but who are living together as a couple on a genuine domestic basis (irrespective of gender). Note the definition of domestic partner is a person with whom the person *is or has been* in a domestic relationship.
51. The Courts having jurisdiction under Part 3.3 are the Supreme Court, the County Court, and the Magistrates' Court depending on the jurisdictional limits. There is provision for the transfer of proceedings between Courts for reason associated with the jurisdictional limit and in the interest of justice.
52. Under Part 3.3, not only may a Court make a declaration in respect of the title or rights if any that a domestic partner has in respect of property, but the Court

also may make orders to give effect to the declaration, including orders about possession.

53. Section 41 provides that a domestic partner may apply to the Court not merely for an adjustment of interests with respect to the property of one or both of the domestic partners, but also may apply for an order for the granting of maintenance. Either or both of these applications can be made whether or not any other application for any remedy or relief (such as a claim under a trust or a claim for partition/sale of property) has been made under the Relationships Act or any other Act or any other law.

54. Section 42 applies only to unregistered domestic relationships. It sets out residential and other pre-requisites for making an order for the adjustment of property interests or for maintenance. (These pre-requisites do not apply in the case of a domestic relationship that has been registered under Chapter 2 of the Act.) Usually, a Court cannot make an order for the adjustment of property interests or for maintenance unless the domestic partners have lived together in a relationship for a period of at least 2 years. Of course, if there is a child of the domestic partners or a child accepted by the partners as one of their family unit, or where failure to make the order would result in serious injustice for the partner who applied for the order and that partner has made substantial contributions of a specified kind for which they would not otherwise be adequately compensated, the Court can entertain the application and make an order.

Time within which application to Court is to be made

55. Section 43 deals with the time limit for making applications under Part 3.3. If a domestic relationship has broken down, an application for an order for the adjustment of property interests, or for maintenance, must be made within 2 years of the domestic relationship ending. The Court is empowered to grant leave to apply for an order outside this 2 year period if greater hardship would be caused to the partner applying were that leave not granted compared with the hardship which would be suffered by the other party were leave to be granted.
56. As would be expected, the Court so far as practicable must make orders that will finally determine the financial relationships between the domestic partners and avoid further proceedings between them: s.44.
57. Under part IX of the *Property Law Act*, the Court could “have regard to” agreements between the partners. The Relationships Act has a much more formal approach to agreements, as would be expected, but a wide judicial discretion is retained—see s.59 below.
58. Division 3 of Chapter 3 deals with adjustment of interests in property and the orders that the Court can make.
59. The application can be adjourned by the Court if the Court is of opinion that there is likely to a significant change in circumstances of one or both of the partners and it is reasonable to adjourn. That is set out in section 46. Further,

the Court can adjourn an application for an order for the adjustment of property interests if certain proceedings relating to property are commenced in the Family Court before the Court has made a final order. For example, this could occur where a partner in an unregistered domestic relationship was still legally married at the time of commencing the new relationship and the Family Court is dealing with property matters resulting from the dissolution of the pre-existing marriage.

60. Section 48 authorises the Court to defer the operation of an order for an adjustment of property interests if it is satisfied that one of the domestic partners is likely to become entitled to property, within a short period, that could form part of a property order.

61. The effect of death of a party on an application brought under Part 3.3 is dealt with in sections 49 and 50. If no order has been made, the application can be continued against the legal personal representative of the deceased partner. Where an order has been made under Part 3.3, the effect of death of a party on the order is set out in section 50. As is to be expected, if an order has been made against the party who dies, the order may be enforced against the estate of the deceased party.

62. Division 4 of Part 3.3 deals with orders for maintenance. Section 51 empowers a Court to make an order for maintenance in favour of a domestic partner unable to support him or herself because his or her earning capacity has been adversely affected by the domestic relationship, or because of any

other reason arising in whole or part from the circumstances of the domestic relationship. Sub-section (2) sets out matters which the Court must have regard to. Sub-section (3) specifically provides that in making an order for maintenance, a Court must disregard any entitlement of the person whose maintenance is under consideration to an income-tested pension, allowance or benefit. In other words, the ability to support oneself without such assistance is what is assessed, at the time of making the order. Sub-section (4) provides that an application for maintenance abates if either partner dies before it is determined. Section 59 provides that in exercising its powers under Part 3.3, a Court must not make an order or do any other thing that is inconsistent with the terms of a relationship agreement between the domestic partners who are parties to the proceeding, provided certain conditions set out in section 59 are satisfied.

63. Section 52 allows the Court to make an interim order for maintenance where the applicant is in immediate financial needs. Section 53 prevents a person who has married or entered a new domestic relationship from making an application for maintenance in relation to an earlier domestic relationship that has ended. There is no requirement that the domestic relationship be a registered domestic relationship, so again there may be problems concerning proof of the relationship.

64. Section 54 provides that an order for maintenance automatically ceases to have effect when either domestic partner dies, or when the partner receiving the maintenance marries or remarries, or registers a relationship under

Chapter 2 of the Act. Section 55 provides that maintenance arrears are still payable after an order has ceased to have effect.

65. The Court is empowered to vary an order for periodic maintenance in certain circumstances. These include where the circumstances of either domestic partner has changed or there have been changes in the cost of living that would justify the Court varying the order. The Court may discharge, suspend or revive the order, or vary the terms of the order.
66. Section 57 provides that, subject to section 62, an order for maintenance, other than for periodic maintenance, cannot be varied. The general powers of the Court in making an order are set out in section 58 (copy attached in Attachment A).
67. Section 59 (copy attached in Attachment A) prevents a Court from making an order or doing any other thing that is inconsistent with the terms of a relationship agreement between the domestic partners who are parties to the proceeding, provided the Court is satisfied of all of four separate matters, set out in sub-section (1). Those matters are that the agreement is in writing, that the agreement is signed by the partner against whom it is sought to be enforced, that each partner was given a legal practitioner's certificate before the time at which the partner signed the agreement, and each legal practitioner's certificate is endorsed on, annexed to or otherwise accompanies the agreement. Sub-section (2) specifies that the legal practitioner's certificate must be signed by the legal practitioner giving it, must state that the legal

practitioner provided legal advice to the party to whom the certificate was given, independently of the other party to the domestic relationship, and that the advice was given as to the effect of the agreement on the powers of a Court under Part 3.3 of the *Relationships Act* and also must have been given as to the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement. If the Court is not satisfied as to any one of the matters referred to in sub-section (1), the Court can make an order or do any other thing that it could have done if there were no relationship agreement at all between the partners. But the Court can, if it chooses to in its discretion, have regard to the terms of the relationship agreement.

68. And even if s 59(1) does not come into play, the Court is still not required to give effect to the terms of a relationship agreement if the Court is of the opinion that the partners themselves have by words or conduct revoked or consented to the revocation of the agreement or the agreement has otherwise ceased to have effect. Also, if the Court has determined to vary or set aside the agreement or any relevant term under section 37, the Court is not required to give effect to the terms of the relationship agreement.

69. Section 60 authorises the Court to appoint an officer of the Court or other person to execute the deed or instrument required to be executed where either a person has refused or neglected to comply with an order to execute such, or for any other reason, a Court thinks it necessary to exercise the powers conferred on it under section 60(1). This power is broader than a Court's power under section 22 of the *Supreme Court Act*. Section 22 requires an

actual refusal or failure to comply with the order to sign or execute an instrument. Section 61 allows for the making of ex parte injunctive relief in appropriate circumstances and s 63 expressly gives power to the Court for injunctive relief to prevent a sale or transfer to defeat claims. Expressly, disposition includes a sale and a gift.

70. Orders for maintenance may be varied under section 62. This section allows a Court to vary or set aside an order for the adjustment of property interests or maintenance if there has been a miscarriage of justice, if it is impracticable for the order to be carried out or a person has failed to carry out their obligations under the order.

71. In the exercise of its powers under Part 3.3, the Court must have regard to the interests of a purchaser for good faith or any other persons interested in the property and must make an order proper for the protection of such a person or purchase: s 64.

72. Section 70 deals with the enforcement of orders and injunctions granted under Part 3.3.

#### Chapter 4

73. Chapter 4 deals with general and transitional provisions and consequential amendments. As is clear from the Table of Provisions, there are many statutes amended consequentially. I have simply included here the amendments to the *Administration and Probate Act*, to the *Births Deaths and Marriages*

*Registration Act, the Guardianship and Administration Act and to the Wills Act (see Attachment B).*

## CONCLUSION

74. Despite the hype in the press about the Relationships Register, the most significant changes in the Act, in my view, are the establishment of a limited scheme for maintenance, and the new status given under the Act to relationship agreements, whether made by partners in registered relationships or unregistered relationships. Remember that definitions can vary throughout the Act.
75. The Court retains its powers in relation to adjustment of property interests, and will enjoy a wide discretion in relation to enforcing or varying relationship agreements.
76. The expectation of the legislature is that the registration scheme will provide certainty for domestic partners in proving their relationship. It will provide certainty to those who register their relationship, and who remember to revoke the registration if the relationship ends. However, there may be many domestic partners in stable relationships who, for a variety of reasons, do not register their relationship.

**Kathryn R Rees**

**List S (Gordon & Jackson), Victorian Bar**

**22 April 2008**

Consequential Amendments to Other Acts

4 examples.

Relationships Act 2008  
No. 12 of 2008

Sch. 1

**2 Administration and Probate Act 1958**

2.1 In section 3(1)—

(a) for the definition of *domestic partner substitute*—

*"domestic partner* of a person who dies means a registered domestic partner or an unregistered domestic partner of that person;"

(b) insert the following definitions—

*"registered domestic partner* of a person who dies means a person who, at the time of the person's death, was in a registered relationship with the person within the meaning of the **Relationships Act 2008**;

*unregistered domestic partner* of a person who dies means a person (other than a registered domestic partner of the person) who, although not married to the person—

(a) was living with the person at the time of the person's death as a couple on a genuine domestic basis (irrespective of gender); or

(b) either—

(i) had lived with the person in that manner continuously for a period of at least 2 years immediately before the person's death; or

(ii) is the parent of a child of the person, being a child who was under 18 years of age at the time of the person's death."

2.2 For section 3(3) **substitute**—

"(3) For the purposes of the definition of *unregistered domestic partner* in subsection (1), in determining whether persons were unregistered domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act 2008** as may be relevant in a particular case."

2.3 For section 51A **substitute**—

**"51A Distribution if more than one partner**

(1) If an intestate leaves both a spouse or registered domestic partner and an unregistered domestic partner, the entitlement to the partner's share of the intestate's residuary estate is to be determined in accordance with the following table.

**TABLE**

<i>Period that unregistered domestic partner has lived as domestic partner of intestate continuously before intestate's death</i>	<i>Spouse or registered domestic partner's entitlement to partner's share</i>	<i>Unregistered domestic partner's entitlement to partner's share</i>
less than 4 years	two-thirds	one-third
4 years or more but less than 5 years	half	half
5 years or more but less than 6 years	one-third	two-thirds
6 years or more	none	all

Note

There is a minimum requirement that the unregistered domestic partner lived with the intestate continuously for at least 2 years immediately before the intestate's death, unless the domestic partner is the parent of a child of the intestate who was under 18 at the time of the intestate's death—see definition of *unregistered domestic partner* in section 3(1).

(2) In this section—

*partner's share* of an intestate's residuary estate means the share of the estate to which the partner of the intestate is entitled under this Division."

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**3 Alcoholics and Drug-dependent Persons Act 1968**

3.1 In section 3(1), for the definition of *domestic partner, substitute—*

*"domestic partner* of a person means—

- (a) a person who is in a registered relationship with the person; or
- (b) an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person—
  - (i) for fee or reward; or
  - (ii) on behalf of another person or an organisation (including a government or government agency, a body corporate or a

Present s.51A of the *Administration and Probate Act 1958*:

S. 51A  
inserted by  
No. 27/2001  
s. 3(Sch. 1  
item 1.9).

**51A Distribution between spouse and domestic partner**

(1) If an intestate leaves both a spouse and a domestic partner, the entitlement to the partner's share of the intestate's residuary estate is to be determined in accordance with the following table.

**S.51A**

TABLE

<i>Period that domestic partner has lived as domestic partner of intestate continuously before intestate's death</i>	<i>Spouse's entitlement to partner's share</i>	<i>Domestic partner's entitlement to partner's share</i>
less than 4 years	two-thirds	one-third
4 years or more but less than 5 years	half	Half
5 years or more but less than 6 years	one-third	two-thirds
6 years or more	none	All

Note: There is a minimum requirement that the domestic partner lived with the intestate continuously for at least 2 years immediately before the intestate's death, unless the domestic partner is the parent of a child of the intestate who was under 18 at the time of the intestate's death—see definition of *domestic partner* in section 3(1).

(2) In this section—

*partner's share* of an intestate's residuary estate means the share of the estate to which the partner of the intestate is entitled under this Division.

When *Relationships Act 2008* commences, s 51A of the A & P will be:

**"51A Distribution if more than one partner**

(1) If an intestate leaves both a spouse or registered domestic partner and an unregistered domestic partner, the entitlement to the partner's share of the intestate's residuary estate is to be determined in accordance with the following table.

TABLE

<i>Period that unregistered domestic partner has lived as domestic partner of intestate continuously before intestate's death</i>	<i>Spouse or registered domestic partner's entitlement to partner's share</i>	<i>Unregistered domestic partner's entitlement to partner's share</i>
less than 4 years	two-thirds	one-third
4 years or more but less than 5 years	Half	Half
5 years or more but less than 6 years	one-third	two-thirds
6 years or more	None	All

**Note**

There is a minimum requirement that the unregistered domestic partner lived with the intestate continuously for at least 2 years immediately before the intestate's death, unless the domestic partner is the parent of a child of the intestate who was under 18 at the time of the intestate's death—see definition of *unregistered domestic partner* in section 3(1).

(2) In this section—

*partner's share* of an intestate's residuary estate means the share of the estate to which the partner of the intestate is entitled under this Division."

**Births, Deaths and Marriages Registration Act 1996**—amendments are purely to include power under the *Relationships Act*:

*Amendments (when Relationships Act proclaimed) are in italics*

## 5 Registrar

s. 5

A Registrar of Births, Deaths and Marriages must be employed under Part 3 of the **Public Administration Act 2004** for the purposes of this Act *and the Relationships Act 2008*.

## 6 Registrar's general functions

The Registrar's general functions are—

- (a) to establish and maintain the registers necessary for the purposes of this Act *and the Relationships Act 2008*; and
- (b) to administer the registration system established by this Act *and the Relationships Act 2008* and ensure that *they operate* efficiently, effectively and economically; and
- (ba) to provide information in relation to reviewable deaths for the purposes of the **Coroners Act 1985** including information in relation to—
  - (i) the identification of living siblings; and
  - (ii) known or registered previous child deaths including neonatal deaths; and
- (c) to ensure that this Act *and the Relationships Act 2008 are* administered in the way best calculated to achieve its objects.

S. 6(ba)  
inserted by  
No. 36/2004  
s. 17.

S. 7  
substituted by  
No. 46/1998  
s. 7(Sch. 1),  
amended by  
No. 108/2004  
s. 117(1)  
(Sch. 3  
item 19).

## 7 Registrar's staff

Any other employees that are necessary for the purposes of this Act *and the Relationships Act 2008* may be employed under the **Public Administration Act 2004**.

S. 8  
amended by  
Nos 46/1998  
s. 7(Sch. 1),  
74/2000  
s. 3(Sch. 1  
item 12).

## 8 Delegation

The Registrar, by instrument, may delegate to a person employed pursuant to section 7 any of the Registrar's powers under this Act *and the Relationships Act 2008*, other than this power of delegation.

- 
- (c) a person is not a domestic partner of another person only because they are co-tenants."
- 

**27 Guardianship and Administration Act 1986**

27.1 In section 3(1), for the definition of *domestic partner substitute*—

"*domestic partner* of a person means—

- (a) a person who is in a registered relationship with the person; or
- (b) an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person—
  - (i) for fee or reward; or
  - (ii) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation);".

27.2 For section 3(4) **substitute**—

"(4) For the purposes of the definition of *domestic partner* in subsection (1)—

- (a) *registered relationship* has the same meaning as in the **Relationships Act 2008**; and
-

- 
- (b) in determining whether persons who are not in a registered relationship are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act 2008** as may be relevant in a particular case; and
  - (c) a person is not a domestic partner of another person only because they are co-tenants."

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**28 Health Act 1958**

28.1 In section 3(1), insert the following definition—

*"domestic partner* of a person means—

- (a) a person who is in a registered relationship with the person; or
- (b) a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender);"

28.2 For section 3(3) substitute—

"(3) For the purposes of the definition of *domestic partner* in subsection (1)—

- (a) *registered relationship* has the same meaning as in the **Relationships Act 2008**; and
- (b) in determining whether persons who are not in a registered relationship are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act**

- 
- (ii) a person to whom the person is not married but with whom the person is, or was at the time of the person's death, living as a couple on a genuine domestic basis (irrespective of gender);".

65.2 For section 3(3) **substitute**—

"(3) For the purposes of the definition of *domestic partner* in subsection (1)—

- (a) *registered relationship* has the same meaning as in the **Relationships Act 2008**; and
- (b) in determining whether persons who are not in a registered relationship are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act 2008** as may be relevant in a particular case; and
- (c) a person is not a domestic partner of another person only because they are co-tenants."

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**66 Wills Act 1997**

66.1 In section 3(1), for the definition of *domestic partner* **substitute**—

"*domestic partner* of a deceased person means—

- (a) a person who was at the date of death in a registered relationship with the person; or
- (b) a person to whom the person was not married but with whom the deceased person was living at the date of death as

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a couple on a genuine domestic basis  
(irrespective of gender);".

66.2 For section 3(1A) **substitute**—

"(1A) For the purposes of the definition of  
*domestic partner* in subsection (1)—

- (a) *registered relationship* has the same meaning as in the **Relationships Act 2008**; and
- (b) in determining whether persons who were not in a registered relationship were domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act 2008** as may be relevant in a particular case."

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**67 Witness Protection Act 1991**

67.1 In section 3(1), for the definition of *domestic partner* **substitute**—

"*domestic partner* of a person means—

- (a) a person who is in a registered relationship with the person; or
- (b) an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person—

**Section 3(1A) at present:**

- (1A) For the purposes of the definition of *domestic partner* in subsection (1), in determining whether persons were domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 275(2) of the **Property Law Act 1958** as may be relevant in a particular case.

S. 3(1A)  
inserted by  
No. 27/2001  
s. 3(Sch. 1  
item 14.2).

**When the Relationships Act is proclaimed:**

Section 3(1A) For the purposes of the definition of *domestic partner* in subsection (1)—

- (a) *registered relationship* has the same meaning as in the **Relationships Act 2008**; and
- (b) in determining whether persons who were not in a registered relationship were domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act 2008** as may be relevant in a particular case.

# Attachment A

Relationships Act 2008  
No. 12 of 2008

Part 3.3—Property and Maintenance

s. 57

- (3) In satisfying itself for the purpose of subsection (2)(c), the court must have regard to any changes occurring during the relevant period in the Consumer Price Index (All Groups Index) for Melbourne issued by the Australian Statistician (or, if the regulations prescribe another economic index for the purposes of this section, that other index).
- (4) In considering the variation of an order, a court must not have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made or last varied.
- (5) An order increasing or decreasing the amount of a periodic sum payable under an order may be expressed to be retrospective to any date the court thinks fit.
- (6) For the purposes of this section, a court must have regard to section 51.

## **57 Other maintenance orders not to be varied**

Subject to section 62, an order for maintenance, other than for periodic maintenance, cannot be varied.

## **Division 5—General provisions for property adjustment and maintenance orders**

### **58 Powers of a court**

- (1) In exercising its powers under this Part, a court may do any one or more of the following—
  - (a) order the transfer of property;
  - (b) order the sale of property and the distribution of the proceeds of sale in any proportions that the court thinks fit;

- (c) order that any necessary deed or instrument be executed and that documents of title be produced or other things be done that are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
  - (d) order payment of a lump sum, whether in one amount or by instalments;
  - (e) order payment of a weekly, fortnightly, monthly, yearly or other periodic sum;
  - (f) order that payment of any sum ordered to be paid be wholly or partly secured in any manner that the court directs;
  - (g) appoint or remove trustees;
  - (h) make an order or grant an injunction for either or both of the following purposes—
    - (i) for the protection of or otherwise relating to the property of one or both of the parties to an application; or
    - (ii) to aid enforcement of any other order made in respect of an application;
  - (i) impose terms and conditions;
  - (j) make an order by consent;
  - (k) make any other order or grant any other injunction to do justice.
- (2) In relation to an application under this Part, a court may—
- (a) make any order or grant any remedy or relief that it is empowered to make or grant under this or any other Act or any other law; and

- (b) make any order or grant any remedy or relief under this Part in addition to or in conjunction with making any other order or granting any other remedy or relief that it is empowered to make or grant under this Act or any other Act or any other law.
- (3) This section does not take away any other power of the court under this or any other Act or any other law.

**Note**

See section 59 for the effect of a relationship agreement on the court's power to make an order under this section.

**59 Effect of relationship agreements**

- (1) In exercising its powers under this Part in a proceeding, a court must not make an order or do any other thing that is inconsistent with the terms of a relationship agreement between the domestic partners who are parties to the proceeding, if the court is satisfied that—
  - (a) the agreement is in writing; and
  - (b) the agreement is signed by the partner against whom it is sought to be enforced; and
  - (c) each partner was given a legal practitioner's certificate before the time at which the partner signed the agreement; and
  - (d) each legal practitioner's certificate is endorsed on, annexed to or otherwise accompanies the agreement.
- (2) A legal practitioner's certificate—
  - (a) must be signed by the legal practitioner giving it; and
  - (b) must state that the legal practitioner provided legal advice to the party to whom the certificate was given, independently of the

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other party to the domestic relationship, as to the following matters—

- (i) the effect of the agreement on the powers of a court under this Part;
  - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement.
- (3) If the court is satisfied that there is a relationship agreement between the domestic partners but it is not satisfied as to any of the matters referred to in subsection (1)(a), (b), (c) or (d), the court may make any order or do any other thing that it could have made or done if there were no relationship agreement between the partners.
- (4) In making an order or doing a thing referred to in subsection (3), the court may have regard to the terms of the relationship agreement.
- (5) Despite subsection (1), a court is not required to give effect to the terms of a relationship agreement if—
- (a) the court is of the opinion that—
    - (i) the partners have, by their words or conduct, revoked or consented to the revocation of the agreement; or
    - (ii) the agreement has otherwise ceased to have effect; or
  - (b) the court varies or sets aside the agreement or the relevant term of the agreement under section 37.